ARTICLE

Before "National Security": The Espionage Act of 1917 and the Concept of "National Defense"

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I. Introduction

The Trump Administration's 2019 indictment of Julian Assange[1] under the Espionage Act of 1917[2] set off a wave of alarm across the press.[3] A decade earlier, the Obama Administration had launched what was called a "war on leakers"[4] as it became the first administration in history to regularly deploy the Espionage Act against sources who passed classified information to journalists.[5] The Trump

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[1] Superseding Indictment, United States v. Assange, No. 1:18-cr-111 (E.D. Va. May 23, 2019).
[2] 18 U.S.C. §§ 793–94 (2012).
[3] *See, e.g.*, Brian Barrett, *The Latest Julian Assange Indictment is an Assault on Press Freedom*, WIRED (May 23, 2019), https://www.wired.com/story/julian-assange-espionage-act-threaten-press-freedom [https://perma.cc/97U7-Z5QJ]; Julian Borger, *Indicting a Journalist? What the New Charges against Julian Assange Mean for Free Speech*, GUARDIAN (May 23, 2019), https://www.theguardian.com/media/2019/may/23/julian-assange-indicted-what-charges-mean-for-free-speech [https://perma.cc/V5WE-L5NL]; Massimo Calabresi & W.J. Hennigan, *The Danger in Prosecuting Julian Assange for Espionage*, TIME (May 24, 2019), https://time.com/5595669/julian-assange-espionage-act [https://perma.cc/RUM6-Y2FG]; Eric Havian, *Espionage Act Should Exempt Journalists—Whether Assange Is a 'Real' Reporter or Not*, HILL (May 28, 2019), https://thehill.com/opinion/cybersecurity/445783-espionage-act-should-exempt-journalists-whether-assange-is-real; Mathew Ingram, *The Case Against Julian Assange Is a Clear Threat to Journalism*, COLUM. JOURNALISM REV. (April 18, 2019), https://www.cjr.org/analysis/assange-threat-journalism.php [https://perma.cc/JH9A-923T]; Jameel Jaffer, *The Espionage Act and a Growing Threat to Press Freedom*, NEW YORKER (June 25, 2019), https://www.newyorker.com/news/news-desk/the-espionage-act-and-a-growing-threat-to-press-freedom [https://perma.cc/BRJ2-4SDV]; Aryeh Neier, *Assange May Have Committed a Crime, But the Espionage Act Is the Wrong Law to Prosecute*, JUST SEC. (June 4, 2019), https://www.justsecurity.org/64395/assange-may-have-committed-a-crime-but-the-espionage-act-is-the-wrong-law-to-prosecute [https://perma.cc/X74S-76QA]; Deanna Paul, *How the Indictment of Julian Assange Could Criminalize Investigative Journalism*, WASH. POST (May 27, 2019), https://www.washingtonpost.com/national-security/2019/05/27/how-indictment-julian-assange-could-criminalize-investigative-journalism [https://perma.cc/MSM4-UFGS]; James Risen, *The Indictment of Julian Assange Under the Espionage Act Is a Threat to the Press and the American People*, INTERCEPT (May 24, 2019), https://theintercept.com/2019/05/24/the-indictment-of-julian-assange-under-the-espionage-act-is-a-threat-to-the-press-and-the-american-people [https://perma.cc/HJV5-BS2X]; Stephen Rohde, *Julian Assange, the Espionage Act of 1917, and Freedom of the Press*, AM. PROSPECT (June 19, 2019), https://prospect.org/justice/julian-assange-espionage-act-1917-freedom-press [https://perma.cc/J32C-XARP]; Bruce Shapiro, *Trump's Charges Against Julian Assange Would Effectively Criminalize Investigative Journalism*, NATION (May 31, 2019), https://www.thenation.com/article/archive/assange-wikileaks-journalism-free-press [https://perma.cc/3RSU-ZWVZ]; Jack Goldsmith, *The U.S. Media Is in the Crosshairs of the New Assange Indictment*, LAWFARE (May 24, 2019), https://www.lawfareblog.com/us-media-crosshairs-new-assange-indictment [https://perma.cc/7NMK-4MD3].
[4] *See, e.g.*, Timothy B. Lee, *Everything You Need to Know About Obama's War on Leakers in One FAQ*, WASH. POST (May 23, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/05/23/everything-you-need-to-know-about-obamas-war-on-leakers-in-one-faq [https://perma.cc/7PZF-5W5V]; Greg Price, *Obama's 'War on Leakers' Was More Aggressive Than Trump's So Far*, NEWSWEEK (August 4, 2017), https://www.newsweek.com/obama-leaks-trump-sessions-646734 [https://perma.cc/U7BR-SPN5].
[5] *See, e.g.*, Thomas C. Ellington, *The Most Transparent Administration in History?: An Assessment of Official Secrecy in the Obama Administration's First Term*, 15 PUB. INTEGRITY 133, 140-42 (2013); Aiden Warren & Alexander Dirksen, *Augmenting State Secrets: Obama's Information War*, 9 YALE J. INT'L AFF. 68, 72 (2014).

Administration became the second.[6] These leak prosecutions have intensified longstanding scholarly fears that the eventual targets of Espionage Act prosecutions could be journalists themselves.[7]

The fearsomeness of the Espionage Act's draconian penalties arises from the sheer breadth of the statute's potential application. The Act provides no limits on who can be charged and it protects all information "connected with the national defense."[8] This all-important term goes undefined in the legislation[9] and many assume it may encompass "anything rationally or conceivably tied to national security."[10] Faced with this statute of seemingly immense scope, some legal scholars have sought to contain its reach by raising constitutional objections.[11] Others also have pleaded for Congress to revise the law, without success,[12] and for prosecutors and judges to exercise restraint in applying it.[13]

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[6] *See, e.g.*, Gabe Rottman, *A Typology of Federal News Media "Leak" Cases*, 93 TUL. L. REV. 1147, 1157–58 (2019).

[7] *See, e.g.*, Harold Edgar & Benno C. Schmidt Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973); Patricia L. Bellia, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 YALE L.J. 1448, *passim* (2012); Bruce Brown & Selina MacLaren, *Holding the Presidency Accountable: A Path Forward for Journalists and Lawyers*, 12 HARV. L. & POL'Y REV. 89, 91 (2018); David McCraw & Stephen Gikow, *The End to an Unspoken Bargain? National Security and Leaks in a Post*-Pentagon Papers *World*, 48 HARV. C.R.-C.L. L. REV. 473, 502 n.178 (2013); Christopher J. Markham, *Punishing the Publishing of Classified Materials: The Espionage Act and Wikileaks*, 23 B.U. PUB. INT. L.J. 1, 6 (2014); Geoffrey R. Stone, *WikiLeaks and the First Amendment*, 64 FED. COMM. L.J. 477, 481 (2012); Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL'Y REV. 219, 220, 234 (2007). *See also* Jonathan C. Medow, *The First Amendment and the Secrecy State:* Snepp v. United States, 130 U. PA. L. REV. 775 (1982); Dorota Mokrosinska, *Why Snowden and not Greenwald? On the Accountability of the Press for Unauthorized Disclosures of Classified Information*, 39 L. & PHIL. 203 (2020); Peter E. Quint, *Toward First Amendment Limitations on the Introduction of Evidence: The Problem of United States v. Rosenberg*, 86 YALE L.J. 1622 (1977); Goldsmith, *supra* note 3.

[8] 18 U.S.C. §§ 793-94. Other parts of these sections use the phasing "related to the national defense," instead of "connected with the national defense."

[9] *Id*.

[10] *See* Lindsay B. Barnes, *The Changing Face of Espionage: Modern Times Call for Amending the Espionage Act*, 46 MCGEORGE L. REV. 511, 526 (2014).

[11] *See* Stone, *supra* note 7 at 481–89 (outlining First Amendment defenses to Espionage Act charges); *but see* Vladeck, *supra* note 7 at 227 (questioning the likely success of such defenses).

[12] Barnes, *supra* note 10 at 513, 521; Edgar & Schmidt, *supra* note 7, at 1077–79; Robert D. Epstein, *Balancing National Security and Free-Speech Rights: Why Congress Should Revise the Espionage Act*, 15 COMMLAW CONSPECTUS 483, 484 (2007); Mary-Rose Papandrea, *The Publication of National Security Information in the Digital Age*, 5 J. NAT'L SEC. L. & POL'Y 119, 128 (2011). *See also* Josh Zeman, Note, *A Slender Reed Upon Which to Rely: Amending the Espionage Act to Protect Whistleblowers*, 61 WAYNE L. REV. 149 (2015); Note, *Plugging the Leak: The Case for a Legislative Resolution of the Conflict between the Demands of Secrecy and the Need for an Open Government*, 71 VA. L. REV. 801 (1985).

[13] Mailyn Fidler, *First Amendment Sentence Mitigation: Beyond a Public Accountability Defense for Whistleblowers*, 11 HARV. NAT'L SEC. J. 214 (2020); David J. Ryan, *National Security Leaks, The Espionage Act, and Prosecutorial Discretion*, 6 HOMELAND & NAT'L SEC. L. REV. 59 (2018); Pamela Takefman, *Curbing Overzealous Prosecution of the Espionage Act: Thomas Andrews Drake and the Case for Judicial Intervention at Sentencing*, 35 CARDOZO L. REV. 897 (2013).

This Article upsets current understandings of the Espionage Act of 1917 by challenging a key, long-engrained assumption about the statute itself. The Espionage Act is not the highly punitive behemoth that shrouds enormous swathes of the government in secrecy, as is presently imagined. The term "national defense" does not capaciously expand to cover any government secret a prosecutor might deem worth protecting; rather, "national defense" actually has a highly specific and coherent meaning—one that is dramatically narrower than anyone has realized.

A seminal 1973 *Columbia Law Review* article by Harold Edgar and Benno C. Schmidt, Jr firmly entrenched present assumptions about the enormous breadth of the Espionage Act.[14] That highly influential article, still held to be the "definitive academic survey" of the espionage statutes[15] and cited in key court decisions,[16] concluded that the term "national defense" is "extremely far reaching" and "comprehends most properly classified information."[17] The authors drew this inference largely from an absence of evidence: they puzzled over the text of the Act and its judicial precedents, neither of which provided them much assistance.[18] They delved into the legislative history, but this inquiry too failed to shed any light on the subject,[19] leading to the conclusion that "national defense" must be "without principled limitations."[20] Their conclusions have gone unquestioned for nearly a half-century.[21]

Edgar and Schmidt, however, were gravely mistaken. What the two scholars failed to realize is that in the early twentieth century, the term "national defense" actually invoked a widely understood concept of the era —one with a clear construction and reasonably clear boundaries.[22] Understanding this historical concept solves the puzzles that Edgar and Schmidt struggled to decipher. The text of the Espionage Act actually contains unmistakable indications of how "national defense" should be interpreted.[23] The main Supreme Court precedent on the Act, *Gorin v. United States*,[24] which the two scholars read to require a highly expansive interpretation of "national defense,"[25] actually mandates a dramatically narrower one.[26] Understanding this concept also helps us to notice related statutes that provide clear guidance as to how "national defense" should be interpreted—including especially the Council of National Defense Act of 1916, which still

[14] Edgar & Schmidt, *supra* note 7.
[15] Vladeck, *supra* note 7, at 221 n.8.
[16] United States v. Morison, 844 F.2d 1057, 1066 n.15 (4th Cir. 1988); United States v. Truong Dinh Hung, 629 F.2d 908, 918–919, 926 n.18, 928 (4th Cir. 1980); United States v. Rosen, 445 F. Supp. 2d 602, 611, 616, 616 n.14, 619, 626 n.33, 639 n.54 (E.D. Va. 2006).
[17] Edgar & Schmidt, *supra* note 7, at 938, 973.
[18] *Id*. at 937–39, 945–46, 966–69, 974–85, 998–99.
[19] *Id*. at 939–44, 946–65, 969–74, 991–96, 1000–20, 1040–43.
[20] *Id*. at 974.
[21] *See supra* notes 7 and 12–13.
[22] See infra section IV.
[23] *See infra* section V.B.
[24] 312 U.S. 19 (1941).
[25] *See* Edgar & Schmidt, *supra* note 7, at 974–86.
[26] *See infra* section V.A.

remains in force.[27] Understanding this concept also renders the legislative history of the Espionage Act, explored so extensively and unsuccessfully by Edgar and Schmidt,[28] both easier to comprehend and largely unnecessary as an interpretative tool.

These difficulties in interpreting the meaning of "national defense" arise from the 1940s. That decade, an entirely new concept, "national security," supplanted "national defense" as the main way of thinking about and discussing the United States' international vulnerabilities.[29] Broadly encompassing diplomatic, military, and intelligence matters, "national security" was widely adopted after World War II precisely because it conceptualized American international vulnerability in an expansive way.[30] The concept that it replaced, "national defense," represented a narrower mode of thinking about the United States' place in the world, and was associated almost exclusively with military affairs.[31] As "national security" achieved ascendancy, the once clear construction of the concept of "national defense" became lost.[32] In applying the Espionage Act, the two terms increasingly became conflated, and today they are wrongly assumed to be synonymous.[33] In fact, the historical understandings of the two concepts were radically different.

This research lies at the intersection of the fields of law and history. Understanding the laws of the past can be assisted by understanding the *ideas* of the past, and in this latter area, scholars of history can provide a unique perspective for their legal counterparts. Historians of U.S. foreign policy have become increasingly interested in the intellectual history of the idea of "national security" in American history, and of its predecessor concept, "national defense." Applying that intellectual history to the Espionage Act leads to a startlingly different

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[27] Council of National Defense Act of 1916, Pub. L. 64-242, 39 Stat. 619, 649–650 (codified at 50 U.S.C. §§ 1–5 (2012)); *see infra* section IV.A.

[28] *See* Edgar & Schmidt, *supra* note 7, at 939–44, 946–65, 969–74, 991–96, 1000–20, 1040–43.

[29] *See* DANIEL YERGIN, SHATTERED PEACE: THE ORIGINS OF THE COLD WAR AND THE NATIONAL SECURITY STATE 193 (1977); Ernest R. May, *National Security in American History*, *in* RETHINKING AMERICA'S SECURITY: BEYOND COLD WAR TO NEW WORLD ORDER 95 (Graham Allison & Gregory F. Treverton eds., 1992); Dexter Fergie, *Geopolitics Turned Inwards: The Princeton Military Studies Group and the National Security Imagination*, 43 DIPL. HIST. 644, 644 (2019); Daniel Larsen, *Creating an American Culture of Secrecy: Cryptography in Wilson-Era Diplomacy*, 44 DIPL. HIST. 102, 112 (2020) [hereinafter Larsen, *Creating an American Culture*]; Andrew Preston, *Monsters Everywhere: A Genealogy of National Security*, 38 DIPL. HIST. 477, 479-81 (2014); Emily S. Rosenberg, *Commentary: The Cold War and the Discourse of National Security*, 17 DIPL. HIST. 277, 277 (1993).

