UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA, Plaintiff, v. TERRY J. ALBURY, Defendant	Case No. 18-cr-00067 (WMW) **UNOPPOSED BRIEF OF *AMICUS CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS**

INTEREST OF *AMICUS CURIAE*[1]

Amicus Reporters Committee for Freedom of the Press ("Reporters Committee") is an unincorporated nonprofit association of reporters and editors that was founded by leading journalists and media lawyers in 1970 in response to an unprecedented wave of government subpoenas forcing reporters to name confidential sources. The Reporters Committee has an interest in ensuring that federal criminal laws governing espionage are not transformed into catch-all tools to investigate and stifle newsgathering, particularly in the national security and law enforcement fields, and fear that draconian sentences in Espionage Act cases targeting individuals who disclose information to the press will chill newsgathering and unduly restrict the free flow of information to the public.

INTRODUCTION

Until ten years ago, prosecuting an individual under the Espionage Act for disclosing information to the news media was virtually unheard of. In the 230 years since the founding

[1] No party's counsel authored this brief in whole or in part, and no party, party's counsel, or any person other than *amicus* or its counsel contributed money that was intended to fund preparing or submitting this brief. The parties have consented to the filing of this brief.

of our nation, and for ninety years following passage of the 1917 Espionage Act, the prosecution of a "leaker" as a *spy* was such a rarity that President Bill Clinton pardoned the first person convicted for such activity, precisely because his case was so singular.

President Clinton pardoned that defendant, Navy analyst Samuel Loring Morison, following two years of lobbying by the then-chair of the Senate Commission on Protecting and Reducing Government Secrecy, Sen. Daniel Patrick Moynihan (D-NY). In a letter to President Clinton, Moynihan wrote that Morison was the "only one convicted of an activity which has become a routine aspect of government life: leaking information to the press in order to bring pressure to bear on a policy question."[2] Moynihan urged a pardon both because Morison's prosecution reflected the danger of selective enforcement—higher ranking figures always escaped punishment for the same activity—and because of "the anomaly of this singular conviction in eighty-one years."[3]

Although Espionage Act prosecutions have increased in the past decade, their rarity in our history reflects the abiding risk to First Amendment freedoms that is posed by treating as spies individuals who disclose information, often information in the public interest, to the press. And that rarity is by design. Congress passed the Espionage Act in the opening days of U.S. involvement in World War I to combat the crime reflected in its name—*espionage* by or on behalf of foreign nations.[4] Indeed, President Woodrow Wilson asked for, and Congress debated, a grant to the president of censorial authority to restrain press publication

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[2] Letter from the Honorable Daniel Patrick Moynihan to President William Jefferson Clinton (Sept. 29, 1998) [hereinafter *Moynihan Letter*], https://perma.cc/LCX5-QCUX.

[3] *Id.*

[4] *See* Harold Edgar & Benno C. Schmidt Jr., *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 939-42 (1973).

of defense information in the 1917 Espionage Act, and it was expressly rejected.[5] Similar proposals to extend the publication ban to the press have been considered over the years, and again have been roundly dismissed.[6] Congress has never passed anything like an "Official Secrets Act," the British law that created a strict liability crime for current and former security and intelligence personnel who leak information, and a separate offense applicable to journalists and any other civilians who knowingly disclose damaging information (or have "reasonable cause to believe" the information would be damaging to government interests such as foreign affairs or law enforcement).[7]

In light of that First Amendment risk, the Reporters Committee respectfully submits this *amicus* brief to provide the Court with two observations regarding Espionage Act prosecutions of the kind at issue here, and to briefly echo *amici* legal scholars' comments about the danger of growing over-classification in these cases. We also provide for the Court's consideration a comprehensive survey the Reporters Committee prepared of every federal case involving the unauthorized disclosure of government information to the media, including detailed charging and sentencing information.[8]

First, *amicus* notes that until ten years ago, there had been only a handful of Espionage Act cases involving the unauthorized disclosure of government information to the

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5 *Moynihan Letter*, *supra* note 2.

6 *See* Edgar and Schmidt, *supra* note 4, at 942; Intelligence Authorization Act for Fiscal Year 2001 – Veto Message from the President of the United States, 146 Cong. Rec. H11852 (Nov. 13, 2000) ("As President, therefore, it is my obligation to protect not only our Government's vital information from improper disclosure, but also to protect the rights of citizens to receive the information necessary for our democracy to work.").

