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The Espionage Act Versus Whistleblowers and the Public Interest

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RESEARCH QUESTION:

Using both John Rawls' justification of acts of civil disobedience and the Inter-American Court of Human Rights as standards, is the issue of public interest being balanced against threats to national security in whistleblower trials?

ABSTRACT:

The central question surrounding this thesis is whether or not United States' federal courts are balancing the issue of national security threats against the issue of public interest when dealing with whistleblower cases. The first step it takes in answering this question is examining whistleblowers under John Rawls' standard of justified acts of civil disobedience. Afterwards, the research examines how the respective courts look at the act of leaking causing a potential security threat or its benefit to the public interest. This analysis is performed by using the Inter-American Court of Human Rights' structure for dealing with free speech issues as a guide. The whistleblowers that are examined are the following: Daniel Ellsberg, Thomas Andrews Drake, John Kiriakou, Chelsea Manning, and Edward Snowden. Finally, the research concludes by examining the results, applying the results to what it would mean for the case of Snowden, and ultimately what it would mean for whistleblower cases at large.

Executive Summary

This research will utilize philosopher John Rawls' justification for acts of civil disobedience as a standard and to help reveal and analyze the intentions of whistleblowers Daniel Ellsberg, Thomas Andrews Drake, John Kiriakou, Chelsea Manning, and Edward Snowden as well as the channels they might have went through before deciding to leak their respective information. Furthermore, this research will apply an idea that researcher Pamela Takefman proposes. In sum, Takefman argues that leaking can be used to preserve our nation's democracy. As mentioned before, this is usually said to be a primary concern of whistleblowers. Takefman proposes that courts such as the European Court of Human Rights are an entity that United States Federal Courts can look to as a guide for dealing with whistleblower cases because of their way of balancing national security threats and public interests in looking at these cases. Ultimately, this will help to discern whether the federal courts are already doing this, and if not, what that means for future whistleblowers, and if there needs to be changes set in place.

Chapter 1

Introduction

Imagine. You are well into your government career and it has been your dream to work for a government intelligience agency such as the National Security Agency (NSA) or the Central Intelligience Agency (CIA) for quite some time. Finally, there is an opening at the NSA. You apply and fortunately get hired. You are excited because you have obtained a high level of security clearance which means that they trust you with having access to a variety of "top-secret" information.

However, as the years go by you begin to notice certain things that the NSA is doing. Maybe issues that would make the average person uncomfortable such as surveilling the average American citizen warrantlessly or torturing a prisoner such as a war criminal. You decide to report it to your superiors and follow the chain of command. They say they will handle the situation, so you wait. You are excited once again because this is an opportunity to help your fellow Americans. You are helping preserve the United States' ideas of democracy.

Time continues to pass by. Months go by and maybe even years. You realize nothing is being done to deal with these violations of democratic ideals. You recall the nondisclosure form you signed when you hired that discuses "threats to national security". Additionally, during your reflections you are weighing the cost of these "threats" the public's right to know of these abuses of power, and even you possibly getting fired. Nevertheless, you decide since your reports to your superiors have essentially been ignored, the public's interest matters more in this situation in order to bring light to these

violations and help correct these questionable actions. However, after doing so you are eventually caught and officially charged under the Espionage Act. The news outlets keep referring to you as a "whistleblower". A whistleblower is "someone who publicizes or reports to the relevant authorities what they perceive to be unlawful or unethical practices by their employer or fellow employees" (Christopher Pass). In trial they never take into consideration your intention in revealing the information you revealed. The Court solely focuses on the act of leaking the "top secret" information. But why? That does not paint the full picture. They are painting you as a spy; a traitor even. When, it was just not that simple.

Here lies the issue. Is this how the government normally treats whistleblowers? Do the courts solely examine the act of leaking information as threatening the national security of our nation, but neglect the fact that the reason whistleblowers may leak similar information, is to bring violations such as the ones you discovered to the public's attention? This is the very focus of this research. When non-violent acts such as this, essentially acts of civil disobedience, are examined by the Court, are the threats to national security being balanced against the public interest? All in all, by examining the cases of whistleblowers Daniel Ellsberg, Thomas Andrews Drake, John Kiriakou, Chelsea Manning, and Edward Snowden, this research will follow the hypothesis that ultimately the federal courts are not balancing these two issues against each other and are instead only focusing on the immediate "national security threats".

Many researchers in the past have dealt with the issue of whistleblowers and the Espionage Act, but none have directly dealt with the issue of what courts are looking at over the other; fully fleshing it out. For example, many scholars such as Jie Qin tend to

focus on whether whistleblowers should be heroes or traitors (Qin). Then there are some scholars or attorneys such as William Scheuerman who look at whether leaking should be examined as an act of civil disobedience (Sheuerman).

In addition, there are researchers and attorneys such as Jesselyn Radack and Abbe David Lowell who make a more procedural argument. They find that the Espionage Act is too broad or vague to be applied to whistleblower cases. As Radack states, the original intention of the Espionage Act when it was enacted after the United States entered World War 1 was to deal with spies and not how a whistleblower discloses classified information (Jesselyn Radack). During the John Kiriakou case, Kiriakou and his team also appealed on the basis that the language in the Espionage Act was too broad. Scheuerman also makes the case that any possibility of a fair trial is weakened "when criminal proceedings rest on vague and poorly defined legal norms" (Radack). Also, in the 2010 hearing before the Committee on the Judiciary, Attorney Lowell is clearly emphasizing the vagueness of the act. He specifically mentions how it fails to require a specific intent; to harm national security or to aid foreign powers (Lowell). This allows the Act to stretch too wide and allow the prosecutors in the whistleblower trials to abuse their discretion.

Furthermore, in addition to making the case of whether whistleblowers should be categorized as heroes or traitors, several scholars as well as individuals in the courtroom workgroup (i.e. lawyers, prosecutors, judges) make mention that the Espionage Act is too vague. However, no one has seemed to completely flesh out this claim. Attorney Lowell came the closest, yet the dialogue remains to be continued and we still have whistleblowers like Manning being tried under the Espionage Act.

Nonetheless, this research will utilize John Rawls' justification for acts of civil disobedience as a standard and to help reveal and analyze the intentions of whistleblowers Daniel Ellsberg, Thomas Andrews Drake, John Kiriakou, Chelsea Manning, and Edward Snowden as well as the channels they might have went through before deciding to leak their respective information. Furthermore, this research will apply an idea that Pamela Takefman proposes. In sum, Takefman argues that leaking can be used to preserve our nation's democracy (Takefman). As mentioned before, this is usually said to be a primary concern of whistleblowers. Takefman proposes that courts such as the European Court of Human Rights are an entity that United States Federal Courts can look to as a guide for dealing with whistleblower cases because of their way of balancing national security threats and public interests in looking at these cases. Ultimately, this will help to discern whether the federal courts are already doing this, and if not, what that means for future whistleblowers, and if there needs to be changes set in place.

