EDGAR & SCHMIDT ARTICLE

ESPIONAGE STATUTES -- THREE MAJOR CONSIDERATIONS FOR INTERPRETATION

(1) Is Revelation or Communication a Necessary Element?

-- If so, is it satisfied by publication or preparatory communication?

(2) What State of Mind (Concerning Consequences of Disclosure) is a Necessary Element?

(3) What Information Subjected to Restraint? ("Information Related to the National Defense")

Communication (to foreign government or agent thereof)

1. 18 U.S.C. 794(a) uses phrase "communicates delivers, or transmits" -- leg. history shows not intended to include publication.

Publication (limited to time of war, but see 18 U.S.C. 798)

2. 18 U.S.C. 794(b) uses phrase "publishes or communicates" so covers publication; however, uses "with intent that the same shall be communicated to the enemy" -- does this mean conscious purpose or "reason to believe"? Leg. history indicates conscious purpose to communicate to the enemy.

3. Related to the national defense. 793(a) -- doesn't prohibit communication but may prohibit conduct preparatory thereto (obtaining of certain information); uses phrase "information respecting the national defense" -- leg. history shows very broad meaning intended, see pp. 972-74 (conviction 793(b) forerunner) Gorin v. U.S., 312 U.S. 19 (1941) -- defendants argued that "related to the national defense" must be used in conjunction with 793(a) which defines national defense in terms of protected places. SC agreed that phrase had broad meaning but found that intent requirement necessitated a showing that those prosecuted have acted in bad faith. Q of "related to the national defnese" was for the jury provided adequate basis exists for their finding.

Q: a. Scope of "related to national defense."

b. Must info be important to be defense related? Gorin seems to provide guidance by adopting standards of "injury to the U.S." or "advantage to a foreign nation."

c. Does info "related to the national defense" include info in the public domain or otherwise not kept secret? U.S. v. Heine, 151 F.2d 813 (2d Cir. 1945), cert. denied, 328 U.S. 833 (1946) (information related to the national defense does not include publicly available info not sought to be kept secret) ("public" defense information not w/i "info related to the national defense).

4. Intent or reason to believe that information is to be used to injury of U.S. or advantage of a foreign nation.

a. 793(a) & (b) proscribe gathering and obtaining of specified info for or with above intent.

b. "advantage" has been interpreted to mean "helpful."

c. as a practical matter once info relating to the "national defense" (not in public domain) is transferred to foreign agents "reason to believe" that "advantage" will result is practically certain.

d. "injury" and "advantage" have been read as alternate grounds for culpability but "advantage" is much easier to prove; this reading makes "injury" surplusage (is this necessarily so?)

e. based on above the consequences would be same regardless of whether it's clandestine transfer or publication.

f. "reason to believe" same as constructive intent? Question posed by Edgar & Schmidt is whether statutes allow for distinction between "conscious disregard for known risks" and "lack of perception of risks."

g. Authors conclude that culpability requirement of "gathering" offenses in 793(a) and (b) is not met when intention is to engage in public debate or ~~authorize~~ criticize defense policy, p. 991.

h. Precursor of 793 (§1 of S. 8148) would have allowed criminal liability on culpability standard of simply having "the purpose of obtaining info respecting the national defense."

(1) When next session took up identical provision in S. 2 Senate added "with intent or knowledge that info to be obtained is to be used to injury of U.S. or advantage of foreign power."

(2) One explanation is that this intent would apply to gathering; the broader culpability standard would apply to general revelation covered by another section.

(3) Another explanation is that main proponent of broad liability may have thought "intent or knowledge" standard would be met if info gathered with intent to publicize it.

(4) Authors favor h(2) because of subsequent silence of main critic (Cummins) who strongly favored limiting intent to that in traditional espionage cases.

(5) Debate in House more clearly showed that conscious purpose to injure was required; opponent of prohibition on publication w/o an intent standard accepted language in House version.

(6) Conference Comm. deleted knowledge and allowed "reason to believe" to remain w/o debate or comment.

i. Interpretations of culpability standard of 793(a) and (b).

(1) Implied defense in legislative history for gathering for good faith purpose to criticize defense policy or participate in public debate (authors think this was intent of Congress) (reject unless no alternative reading more in harmony with statute)

(2) Could read "reason to believe" as creating evidentiary test to allow inference of evil purpose or injurious intent; problem is that this would allow conduct clearly intended to be w/i statute (serviceman selling documents to agent of foreign country -- monetary intent and belief of no injury or advantage); this interpretation shifts inquiry from state of mind to general inquiry into justification.