[30] *See supra* note 29.

[31] Fergie, *supra* note 29, at 644–49, 654, 666–70; Dexter Fergie, *The Strange Career of "National Security,"* ATLANTIC (Sept. 29, 2019) [hereinafter Fergie, *The Strange Career of National Security*], https://www.theatlantic.com/ideas/archive/2019/09/the-strange-career-of-national-security/598048 [https://perma.cc/KM8A-DTZR]; *infra* section IV.

[32] *See supra* note 31; *infra* section III.

[33] *See infra* section III.

understanding of the statute compared with that in the existing legal scholarship and recent legal applications.

Where Edgar and Schmidt's traditional legal approach failed to attach any coherent limits to the term "national defense,"[34] a broader, more historically informed approach readily succeeds in doing so. As the House floor manager of the Espionage Act bill argued in 1917, national defense's "meaning is pretty well understood in the minds of the public."[35] This Article reconstructs how that understanding was lost and what it was that the public then understood. A broad historical overview shows how the concept of "national defense" began to disappear around the mid-twentieth century.[36] An in-depth examination of the sources of the early twentieth century allows us to reconstruct the meaning and boundaries that "national defense" then invoked.[37] This historical examination allows us to view the text of the Espionage Act and *Gorin* with new eyes, and to confirm a much narrower understanding of the Act.[38] This narrower understanding raises grave doubts about the propriety many of the recent and current prosecutions under the Act, as well as serious due process questions.[39] The Espionage Act not only originally was, but again ought to be, a far less fearsome weapon than anyone has realized.

II. Research on the Rise of "National Security" in the 1940s

Aside from a few earlier examinations,[40] historians only recently began to investigate the intellectual history of the idea of "national security." These historians have critiqued the expansiveness of the concept and show how it has helped to engender a strong sense of U.S. international vulnerability. In a path-breaking 2014 article, historian Andrew Preston explained how the concept surged into the national discourse in the 1940s and 1950s.[41] The idea, he wrote, "was invented by fusing long-standing, traditional concerns about U.S. territorial sovereignty with a newer, thoroughly revolutionary desire to protect and promote America's core values on a global scale."[42] He argued that the expansiveness of the idea helped to frame faraway problems as significant threats to the United States, such as in Vietnam, and so has helped to encourage U.S. interventionism abroad.[43]

Dexter Fergie recently expanded on Preston's work by examining more closely the development and emergence in the 1940s of the idea of "national security."[44] Fergie traced the concept to Edward Mead Earle, a Princeton historian.

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[34] Edgar & Schmidt, *supra* note 7, at 943–86, 1011–12, 1044–45, 1076–77.
[35] 55 CONG. REC. 1594 (1917) (statement of Rep. Edwin Webb).
[36] *See infra* section III.
[37] *See infra* section IV.
[38] *See infra* section V.
[39] *See infra* section VI.
[40] YERGIN, *supra* note 29, at 193–220; May, *supra* note 29; Rosenberg, *supra* note 29.
[41] Preston, *supra* note 29, *passim*.
[42] *Id*. at 479.
[43] *Id*. at 477–481, 494–500.
[44] Fergie, *supra* note 29, *passim*.

Fergie showed that the modern concept of "national security" stems from Earle's thinking, and he examined how Earle worked to popularize this new idea.[45] Fergie observed that the concept of "national defense" dominated American discourse prior to Earle's work, noting how in 1940, Earle spoke on a conference panel at Columbia titled "The Bases for an American Defense Policy."[46] Fergie explained that Earle devoted much of his talk to attacking the panel's title:

> The term "defense" was "misleading," Earle began. It designated a policy of "sitting back and waiting until the enemy is at one's gates. Perhaps a better word to use is security." For only with "security" could "the initiative . . . be ours, and only by taking the initiative, only by being prepared, if necessary, to wage war *offensively*, can we . . . make sure that defense is more than a phrase and is in fact a reality." Earle's co-panelists continued to use "defense," but soon "national security" would be on the tip of all their tongues, as the United States pivoted from a policy of national defense to one of national security. This was more than a semantic shift. National security heralded a novel way of imagining the world, one in which a permanently prepared United States would confront seemingly omnipresent threats. It marked the re-thinking and re-making of U.S. power abroad and at home.[47]

Fergie did not explore the conceptualization of "national defense" in much detail—a task that is for the first time attempted in this Article—but he observed that it represented a comparatively limited way of conceiving of the United States' international vulnerabilities.[48] National defense "referred to matters of war only."[49] The older term "posited boundaries between the domestic and the foreign, soldier and civilian, and war and peace."[50] National security, on the other hand, "neither conceptually nor in practice divides the world along such lines."[51] It provided "a more elastic and expansive alternative": "Under a regime of national security, everything can be imagined as a potential target and enemies can be imagined everywhere."[52] Before the newer term emerged, there existed "no concept that linked together so many disparate policy domains, from information and infrastructure to terrorism and trade. The rise of 'national security' has since helped expand the power of government, defy the very idea of peacetime, and reorganize much of modern life."[53]

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[45] *Id*.
[46] *Id.* at 644-45.
[47] *Id*. at 644.
[48] *Id*. at 645–54, 665–66.
[49] Fergie, *The Strange Career of National Security*, *supra* note 31.
[50] Fergie, *supra* note 29, at 670.
[51] *Id*.
[52] *Id.* at 646, 670.
[53] Fergie, *The Strange Career of National Security*, *supra* note 31.

Where Preston and Fergie concentrated their critiques on how "national security" has affected U.S. understandings of geopolitics, I have previously extended their work by examining the term in relation to U.S. government secrecy, exploring how Americans conceived of secrecy in a completely different way before "national security" emerged.[54] Whereas modern diplomatic, military, and intelligence matters—fused together into "national security"—are today all seen as meriting comparable levels of secrecy, a century ago, Americans held more nuanced attitudes about what levels of secrecy different functions of the government needed.[55] There existed no meaningful culture of secrecy in American diplomacy prior to World War I; to the contrary, the State Department had a practice of releasing an annual volume of its most important internal correspondence from the previous year.[56] Even as Congress gave the military enhanced secrecy protections with the passage of the National Defense Secrets Act of 1911, the State Department was at the same time complaining to Congress about insufficient appropriations to ensure a timely release of its annual volumes.[57] Although Preston and Fergie did not discuss the Espionage Act in their works,[58] I have previously pointed out the importance of historical understandings of American secrecy to the interpretation of the Act. Given that the phrase "national defense" is used identically in both the 1911 and 1917 acts, I concluded that:

> The legal question of whether the 1917 Espionage Act criminalized the disclosure of diplomatic secrets can, at least from the perspective of how the [A]ct was originally understood, be answered rather straightforwardly in the negative. No law would criminalize the disclosure of any American diplomatic communications until 1933 . . . and, even then, broad swathes of diplomatic dispatches remained without any kind of legal protection.[59]

These works substantially contradict Edgar and Schmidt's conclusions about the meaning of "national defense."[60] Despite the extensive legal literature on the Espionage Act, their 1973 conclusions about the meaning of "national defense" within the Act have never been revisited.[61] In 1973, however, Edgar and Schmidt were both young academics in the early stages of their careers; having both been undergraduates in the early 1960s, neither had any personal experience of a pre-

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[54] Larsen, *Creating an American Culture*, *supra* note 29, *passim*; Daniel Larsen, *How U.S. Foreign Policy from Iran to Ukraine Became Shrouded in Secrecy*, WASH. POST (Jan. 7, 2020), https://www.washingtonpost.com/outlook/2020/01/07/how-us-foreign-policy-iran-ukraine-became-shrouded-secrecy [https://perma.cc/2S8W-K79C] [hereinafter Larsen, *From Iran to Ukraine*].

[55] *See supra* note 54.

[56] Larsen, *Creating an American Culture*, *supra* note 29, at 114–15.

[57] *Id*. at 111–12, 115; Defense Secrets Act of 1911, Pub. L. 61-470, 36 Stat. 1084.

[58] Fergie, *supra* note 29, *passim*; Preston, *supra* note 29, *passim*.

[59] Larsen, *Creating an American Culture*, *supra* note 29, at 112–13.

[60] *See* Edgar & Schmidt, *supra* note 7, at 938, 969–86 (concluding that "judicial gloss has not cabined its tendency to encompass nearly all facets of policy-making related to potential use of armed forces.").

[61] *See supra* note 7 and *infra* note 319.

"national security" world.[62] Without the advantage of this subsequent historical work, their analysis could not help but be infused with the expansiveness of the newer concept.[63] The two scholars strained to make any sense of the meaning of "national defense."[64] Attempting to parse a limited body of evidence, the two scholars complained that the legislation "is in many respects incomprehensible."[65] They all but invited other scholars to scrutinize their conclusions, frankly admitting that "[t]he longer we looked, the less we saw. Either advancing myopia had taken its toll, or the statutes implacably resist the effort to understand."[66]

Although separated by nearly a half-century, this Article now takes up that invitation. This Article's challenge to Edgar and Schmidt's work is simultaneously narrow and fundamental. Much of their article addressed important matters unrelated to the boundaries of "national defense," and their analysis on those points is not disputed here.[67] Edgar and Schmidt's overall conclusion that the espionage statutes as a whole "are poorly conceived and clumsily drafted" retains most of its force.[68] This Article shows that the drafting is not *quite* as dire as the two scholars imagined and that important aspects of the record are more easily understood than they realized, but their article very ably displays many other instances in the drafting of the espionage statutes in which carelessness and confusion reign.[69] However, the meaning of "national defense" is, as they acknowledge, "central to the Espionage Act's prohibitions."[70] In illuminating the manner in which the authors misunderstood the term, this article renders their overall depiction of the Act and its potential scope almost unrecognizable.

Finally, other authors have observed that the phrase "national security" did exist in American discourse before the 1940s. While this is true, these writers have neglected to realize that earlier uses of the phrase came with a dramatically different connotation. In particular, Laura Donohue' attempted to trace U.S. national security through four epochs from the founding in a 2011 article.[71] Her article challenged earlier scholars' conclusion that "national security" did not exist before the 1940s, which she argued "overlook[s] earlier usage."[72] Without being able to benefit from subsequent historical research, however, Donohue neglected to realize that uses of the phrase "national security" before the 1940s do not invoke a *concept*—because that concept did not yet exist—but rather existed only as a platitude, a mere stock "rhetorical flourish."[73] She pointed, for example, to Franklin Pierce's invocation of "the national security and the preservation of the public tranquility," but did not

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[62] Edgar & Schmidt, *supra* note 7, at 929.
[63] *Id.* passim.
[64] *Id.* at 969–86.
[65] *Id*. at 930, 934.
[66] *Id*. at 930.
[67] *Id*. at 986–1060.
[68] *Id*. at 1076.
[69] *Id*. at 986–1060.
[70] *Id.* at 974.
[71] Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1576–77 (2011).
[72] *Id.* at 1578.
[73] Preston, *supra* note 29, at 487.

realize that the former for Pierce held no more meaning than the latter.[74] Attempting to write a history of "the national security" before the 1940s would be no different from attempting to write a history of "the public tranquility" today: there would be no sense in doing so, because "public tranquility" conveys no deeper concept and exists merely as a vague societal aspiration. The phrase "national security" is used with some frequency in World War I-era sources, but only in this sense; historian Mark Shulman made a similar mistake in his otherwise admirable article on the National Security League, founded in 1914, to which Shulman attempted to trace the idea of "national security."[75] But the National Security League was not invoking Earle's later concept, it was merely embracing a platitudinous phrase that had long existed. As Fergie demonstrated, it was only when Earle transformed this platitude into a serious concept that the term took on its present connotations.[76]

III. The Espionage Act of 1917 and "National Defense": A Historical Overview

To show how the once clear construction of the concept of national defense became lost and the effect that this shift has had on the interpretation of the Espionage Act, this Part sketches a brief history of the concept, the Act, and U.S. government secrecy more generally. Although national defense as a concept certainly existed in American discourse prior to the twentieth century,[77] this analysis begins in the years immediately preceding the adoption of the Espionage Act. It divides the twentieth and early twenty-first centuries into three periods, exploring the era before "national security" arrived, the transition to "national security" that occurred in the 1940s and early 1950s, and the period since then in which "national security" has predominated. It sets the Espionage Act in its historical context, showing how "national defense" evolved from a distinct concept in its own right in the early twentieth century to being completely conflated with "national security" by the early twenty-first.

A. *Before "National Security" (Early Twentieth Century to 1941)*

In the absence of "national security," early twentieth century Americans conceived of their potential international vulnerabilities in a profoundly different way. Today, the idea of national security effortlessly fuses diplomatic, military, and intelligence matters under a single conceptual umbrella: we expect to see (ideally speaking at least) the State Department, the Defense Department, and the intelligence community all working together to execute a unitary U.S. "foreign policy," as coordinated by the National Security Council.[78] In the early twentieth

[74] Donohue, *supra* note 71, at 1609.
[75] Mark R. Shulman, *The Progressive Era Origins of the National Security Act*, 104 DICK. L. REV. 289 (2000).
[76] Fergie, *supra* note 29, at 644–45.
[77] *See* W. B. Franklin, *National Defense*, 137 N. AM. REV. 594 (1883). *See also* THE FEDERALIST NOS. 25–26 (Alexander Hamilton).
[78] *See, e.g.*, THE OXFORD HANDBOOK OF U.S. NATIONAL SECURITY (Derek S. Reveron et al. eds., 2018); Michael Warner, *The Rise of the U.S. Intelligence System, 1917-1977*, *in* THE OXFORD HANDBOOK OF NATIONAL SECURITY INTELLIGENCE 112 (Loch K. Johnson ed., 2010).

century, however, this conceptual fusion had yet to take place.[79] Intelligence as a distinct conceptual function of government did not yet meaningfully exist. With no standalone intelligence agencies, the United States had only very rudimentary intelligence capabilities prior to its entry into World War I, and these intelligence "elements would not have been seen as separate from the departments under which these various agencies served."[80] Diplomacy and military matters, meanwhile, were seen as belonging to strongly distinct spheres. As I have previously explained, Americans "viewed diplomacy as something of a standalone function of government. Rather than being seen as closely related to military affairs, diplomacy was rather seen more as their opposite: diplomacy ended when war began, and war ceased as diplomacy resumed."[81]

Without "national security," two main concepts predominated: the idea of "foreign relations," which was carried out by the State Department, and the idea of "national defense," which centered on the U.S. military—ideas that were seen as clearly distinct.[82]

This conceptual distinction between diplomatic affairs and military matters extended to how Americans treated secrecy, with sharply different attitudes as to the secrecy each merited.[83] There was little role for secrecy in the State Department before World War I.[84] Before the presidency of Woodrow Wilson (1913-1921), who sought to impose greater secrecy onto the State Department as part of his wartime diplomacy, "secrecy was largely limited to active treaty negotiations, and, even then, only for the duration of the negotiations."[85] By contrast, the idea that the Departments of War and of the Navy had secrets that merited protection was more broadly accepted. The Defense Secrets Act of 1911, which contained key language that was expanded on with the Espionage Act six years later, represented the first attempt to provide the military with firm secrecy protections in law.[86] The Act had been proposed supposedly in response to foreign spies who were caught collecting information on U.S. military facilities, and whom the government had been unable

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[79] Larsen, *Creating an American Culture*, *supra* note 29, at 104–05.