Chapter 2

Significance

It is no secret that there has been a steady flow of whistleblowers and leaking in recent years within the United States. This is evident even just by looking at the recent 2016 elections and Wikileaks, as well as whistleblowers such as Edward Snowden and Chelsea Manning; to name a few. As technology becomes more accessible, it becomes even easier to spread information in present time when compared to the days of Daniel Ellsberg and the Pentagon Papers.

The Oliver Stone film, *Snowden*, works to get in the mind of whistleblowers by using Snowden and the struggles of what he knew and the circumstances that led him to leak the questionable surveillance methods of the NSA. When the news first rung out about what Snowden had done, newspaper articles and media were filled with words such as "traitor", "treason", and "fugitive". Consequentially, this type of framing is what led many to think of him in this way.

Nevertheless, the film managed to illuminate other important factors in the field of national security. Specifically, the part in the film where Snowden mentions the Foreign Intelligence Surveillance Courts (i.e. FISA Court) is critical. This Court is the body that grants applications to the government for secret warrants for surveillance; undermining the law that one cannot be watched by the government without a warrant (P.H. Collin). Moreover, another important factor that Snowden himself notes in the film is the issue of him not being able to be tried in a jury of his peers. This unsurprisingly becomes an issue

due to the secret intelligence that is involved in whistleblower cases and the defendants being tried under the Espionage Act. Thus, leading to the question of: What effect the Espionage Act has on how whistleblower cases are treated? Are primary issues being weighed equally?

Chapter 3

Literature Review

Most previous scholarly articles make the argument for whether whistleblowers should be considered heroes or traitors. Jie Quin, for example, even distinguishes that Snowden appears to be a hero on Twitter, but due to the demonization of his character on news networks, those viewers tend to view him as a traitor (Quin). Is revealing classified information to the public simply an act of betrayal? Or does that act become heroic because it creates dialogue about otherwise secret, sometimes corrupt, actions of the government that would have been left in the dark?

Jesselyn Radack argues that the Espionage Act has transformed into a “strict liability law" which frees the government of the responsibility of showing an individual had criminal intent (Radack). Similar to what Snowden stated in the film, Radack states that the statute prevents individuals from defending themselves in an open court (Radack). This makes it so that a defendant is unable to be tried in a jury of his or her peers. According to Radack, trials under the Espionage Act adhere to specific procedures due to the sensitivity of the leaked information. She asserts that when the Espionage Act was first enacted, it was intended for spies and not modern-day whistleblowers such as Snowden (Radack). Yet, the statute is still be vigorously used in dealing with whistleblowers.

The major issue that arises with whistleblower cases is that it is testing a fundamental question on when citizens have the right to criticize or go against the government. That is, in fact, the essence of a democracy. For example, William Sheuerman argues that Snowden's actions satisfy John Rawls’ '"last resort' test for legitimate civil

disobedience". He claims that whistleblowers, such as Thomas Andrews Drake who commit acts of whistleblowing, should be allowed to because according to John Rawls, when all “political and legal channels are exhausted” it is permissible to disobey the laws (Sheuerman). Scheuerman discusses whistleblowing as an act of civil disobedience using Edward Snowden as an example. He argues that Snowden falls in line with other civil disobeyers such as Gandhi and Martin Luther King Jr. Further, he states Snowden's actions fit into a "potentially legitimate resistance or civil disobedience" (Sheuerman). To him, Snowden only participated in whistleblowing as a means to show the wrongdoings of the surveillance policies. Therefore, he did not do this intentionally to go against other present laws such as Espionage Act. Then he ends his argument by stating that there needs to be a change to make sure the rights of whistleblowers are safeguarded when they take on the government for legitimate reasons.

According to John Rawls, civil disobedience is “a public, nonviolent, conscientious yet political act, contrary to law usually done with the aim of bringing about a change in the law or policies of government” (Rawls). In the case of whistleblowers, the act would be the illegal release of information. As mentioned by Sheuerman, Rawls has certain criteria for when civil disobedience is justified. The first condition where civil disobedience should be permitted is when there have been violations of “the principle of equal liberty” and “the principle of fair equality of opportunity” (Rawls). Although these two principles seem to bear the same meaning, Rawls says essentially the focus should be that the principles honor basic liberties (Rawls). Therefore, if they are being violated, the violation begins making room for a possibility of civil disobedience. Nevertheless, there is still another condition to be met. Scheuerman describes this as all legal options being exhausted.

However, Rawls makes the distinction that this does not necessarily need to be the case. For example, he states that not all legal options necessarily need to be exhausted. The mere fact that past actions have not changed the mindsets of the majority is adequate proof that further attempts probably will not be effective (Rawls). Here lies the second condition. If it appears that the legal alternatives are not working, to influence change of the unjust policy or law, then that fits one of the causes for justly committing an act of civil disobedience (Rawls). Therefore, according to Rawls, if there is a law violating basic civil liberties as well as no viable legal option to amend said law, then the individual has a right to go against the law.

Additionally, Pamela Takefman makes the claim that leaks play a role in protecting the nation's democracy (Takefman). Also, interestingly she states that a 1950 amendment to the Espionage Act proposed by Senator McCarran was done to close loopholes within the act and prevent threats of further deceit and secrecy as a response to what Senator McCarran viewed as a "perceived threat of Communism" from abroad and within the United States (Takefman 902). This means that legislators who enacted the law and the amendments did so as a means "to expose corruption" (Takefman). Instead, she states that the Thomas Andrew Drake case displays how the government will go after individuals who oppose them like Drake did while claiming it is a matter of national security. In her article, she proposes that "at the sentencing stage, judges should balance the threat to national security with the public interest in releasing information about government agencies (Takefman). This way the state of democracy can still remain intact.

The balancing test that Takefman is referring to is modeled after that of the freedom of expression provisions of the European Convention of Human Rights (ECHR) and the

American Convention on Human Rights. According to the ECHR's Article 10, freedom of expression should "be limited in the interest of national security" (qtd. in Takefman). However, this limitation should be "prescribed by law" and "necessary in a democratic society" Further according to Article 10, necessary suggests a "pressing social need" and "proportionate to the legitimate aim pursued" (qtd. in Takefman). Similarly, the Inter-American Court of Human Rights interprets American Convention on Human Rights' Article 13(2) as a test for any restriction on freedom of expression. The restriction has to:

> "(1) be defined in a precise and clear manner by a formal law; (2) serve a legitimate aim authorized by the Convention; and (3) be necessary in a democratic society to serve that legitimate aim, strictly proportional to the objective pursued, and appropriate to serve said objective" (qtd. in Takefman).