(3) Interpret language to refer to actor's state of mind with respect to whether the information is to be used to bring about injury to U.S. or advantage to foreign nation; focuses on what obtainer thinks will be the principal use of the information or materials -- choice of Edgar & Schmidt.

5. Subsections 793(d) and (e) (receipt & delivery)

A. Problems

(1) Meaning of phrase "not entitled to receive it"

(2) Culpability standard: "willfully" is all that is required, but what effect of the phrase "which information the possessor has reason to believe could be used to the injury of the U.S. or advantage of foreign nation"?

(a) merely refer to type of information? or,

(b) is ~~action~~ actor's awareness of possible consequences an element of offense?

(3) What info and docs covered? Only USG?

(4) How to reconcile language of (d) and (e) with 1917 and 1950 legis. history which give clear message that publication of defense info to sell newspapers and engage in public debate not a criminal act?

B. Legislative History

(1) Edgar & Schmidt conclude that 1911 predecessor of §793(d) & (e) was intended to cover govt employees, perhaps govt contractor & those with special trust relationship (- see pp. 1003-04) and that it covered publication (1004-05)

(2) 1917 Act added "retention" offenses and broadened reach to lawful and unlawful possessors; consensus that "not lawfully entitled" (in predecessor to 793(a)) meant against someone's orders or statute)

(3) 1917 Act contained provision which would have authorized President to prescribe regulations designating info related to the national defense and who was "entitled" to have it, to be used in conjunction with 793(d) & (e) predecessor, but Congress eliminated this provision

(4) One Senator indicated predecessor was aimed at newspaper reports in time of peace p. 1011, but authors conclude that consensus of Senate was otherwise (pp. 1014-15)

(5) Question left unresolved by House version was whether it applied to "communications" by other than govt. employees or those entrusted with possession

(6) Serious question of enforceability presented by fact that provision was deleted that would have authorized President to make regulation to define who was "not entitled to receive" the defense-related documents and information

(7) 1950 Amendment (a) split 1917 provision into lawful and "unauthorized possession; (b) added "information" to list of covered material, but with a raised culpability standard of "reason to believe ... injury ... or advantage"; (c) added causing or attempting to cause either offense.

C. Conclusions - 793(d) & (e)

(1) Is publication a "communication"? Is retention and communications incident thereto covered?

a. 1917 Congress rejected prohibitions on publication unless conditioned on a specific intent requirement

b. 1950 Congress thought newspapers not covered except for "wrongful acts" (those w/specific intent?)

c. Authors not convinced that 793(d) & (e) not broad enough to reach publication simply because that word is not used but is used in 797-798 (-- see pp. 1034-35)

d. Also, not sound theoretically to distinguish between communications and publication based on purpose of predecessor statutes (-- 1035-36) - the 1911 Act and first draft in 1917 used "communicate" broadly

e. E&S suggest that, if communications and publication cannot be satisfactorily distinguished, look for reading that excludes publication and certain communications equally: a narrowing culpability standard

(2) Culpability: "willfully" has been interpreted to mean (a) mere awareness of one's acts or conduct (b) awareness that one's acts or conduct is illegal (c) more generally, with bad motive, or (d) with specific intent (Screws v. U.S.)

a. Problem is that neither language nor legislative history indicate that "willfully" should be given any particular narrow meaning, such as anti-U.S. or pro-foreign animus.

b. U.S. v. Coplon, 88 F.Supp. 910 (S.D.N.Y. 1949) affd. 185 F.2d 629 (2d Cir. 1950) construed 793(d) as not requiring the same bad intent as 793(b) and 794(a). Authors point out that "the most ominous aspect of Coplon is its assumption that a recipient of wrongly disclosed information can be prosecuted as a conspirator with the person who discloses."

c. Vagueness issue raised by 793(d) & (e) is substantial because of broad interpretation of "related to the national defense" (Gorin) and lack of limiting culpability standard of 793(a) and (b) and 794(a) of "intent or reason to believe" injury U.S./advantage foreign nation - what about revelations animated by desire to inform public?

(i) If "willfully" construed to merely require knowledge that materials communicated did relate to the national defense would not be a question of vagueness but rather whether Congress could enact such a broad statute.

(ii) But if statute made simple communications of national defense information an offense w/o regard to actor's appreciation of defense -- relatedness, authors say would be unconstitutionally vague citing Coates v. City of Cincinnati, 402 U.S. 611 (1971).

d. Overbreadth problems under First Amendment speech and press guarantees -- authors believe govt. employees may be subjected to penalties where ordinary citizens may not.