[80] *Id*. at 105. *See also* CHRISTOPHER ANDREW, FOR THE PRESIDENT'S EYES ONLY: SECRET INTELLIGENCE AND THE AMERICAN PRESIDENCY FROM WASHINGTON TO BUSH 30-67 (1995); Daniel Larsen, *Intelligence in the First World War: The State of the Field*, 29 INTEL. & NAT'L SEC. 282, 292-98 (2014) [hereinafter Larsen, *Intelligence in the First World War*].

[81] Larsen, *Creating an American Culture*, *supra* note 29, at 105.

[82] *See id*. at 111; Denys P. Myers, *The Control of Foreign Relations*, 11 AM. POL. SCI. REV. 24 (1917). *See also infra* notes 102–106, 144, 147–148, 164–166, 173, 209–212, 215–216, 263–275 and accompanying text.

[83] Larsen, *Creating an American Culture*, *supra* note 29, *passim*; Larsen, *From Iran to Ukraine*, *supra* note 54.

[84] Larsen, *Creating an American Culture*, *supra* note 29, *passim*.

[85] *Id*. at 106. For the importance of secrecy to Wilson's wartime diplomacy more generally, *see* DANIEL LARSEN, PLOTTING FOR PEACE: AMERICAN PEACEMAKERS, BRITISH CODEBREAKERS, AND BRITAIN AT WAR, 1914-1917 (2021); Daniel Larsen, *British Intelligence and the 1916 Mediation Mission of Colonel Edward M. House*, 25 INTEL. & NAT'L SEC. 682 (2010); Daniel Larsen, *War Pessimism in Britain and an American Peace in Early 1916*, 34 INT'L HIST. REV. 795 (2012).

[86] Larsen, *Creating an American Culture*, *supra* note 29 ,at 111; Edgar & Schmidt, *supra* note 7, at 939–40, 969–70.

to prosecute.[87] This desire for greater military secrecy protections universally seemed reasonable at the time: the original draft of the Act was provided by the American Bar Association,[88] and the bill cleared the House and the Senate virtually without debate.[89]

After World War I broke out in 1914, a neutral United States was confronted with new challenges that resulted in the Wilson Administration demanding stronger espionage protections. With the United States providing large amounts of munitions and other supplies to the Allies, German authorities pursued a covert espionage and sabotage campaign to attempt to disrupt these supplies; often marked by incompetence, this campaign rapidly attracted the ire of the President.[90] By December 1915, Wilson had demanded from Congress new laws against those who "have formed plots to destroy property," "entered into conspiracies against the neutrality of the Government," and "sought to pry into every confidential transaction of the Government in order to serve interests alien to our own."[91] Although the German covert campaign continued—most dramatically in the case of the Black Tom explosion in July 1916, when German saboteurs killed six as they blew up a massive munitions cache in New York Harbor in the middle of the night[92]—Congress did not deliver on Wilson's request until the United States entered the war.[93]

In the meantime, there was intense public debate about how the government should respond to the ongoing war. A new "preparedness" movement, led by former President Theodore Roosevelt among others, sought to pressure Congress and the Wilson Administration to dramatically expand the Army and the Navy.[94]

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[87] Larsen, *Creating an American Culture*, *supra* note 29, at 111.
[88] *Id*.
[89] *Id*. at 112.
[90] REINHARD R. DOERRIES, IMPERIAL CHALLENGE: AMBASSADOR COUNT BERNSTORFF AND GERMAN-AMERICAN RELATIONS, 1908-1917 141-190 (Christa D. Shannon trans., University of North Carolina Press 1989) (1975); Reinhard R. Doerries, *Die Tätigkeit deutscher Agenten in den USA während des Ersten Weltkrieges und ihr Einfluß auf die diplomatischen Beziehungen zwischen Washington und Berlin [The Activities of German Agents in the USA during the First World War and Their Influence on Diplomatic Relations between Washington and Berlin]*, *in* DIPLOMATEN UND AGENTEN NACHRICHTENDIENSTE IN DER GESCHICHTE DER DEUTSCH-AMERIKANISCHEN BEZIEHUNGEN [DIPLOMATS AND AGENTS: INTELLIGENCE SERVICES IN THE HISTORY OF GERMAN-AMERICAN RELATIONS] 11 (Reinhard R. Doerries ed., 2001) (Ger.); Larsen, *Intelligence in the First World War*, *supra* note 80, at 290–92; Michaël Wala, *Espions, saboteurs, propagandistes et les relations germano-américaines dans la Première Guerre mondiale [Spies, Saboteurs, Propagandists, and German–American Relations in the First World War]*, 232 GUERRES MONDIALES ET CONFLITS CONTEMPORAINS 59 (2008) (Fr.).
[91] PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES WITH THE ADDRESS OF THE PRESIDENT TO CONGRESS DECEMBER 7, 1915 xx–xxii (1915).
[92] Stephen Irving Max Schwab, *Sabotage at Black Tom Island: A Wake-Up Call for America*, 25 INT'L J. INTEL. & COUNTERINTEL. 367, 368, 381 (2012).
[93] *See, e.g.*, Edgar & Schmidt, *supra* note 7, at 940.
[94] JOHN PATRICK FINNEGAN, AGAINST THE SPECTER OF A DRAGON: THE CAMPAIGN FOR AMERICAN MILITARY PREPAREDNESS, 1914–1917 108-10 (1974); Manuel Franz, *Preparedness Revisited:*

"Preparedness" was intensely controversial, with many rejecting it on the grounds it could increase the risk of the United States being drawn into the war; Wilson co-opted these demands by requesting significant but much less dramatic increases in the size and funding of the armed forces.[95] After much wrangling, Congress adopted three particularly significant pieces of legislation during 1916: a naval appropriation act significantly expanded the Navy,[96] a National Defense Act expanded the Army while also giving the President new powers over the National Guard and over "the procurement of military supplies in time of actual or imminent war,"[97] and, finally, tucked into routine army appropriations and military justice legislation, the Council of National Defense Act set up a new Council of National Defense within the government.[98]

The United States entered World War I in April 1917, and Congress took up the Wilson Administration's request for an espionage statute. Although there was intense controversy over certain proposed provisions that would impose a degree of press censorship, the rest of the bill was uncontroversial, and once the objectionable provisions were removed, the Act itself passed with little controversy.[99] It cleared the Senate by voice vote[100] and the House of Representatives 86-22, with the handful of opponents not even bothering to demand a quorum.[101]

The Act itself fully preserves and reflects the conceptual distinction drawn between "national defense" and "foreign relations."[102] Although the key provisions today are found in §§ 1–2 of Title I, the Act actually had a long list of provisions spread over thirteen titles. Title I was entitled "Espionage" and repeatedly invoked the term "national defense," with no mention of foreign relations.[103] Title VIII, on the other hand, was entitled "Disturbance of Foreign Relations," with no mention of national defense.[104] In comparison with the broader sweep of the espionage provisions, as I previously noted, Title VIII "did rather little and was mostly directed at stopping foreign intrigue rather than increasing State Department secrecy: it criminalized the impersonation of American diplomatic officials and required any private citizen acting as a foreign diplomatic agent to identify

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Civilian Societies and the Campaign for American Defense,1914–1920, 17 J. GILDED AGE & PROGRESSIVE ERA 663, 663–64 (2018).

[95] Ross A. Kennedy, *Preparedness*, *in* A COMPANION TO WOODROW WILSON 270, 270 (Ross A. Kennedy ed., 2013).

[96] Naval Act of 1916, Pub. L. 64-241, 39 Stat. 556 (1916).

[97] National Defense Act of 1916, Pub. L. 64-85, 39 Stat. 166, 213 (1916).

[98] Army Appropriation Act of August 29, 1916, 39 Stat. 649 (1916).

[99] Edgar & Schmidt, *supra* note 7, at 940–41; Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 345–54 (2003) [hereinafter Stone, *Judge Learned Hand*].

[100] 55 CONG. REC. 3492–98 (1917).

[101] *Id*. at 3301–07.

[102] Espionage Act of 1917, PUB. L. NO. 65–24, 40 Stat. 217 (1917) (codified as amended at 18 U.S.C. §§ 793–94 (2012)).

[103] *Id.* at 217–19.

[104] *Id.* at 226.

themselves as such to the State Department."[105] Set within the context of the diplomatic secrecy of the era, the Espionage Act's key provisions were therefore "a matter of military secrecy," and military secrecy only.[106]

Historically, the Espionage Act was most important for its Title I, § 3, which criminalized, among other things, "willfully obstruct[ing] the recruiting or enlistment service of the United States" during time of war, with high penalties.[107] This section was amended by the Sedition Act of 1918 to make it even more stringent, punishing those who in time of war "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language" concerning various aspects of the U.S. government.[108] These provisions were extensively abused to suppress domestic dissent during 1917 and 1918.[109] The Sedition Act was repealed in 1921, restoring the 1917 version of this section.[110] Applying only during wartime, the section remained dormant until the United States entered World War II, when it was revived to suppress dissent, but only on a much smaller scale.[111] The Supreme Court in 1944 closed the opportunity for this abuse in *Hartzel v. United States*.[112] The Court insisted on the government showing strong evidence that an individual actually "intended to bring about the specific consequences prohibited by the Act"; mere inference from the nature of their speech was insufficient.[113]

Prosecutions under the two sections most important today, by comparison, were much rarer in the interwar period. The first two interwar cases were brought in 1936, both against former Navy personnel for providing naval secrets to the Japanese.[114] A third prosecution involving providing naval intelligence information to the Soviets reached the Supreme Court, which decided *Gorin* in early 1941.[115] The Supreme Court unanimously rejected a vagueness challenge against the Espionage Act and offered a brief definition of the meaning of "national defense," defining the term as "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national

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[105] Larsen, *Creating an American Culture*, *supra* note 29, at 112.
[106] *Id.*
[107] Espionage Act of 1917 at 219 (codified as amended at 18 U.S.C. § 2388 (2012)).
[108] Sedition Act of 1918, PUB. L. NO. 65-150, 40 Stat. 553 (repealed 1921); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 184-91 (2004); Arnon Gutfeld, *The Ves Hall Case, Judge Bourquin, and the Sedition Act of 1918*, 37 PAC. HIST. REV. 163, 178 (1968).
[109] JOAN M. JENSEN, THE PRICE OF VIGILANCE (1968); STEPHEN MARTIN KOHN & HOWARD ZINN, AMERICAN POLITICAL PRISONERS: PROSECUTIONS UNDER THE ESPIONAGE AND SEDITION ACTS (1994); STONE, *supra* note 108, at 146–220; Stone, *Judge Learned Hand*, *supra* note 99, at 336–41.
[110] Joint Resolution of Mar. 3, 1921, Pub. Res. 66–64, 41 Stat. 1359, 1360 (1921).
[111] STONE, *supra* note 108, at 255–72; David F. Forte, *Righting a Wrong: Woodrow Wilson, Warren G. Harding, and the Espionage Act Prosecutions*, 68 CASE W. RES. L. REV. 1097 (2017); Geoffrey R. Stone, *Free Speech in World War II: "When Are You Going to Indict the Seditionists?"* 2 INT'L J. CONST. LAW 334 (2004) [hereinafter Stone, *Free Speech*].
[112] Hartzel v. United States, 322 U.S. 680 (1944); Stone, *Free Speech*, *supra* note 111 at 366.
[113] *Hartzel*, 322 U.S. at 689.
[114] Eric Setzekorn, *The Contemporary Utility of 1930s Counterintelligence Prosecution Under the United States Espionage Act*, 29 INT'L J. OF INTEL. AND COUNTERINTEL., 545, 549–53 (2016).
[115] *Id*. at 553–57.

preparedness."[116] This definition will be analyzed in more detail below.[117] For now, however, it suffices to emphasize the Supreme Court's description of national defense as a "concept": the term evoked a specific conceptual understanding that the Supreme Court readily comprehended, and because of that ready comprehension, no further elaboration was necessary.

B. *The "National Security" Transition (1941–1952)*

During World War II, Earle worked to popularize his new concept of "national security."[118] Earle's Princeton Military Studies Group started an influential research seminar that attracted not only prominent academics, but government and other elites—including in particular the well-known journalist Walter Lippmann as well as Undersecretary of the Navy James Forrestal, who was promoted to Navy Secretary in 1944.[119] Earle's efforts to get the concept to take root in American discourse proceeded slowly at first, but a turning point came in 1945: the previous year the term "barely came up at all" in congressional hearings, but in 1945, "policymakers constantly invoked the idea as their starting point."[120] Forrestal, in a hearing, told Congress that he was "using the word 'security' here consistently and continuously rather than 'defense'"; "I like your words 'national security,'" replied Senator Edwin Johnson (D-Colo.).[121] *Life* magazine in 1945 told its readers, "How large the subject of security has grown, larger than a combined Army and Navy."[122]

Within the span of only a few years, the new idea transformed the government, and the old distinction between "foreign relations" and "national defense" was being erased. At the end of 1944, a new State-War-Navy Coordinating Committee (SWNCC) was established.[123] A 1945 report commissioned by Forrestal criticized how the United States had been "compartmentalizing the conduct of foreign policy and military policy" and recommended that the innovation of SWNCC be made permanent in the form of a "National Security Council."[124] Congress subsequently passed the National Security Act of 1947, which did precisely that.[125] The National Security Act also set up a Central Intelligence Agency (CIA), which was responsible for intelligence collection—without regard for its ultimate diplomatic or military application—and

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[116] 312 U.S. at 28.
[117] *See infra* section V.A.
[118] Fergie, *supra* note 29, *passim*.
[119] *Id*. at 649–53.
[120] YERGIN, *supra* note 29, at 194.
[121] *Id*. at 194.
[122] *Id*. at 195.
[123] Ernest R. May, *The Development of Political-Military Consultation in the United States*, 70 POL. SCI. Q. 161, 175–78 (1955).
[124] STAFF OF S. COMM. ON NAVAL AFFAIRS, 79TH CONG., REP. TO HON. JAMES FORRESTAL ON UNIFICATION OF THE WAR AND NAVY DEPARTMENTS AND POSTWAR ORGANIZATION FOR NATIONAL SECURITY, 55–56 (Comm. Print 1945).
[125] National Security Act of 1947, PUB. L. NO. 80-253, § 101, 61 Stat. 495, 496–97.

the Act merged the armed services together under Forrestal as the new "Secretary of Defense."[126]

This conceptual transformation was also reflected in the development of the modern classification system for U.S. government secrets. The origins of the current classification system have been traced to Executive Order 8381, issued by President Franklin Roosevelt in 1940: it contained three classification levels (secret, confidential, and restricted), but by invoking "national defense," it applied only to "military and naval installations" within the War and Navy Departments.[127] The State Department set up a similar classification system in 1941 but with its own definitions.[128] The most important difference, however, was that where EO 8381 was explicitly tied to statutory penalties for disclosure, the State Department's internal classification system was merely to "insure the use of the proper code in connection with the dispatch of outgoing telegrams."[129] By 1947, these distinct classifications systems were converging. Although the old executive order remained in place, SWNCC agreed to a joint system of classification with common definitions, which repeatedly invoked the new idea of "national security."[130] In 1950, President Harry Truman's Executive Order 10,104 gave a modest update to the classification system, but continuing to employ "national defense," the formal authority to classify material protected by statute remained located solely within the new Department of Defense.[131] This changed dramatically the next year: now invoking "national security," and without citing a statute, Executive Order 10,290 expanded the authority to classify information beyond the Defense Department to "any department or establishment within the Executive Branch."[132]

C. *The Conflation of "National Security" and "National Defense" (1953-Present)*

By 1953, the expansiveness of the new concept of "national security" was also expanding understandings of "national defense." The reach of Truman's Executive Order 10,290 had attracted enormous public criticism,[133] and the new

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[126] *Id.* at 497-99; JEFFERY M. DORWART, EBERSTADT AND FORRESTAL: A NATIONAL SECURITY PARTNERSHIP, 1909–1949 145–49 (1991).