7 Official Secrets Act 1989, c. 6, § 5 (Eng.).

8 Reporters Comm. for Freedom of the Press, Federal Cases Involving Unauthorized Disclosures to the News Media, 1844 to the Present, https://perma.cc/X955-9YXS.

news media. *Amicus* further notes that, even among the fourteen cases other than Mr. Albury's that have been brought since 2009,[9] most of those that have resulted in prison sentences are not close to the thirty-seven months that would be at the low end of the range in the guidelines,[10] and many of the most high-profile cases, especially those involving high-ranking defendants, have ended in sentences of probation, commutation, or outright pardon.

Second, *amicus* questions whether the applicable section of the federal sentencing guidelines appropriately captures the fraught First Amendment concerns raised by the criminal prosecution of someone who discloses information to the press under a 1917 law aimed at punishing spies. The guidelines are an empirical project, and are based on thousands of past sentences in similar matters.[11] However, the relevant guideline for the main "leak" statutes—§ 2M3.3, which sets the range for 18 U.S.C. § 793(d) and (e), the two statutes at issue here—was formulated in 1987 and its levels have not changed since then. At that point in time, there was only one sentence in a case involving the unauthorized disclosure of national defense information to the media: Morison's sentence of twenty-four months. Any of the other sentences the United States Sentencing Commission (the "Sentencing Commission" or the "USSC") considered in setting the levels in that guideline would have been for bona fide espionage: the transfer of national defense information, often

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[9] Some of these cases were resolved with a plea under non-Espionage Act statutes, and James Wolfe, whose case is cited below, has only been charged with making false statements to the FBI (though his case arose out of an investigation into the unauthorized disclosure of classified information to the press).

[10] Amicus understands that the low end of the lower guideline level contemplated in this case by defendant (*i.e.*, an offense level of twenty-one, which would exclude the public trust enhancement in the guidelines) would be a prison sentence of thirty-seven months. The low end under the government's position would be forty-six months, which is even further outside the normal range of sentences in Espionage Act prosecutions for the unauthorized disclosure of national defense information to the news media.

[11] *Rita v. United States*, 551 U.S. 338, 349 (2007).

for personal gain, to hurt U.S. national security or help a foreign adversary. Accordingly, the methodology of the sentencing guidelines calls into question whether they serve the interests of justice in non-espionage cases, particularly given that the guidelines are advisory, and that the statutory command in the law establishing the guidelines is that the sentence reflect the "nature and circumstances" of the relevant offense and provide "just punishment."

Finally, *amicus* notes that it shares the deep concern expressed by the *amici* legal scholars, who are also before this Court, about the pressing issue of over-classification. Referring the Court to the legal scholars' discussion on the problem of over-classification, *amicus* Reporters Committee submits that over-classification is growing rapidly at the same time that Espionage Act prosecutions in media leak cases are increasing, meaning that the chances that a particular disclosure could harm national security are *decreasing* just as these prosecutions are starting to become routine. This development poses an independent and serious threat to newsgathering, an informed public, and the ability of the news media to access the information it needs to serve its constitutionally enshrined mission—to serve as one of the checks and balances on government power that are essential to the preservation of our democracy.

ARGUMENT

I. Sentences of more than thirty-seven months are rare in Espionage Act prosecutions for the disclosure of national defense information to the news media.

As noted above, until 2005, there had been only one Espionage Act prosecution and conviction for the disclosure of national defense information to the press.[12] That was Samuel

[12] Before Morison, there had been a handful of failed prosecution attempts, two of which resulted in guilty pleas under lesser, non-Espionage Act charges. The first attempted prosecution was against a journalist and

Loring Morison, who was sentenced to two years in prison. Morison was pardoned in 2001 by President Clinton following the aforementioned advocacy by Senator Moynihan, who expressly feared that treating individuals who provide information to the news media as secret agents would impair newsgathering.[13]

Following Morison, there was only one other Espionage Act "leak" prosecution until Shamai Leibowitz in 2009. That was the 2005 case involving two lobbyists for the American Israel Public Affairs Committee and a Defense Department analyst, Larry Franklin. The case was unusual in that Franklin was charged with disclosing national defense information to the two lobbyists, and they, despite not being government officials, were in turn charged with disclosing that information to third parties. The case against the two lobbyists, Steven Rosen and Keith Weissman, fell apart completely and all charges were dropped. Franklin pled guilty in 2005 and was initially sentenced to 151 months, which was reduced significantly in 2009 to probation and ten months in community confinement.[14] In sum, until 2009, prosecutors had secured only one jail sentence under the Espionage Act for a case involving