The way these Courts interpret their respective freedom of expression provisions, balance the governments' rights to protect their national security, as well as the pressing social need in question. Following a structure such as this would help to deal with the dilemma that arises in democratic regimes when it comes to criticizing the government in certain respects.

In the "Espionage Act and the Legal Constitutional Issues Raised by Wikileaks" Congressional judiciary hearing, University of Chicago Law Professor Geoffrey Stone, for instance, acknowledges that the dilemma that exists is that the government is exclusive and therefore has exclusive policies that would be fitting for public debate (qtd. in US. Cong. House. Com. on Jud.). However, they insist that it needs to be kept secret from the public and thus leaving the public unable to keep them accountable. This issue definitely arises in several whistleblower situations such as Snowden, Manning, Daniel Ellsberg, etc. These

individuals broke the law by reporting on "exclusive" government activities. Therefore, they are punished and no one else is there to keep the government accountable for the supposed wrongdoings.

One question that Stone poses is: When can a government constitutionally punish leakers in the respect of a “public” or government employee? He proposes an answer to this question with two circumstances. The first, being when the employee’s disclosure jeopardizes the functionality of the government entity (qtd. in US. Cong. House. Com. on Jud.). That is to say, such a disclosure would upend the daily operations and main functions of the government. Then according to Stone, the second circumstance when the government should be allowed to constitutionally punish a leaker would be when the employee gained access to said classified information upon employment (qtd. in US. Cong. House. Com. on Jud.). Simply put, if this individual had not been hired for the particular position, they would never have been privy to the information they decided to leak to the public. Nevertheless, Stone acknowledges that such an approach places a large amount of discretion to the government. Furthermore, he acknowledges that this would not take into account the fact that such a disclosure could be both threatening to national security as well as valuable to public debate. Therefore, there still needs to be a balance.

In addition, in the hearing, Attorney Abbe David Lowell argues that the Espionage Act tends to over classify various items (qtd. in US. Cong. House. Com. on Jud.). He argues to help deal with the dilemma the Act should be amended to measure two main factors in cases dealing with leaks and whistleblowers; extent of the harm of the speech act as well as the value of the speech itself (qtd. in US. Cong. House. Com. on Jud.). Moreover, Lowell claims that the language of the act needs to clarify the level of intent needed to prosecute

an individual, when the government needs to prove the leak risked damage to national security during a trial, and what constitutes national defense information (qtd. in US. Cong. House. Com. on Jud.). When looking at how certain whistleblower cases like Daniel Ellsberg, John Kiriakou, etc. clarifying these issues would help to deal with these types of problems.

Chapter 4

Theory

The main argument of this research stems from both Rawls' justification of acts of civil disobedience as well as Takefman's proposal to implement a balance test of sorts as is done with courts such as the European Court of Human Rights. On the outset, these two factors may not appear to relate, but they in fact do. As mentioned before, some scholars such as Scheuerman have examined whether whistleblowing fits into the category of acts of civil disobedience. However, this research will look at Rawls' justification for civil disobedience which necessitates the existence of basic rights violations which would cause the respective whistleblower to feel the need report the occurrence of wrongdoings to his or her superiors, or ultimately to the public. This is where Takefman's suggestion of a balance test comes in. If federal courts conduct such a balance test, this would mean that they are balancing national security threats resulting from the leak against the whistleblower committing such an act in the interest of the general public. All in all, this research will argue that: (1) each of these acts of whistleblowing would be justified under Rawls' definition of civil disobedience, and (2) the federal courts are not taking into consideration both the issues of national security and the public interest when examining these cases.

The use of such a balance test would be to ensure that the democratic feature of public discourse is not neglected when handling whistleblowers. Do leakers follow the "last resort" criteria that is laid out by Rawls; thus, making their disclosure justified? Furthermore, leading the discussion towards the primary intent of whistleblowers which is

to let the public obtain information that the whistleblowers believe they have a right to. This is where the issue of public interest comes into play. Thus, straying from the somewhat normative part of the argument, the research will move to observe whether courts are balancing the public's interest in the whistleblower disclosures against the threat to national security. This is because as it has been noted by several scholars and government officials there is an issue in dealing with whistleblower cases such as that of Ellsberg, Drake, Manning, Kiriakou, and Snowden which is with weighing public interest along with its potential or existing threat to the national security of the United States. All of this just goes to reiterate that the overall claim of this research will be that in looking through Rawls' lens for the justification of an act of civil disobedience, these whistleblowers are justified, but do not receive the benefit of having the issue of national security balanced against the public interest when their cases are tried.

Chapter 5

Research Design

In order to focus on the main point of this research, I will use Rawls' two conditions for the allowance of civil disobedience. Under each individual circumstance of Ellsberg, Kiriakou, Drake, Manning and Snowden, I will examine if in each situation there were (1) violations of basic liberties such as equal liberty, fair equality of opportunity, and if the (2) past actions taken by that individual had not changed the mindsets of the majority so much so that it would appear that anything further would not have the intended effect. This is to determine if these individuals each were justified under the Rawlsian perspective to commit civil disobedience by releasing the respective classified information.

In addition to that, I will examine whether or not the courts in each case are currently balancing public demand for information as suggested by scholars such as Takefman as well as courts such as the ECtHR and Inter-American Court of Human Rights. Specifically, I will use the Inter-American Court of Human Rights' test of whether the charge is (1) defined precisely by a formal law (in these cases being the Espionage Act); and (3) is necessary in a democratic society that is proportional to what was pursued.

Note, I have decided to eliminate the use of the second prong of the balance test, "(2) serves a goal authorized by the Convention", because I believe the first and third prongs of this research will provide adequate results for the purpose of this research. The two standards narrow in on the primary issues at hand; national security and public interest. The first prong does so because by looking whether each act of whistleblowing is defined to be illegal by a formal law under the Espionage Act, we and the courts are acknowledging whether or not

there was a potential threat to national security. Furthermore, in looking at the third prong we are looking at public interest by seeing if the courts consider that in a democratic society such as the United States, the restriction was necessary in light of the public interest.

The implementation of this test will be used as a guideline to see if the courts who heard the cases of the previously mentioned whistleblowers, with the exception of Snowden, to examine if they are in fact balancing the public's interest as well as the danger to national security. Through analyzing all these factors, I will also be better equipped to examine the effect of charging whistleblowers under the Espionage Act.