(3) Transfer and Retention of Information -- with respect to information (as opposed to documents or materials) 793(d) & (e) provide that it must be information which the possessor "has reason to believe could be used to the injury of the U.S./ advantage of foreign nation" --

Q: Does this phrase refer to QUALITY of the information or the actor's EXPECTATION of consequences from passages or retention?

A: Authors says probably only that information is susceptable to wrongful use - so read it is doubtful that it adds anything because of phrase "relating to the national defense" -- same with respect to expectation of consequences.

(4) Documents and Information -- authors reading of legislative history back to 1911 is that the words cover only defense-related information that originates within the govt. (compare 794(a) which punishes transfer of independently discovered information -- if transferred to foreigners with requisite bad motive). Is there a clear line between the two -- see hypos (p. 1048) -- and the different consequences of passage depending on which it is (p. 1049.)

vs.

(5) "Entitled to Receive It" -- Two divergent interpretations possible.

a. when authorized by statute (very few would be entitled)

b. if no statute barring acquisition (E&S say this puts ordinary citizen on par with General -- is this true? What about 793(c)? 793(c) seems to require acquisition (receipt) with a bad motive which does not describe most communications preparatory to publication.

(i) 1911 Act probably intended that EXEC branch officials in charge of protected places and docs would determine

(ii) 1917 Act had provision authorizing President to proscribe regulations to cover this but conference committee deleted

(iii) 1950 Congress enacted other provisions that turned on EXEC classification system (50 U.S.C. 783(b) and 18 U.S 798) but did not directly address re: 793(d) & (e)

(iv) EXEC orders on classification have failed to claim authority to regulate private citizen transfers or implement "entitlement" concept (E.O. 11652 and NSC Directive made reference to unauthorized disclosures in violation of criminal statutes. E.O. 12065 & Info Security Oversight Office regs. do not although latter mentions possible "legal action" for loss or compromise -- Section IV.H)

(v) Cannot read EO classification system to give meaning to "not entitled to receive it" element of 793(d) & (e) Congress has historically refused to enact broad prohibitions based on EXEC classification system

(6) In view of above, E&S conclude 793(d) & (e) should be held inapplicable to communications and retention activities incidental to non-culpable revelation (including publication) of defense information.

6. Subsection 793(c) - proscribes receipt/obtaining documents/materials re: anything connected with the national defense "for the purpose aforesaid" (intent/reason to believe information will be used to injury of U.S./advantage foreign nation) "knowing or having reason to believe" docs/materials obtained contrary to provisions of Ch. 37 18 U.S.C. (792-799).

A. E&S raise question of whether literal reading of 793(c) would support requirement of bad intent - (p. 1059) but ultimately reject that ~~interpretation~~ possibility

B. Elements

(1) tangible items only - not oral communication

(2) knowledge that items have been obtained in violation of espionage statutes - raises question of coverage of those statutes, esp. 793(d) and (e)

7. 18 U.S.C. 952 (the "Yardley" Statute)

A. Statute enacted as a result of Herbert O. Yardley's book "The American Black Chamber" (1929) (book used as an example in Biden Subcommittee report)

B. Elements

(1) who is covered? E&S say federal employees. Language is broad enough to cover former employees. Indeed, Yardley was a former employee when he published his book.

(2) information covered: foreign diplomatic codes and information obtained in process of transmission between foreign govt and its mission in U.S.

(3) acts covered: willful publication & communication to another

C. E&S say not clear why Exec. Branch considered Yardley's conduct outside 1917 Act

(1) may not have considered foreign diplomatic codes "information respecting the national defense"

(2) may have thought publication not a "communication" within the forerunners to 793(d) & 794(a)

8. 18 U.S.C. 798

A. Covers classified information regarding

(1) codes, ciphers, crypts system of U.S. or foreign govts

(2) cryptographic devices

(3) communications intelligence activity of U.S. or foreign govts

(4) information obtained by communications intelligence process from any foreign govt, knowing it was so obtained

B. Conduct covered: knowing and willful communications or publication.

C. Classification: legis. history shows both House and Senate intended that "classification must be in fact in the interests of national security." Thus, injury/damage to the U.S. or advantage to a foreign nation must be proven to jury satisfaction just as with 793 and 794...

D. E&S conclude that most likely reason publication was not considered to be covered by 1917 Act (thus requiring passage of 798) is that it did not meet the culpability standard of intent/reason to believe injury to U.S./ advantage foreign nation.