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newspaper during World War II. In 1942, the Justice Department convened a grand jury to investigate whether Chicago Tribune reporter Stanley Johnston had gained unauthorized access to intelligence derived from broken Japanese codes. The grand jury declined to indict after the Navy refused to provide witnesses to testify as to the harm the disclosures could have caused to national security. *See Carlson v. United States*, 837 F.3d 753, 756 (7th Cir. 2016). Shortly after the war, there was the "Amerasia" affair—again an attempt to prosecute journalists for receiving and publishing classified information, which resulted in exceedingly light plea agreements, requiring no jail time, under lesser charges (the Justice Department announced the arrests saying the defendants would be charged under the Espionage Act, but the ultimate charges were conspiracy to embezzle or steal government property). *See* Reporters Comm., *supra* note 8, at 8. The first person to face formal charges under the Espionage Act for the unauthorized disclosure of national defense information to the news media was Army Colonel John Nickerson, who was court-martialed in 1957 and pled guilty to lesser charges. He also received a light sentence, and avoided jail. *Id.* at 9-10. Finally, the government was forced to drop its case against Daniel Ellsberg and Anthony Russo for disclosing the Pentagon Papers due to government misconduct. *Id.* at 12-13.

[13] *Moynihan Letter*, *supra* note 2 ("As President Kennedy has said, 'the ship of state leaks from the top.' An evenhanded prosecution of leakers could imperil an entire administration. If ever there were to be widespread action taken, it would significantly hamper the ability of the press to function.").

[14] Reporters Comm., *supra* note 8, at 28-31.

an unauthorized disclosure of national defense information to the media: the two-year sentence against the now-pardoned Morison.

Although the number of Espionage Act prosecutions for the unauthorized disclosure of national defense information to the press has increased over the last ten years, the average sentence is well below the thirty-seven months, the low end of the adjusted offense level of twenty-one calculated by defendants, and dramatically less than the forty-six months, the low end of an adjusted level of twenty-three proposed by the government. Over the last decade, depending on how one counts, there have been fifteen cases involving a prosecution for the unauthorized disclosure of classified or controlled information to the press (eleven during President Barack Obama's two terms, and now four during President Trump's first twenty months). The highest sentence to date, 420 months at Chelsea Manning's court martial, was commuted by President Obama to time-served plus 120 days. The three other cases with sentences above thirty-seven months are distinguishable from Mr. Albury. Jeffrey Sterling received a sentence of forty-two months after being convicted by a jury on nine counts. Donald Sachtleben pled guilty in a Fed. R. Crim. P. 11(c)(1)(C) consent plea and was sentenced to forty-three months on several Espionage Act counts, to be served concurrently, but was also simultaneously facing child pornography charges. Reality Winner was recently sentenced to 63 months—the longest jail term to date—also under a Rule 11(c)(1)(C) consent plea. Only Winner is above the forty-six months at the bottom range of the offense level proposed by the government.

No other defendant in the fourteen cases since 2009 received a more than thirty-month sentence, and many received no jail time at all. Indeed, the highest-ranking defendants received either probation (*i.e.*, General David Petraeus, who pled guilty to a

misdemeanor for disclosing codeword-level intelligence, including the identities of assets, to his biographer with whom he was also involved romantically) or a pardon (*i.e.*, General James Cartwright, who was pardoned by President Obama before being sentenced for making false statements to FBI agents investigating disclosures to journalists about the Stuxnet virus).

For the Court's consideration, *amicus* lists the fourteen cases aside from Mr. Albury's since 2009, along with the sentence and resolution of the matter, below:

- Shamai Leibowitz (pled guilty in 2010; twenty-month sentence);
- Thomas Drake (pled guilty to one computer crime count in 2011; probation);
- Chelsea Manning (sentenced to 420 months in 2013; commuted in 2016);
- Steven Jin-Woo Kim (pled guilty in 2014; thirteen-month sentence);
- Jeffrey Sterling (sentenced to forty-two months in 2015);
- John Kiriakou (pled guilty in 2014; thirty-month sentence);
- Donald Sachtleben (pled guilty in 2013; forty-three-month sentence);
- James Hitselberger (pled guilty in 2014; time served);
- Edward Snowden (under indictment);
- David Petraeus (pled guilty to a misdemeanor in 2015; probation);
- James Cartwright (pled guilty to making false statement; pardoned);
- Reality Winner (consent plea in 2018; sixty-three months);
- Joshua Schulte (case pending); and

- James Wolfe (case pending).[15]

In sum, *amicus* notes that a sentence of thirty-seven months, which would be at the low end of an adjusted guideline level of twenty-one, would still be high relative to almost all of the unauthorized disclosure cases over the last decade. In four of the fourteen cases listed above, the defendant received no jail time. In one, President Obama commuted the sentence to time served. In another, he pardoned the defendant.