To examine the cases of Thomas Andrews Drake, John Kiriakou, and Chelsea Manning, specifically, I will use the Federation of Atomic Scientists (FAS) website where they petitioned to gain access to and were then allowed to share selected files from each case. This organization was founded in 1945 by the scientists who worked on the Manhattan Project. The organization has a goal of using science and analysis to help make society more secure. For example, with the FAS website I will be analyzing files such as indictments, defendant statements, motions, and sentence hearings. As for the Daniel Ellsberg case, I will be using the Famous Trials website which also was allowed to share files from the case. The website is an educational website run by the University of Missouri-Kansas City Law School that contains materials such as government records that have been reprinted with permission. For example, from the Famous Trials website I aim to use files such as the indictment, oral arguments and the direct examination. All of this will aid in determining the answer to the primary research question.

Chapter 6

Whistleblowing Justification Under Civil Disobedience:

Daniel Ellsberg

First and foremost, it is important to describe what each whistleblower did to allow them to be charged for whistleblowing under the Espionage Act in the first place. At the relevant time in question, he was an American military analyst and researcher working for the United States Department of State during the war in Vietnam. His responsibilities consisted of tasks such as "[evaluating] the strategic capabilities, intentions, and decision making of foreign national security establishments and non-state actors such as terrorist and insurgency groups or assess the technical performance and tactical proficiency of foreign weapons systems and forces" (Central Intelligence Agency). When working for the Department of State, there comes with it a level of secrecy and exclusivity as Stone discusses in the 2010 Congressional Hearing concerning the challenges of handling whistleblowers and the Espionage Act.

It was during his position at the headquarters at the United States Embassy in Ho Chi Minh City (present-day Saigon), that he began to develop an opinion that the efforts in Vietnam were becoming fruitless, and that the war was becoming unwinnable (Britannica Academic). Afterwards, he returned to the United States to return to his work with the Research and Development (RAND) Corporation. There, he began writing the "*U.S. Decision-Making in Vietnam*, 1945–68, a top-secret report commissioned by Secretary of Defense Robert McNamara" (Britannica Academic). The content of the reports further strengthened his doubts about the war efforts, and in October of 1969 he decided that he would make the contents public and started photocopying the report. Then, in 1970, during

his new position at the Massachusetts Institute of Technology, he began to leak various sections of the report to *The New York Times*. Fast-forward to June 13, 1971, the *New York Times* finally began publishing articles based on the report which came to be known as the Pentagon Papers (Britannica Academic).

In examining the Ellsberg case under the lens of Rawls' definition of civil disobedience, it is clear that it does indeed fit the definition. For example, Ellsberg leaking the information was a nonviolent act that was against the law. Furthermore, when looking at whether or not he was doing it to spur some sort of policy change, it is clear that that was the case. For instance, he leaked the McNamara report as a means to stop a war that he did not agree with. He believed it was unwinnable, and so in order to create a change in the war efforts and foreign policy he decided to release said information to the public. Therefore, when looking at his actions from a Rawlsian point of view, it is evident that Ellsberg's actions did constitute an act of civil disobedience.

Nonetheless, now it is necessary to determine whether Ellsberg's actions were justified under a Rawlsian lens. In order to do that, we must first take a look at whether his actions meet Rawls' first condition. It is imperative to know whether or not there were any "violations of basic liberties" that would prompt Ellsberg to reasonably think there was a need for the release of the McNamara report. An instance of findings of basic liberty violations in this case is during his time at the Department of Defense. For example, while he was reading through the highly sensitive Pentagon Papers, Ellsberg discovered that the United States had been supporting efforts from the French to suppress ongoing "independence movements in Indochina in the 1950s". (Douglas Linder). This could be said to be violating basic rights of equality and fairness because the United States in that situation

was clearly helping to diminish another nation of peoples' right to freedom and equal liberties. Thus, accordingly, "Ellsberg came to see the continuation of the war in Vietnam as not just bad policy, but as immoral" (Linder). This then supports the idea that there were, in fact, violations of basic rights during the time of Ellsberg's release of the Pentagon Papers. This means that he meets the first condition of Rawls' criteria for the justification of civil disobedience. Therefore, thus far, he has committed an act of civil disobedience and is partially justified in that regard.

Now, we must move forward to determine whether Ellsberg's actions were justified under Rawls' second condition of when an act of civil disobedience should be justified; all promising legal options have been exhausted. As previously stated, this means that the individuals did whatever they could through the legal channels so much so that any further attempt would make no difference. Now it is often argued that Ellsberg could have found a legal way to report what he knew besides just handing it over to a large media corporation such as the *New York Times*. However, he did attempt to do so. For example, first, he met with anti-war Senator William Fullbright; also, a Vietnam policy critic (Linder). The next year "he resigned from Rand, testified about Vietnam policy before Fulbright's Senate committee, spoke at an anti-war "teach in" at Washington University in St. Louis, and argued for an immediate withdrawal on the national television program The Advocates" (Linder). Furthermore, he was even in discussions with then National Security Adviser, Henry Kissinger, who he advised to read the Pentagon Papers (Linder). However, there were no promising signs that anything would be done to handle the situation in Vietnam. This is then what led him to decide to leak it to the *New York Times*. No one in the government circle who he reached out to was willing to do anything. Therefore, it appears that if he continued

to go the route that he had been going through previously no progress would have been made. This supports the idea that Ellsberg's actions met the second part of Rawls' justification of civil disobedience. He went through the legal channel available to him and only decided to begin leaking the classified information after none of those previous options worked. Thus, Ellsberg's leaking of the Pentagon Papers would be deemed justified under the purview of Rawls.

Thomas Andrews Drake

In the case of Thomas Andrews Drake, Drake was a senior executive of the United States National Security Agency (NSA) at the time in question. In this position, Drake was allowed "Top Secret clearance and had access to classified computer systems, such as the NSA's internal intranet or NSA Net" (Department of Justice June 10, 2011 Press Release). An intranet is "a network operating like the World Wide Web but having access restricted to a limited group of authorized users" (Webster Dictionary). He also received security briefings concerning how to deal with restrictions and requirements that come with official NSA information" (Department of Justice (DOJ)). This would mean that he knew that he should handle the information he was privy to very carefully. Essentially, since the information he had access to was restricted and could not be shown to just anyone, he was granted security clearance. Therefore, similar to Ellsberg, his position came with a level of secrecy.