[127] Exec. Order No. 8381, 3 C.F.R. 116 (1940 Supp.); KENNETH MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 143–44 (2001); ARVIN S. QUIST, SECURITY CLASSIFICATION OF INFORMATION 45 (rev. ed. 2002).

[128] U.S. DEP'T OF STATE, DEPARTMENTAL ORDER 992 (1941), https://www.nsa.gov/Portals/70/documents/news-features/declassified-documents/friedman-documents/reports-research/FOLDER_467/41731779077101.pdf [https://perma.cc/YPX3-XAGA]. The order does once mention "the national security," but only in the older rhetorical sense.

[129] *Id.*; *cf. supra* note 127.

[130] *Minimum Standards for Handling of Classified Information*, 17 DEP'T ST. BULL. 917, 917 (1947).

[131] Exec. Order No. 10,104, 15 Fed. Reg. 597 (Feb. 1, 1950); MAYER, *supra* note 127, at 144–45; QUIST, *supra* note 127, at 49–50.

[132] Exec. Order No. 10,290, 16 Fed. Reg. 9795 (Sept. 27, 1951); MAYER, *supra* note 127, at 145; QUIST, *supra* note 127, at 50–52.

[133] Kathleen L. Endres, *National Security Benchmark: Truman, Executive Order 10290, and the Press*, 67 JOURNALISM Q. 1071, 1073 (1990).

Eisenhower Administration made a show of rescinding and replacing it.[134] In a press release, the White House trumpeted the new Executive Order 10,501 as a blow against unnecessary government secrecy: The order "limit[ed] the authority to classify," eliminated the former lowest level of classification which was "particularly subject to abuse," and provided for a "continuing review" for material to be declassified.[135] Unmentioned in the press release, however, was a highly significant change: the new order reverted the previous references to "national security" back to "national defense"—but only the *term* fully reverted, the *concept* did not.[136] The executive order had a certain military emphasis, but it newly categorized as "defense information" anything "jeopardizing the international relations of the United States" or "information revealing important intelligence operations."[137]

This linguistic change moved diplomacy and intelligence within the bounds of "national defense"—and therefore potentially within the protection of the Espionage Act. Earle had favored "national security" precisely because of its conceptual vastness;[138] the boundaries of "national defense" were growing to match. In 1962, the D.C. Circuit in *Scarbeck v. United States* briefly addressed the two terms.[139] We see in the judgment both a vague sense that "defense" somehow remained conceptually smaller than "security," and yet also that the two phrases were increasingly becoming seen as synonyms: "*defense is one aspect of security* and indeed in their broad senses the *two terms have a very similar connotation*."[140]

The next major Espionage Act case came with the well-known Pentagon Papers episode, in which the Nixon Administration sought to prevent the *New York Times* and the *Washington Post* from publishing a damning historical assessment of the Vietnam War.[141]This dispute resulted in 1971's *New York Times Co. v. United States*, in which the Supreme Court held that the Espionage Act could not be used to enjoin a newspaper from publishing government secrets.[142] Several justices, in concurrence or dissent, wrote of "defense" only in directly analyzing the statute; otherwise they wrote primarily of the United States's "security" needs and interests, with little recognition that the ideas were different.[143] Only Justice Stewart eschewed the newer concept entirely. Instead, Justice Stewart repeatedly

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[134] Paul Kennedy, *White House Gives New Security Code*, N.Y. TIMES, June 18, 1953, at 1.
[135] *Hearings Before a Subcommittee on Reorganization of the Committee on Government Operations on S. J. Res. 21, A Joint Resolution to Establish a Commission on Government Security*, 84th Cong. 30–31 (1955) (press release accompanying executive order).
[136] Exec. Order No. 10,501, 3 C.F.R. 979 (1949–1953 Comp.). *See also* QUIST, *supra* note 127, at 52-53.
[137] 3 C.F.R. 979-80, §1(b).
[138] Fergie, *supra* note 29, *passim*.
[139] 317 F.2d 546 (D.C. Cir. 1962).
[140] *Id.* at 557 (emphasis added).
[141] *See* STONE, *supra* note 108, at 500–23; Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271 (1971); Peter D. Junger, *Down Memory Lane: The Case of the Pentagon Papers*, 23 CASE W. RES. L. REV. 3 (1971).
[142] 403 U.S. 713 (1971).
[143] *Id.* at 718–23, 732–50.

employed the concept of "national defense" in its older sense, discussing "the two related areas of national defense and international relations"—repeating four times throughout his brief opinion this distinction between "national defense" and "international relations" (the latter of which he also calls "foreign affairs" or "international affairs").[144] The subsequent Espionage Act prosecution against Daniel Ellsberg, who leaked the material, collapsed only because of prosecutorial misconduct, leaving many unanswered legal questions about the application of the Act to government leakers.[145]

Inspired by this episode, Edgar and Schmidt undertook to write their article on the espionage statutes, which was published in 1973.[146] One final trace of the older conceptual distinction between "foreign relations" and "national defense" appeared when Nixon finally replaced Eisenhower's Executive Order 10,501: Nixon's replacement included a definition of "national security," which was defined as the combination of "national defense" and "foreign relations."[147] The 1980 Classified Information Procedures Act put this definition into law: "'National security', as used in this Act, means the national defense and foreign relations of the United States."[148] In almost every other sense, however, the older concept of "national defense" had disappeared. In 1980, the Fourth Circuit in *United States v. Truong Dinh Hung* specifically cited Edgar and Schmidt in rejecting "the defendants' attempt to constrict the ambit of 'national defense' to strictly military matters."[149] The district court in 1985's *United States v. Zehe*, a military technology espionage case, referred to "national defense" in discussing the text of the Espionage Act but otherwise speaks only of "national security."[150]

The questions posed by the Ellsberg prosecution were subsequently answered with the government's first successful attempt to deploy the Espionage Act against a leaker with *United States v. Morison* in 1988.[151] Samuel Morison leaked copies of naval intelligence satellite photographs of a Soviet aircraft carrier to a British magazine; the Fourth Circuit opinions upholding Morison's conviction used the phrases "national security" and "national defense" without any recognition

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[144] *Id*. at 727–30 (Stewart, J. concurring).
[145] Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311, 326–27 (1974).
[146] Edgar & Schmidt, *supra* note 7.
[147] Exec. Order No. 11,652, § 1, 3 C.F.R. 375, 376 (1973). This definition remains in place today. *See* Exec. Order No. 13,526, § 6.1(cc), 3 C.F.R. 298, 324 (2010). *See also* QUIST, *supra* note 127, at 54–55. A congressional committee explored this change of terminology but could not determine its origins. *See* Executive Classification of Information—Security Classification Problems Involving Exemption (b)(1) of the Freedom of Information Act (5 U.S.C. 552), Third Report, 93d Cong. 61–66 (1973).
[148] Classified Information Criminal Trial Procedures Act, Pub. L. No. 96–456, § 1(b), 94 Stat. 2025, 2025 (1980) (codified at 18 U.S.C. app. § 1(b) (2012)). Identical or very similar definitions exist at 10 U.S.C. § 801(16) (2012) and 50 U.S.C. § 3355g(6) (2012).
[149] 629 F.2d 908, 918 (4th Cir. 1980).
[150] 601 F. Supp. 196 (D. Mass. 1985).
[151] Anthony Lewis, *National Security: Muting the Vital Criticism*, 34 UCLA L. REV. 1687, 1697 (1987).

that there existed a difference between the two.[152] This use of the Espionage Act against a government leaker, however, remained highly unusual.[153] For the next two decades, prosecutions under the Act continued to be limited to more traditional cases of espionage,[154] apart from a single case involving a leak to pro-Israeli lobbyists.[155] This leak case, however, shows that by the early twenty-first century, the conflation of "national security" with "national defense" had become total, with the district court in *United States v. Rosen* actually including the former in defining the latter:

> [T]he phrase "information relating to the national defense," while potentially quite broad, is limited and clarified by the requirements that the information be a government secret . . . and that the information is the type which, if disclosed, could threaten the national security of the United States.[156]

The Obama Administration brought what has been called a "turning point" in Espionage Act prosecutions, with the Justice Department beginning to regularly deploy the Act against leakers.[157] Katherine Feuer in 2015 counted eight cases in which the Obama Administration had used the Espionage Act to charge leakers of classified material. These range from Stephen Jin-Woo Kim at the State Department, Shamai Leibowitz at the FBI, Thomas Drake at the NSA, Jeffrey Stirling at the CIA, and a still-pending high-profile case against Edward Snowden.[158] The Trump Administration was equally aggressive, charging Reality Winner's leak of NSA material[159] and bringing cases against Terry Albury for an FBI leak and Joshua Schulte for one at the CIA.[160] In leveling Espionage Act charges against Julian Assange in 2019, the government crossed a new frontier: where the Obama Administration sought to penalize only those who leaked, the Trump Administration endeavored to punish the dissemination of those leaks.[161] A number of commentators fear that traditional journalists may be next.[162]

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[152] 844 F.2d 1057, 1062–86 (4th Cir. 1988).
[153] Rottman, *supra* note 6, at 1157–58.
[154] *See generally* MICHAEL J. SULICK, AMERICAN SPIES: ESPIONAGE AGAINST THE UNITED STATES FROM THE COLD WAR TO THE PRESENT (2013).
[155] United States v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2006). *See generally* Joe Bant, Note, United States v. Rosen*: Pushing the Free Press onto a Slippery Slope*, 55 U. KAN. L. REV. 1027 (2007); Peter Shapiro, Note, *Prologue to the Farce - A Historical Perspective on the AIPAC Case and the Applicability of the Espionage Act to Journalists*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 237 (2007); Recent Case, *United States v. Rosen*, 120 HARV. L. REV. 821 (2007).
[156] 445 F. Supp. 2d at 622.
[157] Katherine Feuer, *Protecting Government Secrets: A Comparison of the Espionage Act and the Official Secrets Act*, 38 B.C. INT'L & COMP. L. REV. 91, 98–99 (2015).
[158] *Id*. at 99-110. *See also* Rottman, *supra* note 6, at 1157–58.
[159] *See* Thomas C. Ellington, *Transparency Under Trump: Policy and Prospects*, 21 PUB. INTEGRITY 127, 129 (2019).
[160] Rottman, *supra* note 6, at 1158, 1185–86.
[161] Superseding Indictment at 10, United States v. Assange, No. 1:18-cr-111 (E.D. Va. May 23, 2019).
[162] *See supra* note 7.

With Espionage Act cases now being brought across many domains of government—including diplomacy, law enforcement, intelligence, and military matters—for a wide range of purposes, the Espionage Act has emerged as a "De Facto Leak Law" of extremely broad, and still growing, applicability.[163] Yet this dramatic expansion has become possible only because of a collective societal forgetting of the concept of "national defense" and its fusion with Earle's far more expansive idea of "national security."

IV. The Concept of the National Defense in the Early Twentieth Century

When the Espionage Act was adopted, the concept of "the national defense" meant the physical protection of the nation. The concept encompassed military and naval affairs as well as the physical necessities that an effective army and navy required: Munitions, clothing, food, and other key war supplies. Especially in time of war, the concept could reach to include matters that had a marked impact on these military affairs and necessities. It extended to include, for example, the raw materials needed to make munitions and other war supplies, and the rail and water transportation networks essential to the movement of troops and to the productivity of war industries. It similarly included fuels and other sources of power directly needed for military purposes or indirectly for the creation or transportation of military supplies. Less intuitively, the concept also encompassed a significant agricultural dimension, emphasizing the need for a stable food supply in wartime—military surrender, after all, could as much be the result of civilian starvation as of battlefield defeat.

All, however, ultimately stemmed from military needs, with a strong recognition that these needs became much more acute during wartime. To be a matter of national defense, there had to be some tangible, physical connection to the nation's military or naval performance, or, by extension, to that of its wartime allies. Even if only indirectly, matters of national defense needed to be related to providing some physical advantage for U.S. or allied soldiers and sailors. Once that connection to military affairs became so nebulous as to be meaningless, the matter no longer qualified as one of national defense.

One barely needs to articulate this argument for its truth to be immediately evident to anyone with a serious familiarity with the sources that form the historical record in the early twentieth century. The term is commonplace in written sources, and one readily finds usages of the concept precisely along the lines above

[163] Fidler, *supra* note 13, at 219.

throughout newspapers,[164] scholarly articles,[165] and other written records.[166] A litany of quotations from almost any source could be selected to prove the point, but it is proposed here to focus on Congress in 1916 and 1917. First, examining the 1916 Council of National Defense Act, which still remains in force, is particularly helpful, because the composition and duties of that body provide a clear guide to how "the national defense" was then conceived. Second, usages of the term "national defense" in the 1917 *Congressional Record* will be examined to show how the reach of the concept could expand during wartime. A series of examples is carefully selected in order to illustrate the construction of "the national defense" as the concept was then commonly understood.

A. *The Council of National Defense*

The Council of National Defense is particularly illustrative because of the stark differences between it and the later National Security Council. The National Security Council was established with the very broad declared purpose of facilitating "the integration of domestic, foreign, and military policies relating to the national security."[167] Its current statutory members are "the President, the Vice President, the Secretary of State, the Secretary of Defense, the Secretary of Energy, [and] the Secretary of the Treasury";[168] an array of intelligence and other officials often attend.[169]

By sharp contrast, the membership of the Council of National Defense was dramatically different, and specifically *excluded* the Secretaries of State and of the Treasury.[170] Instead, the Council consisted of "the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor."[171] Consistent with this membership, the Council of National Defense had a far narrower remit, one primarily focused on

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[164] *See, e.g.*, Carman F. Randolph, *The Outline of a Plan for National Defense*, N.Y. TIMES MAG., Nov. 28, 1915, at 16; *The President's Plea for National Defense*, N.Y. TIMES, Jan. 28, 1916, at 8; *Theories of National Defense*, N.Y. TIMES, Jan. 27, 1917, at 8.