E. Authors argue that passage of 798 supports a narrow interpretation of 793(d) as either -

(1) applicable only to current govt. employees, or

(2) having the 1917 Act's restrictive culpability standard through use of the word "willfully"

9. Photographic Statutes - 18 U.S.C. 795, 797, 50 U.S.C. App. 781

A. 795 and 797 proscribe obtaining, taking, reproducing, publishing or selling any photograph, sketch, etc. of vital military or naval installations designated by the President, unless permission of commanding officer first obtained

(1) E.O. 10104, 1 Feb 1950 designating practically all military facilities still on the books

(2) no prosecutions reported

(3) one problem is that E.O. 10104 purports to cover all classified documents

B. 50 U.S.C. App. 781 - applicable during national emergency and applies to photographing and other conduct "except in performance of duty or employment in connection with the national defense."

10. 50 U.S.C. 783(b) - Scarbeck statute

A. Enacted as part of the Internal Security Act of 1950

B. Elements

(1) communication w/o authority by officer or employee of U.S. Govt.

(2) of classified information, knowing it to be classified

(3) to representative of a foreign government or defined Communist organizations

C. Classification: Scarbeck v. U.S., 317 F2d. 546, cert. denied, 374 U.S. 856 (1963)

(1) correctness of classification in fact not a question as long as its procedurally proper

(2) sweep of this element thought permissible because:

(a) narrow application to govt. employees

(b) statute prohibits communication to a narrow category of recipients

11. Restricted Data Statutes: 42 U.S.C. §§2271-81

A. Some help in assessing schemes to control publication of defense information

B. Restricted data is defined in statute

C. Section 2274 creates two differently graded offenses

(1) disclosure with intent to secure an advantage to foreign nation

E. Failure of criminal statutes to give weight to legitimate security interest increases the tendancy to centralize power (by greater secrecy) in the hands of a few.

F. E&S say it would be better for Congress to regulate publication that is decided to be necessary rather than Executive enforcement of secrecy agreements through injunctions based upon what are essentially adhesion contracts - they argue Congress most entitled to make policy in this area.

(1) E&S say only fact that U.S. will so rarely have advance notice of publication keeps Marchetti from becoming dangerous alternative to necessity of legislative clarification

(2) Compare Snepp

G. Discussion of Espionage Provisions of S.1

(1) perpetuates some old phrases - "is to be used to injury of U.S./advantage of a foreign power"

(2) "national defense information"

(3) would cover publications only ~~if~~ intent to communicate to the enemy §2-507(b) p. 1079

H. S. 1400 - Nixon Administration - Problem was tremendous breadth - literally read the proposals would have made most current newspaper reporting and public and private speech on defense matters a crime

I. E&S put finger on the problem when they recognize that it is the narrow unique categories of secrets which are deserving of protection p. 1083

J. E&S recognize that 3 ~~categories~~ groups raise different consideration & must be treated separately

(1) spies

(2) govt employees & ex-employees

(3) the press and public

K. Spies

(1) define information protected against clandestine transfer to foreign agents as broad or more broadly than current law

(2) E&S see no objection to prohibiting knowing and unauthorized transfer of classified info to foreign agents w/o regard to classification, thus avoiding the disclosure problems associated with trial (could depend on sentencing to see justice done in case where info not important?)

a. increases importance of determining accurately that recipients are acting as agents of foreign powers

b. could add requirement that actor be aware disclosures are intended for primary use by foreign political organizations (E&S suggest possible special protection for govt employees who work with foreign govts)

c. depend on in camera sentencing procedures to balance out fact that improper classification not a defense (E&S prefer making offense less serious if govt not prepared to disclose the significance of the information - this doesn't help in attempt situations: Moore)

L. Employees & Ex-employees

(1) protect employee disclosures to Congress

(2) provide a justification defense -

a. either allow jury to balance defense significance against importance to public debate, or

b. allow jury to consider possible dereliction of duty by employee's superiors

(3) information protected against employee revelation should be narrow categories - classification should not be used because of problem of overclassification

(4) grade offense to recognize unintentional revelations or compromises

M. Press & Public

(1) E&S feel that since information flow to Congress and public is so restricted by Executive, interests of informed public outweigh potential adverse security consequences

(2) prohibitions should cover only the most narrow categories of defense information, such as technical design of weapons systems and cryptographic information

(3) justification of defense (specified or unspecified) cover for narrow categories