Mainly due to the fact that Drake had just started working at the NSA the day of the September 11, 2001 attacks, he and others there noticed the need for an increase in NSA intelligence. This led him to advocate for "ThinTread .., a program that could process huge

amounts of digital data while immediately rejecting the useless pieces for the purposes of intelligence gathering" (Takefman 908). This would allow the NSA to receive data from "financial transactions, travel records, web searches, G.P.S. equipment, and anything else an analyst might find useful in pinpointing terrorists" (908). The critical issue with the use of this program, however, was that it primarily captured American data as opposed to foreign data. Thus, the NSA dismissed it on the fact that it was "too invasive of Americans' privacy" and went for "Trailblazer"; the alternative (908). This program was still in the design stage, but due to the recent terror attacks in New York City the NSA received approval from the Bush administration to go forward and use it anyway. This meant it would not have its privacy controls.

Moreover, this would mean that they would be capturing data from Americans without the legally required warrant (Takefman 909). For example, from Drake's perspective not only was the government illegally spying on Americans when ThinTread, the alternative program, had specific features to prevent this sort of occurrence, but also it was a waste of government funds (909). This is where Rawls' first criteria for an act of civil disobedience when there's an instance of a violation of basic human rights. For example, according to the Fourth Amendment of the United States Constitution, all Americans have a right to privacy insomuch as there is not a warrant allowing for the interference (USCS Const. Amend. 4). However, as previously mentioned Trailblazer failed to meet that legal requirement. With this program, the United States government essentially violated the basic principle of the right to privacy. Thus, according to Rawls, this gave him partial reason to commit such an act of civil disobedience such as leaking this to the public.

Nevertheless, it is still essential to look at how he went about releasing this information to determine if his actions constitute a justification of civil disobedience. As aforementioned, Rawls' second criteria for committing an act of civil disobedience is that one only does so after exhausting all reasonable channels with no signs for change. For example, similar with Ellsberg, Drake ultimately, in 2005 started leaking information to the *Baltimore Sun* regarding the NSA's practices. Now it may seem that this was unnecessary and that he should have used the other channels set in place within the NSA to report the rights violations that were being committed on their part. Therefore, one must look at what he did before the leak. For instance, soon after the implementation of Trailblazer, Drake voiced his concerns to his superior, (who actually left the NSA for the Federal Bureau of Investigation because of her own negative concerns about Trailblazer), NSA lawyers, and the Inspector General (Takefman 909). Consequentially, once again Drake used NSA legal channels when "in September 2002, Drake, along with Diane Roark, a staff member on the House Permanent Select Committee on Intelligence, Ed Loomis, an NSA computer scientist, and J. Kirke Wiebe, an NSA intelligence analyst, filed a complaint with the Department of Defense" which was completed in 2005 (910). Then, as said before, Drake began to leak information for a Baltimore Sun exposé on the use of Trailblazer.

In examining this, one may quickly conclude that this did not constitute a justifiable act of civil disobedience since Drake was using the legal channels provided to him, but then decided to leak information anyway. However, I believe it is imperative to note how much time had passed since the implementation of Trailblazer. For example, Trailblazer began to be used in 2001 and Drake began leaking to the Baltimore Sun in 2005 (Takefman). This means it had already been four years and, yet, Trailblazer was still being used. Thus, it would

appear that not enough was happening quick enough. Yes, the complaint was being heard and examined by other officials internally. However, it was doing so sluggishly, and nothing immediate was being done in the meantime. For example, the NSA had access to Thintread, the surveillance program with built-in privacy controls if they did not want to just drop the surveillance overall in light of national security. Yet, the program was still being used. Thus, it would be reasonable for Drake to assume that his efforts were proving to be futile. In looking within the scope of Rawls' second criteria, the very fact that this revelation of the NSA's alarming activities had not caused more to be done would allow for Drake to find reason to divulge this information to the public. Therefore, Drake was justified in leaking the information to the news reporter.

John Kiriakou

In the case of John Kiriakou, Kiriakou was a Central Intelligence Agency (CIA) operations officer at the relevant time. Operations officer responsibilities include "spotting, assessing, developing, recruiting, and handling non-US-citizens having access to foreign intelligence vital to US foreign policy and national security decision-maker" (Central Intel. Agency). Therefore, like Drake and Ellsberg he was privy to a great deal of classified information and thus was required to keep that intel as such. Eventually, he went against that by "…repeatedly disclosing classified information to journalists…" including the names of two other CIA employees (Dept. of Justice April 5, 2012 Press Release). Thus, he was indicted and then convicted under the Espionage Act like Drake and Ellsberg.

As with the other whistleblowers, in order to examine Kiriakou under Rawls' view of whether his actions are justifiable under the scope of civil disobedience, we first have to look at whether basic rights were being violated. During his time at the CIA, Kiriakou was involved in apprehending Abu Zubaydah. At the time Zubaydah was believed to be the "chief of operations for Al Qaeda" (9/11 Encyclopedia). This is where the basic rights violations are rooted. For example, it is from his apprehension that Kiriakou discovered the United States had been implementing interrogation tactics such as waterboarding. :

> "Waterboarding is an interrogation procedure whereby a suspect is laid down on his back, usually with a gunny sack over his head and has water poured over the gunny sack creating the sensation that the suspect is drowning. It is meant to get the victim to confess to a wrongful act or to provide information sought by the perpetrator." (Condé H Victor).

This process would be used until detainees provided the information that the officers would be looking for. A tactic such as this would mean that these officers were physically threatening a human life; practically almost killing him. Thus, this along with other information he found prompted Kiriakou to want to come out with the information. Not to mention that there was much debate over the legality of this method of interrogation and whether or not it was torture once it became known. For instance, it was not until later that "President Obama, through his [Attorney General], issued a rescission of all the so-called Torture Memos and ordered the government to cease any interrogation technique not permitted in the Army Field Manual" (Victor). This unfolding of events is why waterboarding has been deemed illegal. "The answer to the question of whether waterboarding is torture is yes. As a matter of law waterboarding is torture" (Victor). This demonstrates, once again, how the act that Kiriakou was trying to bring attention to was definitely

a gross violation of human rights. Therefore, from Rawls' point of view, Kiriakou was justified in that regard in because of the basic rights violations.

