UNITED STATES V. ROSEN, 445 F. Supp. 2d 602 (E.D. Va. 2006). Steven Rosen and Keith Weissman were employed by the American Israel Public Affairs Committee (AIPAC), a pro-Israel lobbying group. The government accused Rosen and Weissman of conspiring to transmit information relating to the national defense to persons lacking a security clearance, in violation of 18 U.S.C. §§ 793(d) and (e) of the Espionage Act. In particular, they alleged that Rosen and Weissman obtained classified information from various government officials and communicated it to the media, to other foreign policy analysts, and to members of a foreign government.

18 U.S.C. §§ 793 provides that:

> (d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or
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> (e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive [**14] it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . .
>
> Shall be fined under this title or imprisoned not more than ten years, or both.
>
> (g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of the conspiracy.

Rosen and Weissman argued that the Espionage Act provisions were unconstitutional as applied to their activities.

Judge Ellis of the Eastern District of Virginia interpreted the phrase "information relating to the national defense" to require the government to prove both that the information is "closely held by the government" and that the information is the type "that could harm the United States" if disclosed. He also held that the phrase "entitled to receive" incorporates the Executive Order establishing a uniform classification system.

Judge Ellis argued that the requirement that "information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation" was not by itself sufficient to protect First Amendment rights. He therefore interpreted section 793 to require that "information relating to the national defense, whether tangible or intangible, must necessarily be information which if disclosed, is potentially harmful to the United States, and the defendant must know that disclosure of the information is potentially harmful to the United States."

> It must be emphasized, however, that this conclusion rests on the limitation of § 793 to situations in which national security is genuinely at risk; without this limitation, Congress loses its justification for limiting free expression. . . .
>
> Nor is this judicial limitation on the meaning of "information relating to the national defense" obviated or rendered unnecessary by the additional scienter requirement that the defendants, in communicating the information allegedly received from their government sources, must have reason to believe the communication "could be used to the injury of the United States or to the advantage of any foreign nation." 18 U.S.C. §§ 793(d) and (e).
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> This scienter requirement, by itself, is inadequate protection against a First Amendment challenge for three reasons, all of which are related to the need for the government to justify its restriction on free speech. First, the requirement that the defendant have "reason to believe [the disclosure of information] could be used to the injury of the United States or to the advantage of any foreign nation" applies only to the communication of "information," and therefore, the intrinsic limitation of the term "relating to the national defense" to items potentially damaging to the United States is required to avoid rendering the statute unconstitutionally overbroad where persons exercise their First Amendment rights by transmitting a tangible item related to the national defense.
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> Thus, to take a hypothetical example, without this limitation the statute could be used to punish a newspaper for publishing a classified document that simply recounts official misconduct in awarding defense contracts. . . . [Moreover] the statute would permit prosecution for the communication of information in instances where there is no reason to believe the information could harm the United States, but there is reason to believe it could be used to the advantage of a foreign nation. . . [T]he statute would reach disclosure of the government's closely held secret that a foreign nation is sitting atop a huge oil reserve, when the disclosure of such information cannot plausibly cause harm to the United States. . . . Finally, even when a person is charged with the transmission of intangible

> "information" the person had "reason to believe could be used to the injury of the United States," the application of the statute without the requirement that disclosure of the information be potentially harmful to the United States would subject non-governmental employees to prosecution for the innocent, albeit negligent, disclosure of information relating to the national defense. Punishing defendants engaged in public debate for unwittingly harming a legitimate government interest is inconsistent with the Supreme Court's First Amendment jurisprudence. Limiting the set of information relating to the national defense to that information which the defendant knows, if disclosed, is potentially harmful to the United States, by virtue of the statute's willfulness requirement, avoids this problem.

In May of 2009, the government dropped the charges against Rosen and Weissman. “In asking a judge to dismiss charges . . . officials said recent court rulings had changed the legal landscape and made it unlikely that they would win . . . A former Pentagon analyst, Lawrence A. Franklin, pleaded guilty in 2005 to passing government secrets to Rosen and Weissman. He was sentenced to more than 12 years in prison.” Jerry Markon, U.S. Drops Case Against Ex-Lobbyists: Former AIPAC Employees Faced Espionage Charges, Washington Post, May 2, 2009, at http://www.washingtonpost.com/wp-dyn/content/article/2009/05/01/AR2009050101310.html