[165] *See e.g.*, Henry B. Breckinridge, *Universal Service as the Basis of National Unity and National Defense*, 6 PROC. OF THE ACAD. OF POL. SCI. IN THE CITY OF N.Y. 12 (1916); Grosvenor B. Clarkson, *The Council of National Defense*, 118 SCI. AM. 306 (1918); Lindley M. Garrison, *The Problem of National Defense*, 201 N. AM. REV. 833 (1915); Charles O. Haines, *Our Railroads and National Defense*, 202 N. AM. REV. 385 (1915); Anne Rogers Minor, *Peace through National Defense*, 2 SCI. MONTHLY 385 (1916); George Haven Putnam, *Politics as a Barrier to an Adequate and Efficient System of National Defense*, 64 ANNALS AM. ACAD. POL. & SOC. SCI. 31 (1916).

[166] *See e.g.*, FIRST ANNUAL REPORT OF THE UNITED STATES COUNCIL OF NATIONAL DEFENSE (1917); GEORGE HEBARD MAXWELL, OUR NATIONAL DEFENSE: THE PATRIOTISM OF PEACE (1915); *Preparedness for National Defense: Hearings Before the Committee on Military Affairs, United States Senate*, 64th Cong. (1916).

[167] National Security Act of 1947, PUB. L. NO. 80-253, § 101(a), 61 Stat. 495.

[168] 50 U.S.C. § 3021(c)(1) (2012).

[169] *See* Memorandum on Renewing the National Security Council System, 2021 DAILY COMP. PRES. DOC. 121 (Feb. 4, 2021).

[170] 50 U.S.C. § 1 (2012).

[171] *Id.*

providing the army and navy with what they might need in a time of war. It was charged with making

> "recommendations to the President and the heads of executive departments as to
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> [1] the location of railroads with reference to the frontier of the United States . . . ;
>
> [2] the coordination of military, industrial, and commercial purposes in the location of branch lines of railroad;
>
> [3] the utilization of waterways;
>
> [4] the mobilization of military and naval resources for defense;
>
> [5] the increase of domestic production of articles and materials essential to the support of armies and of the people during the interruption of foreign commerce;
>
> [6] the development of seagoing transportation;
>
> [7] data as to amounts, location, method and means of production, and availability of military supplies;
>
> [8] the giving of information to producers and manufacturers as to the class of supplies needed by the military and other services of the Government, the requirements relating thereto, and
>
> [9] the creation of relations which will render possible in time of need the immediate concentration and utilization of the resources of the Nation."[172]

By June 1917, the Council of National Defense had formed seven committees to carry out these responsibilities: Transportation, Munitions, Raw Materials, Labor, Supplies, Science and Research, and Medicine.[173] Each of these responsibilities was a matter of military organization and supply. The sole exception was in ensuring the continuation of domestic supplies needed to sustain "the people *during the interruption of foreign commerce*,"[174] which shows the concept's agricultural dimension and emphasizes the clear way in which "national defense" contained within it a sharp distinction between peace and war.

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[172] *Id.* § 3.
[173] *Subcommittees of the Council of National Defense*, 45 SCI. 585 (n.s.), 585 (1917).
[174] 50 U.S.C. § 3 (2012) (emphasis added).

B. *The Concept of "National Defense" Explained through Examples in the 1917 Congressional Record*

The Army and Navy existed at the core of the concept of the national defense because it was the Army and Navy that *provided* the national defense. Rep. Edwin Roberts (R-Nev.) explained in April 1917 that he had always been "in favor of building up our Navy and our Army and for appropriations adequate to keep both branches in a state of preparation necessary for national defense."[175] The Senate Chaplain in a morning prayer similarly referred to "the necessity for an armed force for our national defense."[176] Congress had little difficulty in extending the concept of national defense to a distant European war. Wherever the army and navy needed to be, so went the boundaries of the national defense: "The lines of the national defense," declared Rep. Richard Parker (D-N.J.), "are the battle lines of France."[177]

Whatever the Army and Navy required also became matters of national defense. There was a distinction drawn between having a "direct" connection to the national defense—that is, things needed directly by the military—and an "indirect" connection, or those things not needed by the military itself, but needed in order to fulfill military requirements. As Rep. John Small (D-N.C.) explained in connection with an infrastructure bill:

> Some of the items are more intimately associated than others; most of them are associated directly with national defense. Others are indirectly connected with national defense in that the improvements are necessary for the . . . commodities which are essential in the prosecution of the war.[178]

The supplies that constituted "indirect" matters of national defense could expand very considerably in wartime if there was any question of a shortage impairing military performance. "There are numerous things that are used in the various phases of production that ultimately enter into and form a part of the things that are used for the national defense," explained Sen. Francis Newlands (D-Nev.). "[T]hat applies to the food that supplies the troops, to the cannon, to the muskets and powder, and other munitions of war, and also to all the elements of production that form a part of these munitions of war when completed."[179] Indeed, Newlands argued, if the Navy were for some reason to decide upon "the making of wooden ships," then lumber could then become a matter of national defense—even though "lumber itself is not a munition of war."[180] Similarly, Rep. Nicholas Longworth (R-Ohio) was alarmed by a growing shortage of platinum: "platinum is a necessary part of the national defense. Platinum to-day is an absolute necessity in the production of high explosives. Platinum is a necessity for making concentrated

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[175] 55 CONG. REC. 1232 (1917).
[176] *Id*. at 5149.
[177] *Id*. at 1271.
[178] *Id*. at 3361.
[179] *Id*. at 3349.
[180] *Id*.

sulphuric acid, which is thereafter made into nitric acid," which was used in the making of explosives used by the military.[181] It was, however, the much greater needs of wartime that facilitated this large expansion of what were ordinarily civilian matters into ones of national defense. Sen. John Shields (D-Tenn.) approvingly cited a *New York Post* article, which discussed a congressional appropriation "for the establishment of a plant or plants for the fixation of atmospheric nitrogen—the product to serve our farm lands in times of peace and, during periods of hostilities, to aid us in the manufacture of munitions for national defense."[182]

The concept also encompassed the utilities necessary to fuel these lines of production. In a fight over a Niagara River bill, Rep. Henry Flood (D-Va.) argued that the electricity provided by the Niagara Falls dam was vital to the national defense:

> [E]veryone familiar with the products made from electrical power generated at Niagara Falls tell us that everything made there is used in manufacturing war material. Niagara Falls is the center of the electrochemical industry of this country, and the products made there are vitally essential to the various other industries upon which our national defense directly rests.[183]

Flood proceeded to list many of the items produced by factories supplied by Niagara Falls electricity and to connect each of those items to Army and Navy requirements.[184]

Just as the concept of national defense extended to cover military supplies and the production of them especially in wartime, so too could it extend to cover transportation. "The national defense calls for the greatest facility in the transportation of men, munitions, and supplies," argued an article cited approvingly by Rep. L.C. Dyer (R-Mo.).[185] "What was England's first act of military policy after war was declared?" asked Robert Thomas (D-Ky.).[186] "Did she not take possession of every line of transportation? Did she not assume control of her railroads and water communications, making them all subservient to her great need of national defense?"[187]

Yet while the concept *could* extend to include transportation, it did so only to the extent necessary to provide for military needs. There was a very illustrative fight in Congress over a rivers and harbors bill, as a number of critics doubted the

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[181] *Id*. at 2683.
[182] *Id*. at 3320.
[183] *Id*. at 4541. *See also* Joint Resolution Authorizing the Secretary of War to Issue Temporary Permits for Additional Diversions of Water from the Niagara River, S. J. Res. 186, 64th Cong. (1917).
[184] 55 CONG. REC. 4541–42 (1917).
[185] *Id*. app. at 356.
[186] *Id*. at 1003.
[187] *Id*.

military relevance of a number of the bill's proposed projects. "If this bill is enacted at this session there is no probability that any of the work to be done could be completed in time to be of use in this war," argued Rep. Henry Emerson (R-Ohio).[188] "This extra session was called to enact national defense legislation, as I am informed. This bill can not be placed in that class."[189]

The bill's supporters responded by stressing the military importance of the nation's waterways in general and of individual projects in particular. Rep. William Borland (D-Mo.) defended the bill by pointing to the Council of National Defense having formed a waterways subcommittee, arguing that this subcommittee was "the complete answer, as I take it, to the argument of gentlemen that waterways are not, although railroads may be, an important element in national defense at the present time."[190] The bill's Senate floor manager, Sen. Duncan Fletcher (D-Fla.), stressed that "[e]very project in this bill has not only been approved by the engineers but has been reported . . . as an emergency matter that needs to be taken care of right now, as directly or indirectly connected with the national defense."[191] Sen. Frederick Hale (R-Me.) took exception to criticism of a project in his home state, pointing to a letter from the British embassy saying that the Canadians would use the facilities and it would therefore "be of great importance for the successful prosecution of the war."[192]

Conversely, the bill also came under attack for omitting certain projects. When a senator from Georgia criticized the bill for omitting a proposed harbor project in his home state, Sen. Fletcher defended the omission: although the proposed project was entirely "meritorious," the national defense did not demand its inclusion in an emergency appropriations bill because it was not "a military necessity."[193] Fletcher quoted a letter from the Chief of Engineers, who despite favoring the harbor project in general, acknowledged that "it is not proposed to use this locality in any of the defense measures to be undertaken by the Army or Navy, so that I can not recommend the improvement in connection with the national defense."[194]

At its outer limits, the concept could be deployed to include anything that meaningfully impaired military performance or significantly harmed the production of military requirements—a category that in wartime could expand rather considerably. Representative Clarence Miller (R-Minn.) approvingly cited an argument that "an effective campaign against syphilis is an integral part of national preparedness and must take its place among measures of national defense. The effect of the mobilization of troops, the increase of the personnel of Army and Navy, the importance of the health of enlisted men is being daily better

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[188] *Id*. at 3385.
[189] *Id*.
[190] *Id*.
[191] *Id*. at 5395.
[192] *Id*. at 5489.
[193] *Id*. at 5427–28.
[194] *Id*. at 5428.

appreciated."[195] Similarly, Rep. William Stevenson (D-S.C.) contended that "it is dangerous and deleterious to the national defense to have liquor imbibed by the soldiers of the nation."[196] One of the more aggressive and strained applications of the concept in the 1917 *Congressional Record* came in an argument for national prohibition for the duration of the war as a national defense measure. Rep. Charles Randall (Prohibition Party-Calif.) cited a telegram from a supporter:

> [The] national prohibition [of] liquor traffic would be [a] great step toward efficient national defense. From my official experience [I] am convinced [that the]effects of liquor in time of peace are extremely detrimental to [the] individual and a public waste. In [war]time its evil effects would necessarily be greatly augmented.[197]

Conversely, however, there was also recognition that supposed claims of connections to military and naval affairs could eventually become so indirect and oblique as to become preposterous. In criticizing the waterways bill mentioned above, Sen. Lawrence Sherman (R-Ill.) objected that:

> The indefensible parts of this bill are no more connected with the national defense than the last doctor bill I paid. It may all be very remotely connected with the national defense. The healthier I can keep my person and my family the better off we are and the stronger we are and the more taxes I can afford to pay to the Government. Everything of that character is connected with the national defense, but it is so remote and inconsequential that it can not properly be made the subject matter of legislation.[198]

In short, to properly fall within the concept of "the national defense," there needed to be a meaningful and tangible connection to the military or to the provision of military requirements. The sole exception to this general rule was the concept's significant agricultural dimension, which emphasized maintaining ample civilian food supplies particularly during wartime, with the Secretary of Agriculture sitting as a statutory member of the Council of National Defense.[199] This agricultural dimension no doubt seems rather alien to modern eyes—being accustomed to very ample food supplies, agriculture today is thought of, at best, as a peripheral concern of U.S. national security. Agriculture tends to be assigned primarily either to the concept of U.S. "critical infrastructure," as one sector among sixteen,[200] or to the concept of "food security," a term that generally has no military

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[195] *Id*. at 4981.
[196] *Id*. at 4164.
[197] *Id*. app. at 393.
[198] *Id*. at 5481.
[199] 50 U.S.C. § 3 (2012).
[200] *See* Directive on Critical Infrastructure Security and Resilience, 2013 DAILY COMP. PRES. DOC. 92 (Feb. 12, 2013); U.S. DEP'T OF HOMELAND SEC'Y, FOOD AND AGRICULTURE SECTOR-SPECIFIC PLAN 1 (2015), https://www.cisa.gov/sites/default/files/publications/nipp-ssp-food-ag-2015-508.pdf [https://perma.cc/R5GS-SVJ4].

or international affairs connotations.[201] The Secretary of Agriculture has no status in relation to the National Security Council.[202]

A century ago, however, the idea that wars could be won or lost as readily on the farm as on the battlefield was not so strange. The Franco-Prussian War of 1870-1871 had culminated in a five-month Siege of Paris; the French capital only surrendered when the food supplies ran out.[203] During World War I, the British and Germans both attempted to win the war by starving the other's civilians—using a blockade and a submarine warfare campaign respectively. As a result, keeping the Allies well fed was a major U.S. war objective.[204]It should come as no surprise, then, that Rep. William Mason (R-Ill.) approvingly cited a report urging that "[i]f an adequate food supply is to be assured, the military plan must include an enlistment for food production as definite as for service at the front. From the first the Department of War should as rigorously protect the food production as it does any other means of national defense."[205] Rep. Alben Barkley (D-Ky.) demanded economy in agricultural consumption: "[w]e should put aside every unnecessary indulgence or luxury that may in any way contribute to shorten our supply of food or weaken our national defense."[206] Rep. Gilbert Haugen (R-Iowa) spoke approvingly of a bill that would "provide further for the national defense by stimulating agriculture and facilitating the distribution of agricultural products."[207] Rep. Charles Curtis (R-Kan.) insisted that "[n]o program for national defense is practical unless it includes the settlement of our vacant agricultural land and the organization of agriculture on business principles."[208]

The final element to emphasize is the *concreteness* that accompanied the concept of the national defense. Where the idea of national security often possesses rather abstract, ethereal, and shadowy qualities, the national defense by contrast invoked the world of the tangible: munitions, transportation, production, utilities, agriculture—all of these involved the making or movement of physical items. The more intangible diplomatic considerations now seen as belonging within national security were instead, as previously mentioned, assigned to the entirely distinct concept of "foreign relations." Foreign relations was at no point seen as a subset of