This then leads us into determining whether the actions he took before eventually revealing what he knew to the press would completely justify his act of civil disobedience. If Kiriakou exhausted his accessible channels to the point that releasing the information to the press became his last resort, then his actions are justified. Similar to the other previously discussed whistleblowers, the question arises of: Why did Kiriakou not just report the issue internally? The answer to this, according to him is that it would have been fruitless. The superiors in the CIA were aware of the enhanced interrogation techniques such as waterboarding (PEN American Center). This makes sense because these interrogation tactics are CIA tactics; CIA policy. Of course, one in Kiriakou's situation could be convinced to think that reporting to CIA executives would not work in this case. It would not be news to them. Therefore, he resorted to going to the press. However, he did not make any attempt. Thus, according to Rawls' philosophy, Kiriakou was not justified in disclosing what was going on to the press even if it would be the only way to see results.

Chelsea Manning

Similarly, the Chelsea Manning case also relates to disclosing issues relating to the United States defense. Manning was enlisted in the military at the age of twenty in 2007, and eventually was deployed to Iraq in 2009 (Britannica Academic). Her title was Army Intelligence analyst (Britannica Academic). As an army intelligence analyst, Manning "was privy to a wealth of top-secret documents (Britannica Academic). This means that like the other whistleblowers she had to maintain a certain level of secrecy. It is simply part of the job description.

In regard to the first part of the test of the justification of civil disobedience, Manning passes the test. For example, Manning reported on the questionable actions of the United States military such as the killing of innocent civilians through airstrikes as seen in a July 12, 2007 Aerial Weapons team (AW team) video, Guantanamo detainee profiles, the information she discovered in the Significant Actions (SIGACT) Tables, and battlefield reports (Chelsea Manning). Also, in her statement to the Court Manning stated, “they dehumanized the individuals they were engaging and seemed to not value human life by referring to them as quote "dead bastards" unquote and congratulating each other on the ability to kill in large numbers” (Manning). Like Kiriakou, Manning did not feel that these sorts of actions were in alignment with American values of human rights; the value of a life. Thus, she went to release what she knew to the press. Thus, under Rawls’ she has at least partial reason thus far to commit such an act of civil disobedience. The act of killing civilians demonstrates that there were instances where basic rights in fact were being violated.

However, Manning’s actions still need to be analyzed under the other factor in Rawls’ examination of civil disobedience. If we recall, the individual needs to have reported whatever the troublesome information they found to their authorities. Then, and only then, if their efforts any other future efforts will be deemed fruitless, they are allowed to leak what they know to the public. In this case, Manning did not do that. For example, she chose not to rely on the chain of command stating in an ABC News Nightline interview that it was because “the channels are there, but they don’t work” (Manning). She also hinted that since she is an expert in her field there was essentially no need (Manning). This means that she failed to meet Rawls’ second prong of the validation of an act of civil disobedience. She completely disregarded her authorities and released the information. Therefore, in regard to Rawls’ critique, Manning does not meet the criteria for taking reasonable action to leak the information which she discovered.

Edward Snowden

Now onto the discussion of Edward Snowden's actions. Unlike the previously discussed whistleblowers, he has not had his trial yet because he fled to Russia. However, it is still possible to analyze his actions up until the release of the relevant classified information. Snowden was born June 21, 1983. Just before working for the National Security Agency (NSA), Snowden was hired for the CIA working as a network security technician while posted in Geneva (Britannica Academic). Here he was granted top-secret clearance. After two years, in 2009, he left to work for the NSA "as a private contractor for the companies Dell and Booz Allen Hamilton" (Britannica Academic).

It was as a private contractor where he was able to gather information on various NSA programs and activities including those conducted by the Foreign Intelligence Security Agency (i.e. FISA). FISA originally was "the authority provided by Title I of the Act, which empowered the government to obtain secret warrants for electronic—and, later, physical—surveillance (Brian Fung). The FISA Court is the entity that grants the government with warrants to survey "individuals whom the government had probable cause to believe were acting as an agent, or on behalf, of a foreign power" (Fung). Nevertheless, Snowden learned that sometimes this was not the case. Similar to Drake, Snowden soon discovered that with FISA, the government was looking on several Americans who were not spies or posing any threat to national security. They were ordinary citizens. This means that the United States government was going beyond the scope of what was allowed. This is where Rawls' question of whether a basic right has been violated. For instance, in this case it appears that the right to privacy was being directly violated. Citizens who were not spies or actual threats to national security were being surveilled. Therefore, Snowden's actions pass part one of Rawls' civil disobedience justification test.

Now, in regard to whether he Snowden meets Rawls' particular criteria of going through the channels of reporting, Snowden did meet the standard. As previously mentioned, Snowden's main issue was with FISA and ultimately the systems being used for surveillance. Eventually, he raised the concerns he had about the flaws he witnessed. One instance, for example, is when he told his superior his findings who then allowed "[him] to test the system's susceptibility to hacking" (Luke Harding 37). As a result, Snowden reported back with information supporting his point which his supervisor accepted. However, a senior manager who he had previously had issues with in raising similar questions, became upset and "entered a derogatory report-known as a 'derog' in spy parlance – into Snowden's file" (Harding 37). Thus, it is clear that there was an instance where he raised his concerns to his superiors but was then rejected. Harding writes how this "may have demonstrated to Snowden the futility of raising grievances via internal channels. Complaining upwards only led to punishment…" (37). Therefore, he met Rawls' criteria of leaking only when continuing to report to higher-ups would lead to no changes. Further, in Snowden's case it also led to punishment, and so his actions were justified.

Conclusions: Which Whistleblowers are Justified?

Rawlsian Justification of Civil Disobedience			
	Existence of Violation of Basic Liberties	**Reasonable Legal Actions Exhausted**	**Conclusion: Justified?**
Daniel Ellsberg	Yes	Yes	Yes
Thomas Andrews Drake	Yes	Yes	Yes
John Kiriakou	Yes	No	No
Chelsea Manning	Yes	No	No
Edward Snowden	Yes	Yes	Yes

Chapter 7

Balancing Public Demand for Information and National Security

Now that we have determined whether or not each individual whistleblower's actions can be justified under Rawls' critique of civil disobedience, we can move on to determining how each individual case was handled in the courts. This means first looking at the first prong of the Inter-American Court of Human Rights' evaluation in looking at cases with issue of free speech, "(1) be defined in a precise and clear manner by a formal law" (qtd. in Takefman). This prong basically aids to evaluate how the relevant law, the Espionage Act in these cases, applies to each action of leaking. Also, in analyzing the statutory aspect we inherently demonstrate how the trials give weight to the national security aspect since the utilized sections of the statute are said to involve acts threatening national security. Additionally, we will be looking at each case through the third prong of the American Convention on Human Rights' evaluation free speech issue cases; whether the punishment" (3) is necessary in a democratic society that is proportional to what was pursued" (qtd. in Takefman). That is to say, wherever possible, we will be looking in particular at what the main narrative between the different parts of the courtroom workgroup: defense, the United States' government, and/or the court, for whether weight is given to the issue of public interest.