A sentence of thirty-seven months would be aberrational in light of this modern history of media disclosure cases, alone. But when looked at through the lens of 230 years of history, where it was virtually unheard of to prosecute individuals for disclosing information to the press, Mr. Albury's case stands with all of the other media "leak" prosecutions as truly exceptional.

II. The levels in the sentencing guideline are based overwhelmingly on spying cases, not cases involving the disclosure of national defense information to the media.

In its initial set of guidelines, the Sentencing Commission eschewed the philosophical or theoretical for the empirical and experiential.[16] It used pre-guidelines sentences—some 10,000 sentencing reports—to formulate the guidelines and calculate the offense levels.[17] The initial USSC guidelines were released in 1987.[18] They set the offense level for

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[15] Mr. Wolfe's case has been described by the Justice Department as an unauthorized disclosure matter, but he has only been charged with making false statements to the FBI under 18 U.S.C. § 1001 (2012).

[16] *Rita v. United States*, 551 U.S. 338, 349 (2007) ("Rather than choose among differing practical and philosophical objectives, the Commission took an 'empirical approach,' beginning with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past and then modifying and adjusting past practice in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions, and the like.").

[17] United States Sentencing Comm'n, *Guidelines Manual*, 5 (Nov. 2016); *see also Rita*, 551 U.S. at 349.

[18] United States Sentencing Comm'n, *Guidelines Manual*, 5 (Oct. 1987).

"transmitting national defense information" in violation of 18 U.S.C. § 793(d), (e), and (g) at twenty-nine, if the information was classified as top secret, or twenty-four for any other classification level.[19] Those levels have not been revised since.

It stands to reason, then, that the guidelines as applied to Mr. Albury overwhelmingly reflect *spying* cases—the original and continuing purpose of the Espionage Act—not those involving the unauthorized disclosure of national defense information to members of the news media. And, given that unauthorized disclosure cases were so rare as to be virtually unheard of in 1987 (save Morison), it also stands to reason that the USSC never gave any thought to the abiding First Amendment considerations at play when the government seeks to prosecute an individual as a spy for speaking or providing information to the press. The Court is well within its authority to consider policy considerations such as these when assessing the appropriate application of the sentencing guidelines.[20] Indeed, such considerations are acute in light of the advisory nature of the guidelines, as well as the statutory factors that are supposed to be reflected in the guidelines and in the sentences meted out thereunder, including the "nature and circumstances" of the offense, the command that the sentence provide "just punishment," the requirement that the sentence not be "greater than necessary," and the need to avoid disparities in sentencing between defendants who have been convicted of "similar conduct."[21] The Sentencing Commission never took these

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[19] *Id.* § 2M3.3.

[20] *See, e.g.*, *Kimbrough v. United States*, 552 U.S. 85, 110 (2007) ("[I]t would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case."); *Gall v. United States*, 552 U.S. 38, 59 (2007) ("[T]he range of choice dictated by the facts of the case is significantly broadened.") (internal quotation marks omitted).

[21] *United States v. Booker*, 543 U.S. 220 (2005); 18 U.S.C. § 3553(a), (a)(1), (a)(2), (a)(6) (2012).

factors into account in formulating a guideline for non-espionage unauthorized media disclosure cases because it could not. There was only one case at the time the guideline was written.

CONCLUSION

For all of the reasons above, *amicus* urges the Court to consider the historical aberration that are Espionage Act prosecutions of individuals who disclose government information to the news media. *Amicus* further urges the Court to take into account the sentence length in most of these cases over the past ten years, very few of which were even as high as the low end under the relevant guideline offense levels. *Amicus* also urges the Court to consider the fact that the guidelines were formulated at a time when there was, at most, one case considering the application of the Espionage Act to disclosures to the press and that they fail to take into account the profound threat that draconian sentences that treat media disclosures as spying pose to newsgathering, government accountability, and the public's right to know.

DATED: October 4, 2018

s/ Mark R. Anfinson
Mark R. Anfinson
Attorney for Reporters Committee
Lake Calhoun Professional Building
3109 Hennepin Ave. S.
Minneapolis, MN 55408
Phone: 612-827-5611
mranfinson@lawyersofminnesota.com
Atty. Reg. No. 2744

On the Brief:
Bruce D. Brown, Esq. (D.C. Bar. No. 457317)

Katie Townsend, Esq. (D.C. Bar. No. 1026115)
Gabriel Rottman, Esq. (D.C. Bar. No. 992578)
Linda Moon, Esq. (N.Y. Bar. No. 5525233)
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Ste. 1020
Washington, D.C. 20005
(202) 795-9300
bbrown@rcfp.org