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[201] *See, e.g.* JOHN MICHAEL ASHLEY, FOOD SECURITY IN THE DEVELOPING WORLD (2016); BRYAN L. MCDONALD, FOOD SECURITY (2010).
[202] National Security Presidential Memorandum-4, 3 C.F.R. 456 (2018). See also Memorandum on Renewing the National Security Council System, 2021 DAILY COMP. PRES. DOC. 121 (Feb. 4, 2021).
[203] ROBERT TOMBS, THE WAR AGAINST PARIS, 1871 (1981). *See also* PETER M. R. STIRK, A HISTORY OF MILITARY OCCUPATION FROM 1792 TO 1914 190–91 (2016).
[204] *See, e.g.*, KARL E. BIRNBAUM, PEACE MOVES AND U-BOAT WARFARE: A STUDY OF IMPERIAL GERMANY'S POLICY TOWARDS THE UNITED STATES APRIL 18, 1916–JANUARY 9, 1917 (1958); ERIC W. OSBORNE, BRITAIN'S ECONOMIC BLOCKADE OF GERMANY 1914–1919 (2004); Tom G. Hall, *Wilson and the Food Crisis: Agricultural Price Control during World War I*, 47 AGRIC. HIST. 25 (1973); Dirk Steffen, *The Holtzendorff Memorandum of 22 December 1916 and Germany's Declaration of Unrestricted U-Boat Warfare*, 68 J. MIL. HIST. 215, 215–16 (2004); WILLIAM A. PELZ, A PEOPLE'S HISTORY OF MODERN EUROPE 110 (2016).
[205] 55 CONG. REC. app. 72 (1917).
[206] *Id.* at 5754.
[207] *Id.* at 2836.
[208] *Id.* at 4353.

the national defense. It is, of course, more difficult to prove a negative, but this early twentieth century historian has never encountered in the archives a single instance of diplomatic matters being discussed as a subset of the national defense.[209] Beyond the exclusion of the Secretary of State from the Council of National Defense,[210] journal articles of the era devoted to the subject of foreign relations would not even mention the phrase "national defense."[211] Whenever the two terms appeared together, it was always in a juxtaposition that illustrates the distinction drawn between them, as in this example from Rep. Edward Denison (R-Ill.): in late April 1917, he declared that he had "from the first appearance of threatening danger to our country supported the President on every issue involving our foreign relations, our national defense, and whenever our national honor and dignity were involved."[212]

C. *Analysis: The Definiteness of "National Defense"*

In attempting to treat the "use of indefinite terms in statutes," Ernest Freund proposed in 1921 a still-cited taxonomy of three types of certainty in statutory terms: "precisely measured terms, abstractions of common certainty, and terms involving an appeal to judgment or a question of degree."[213] As the above sections demonstrate, the concept of national defense in the early twentieth century had elements of both the second and third. Matters that were directly military in nature or indisputably key to the provision of military requirements sat readily within the concept; diplomatic and other non-military matters existed firmly outside. The element of judgment lay in establishing *precisely* the point at which a connection to the nation's military performance became sufficiently strained as to fall outside the concept altogether. This judgment, in turn, was sharply affected by whether the country was at peace or at war. It was this element of judgment that made providing

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[209] The closest one comes is a short 1916 article arguing that diplomacy "*should be viewed* as an important part of the national defense." Implicitly acknowledging that what was being offered was an unintuitive, controversial proposition, this argument that diplomacy "might be called [the] first line of national defense" did not catch on. *See* Perry Belmont, *The First Line of National Defense*, 201 N. AM. REV. 883, 883 (1915) (emphasis added). Another writer cast diplomacy as a "first line of defense," but this line was situated *outside* the "national defense." *See* S. Stanwood Menken, *National Defense and Efficiency*, 2 SCI. MONTHLY 355, 355 (1916). Much more often the phrase "first line of defense" was located within the military, although there was no consensus as to which service. *See, e.g.*, Colby M. Chester, *The National Defense*, 21 REC. OF THE COLUM. HIST. SOC'Y 186, 186 (1918); Harry S. Knapp, *The Limitation of Armament at the Conference of Washington* 16 PROC. OF THE AM. SOC'Y OF INT'L L. 12, 15 (1922); Wilbur F. Sadler, Jr., *Efficiency in the National Guard*, 202 N. AM. REV. 544, 544 (1915); Oscar Solbert, *United Defense Services*, 222 N. AM. REV. 226, 228 (1925); John Q. Tilson, *Preparedness*, 2 SCI. MONTHLY 403, 403 (1916).

[210] 50 U.S.C. § 1 (2012).

[211] *See, e.g.*, Allen Welsh Dulles, *The Power of the President over Foreign Affairs*, 14 MICH. L. REV. 470 (1916); Charles E. Hughes, *Some Observations on the Conduct of Our Foreign Relations*, 16 AM. J. INT'L L. 365 (1922); Henry Cabot Lodge, *Foreign Relations of the United States, 1921-1924*, 2 FOREIGN AFF. 525 (1924); Myers, *supra* note 82; Quincy Wright, *The Control of Foreign Relations*, 15 AM. POL. SCI. REV. 1 (1921).

[212] 55 CONG. REC. 1432 (1917).

[213] Ernst Freund, *The Use of Indefinite Terms in Statutes*, 30 YALE L.J. 437, 437 (1921).

a clear legislative or judicial definition of "the national defense" challenging.[214] At the same time, however, the boundaries within which this ambiguity could exist were comparatively narrow. The concreteness of "the national defense," alongside the distinction with "foreign relations," removed vast areas of potential uncertainty. Matters tended to fall either within the concept of national defense or outside it—and, in peacetime, generally outside it.

This examination has focused on Congress in 1916 and 1917, looking at the Council of National Defense Act of 1916 and examining a small but illuminating sampling of the references to "national defense" in the 1917 Congressional Record. As an evidence base, the latter source has been selected rather arbitrarily, useful because of its demonstrating the significant expansion of the concept during wartime, and illustrative because it is the same year that the Espionage Act was adopted. Anyone who doubts this summing up is welcome to repeat this analysis utilizing a different historical source or a different timespan, or both. National defense existed as a stable and well-understood concept of the era: An observer wrote in a political science journal in 1927, for example, that "[n]ational defense means the protection of the country, primarily, from outside aggression, international war, not internal disturbances for which we have police forces and constabulary."[215] This understanding changed little until World War II.[216]

V. Critiquing Edgar and Schmidt

This articulation of the historical concept of the national defense transforms much of the legal scholarship on the Espionage Act[217] and poses a direct challenge to Edgar and Schmidt's 1973 article.[218] While the sharp contrast between the analysis above and that article's conclusions are readily evident, there are a handful of matters that merit additional attention. The analysis above recasts in particular our understanding of the key judicial precedents on the Espionage Act while also shedding new light on certain aspects of the text of the Act itself, its legislative history, and of an important related statute passed in 1933.

A. *Gorin v. United States (1941) and United States v. Heine (1945)*

The Supreme Court's only holding regarding the Espionage Act, *Gorin* was a Soviet spy case. Hafis Salich, an employee of the U.S. Office of Naval Intelligence's (ONI) San Francisco branch, was accused of passing U.S. naval intelligence information regarding Japan to Mikhail Gorin, a Soviet intelligence agent; both were arrested in 1938 and convicted in 1939, with each facing three

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[214] See *infra* Pt. V.
[215] William Mitchell, *Airplanes in National Defense*, 131 ANNALS AM. ACAD. POL. & SOC. SCI. 38, 38 (1927).
[216] *See, e.g.*, JAMES H. BEALS BOGMAN, ECONOMIC PLANNING AND NATIONAL DEFENSE (1933); Fox Conner, *The National Defense*, 225 N. AM. REV. 1 (1928); Frederick H. Payne, *What Constitutes Adequate National Defense?*, 95 WORLD AFF. 12 (1932).
[217] *See supra* note 7.
[218] Edgar & Schmidt, *supra* note 7.

counts under the Espionage Act.[219] The defense argued that an ONI branch was not specifically listed as a protected place within the Espionage Act, and it would unconstitutionally vague to allow a conviction based solely on the phrase "connected with the national defense."[220] They also argued that only courts, and not juries, could decide what information was "connected with the national defense"—and that the information that Salich passed to Gorin did not qualify.[221] The Supreme Court rejected all of the defense's arguments and upheld the conviction.[222]

Edgar and Schmidt struggled to comprehend the decision, calling it "confused and inadequate."[223] But the Court's decision now makes rather straightforward sense—right down to its otherwise rather bizarre reference to "reports . . . which deal with food production."[224] Edgar and Schmidt were baffled by the decision's key text concerning the meaning of "national defense":

> [W]e are of the view that the use of the words "national defense" has given them [that is, the provisions of the Espionage Act], as here employed, a well understood connotation. They were used in the Defense Secrets Act of 1911. The traditional concept of war as a struggle between nations is not changed by the intensity of support given to the armed forces by civilians or the extension of the combat area. National defense, the Government maintains, "is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." We agree that the words "national defense" in the Espionage Act carry that meaning.[225]

Perplexed by this passage, the two scholars pronounced it "internally inconsistent": The phrase the "traditional concept of war" implied a "narrow" understanding, but then the mysterious reference to "national preparedness" seemed as though it could "broadly" include "nearly all facets of policy-making related to potential use of armed forces."[226]

Now, however, the decision's meaning is plain and the passage reads coherently: the decision was merely attempting to articulate the concept explained above. There should be no mystery to the reference to "national preparedness." Does "national preparedness," Edgar and Schmidt wondered, "include information about the political and diplomatic establishments which set the boundaries of military action?"[227] The answer to that question, very straightforwardly, is "no."

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[219] Setzekorn, *supra* note 114, at 553–55.
[220] Gorin v. United States, 312 U.S. 19, 23 (1941).
[221] *Id*. at 29.
[222] *Id.* at 25–33.
[223] Edgar & Schmidt, *supra* note 7, at 976.
[224] *Gorin*, 312 U.S. at 23.
[225] Edgar & Schmidt, *supra* note 7, at 975–76 (quoting *Gorin*, 312 U.S. at 28).
[226] Edgar & Schmidt, *supra* note 7, at 976, 986.
[227] *Id*. at 976.

The World War I-era idea of "preparedness" was a very reasonable one to encompass the matters subsidiary to the Army and Navy described above. Although later falling into disuse, the term "preparedness" was still highly relevant in 1941,[228] as the United States was then in the middle of a significant rearmament program following the Fall of France the previous year.[229] Preparedness was, after all, "associated with the military."[230] The Preparedness Campaign, as one scholar has summarized, had "an unconcern with the relationship of power and policy. It sought to arm America against the nameless dangers that might follow the end of the European war, and it had little connection with the aims and instruments of American diplomacy in the years 1914–1917."[231]

One could readily assemble a litany of quotations from around 1941 to confirm the point, repeating the exercise above, but more than a few seems superfluous here. In 1940, Col. H. K. Rutherford defined "industrial preparedness" as "the preparation of adequate plans for the nation's economic and industrial support of th[e] armed forces in a war emergency."[232] In January 1941, just a few days before the judgment in *Gorin* was issued, Rep. Luther Patrick (D-Ala.) declared that "[t]he best preparedness for war if it should come to this Nation would not be piling up airplanes but speeding up our means of manufacture so that when the time comes we may then turn out in adequate volume the most modern and most effective airplanes and other means of defense and warfare."[233] That same month, a department head at a Kansas college wrote to his senator declaring that he "believe[d] in preparedness, all the preparedness that our trained military engineers think is necessary to protect America from an invasion by any foreign power or combination of foreign powers."[234]

Edgar and Schmidt ask two further questions about *Gorin* that, with a good working understanding of the national defense as a concept, can now be answered rather easily. First, they ask, "is information defense-related if it pertains to military affairs but is unimportant?"[235] The answer, reasonably straightforwardly, is no. It is important to recall that the Army and Navy *effectuate* the national defense; that is, the Army and Navy *enable* the protection and defense of the nation in a physical sense.[236] Unimportant information is, by definition, information that does not serve to enable this protection, and so would not be connected with the national defense. Second, Edgar and Schmidt ask, "does 'related to the national defense' include information which the Government has not sought to keep secret, or which has

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[228] *See, e.g.*, H.K. Rutherford, *Industrial Preparedness*, 4 J. MARKETING 47, 47 (1940).
[229] Marvin R. Zahniser, *Rethinking the Significance of Disaster: The United States and the Fall of France in 1940*, 14 INT'L HIST. REV. 252 (1992).
[230] Franz, *supra* note 94, at 673.
[231] Richard E. Welch, *Finnegan, John Patrick, Against the Specter of a Dragon: The Campaign for American Military Preparedness, 1914–1917*, 3 HIST.: REVIEWS OF NEW BOOKS 202 (1975).
[232] Rutherford, *supra* note 228, at 47.
[233] 87 CONG. REC. 119 (1941).
[234] *Id.* at 435.
[235] Edgar & Schmidt, *supra* note 7, at 976.
[236] *See supra* Pt. IV.

found its way into the public domain despite such efforts?"[237] Again the answer, albeit not quite as straightforwardly, is no. Information that is readily available cannot confer protection to the nation, and so could not be a part of the national defense. That is, once information enters the public domain, that information's value in protecting the nation *as information* (as distinguished from the underlying activities that information describes) is enormously diminished. Edgar and Schmidt raise the possibility of assembling "several small clues [that] may permit piecing together the entire story,"[238] and they are right that there is the possibility of uncertainty on this point. At least theoretically speaking, if the systematic piecing together of public information were to facilitate the discovery of information that *did* serve to enable the protection of the nation, one could argue that the latter might fall within the ambit of "the national defense."

The last is the kind of case that confronted Judge Learned Hand and the Second Circuit in 1945 in *United States v. Heine*, a case that featured a defendant accused of systematically collecting public information about U.S. aviation and passing it to Germany in 1940 (and possibly 1941).[239] Where Edgar and Schmidt portray Hand's effort to grapple with the meaning of "the national defense" as an "unsatisfactory," perplexing attempt to pin down a cloud,[240] no such confusion is evidenced within the decision itself. It was "plain" to Hand that although there were a great many "activities which become tributary to 'the national defense' in time of war," the "*information*" about these activities did not have to fall within the ambit of the concept.[241] It was, to Hand, "obviously lawful" to transmit information that the government had published or otherwise not sought to keep secret.[242] The question posed by the case was whether the "condensing and arranging" of public information could at some point cross a line to become unlawful.[243] Hand held that it could not; the responsibility fell to the military "services . . . to determine what information may be broadcast without prejudice to the 'national defense.'"[244] If the military "consent[ed] to its dissemination," the mere condensing and arranging of that information, he decided, could not be brought within the ambit of the concept, regardless of what discoveries might ensue.[245]

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[237] Edgar & Schmidt, *supra* note 7, at 976.
[238] *Id*. at 980.
[239] 151 F.2d 813 (2d Cir. 1945). Although from 1945, the decision shows no sign of the conceptual transition to "national security" then underway.
[240] Edgar & Schmidt, *supra* note 7, at 982.
[241] *Heine*, 151 F.2d at 815 (emphasis added).
[242] *Id*. at 816.
[243] *Id*. at 817.
[244] *Id*. at 816.
[245] *Id*. Only somewhat different from the circumstances described in this decision, the classification of government-produced intelligence derived from open sources is nevertheless a common phenomenon. *See, e.g.*, HEATHER J. WILLIAMS & ILANA BLUM, DEFINING SECOND GENERATION OPEN SOURCE INTELLIGENCE (OSINT) FOR THE DEFENSE ENTERPRISE 19 (2018).