Daniel Ellsberg and the Espionage Act

First, we will begin by looking at the case of Daniel Ellsberg. As previously mentioned, Ellsberg's actions led to the release of the Pentagon Papers. Using the Inter-American Court of Human Rights as a guide we will first check if his situation meets the first criteria: whether or not

the restriction has been "defined in a precise and clear manner by a formal law" (qtd. in Takefman). This means that in this instance since Ellsberg as well as the other discussed whistleblowers, was charged under the Espionage Act, we will need to examine whether the Espionage Act has any language that would prevent Ellsberg's actions in this particular case of whistleblowing. Thus, first it is essential that we look at the particular section of the statute which he was charged under. In the case of Ellsberg, he was charged under 18 U.S.C. § 793(d) and (e) of the Espionage Act which state the following (*United States v Daniel Ellsberg and Anthony Russo*):

> "Gathering, transmitting, or losing defense information…
>
> **(d)** Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or
>
> **(e)** Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign

> nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it…
>
> Shall be fined under this title or imprisoned not more than ten years, or both".

Essentially, it forbids the release of defense information to someone who is not cleared to receive it. For example, for Ellsberg's case, the defense information in question is the "Pentagon Papers". For example, in the indictment file it states that Ellsberg, "knowingly [converted to his use the following things of value of the United States and a department and agency thereof: Nine volumes of a 38-volume Department of Defense study entitled 'United States Vietnam Relations 1945--1967'" (*United States v Ellsberg and Russo*). As aforementioned, the document was a classified Vietnam War study being headed by Robert McNamara. Ellsberg knew that this information was classified thus by looking at the statute there is a connection to the Pentagon Papers. The document was in fact a national defense document since it was directly dealing with the opinion of the ongoing war in Vietnam. Not to mention, in addition, Ellsberg admits in his direct examination that he even signed a nondisclosure agreement which included the statement, "'I have read or have had read to me the portions of the espionage laws and other federal criminal statutes relating to the safeguarding of classified information'" (*United States v Ellsberg and Russo*). Thus, not only was there a formal law regarding the free speech restriction, but he also knew about the law. It appears it would warn that it would be illegal to release the document to the press. Therefore, this

subsection of the Espionage Act provided adequate warning to Ellsberg which means the grounds for punishing his actions are in fact defined by a formal law.

Ellsberg and Public Interest

The courts in the Ellsberg-Pentagon Paper case did look at the issue of public interest as well as national security. For example, during the oral arguments, Attorney Glendon, the lawyer for Washington Post, mentions Watergate trial Judge Gesell's, standard that "the interest of the United States is the people's interest. And you are weighing here…an abridgement of the First Amendment to people's right to know" (*United States v Ellsberg and Russo*). In a nutshell, this would mean the public has the right to know what is at issue with the United States' government. Then later, on during oral arguments, for instance, when United States Solicitor General Griswold is stating that "properly classified materials are improperly acquired" and potentially pose a threat to "the security of the United States that …there ought to be an injunction" (*United States v Ellsberg and Russo*). In defending the government, the Solicitor General is stating that the release of the Pentagon Papers should be stopped because of its top-secret classification. However, in this case there is an instance of weighing the issue of public interest. For example, Justice Thurgood Marshall hints at the importance of speaking out to benefit the public interest. For example, he replied commenting that, "Well wouldn't we then be, the federal courts be the censorship board as to rather this judge" (*United States v Ellsberg and Russo*). The Solicitor General then replied that he could not think of any other alternative to which Justice Marshall later replies that that would be "a First Amendment violation." (*United States v Ellsberg and Russo*). From this repartee, it appears that this argument of free speech and the public's right to know was brought to the court's

attention by Attorney Glendon, with Griswold of course opposing it, and Judges such as Justice Marshall considering it and what that would mean. All of this just aids in supporting the fact that the issue of public interest and inevitably, free speech was indeed weighed in the case of Ellsberg. Nonetheless, it should be noted that due to several interferences with Ellsberg's case, Judge William Byrne declared it a mistrial, so no decision was made.

Thomas Andrews Drake and the Espionage Act

In order to analyze the Thomas Andrews Drake case, it is essential to look at the same standards. First, we look at if a formal law existed that defines Drake's actions as being wrong. For example, his indictment states that in this case in particular, the primary section of the Espionage Act in question was 18 U.S.C. § 793 (e) as was for Ellsberg (*United States v. Thomas Andrews Drake).* Once again, this statute concerns having unauthorized access to documents such as the ones listed above and releasing it to someone who does not have clearance. It can be argued that this is a restriction to what Drake was charged for because for example, in his indictment file it states that he obtained possession of "a three page classified document bearing the features of an e-mail and referred herein as the "Trial and Testing" email, did willfully retain the document" (*United States v. Drake* 9**)** and never gave it to the designated employee. Thus, one example of the unauthorized access in this case was with "Trial and Testing" and as the statute said, he did not deliver it to the individual who was inclined to receive it. His actions were in fact wrong according to a formal law. Therefore, he did commit an offense that was restricted by the aforementioned section of the Espionage Act.

Drake and the Public Interest

In the case of considering public interest, we must look at the handling of the Drake case in the same manner in which we did for the Ellsberg case. In the Drake case, there was no indication of the court considering the issue of public interest. The issue did not find its way into any of the discussion. For example, this is seen in the sentencing hearing. The judge is describing all the factors that are going into determining Drake's sentence since he pled guilty to his offense. From the transcript, there is no mention of public interest. The court primarily focuses on the chronology of events in regard to the searching of Drake's home in 2007 and the time of his indictment in 2010 (*United States v. Drake*). For example, the Judge stated that the overall scenario is troubling, "the fact that I have clearly been critical of the government and the lack of explanation for the time period and the fact that you're the only one charged, it certainly takes away from the gravitas of the case. "(*United States v. Drake* 40**)**. That is to say that the situation raised issues that somewhat distract from the major issue at hand.

Nonetheless, close to the end of the sentencing hearing, the Judge does narrow his focus on the issue of national security. For example, in lines 18-20 on page 40 of the sentencing hearing transcript, the Judge states, "It doesn't mean that I don't recognize the nature and circumstances of the offense, which are to be considered" (*United States v. Drake*). Then once again discussing the issue in lines 8-13 he states, "anything involving classified material, anything involving protected material, anything involving material that we dealt with were obviously very, very significant and weigh on the thoughts of the court "(*United States v. Drake* 40**)**. These two quotes demonstrate that the Judge notes that although there were issues with how Drake's case was handled unrelated to the offense in question, it must not take away from the offense itself. In violating 18 USC § 793 (e), the focus of the case had to do with abusing his authority to access classified information and

then providing it to an individual that are not privy to that classified information. This would mean that the Judge is enforcing the idea that the threat to national security was really what weighs heavily in the case and not much to be said for the public's interest. Thus, in the case of Drake, the court did not find the need to consider the public's interest against the threat to national security. From the available information, one can discern that the issue did not arise.