B. *The Text and Legislative History of the Espionage Act*

Unable to attach any meaning to "the national defense" from judicial gloss, Edgar and Schmidt sought to puzzle out the term from the text and the legislative history of the Espionage Act, similarly without success.[246] This failure may be partially attributable to the fact that, within the text of the statute, Edgar and Schmidt neglect to realize the significance of the list of places specifically named as protected.[247] Building on a list that was included in the Defense Secrets Act of 1911, what is now 18 U.S.C. § 793(a) protected:

> [I]nformation concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, research laboratory or station or other place connected with the national defense.[248]

This list was largely ignored, no doubt because of its concluding words, and because *Gorin* held that the reach of the Espionage Act need not be limited to the specific places in this list.[249] The analysis above, however, allows us to see that this list *encapsulated* the places that were seen as key to the national defense: eleven of the places named are explicitly military in nature, three involve transportation, three involve production, four involve communications, and one involves research. None involve diplomacy or law enforcement. In arriving at this list, the drafters revisited the 1911 law and specifically added thirteen places not previously named.[250] While it is certainly true that a place need not be on this list in order to be protected by the Act, the list itself should not be ignored as surplusage. Rather, this list offers meaningful guidance as to the conception of "the national defense" used within the Act.

The trial judge's instructions to the jury in *Gorin*, quoted at length by the Supreme Court, reflect precisely this understanding of the text:

> You are instructed that the term 'national defense' includes all matters directly and reasonably connected with the defense of our nation against its enemies. . . . As you will note, the statute specifically mentions the places and things connected with or comprising the first line of defense when it mentions vessels, aircraft, works of defense, fort or battery and torpedo stations. You will note, also, that the statute specifically mentions by name certain

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[246] Edgar & Schmidt, *supra* note 7, at 967–69.
[247] *Id*. at 967–69.
[248] 18 U.S.C. 793(a) (2012); Defense Secrets Act § 1.
[249] Gorin v. United States, 312 U.S. 19, 23–25 (1941); *see* Edgar & Schmidt, *supra* note 7, at 968–69, 975.
[250] 18 U.S.C. 793(a); Defense Secrets Act § 1.

> other places or things relating to what we may call the secondary line of national defense.[251]

Additionally, in exploring the Act's legislative history, Edgar and Schmidt observe that the original House version of the bill contained a definition of "national defense" in its Section 1202:

> The term "national defense" as used herein shall include any person, place, or thing in anywise having to do with the preparation for or the consideration or execution of any military or naval plans, expeditions, orders, supplies, or warfare for the advantage, defense, or security of the United States of America.[252]

This definition—which, it should be noted, is considerably narrower than that used in *Rosen*[253]—was removed at the conference committee stage for reasons that Edgar and Schmidt were unable to identify.[254] The two scholars threw up their hands in confusion at the removal: "Our reading of the legislative history thus offers no limits on the range of the term 'relating to the national defense' and its statutory variations. This term, so central to the Espionage Act's prohibitions was without principled limitations in the minds of the Congresses which adopted it."[255]

It is now clear, however, that this definition was merely an attempt to capture the meaning of "national defense" as the concept was then commonly conceived.[256] "We have prescribed what the national defense is, and its meaning is pretty well understood in the minds of the public," argued the House floor manager of the bill, Representative Edwin Webb (D-N.C.), before the definition was removed.[257] Although Edgar and Schmidt are correct that the precise intention behind the removal of this definition is unclear, the effect of this removal was actually to *narrow* the Act, not to broaden it. To leave this definition in the Act—which the House managers acknowledged "gave the words 'national defense' a broad meaning"[258]—risked the possibility that people could be unfairly ensnared by dubious allegations of tenuous links to military matters. Because the concept of national defense was well understood, omitting the definition did no harm: this change left it to judges and juries to draw the line and to discern a reasonable application of "the national defense" from an unreasonable one. The absence of a definition facilitated the trial judge's instruction to the jury in *Gorin*—as quoted by the Supreme Court: the trial judge emphasized that, to find the defendant guilty, "the connection" to the national defense "must not be a strained one nor an arbitrary

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[251] *Gorin*, 312 U.S. at 30.
[252] 55 CONG. REC. 1700 (1917); Edgar & Schmidt, *supra* note 7, at 973.
[253] *See* United States v. Rosen, 445 F. Supp. 2d 602, 622 (E.D. Va. Aug. 9, 2006).
[254] Edgar & Schmidt, *supra* note 7, at 973.
[255] *Id*. at 974.
[256] *See supra* section IV.
[257] 55 CONG. REC. 1594 (1917).
[258] *Id*. at 3130.

one. The relationship must be reasonable and direct."[259] Because jurors would understand the concept, they could be left to draw the line.

C. *Herbert Yardley and 18 U.S.C. § 952*

Finally, this analysis sheds additional light on the 1933 episode that led to the passage of what is now 18 U.S.C. § 952. The first U.S. codebreaking agency was founded as MI-8 in 1917 and led by Herbert Yardley; it continued after World War I as the Cipher Bureau, a joint enterprise of the State and War Departments that broke both diplomatic and military codes before being shut down in 1929.[260] Yardley, outraged and impoverished by the closure of the agency, published *The American Black Chamber* in 1931.[261] Yardley provided a detailed account of his World War I experience[262] and he revealed extensive details about the U.S.'s diplomatic codebreaking efforts after the war—but only its diplomatic codebreaking, with no mention of the Cipher Bureau's postwar military activities.[263] When officials got word two years later that Yardley was seeking to release a second volume, *Japanese Diplomatic Codes, 1920-1921*, the Roosevelt Administration asked Congress for an enormously sweeping secrecy law, applicable to *all* government records.[264] Congress instead adopted the narrowest possible foreign relations secrecy statute to meet the situation, and Yardley's second volume was abandoned.[265]

Edgar and Schmidt found it difficult to understand why the Espionage Act was not applied to Yardley's disclosures. Yardley's conduct, they wrote, "would seem clearly to fall within the *Gorin* definition."[266] Ultimately they decided that the relevance of the episode is merely "inconclusive."[267] In reality, however, any attempt to cast Yardley's writings as involving "the national defense" would have rested on extremely thin reeds—Yardley's by-then-irrelevant World War I disclosures or the mere fact that the Black Chamber had the War Department as a sponsor. For the lawyers who advised the *American Black Chamber*'s publishers, "the Espionage Act was not even considered as a relevant law,"[268] and for good reason: Yardley's disclosures affected the United States' foreign relations, not its national defense ("intelligence" not yet being conceived of as a distinct function

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[259] Gorin v. United States, 312 U.S. 19, 31 (1941).
[260] DAVID KAHN, THE READER OF GENTLEMEN'S MAIL: HERBERT O. YARDLEY AND THE BIRTH OF AMERICAN CODEBREAKING 28–103 (2004); Gregory J. Nedved, *Herbert O. Yardley Revisited: What Does the New Evidence Say?*, 45 CRYPTOLOGIA 102, 106, 111 (2021).
[261] KAHN, *supra* note 260, at 104–23; John F. Dooley, *1929-1931: A Transition Period in U.S. Cryptologic History*, 37 CRYPTOLOGIA 84, 91–93 (2013).
[262] HERBERT YARDLEY, THE AMERICAN BLACK CHAMBER 1–230 (1931).
[263] *Compare id*. at 231–375 *with* KAHN, *supra* note 260, at 67–103.
[264] KAHN, *supra* note 260, at 158–64; Edgar & Schmidt, *supra* note 7, at 1061–62.
[265] KAHN, *supra* note 260, at 164–72; Edgar & Schmidt, *supra* note 7, at 1060, 1062–63.
[266] Edgar & Schmidt, *supra* note 7, at 1020.
[267] *Id*. at 1063.
[268] Sam Lebovic, *From Censorship to Classification: The Evolution of the Espionage Act* in WHISTLEBLOWING NATION: THE HISTORY OF NATIONAL SECURITY DISCLOSURES AND THE CULT OF STATE SECRECY 45, 51 (Kaeten Mistry & Hannah Gurman eds., 2019).

of government in itself),[269] and there existed no foreign relations secrecy law. In the main Senate debate on the 1933 law, Sen. Tom Connally (D-Tex.) explained that the bill's purpose was about "preventing the publication of unauthorized diplomatic matter in order that our foreign relations may not be disturbed."[270] A Republican critic, Sen. Arthur Robinson (R-Ind.) condemned the bill, but used similar terms: "Now we propose to gag the American people with reference to all foreign relations."[271] No concept of "defense" (or "intelligence") is mentioned throughout the entire debate.[272] Congress's final product, in sharp contrast to the Espionage Act, offered limited protection to:

> [A]ny official *diplomatic* code or any matter prepared in any such code. . . or any matter which was obtained while in the process of transmission between any foreign government and its *diplomatic* mission in the United States.[273]

This conceptual distinction between foreign relations and national defense is reflected in the compilation of the U.S. Code in 1934: The 1933 Act was assigned to Title 22, "Foreign Relations and Intercourse"[274] while the Espionage Act was contained within Title 50, "War."[275] The 1933 Act, dismissed a decade later by one U.S. codebreaker as a "perfectly futile and silly law,"[276] remained the only relevant statute to such leaks until 1950, when Congress adopted a law protecting "communications intelligence" more generally.[277]

VI. Basis for Novel Challenges

This Article has documented the enormous expansion of "the national defense" that has occurred as the term became absorbed by the newer idea of "national security"—an expansion that has unrecognizably transformed the Espionage Act. The Act has morphed from a comparatively narrow but vigorous law primarily protecting the U.S. military into a vague, highly punitive juggernaut of unrestrained government secrecy. This historical legwork lays the foundation for a novel statutory challenge to recent and current applications of the Act. It also raises important constitutional questions of due process about the Act and its application.

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[269] Larsen, *Creating an American Culture*, *supra* note 29, at 105. *See also* Andrew, *supra* note 80, at 67–84.
[270] 77 CONG. REC. 3133 (1933).
[271] *Id*. at 3129.
[272] *Id*. at 3125–39.
[273] 18 U.S.C. § 952 (2012) (emphasis added).
[274] 22 U.S.C. § 135 (1934).
[275] 50 U.S.C. §§ 31–42 (1934).
[276] Memorandum on Security from William F. Friedman to Col. Corderman, Chief, Signal Sec. Agency (July 23, 1943) (on file with Nat'l Sec. Agency), [https://perma.cc/V6FV-K37U].
[277] 18 U.S.C. § 798 (2012).

A. *Statutory Challenge to Recent and Current Applications of the Espionage Act*

This Article offers the basis for a novel statutory challenge to applications of the Espionage Act beyond the boundaries of the early twentieth century conception of the national defense. It has shown that the Espionage Act actually invoked a clear and well-understood concept of the era, one whose meaning can be reconstructed and its boundaries explained. The question is whether the statute should be interpreted using this historical concept, or whether one can arrive at an "evolved" understanding of the Act that substitutes the post-1940s concept of "national security." The latter should be rejected for four reasons.

First, it is certainly true that the interpretation of statutes can evolve away from their original meaning at the time of their adoption. But for *criminal* statutes, the rule of lenity limits the direction of any such evolution.[278] The rule of lenity demands that ambiguity in the meaning of a statute ought to be resolved in favor of the defendant.[279] The notion that vast swathes of activity that remained legal in 1917 became criminal at some point over the 1940s and 1950s—merely because of a change in the use of language by U.S. foreign policy elites—seems impossible to square with this rule.

Second, the plain text of the Espionage Act demands the application of the historical concept. Even though protected places need not be on the list of such places specified within the Act, this list aligns perfectly with the early twentieth-century understanding of "the national defense" and must not be ignored as surplusage.[280] Moreover, when originally adopted, the structure of the thirteen titles of the Espionage Act provided a clear demarcation between the far greater protection of "the national defense" in Title I, and the much lesser protection of U.S. "foreign relations" in Title VIII.[281] Such a demarcation is impossible to understand or apply without resorting to the historical concept.

Third, a number of related statutes likewise preclude an "evolved" interpretation of "the national defense". Even though the Council of National Defense suspended operations in 1921,[282] the Council of National Defense Act of 1916 still remains in force as 50 U.S.C. §§ 1–5. These provisions provide an as-yet-unnoticed but obvious aid for the interpretation of the Espionage Act of 1917, and they offer a clear statutory justification for dramatically narrowing the scope of the Espionage Act's application.[283] Additionally, at least three titles of the United States Code contain a definition of "national security" that describes it as the combination of "national defense" and "foreign relations"—a definition that also

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[278] *See, e.g.*, Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 886–88 (2003).
[279] *Id.* at 885.
[280] *See supra* notes 247–251 and accompanying text.
[281] *See supra* notes 102–106 and accompanying text.
[282] *See* Record Group 62, U.S. National Archives, College Park, Md.
[283] *See also supra* section V.C.

continues in force within the current executive order on the U.S. classification system, Exec. Order No. 13,526.[284] Whatever the "national defense" may mean, it logically cannot therefore be synonymous with "national security" nor encapsulate "foreign relations".[285]

Fourth, and most importantly, an "evolved" interpretation is inconsistent with *Gorin*, and—absent a showing why it should cease to apply—*Gorin*'s definition of "national defense" remains the law of the land.[286] *Gorin*'s off-hand definition has been extensively misinterpreted and misapplied over the past half-century,[287] but this widespread misunderstanding of the decision cannot be substituted for the original holding itself. Armed with a well-developed grasp of the historical concept of "national defense," *Gorin* ceases to be mysterious and can be readily understood and intelligently applied.[288] Merely because the concept of "national preparedness" has ceased to be a part of the national discourse cannot mean that the term simply expands to match a prosecutor's whims.[289] Rather, the Supreme Court was articulating a specific understanding of "the national defense" in 1941 that reflected a then-dominant societal understanding of the concept.[290] Once properly understood, nothing about *Gorin* supports an expansive understanding of the "national defense" beyond the early twentieth century conception of the term.[291] Indeed, the Supreme Court's endorsement of the trial judge's instructions in the case, as we have seen, run in precisely the opposite direction.[292]

Viewed through the prism of the historical conception of "the national defense,"[293] many recent and current prosecutions under the Espionage Act would be inconceivable to anyone in the early twentieth century. The notion that Julian Assange's leaking of State Department diplomatic cables would be a matter of "national defense" would be seen as risible and impossible,[294] as would Terry Albury's leaking of mere law enforcement material.[295] Reality Winner's leak of an NSA document relating to the 2016 election had no evident military connection to

[284] *See supra* notes 147-148 and accompanying text.
[285] Reading the terms "foreign relations" and "national defense" according to their historical understandings may also mean that the term "national security," at least as it is defined within these statutes and executive orders, has narrower scope compared with how the term is usually understood.
[286] Gorin v. United States, 312 U.S. 19, 28 (1941).
[287] *See supra* sections III.C and V.A.
[288] *See supra* sections IV and V.A.
[289] *See supra* notes and accompanying text.
[290] *See supra* section V.A.
[291] *Id*.
[292] *See supra* notes 251 & 259 and accompanying text.
[293] *See supra* section IV.
[294] *See* Superseding Indictment at 27, United States v. Assange, No. 1:18-cr-111 (E.D. Va. May 23, 2019).
[295] *See* Plea Agreement, United States v. Albury, No. 0:18-cr-00067-WMW (D. Minn. Apr. 17, 2018).

justify the application of the Espionage Act.[296] Using the Espionage Act against Joshua Schulte's alleged leak of CIA cyber material, unless it had undisclosed military importance, similarly seems highly dubious.[297] Reducing the scope of the Espionage Act to military-related matters would be, of course, to grant the military an unusually privileged place of very strong secrecy protections within the U.S. government. As history shows us, however, that is precisely how early twentieth century Americans would have wanted it.[298] To use the statutes of the past is to risk being bound by the past's preferences.

B. *Constitutional Questions of Due Process*

If an "evolved" interpretation of "national defense" is rejected in favor of the historical one, this Article also raises important constitutional questions. Prosecutions under the Espionage Act require applying a criminal statute that has a dead concept at its core. Can such a statute meet the constitutional requirements of due process? Attempting to answer this question in detail would require a radically different approach and so is beyond the scope of this article, but at least two potential constitutional infirmities are implicated.

First, a criminal statute falls foul of the vagueness doctrine when it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[299] Can a law that is unintelligible without the assistance of a historian really provide the "fair notice" the vagueness doctrine requires? Lower courts have invariably relied on *Gorin* in turning back vagueness challenges to the Espionage Act,[300] as recently as last year.[301] There ought to be grave doubt, however, as to whether *Gorin*'s vagueness holding should continue to be binding. The *Gorin* Court's decision was premised on the contention that the phrase "national defense" had "a well understood connotation"[302]—an assertion that scholars have regarded as inexplicable[303] but judges have dutifully obeyed as

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[296] Plea Agreement, United States v. Winner, No. 1:17-cr-00034-JRH-BKE (S.D. Ga. Aug. 23, 2018).

[297] *See* Superseding Indictment, United States v. Schulte, No. 1:17-cr-00548-PAC (S.D.N.Y. June 8, 2020).

[298] Larsen, *Creating an American Culture*, *supra* note 29, at 112–13 (observing that when the 1917 Espionage Act was passed, there existed a conceptual distinction between military secrecy and other types of secrecy); Larsen, *From Iran to Ukraine*, *supra* note 54.

[299] United States v. Harriss, 347 U.S. 612, 617 (1954). *See also* Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 270 (2010).

[300] *See, e.g.*, United States v. Morison, 844 F.2d 1057, 1073-74 (4th Cir. 1988); United States v. Dedeyan, 584 F.2d 36, 39 (4th Cir. 1978); United States v. Hitselberger, 991 F. Supp. 2d 101 (D.C. 2013); United States v. Kim, 808 F. Supp. 2d 44, 50-55 (D.D.C. 2011); United States v. Rosen, 445 F. Supp. 2d 602, 613 (E.D. Va. Aug. 9, 2006).

[301] United States v. Schulte, 436 F.Supp.3d 747, 753 (S.D.N.Y. Jan. 28, 2020).

[302] Gorin v. United States, 312 U.S. 19, 31 (1941).

[303] Tim Bakken, *The Prosecution of Newspapers, Reporters, and Sources for Disclosing Classified Information: The Government's Softening of the First Amendment*, 45 U. TOL. L. REV. 1, 4–6 (2013); Edgar & Schmidt, *supra* note 7, at 945, 976, 1076–77; Feuer, *supra* note 157, at 117, 127.

binding precedent.[304] What all have neglected to realize is that, in 1941, the connotation of "the national defense" *was* in fact well understood.[305]

Now, however, except with the benefit of detailed historical research, it is certainly no longer true that the Espionage Act is, as the *Gorin* Court then held, "sufficiently definite to apprise the public of prohibited activities."[306] Considering that the Act has been so gravely misinterpreted by both legal experts and courts, ordinary citizens would seem to have little hope of correctly understanding the law. The Council of National Defense Act of 1916 is certainly able to provide a road map for a coherent interpretation of the Espionage Act,[307] but the Supreme Court has rejected the notion that related statutes can cure a statute of vagueness.[308] No doubt the government would argue that the Espionage Act's scienter requirements are sufficient to defend against such a novel vagueness challenge,[309] but scienter merely "mitigates" against a vagueness challenge;[310] it does not necessarily "cure" a statute of vagueness,[311] leaving an important unanswered constitutional question that remains to be addressed.

Second, this article raises a crucial question of procedural due process: can a trial be fair when it requires a jury to apply a dead concept in order to convict? The concept of "the national defense" was well understood in 1941, and so for the *Gorin* Court to leave it to juries to decide what was and was not a matter of national defense was therefore a perfectly reasonable thing to do. This does not remain remotely true today. Jurors no longer have the ability, as they did in 1941, to know intuitively what "the national defense" means. To invite them to substitute "national security" would be to amend the Act, and dramatically so. To insist that they use the historical conception of "national defense" is to demand that they comprehend a deeply unfamiliar, dead concept, and then decide whether to convict on the basis of that comprehension.

The jury charge just last year in the *Schulte* case, in which the court left the jury to puzzle over a mutilated version of the *Gorin* definition, illustrates the grave unfairness of present practice.[312] "[N]ational defense," the jury was told, is "a broad term that refers to United States military and naval establishments, *intelligence* and

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[304] *See, e.g.*, Morison, 844 F.2d at 1073-74; *Dedeyan*, 584 F.2d at 3; *Hitselberger*, 991 F. Supp. 2d at 101; *Kim*, 808 F. Supp. 2d at 50-55; Rosen, 445 F. Supp. 2d at 613; *Schulte*, 436 F.Supp.3d at 753.
[305] *See supra* section IV.
[306] *Gorin*, 312 U.S. at 28.
[307] *See supra* section IV.A.
[308] *See* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 303–04 (2003) (citing Herndon v. Lowry, 301 U.S. 242 (1937)).
[309] *See, e.g.*, Jereen Trudell, *The Constitutionality of Section 793 of the Espionage Act and Its Application to Press Leaks*, 33 WAYNE L. REV. 205, 216-17 (1986) (arguing that the scienter requirements contained within § 793(d) and (e) would defeat void-for-vagueness challenges).
[310] Village of Hoffman Estates v. Flipside, Hoffman Estates Inc., 455 U.S. 489, 498–99 (1982); *see also* Goldsmith, *supra* note 308, at 301.
[311] Goldsmith, *supra* note 308, at 283, 301–03.
[312] Jury Charge at 24–25, United States v. Schulte, No. 1:17-cr-00548-PAC (S.D.N.Y. Mar. 3, 2020).

to all related activities of national preparedness."[313] They were given no other guidance as to the meaning of the concept: "Whether the information is connected with the national defense is a question of fact that you, the jury, must determine."[314] By adding "intelligence," the judge in this case modified the *Gorin* definition in an emphatically dubious way. As we have seen, intelligence was included within the concept of "national defense" only to the extent that it had military implications; intelligence unrelated to military matters was not included within the concept of "national defense" as the *Gorin* Court understood and defined it.[315]

This modification, moreover, serves to emphasize the grave difficulty of attempting to use the *Gorin* definition to explain what "the national defense" means in a modern context. The *Gorin* definition defines one dead concept ("national defense") in terms of a second dead concept ("national preparedness").[316] These concepts were readily understood in 1941; today neither is.[317] The *Gorin* definition, even if it remains the law of the land, is now completely unintelligible to any jury charged with applying it. Juries cannot fairly apply a concept that they do not understand, and yet prosecutions under the Espionage Act presently demand that they do precisely that.

Even if the jury was instructed in detail as to the historical conception of "the national defense," this article has required a lengthy exposition in order for the reader to meaningfully grasp the contours and complexities of the concept as it existed in the early twentieth century. Could courts really be certain that juries could be properly instructed as to how to apply this completely alien concept? And in the absence of such certainty, could a trial possibly be fair?

Answering these complex questions of constitutional due process is beyond the scope of this article, but they are important and novel questions that pose a meaningful constitutional threat to continued prosecutions under the Espionage Act. They certainly merit serious answers if those prosecutions are to continue.

VII. Conclusion

This Article has demonstrated that the skills of historians can prove essential to correctly understanding the laws of the past—above all when key legislation hinges on outdated language that invokes alien concepts. The reconstruction of the ideas of the past can shed great light on the laws that invoke them. The scope of the Espionage Act has become so expansive only by a forgetting of history. The example of the Congress of 1917 provides a grave warning for legislators, who

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[313] *Id*. at 24 (emphasis added).
[314] *Id*. at 24-25. The jury charge does provide some discussion of how "the Government must prove that the material is closely held" in order to "qualify as national defense information," but this provides no meaningful guidance to the jury in attempting to understand the meaning of "the national defense" as a concept.
[315] *See supra* notes 80, 137-138, and 260-277 and accompanying text.
[316] 312 U.S. 19, 28 (1941).
[317] *See supra* sections IV and V.A.

should not assume that the concepts of the present will remain the concepts of the future. Language and concepts evolve organically. Laws cannot. Effective statutes require precise definitions and careful drafting, neither of which are characteristic of the Espionage Act.[318]

The full scope of the U.S. secrecy statutes has not been re-examined in detail by legal scholars since 1973,[319] and Congress in the meantime has only added more laws related to secrecy and espionage.[320] With the Espionage Act having emerged as the government's de facto leak law, scholarly attention has focused overwhelmingly on that statute, to the relative neglect of other secrecy laws.[321] If this Article succeeds in its argument for dramatically narrowing the scope of the Espionage Act, however, these other statutes will move to the forefront. In particular, all but completely ignored by scholars,[322] Congress in 1994, created a misdemeanor crime broadly applying to any government employee or contractor involved in the "unauthorized removal" of classified information to an "unauthorized location."[323] With a little-noticed amendment, Congress recently turned this misdemeanor into a felony, increasing the maximum penalty from one year in prison to five.[324] Journalists and ordinary citizens unquestionably escape the statute, making it much less dangerous compared with the Espionage Act, but otherwise the government may well have itself a new "de facto leak law" for the twenty-first century.[325]

Further research on this, and other secrecy statutes, is urgently needed, with a particular need for an updated examination of the scope of U.S. secrecy laws as a whole. Scholars have pleaded repeatedly, and to no effect, for Congress to craft a replacement for the Espionage Act.[326] These scholarly calls for congressional action are now rendered premature: If the scope of the Espionage Act is dramatically narrowed, we possibly may find that no further secrecy laws are needed. Congress has never acted to rationalize U.S. secrecy laws despite decades of scholarly pleading; when Congress has addressed the subject, it has tended

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[318] *See supra* notes 68–69 and accompanying text.
[319] Edgar & Schmidt, *supra* note 7. Rare but brief overviews can be found at Jennifer K. Elsea, CONG. RSCH. SERV., RL33502, PROTECTION OF NATIONAL SECURITY INFORMATION (2006); Stephen P. Mulligan & Jennifer K. Elsea, CONG. RSCH. SERV., RL41404, CRIMINAL PROHIBITIONS ON LEAKS AND OTHER DISCLOSURES OF CLASSIFIED DEFENSE INFORMATION (2017).
[320] *See, e.g.*, Orin S. Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 MINN. L. REV. 1561, 1566 (2010); Andrew Chongseh Kim, *Prosecuting Chinese Spies: An Empirical Analysis of the Economic Espionage Act*, 40 CARDOZO L. REV. 749 (2018); Andrew M. Szilagyi, Note, *Blowing Its Cover: How the Intelligence Identities Protection Act Has Masqueraded as an Effective Law and Why It Must Be Amended*, 51 WM. & MARY L. REV. 2269 (2010).
[321] *See supra* notes 7 and 12–13.
[322] *See, e.g.*, Vladeck, *supra* note 7 at 230.
[323] Intelligence Authorization Act for Fiscal Year 1995, Pub. L. 103–359, § 808, 108 Stat. 3423, 3453 (1994) (codified at 18 U.S.C. § 1924 (2012)).
[324] FISA Amendments Reauthorization Act of 2017, Pub. L. 115-118, § 202, 132 Stat. 3, 19 (2018).
[325] *See also* Jessica Lutkenhaus, Note, *Prosecuting Leakers the Easy Way: 18 U.S.C. § 641*, 114 COLUM. L. REV. 1167, 1171, 1200 (2014).
[326] *See supra* note 12.

mostly to make the situation worse.[327] Undoubtedly U.S. secrecy laws could be much improved, but danger lies within any congressional attempt to do so. The result of a legislative overhaul could be secrecy laws that are more draconian, and not less. Until we have a strong sense of the current overall landscape of U.S. secrecy laws—a landscape that will be transformed if courts accept this article's argument—caution in recommending that Congress revisit the subject is indicated. One must be certain that the need for improvement outweighs the risk of harm, and such certainty cannot yet be had.

Beyond its considerable legal implications, this article has also thrown into sharp relief the enormous impact that the idea of "national security" has had since its introduction in the 1940s. By seeing the stark contrast with what came before, the revolution that Earle unleashed comes into full view. Historians have established the immediate changes that Earle's idea wrought and the vigilant, interventionist mindset it has helped to create.[328] This research illuminates how the advent of "national security" also marked the demise of a radically different way of seeing the world. Though alien to the modern mind, this older mindset should not be dismissed merely as outdated or irrelevant; rather, the insight we have had into it invites us to revisit the assumptions Earle has bequeathed to us. We have seen here a worldview that emphasized the fundamental difference between a diplomat's mission and a soldier's. It saw intelligence merely as a means to an end, rather than an end in itself. It insisted on a distinction between peacetime and wartime. It took a nuanced and restrained view of government secrecy—one that emphasized the military and its needs, and regarded secrecy skeptically outside that sphere.[329] The national security revolution of the 1940s brought some advantages, but it also came with meaningful costs. It is time for a fuller reckoning of the legacy that Earle's revolution has handed down to us. That reckoning should begin with the Espionage Act of 1917.

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[327] Edgar & Schmidt, *supra* note 7, *passim*. *See also supra* notes 319-320, 322-325 and accompanying text.

[328] *See* Preston, *supra* note 29; Fergie, *Geopolitics Turned Inwards*, *supra* note 29.

[329] *See also* Larsen, *Creating an American Culture*, *supra* note 29; Larsen, *From Iran to Ukraine*, *supra* note 54.