John Kiriakou and the Espionage Act

Moving forward, as was done with Ellsberg and Drake, we must first look if the restriction to Kiriakou's leaking is done so by a precise law; meaning a law exists that declares Kiriakou's actions were illegal. For example, more similar to Ellsberg's situation, Kiriakou was also found to be in violation of 18 U.S.C. § 793(d) which involves the disclosure of national defense information to individuals not entitled to it (*United States v John Kiriakou* 11). Once again, in all, this statute prohibits the act of releasing information deemed as classified in the eyes of the government to those who have not been granted the proper clearance. For instance, in the Kiriakou case, the classified information he had "been entrusted with" was "information relating to the national defense, namely, the association of Covert Officer A with the CIA, the RDI Program, and a particular RDI operation " (*United States v Kiriakou* 11). Then he went against the aforementioned statute when he, for example, used that information and "willfully communicated and transmitted, caused to be communicated and transmitted, and attempted to communicate and transmit and cause to be communicated and transmitted, the same to Journalist A" (*United States v Kiriakou* 11). This means he leaked this information to individuals who were not supposed to receive it. According to the government, these pieces of information were clearly related to national defense. This would mean his actions are directly restricted by the statute. Therefore, the

language in the statute does provide sufficient warning to an individual such as Kiriakou that commit such an act would equate to a criminal offense, and thus weight was given to the threat to national security.

Kiriakou and the Public Interest

Furthermore, now we must look at the third prong of the Inter-American Court evaluation of cases involving cases of free speech. We need to determine if the public interest was considered in the handling of Kiriakou's case in the court. In analyzing Kiriakou's case the defense raises the issue of public interest as a factor in Kiriakou's leaking. For example, in the "Defendant's Memorandum in Aid of Sentencing" file, Kiriakou's lawyer states:

> "in support of the essential public interest in any democracy, moreover, he took risks… Telling truth to power, constructively criticizing programs and operations when warranted, and cajoling enterprises to remain loyal to the organization's ultimate mission" (*United States v Kiriakou*).

Kiriakou's lawyer is making the argument that Kiriakou's committed such an offense in favor of the public interest. If we recall, the lawyer in Ellsberg's case made a similar argument. Government agencies, such as the Central Intelligence Agency's, ultimate goal is to protect the national interest which encompasses the public interest (*United States v Ellsberg and Russo***).** In relation to public interest, for this case there was an issue of the methods used by a United States organization that goes against human rights beliefs. This would fall under the public interest as is conveyed by the public discourse. Nevertheless, this is of course the defense's view and it is essential to look if there was anything else discussed on the court's part.

When it comes to analyzing the discussion of public interest on the United States' government's side as a factor to be considered in Kiriakou's case the answer is no. The primary debate dealt with the damage that the leak had on national security. For example, in the file entitled "Position of the United States with Respect to Sentencing" the Government states, "The kind of damage caused by the defendant's disclosures cannot be underestimated, and the disclosure of the identity of Covert Officer A is particularly compelling from a damage perspective" **(***United States v Kiriakou***)**. Essentially, the Government is arguing that the threat to national security from these disclosures is really what matters in this case. It cannot be overlooked. Thus, when it comes to weighing the public interest, the only one doing so is the defense. All in all, this reiterates the claim that the courts not account for the public interest in their decision making.

Chelsea Manning and the Espionage Act

Last, but not least, we need to analyze the Chelsea Manning case in the same way we did with the previous whistleblowers. First, we must look at whether or not her particular actions were restricted by a formal law. This would mean that the particular section of the Espionage Act that she was charged under meets the first prong of the Inter-American Courts' evaluation. Similar to Ellsberg and Drake, Manning, for example, was charged in violating 18 USC § 793 (e). To reiterate, the statute in question provides that it is unlawful to purposefully obtain any item listed above and then provide said item or information to someone who should not have it. To analyze the Manning case in like manner as the other whistleblowers, we need to look at if any of the actions that she took are prevented by the aforementioned section of the Espionage Act.

In short, the law is applicable since the offense Manning committed involved the use of computers to leak classified information. For example, the "Charge Sheet" states Manning had,

"unauthorized possession of photographs relating to the national defense, to wit: a classified video of a military operation filmed at or near Baghdad, Iraq, on or about 12 July 2007, and did willfully communicate, delivered …" it to someone who was not granted any permission to receive it (i.e. WikiLeaks) (*United States v Bradley Manning***)**. This action directly violates the statute. This is evidence that in at least one instance Manning gained access to said classified information, and then divulged it to an unentitled individual. Thus, her offense meets the first prong of having been restricted by a formal statute, and thus demonstrating the weight given to the type of offense and national security in and of itself.

Further, another example of the applicability and clarity of the statute to Manning's circumstances is, in the "Defense's Reply to the Government's Reply to the Defense's Motion to Dismiss" the charge the defense stated,:

> "the Government has specified that because PFC Manning's access to the SIPRNET computers was governed by a purpose-based limitation or restriction – namely, that he was 'accessing a U.S. Government (USG) Information System (IS) that is provided for USGauthorized use only' – he 'exceeded authorized access when he accessed those classified government computers for an unauthorized or expressly forbidden purpose.'" (*United States v Manning*).

This once again demonstrates how the 18 USC § 793 (e) of the Espionage Act applies to Manning's actions. In releasing the information, she would be violating the law. Therefore, when it comes to the first prong dealing with the law, once again, this particular action and statute will suffice.

Manning and the Public Interest

As for the presence of any discussion related to taking the public's interest in the information that Manning leaked into account, most of the narrative within the trial had less to do with why she chose to leak the information, but more with issues involving the leak's threat to the United States' national security. For example, during Closing Arguments, the United States made the case that, "The disclosures were felt in the operational and strategic levels militarily and diplomatically, serious impacts to bilateral military relationships and to diplomatic relationships wasn't a greater good, it wasn't good at all. It was destructive "(*United States v Manning*). Here, the Government is stating that what matters here is the grave danger, the threat that Manning's leaks brought about to United States' national security. Thus, neglecting the issue of public interest.

Then once again, the issue of national security as opposed to public interest arises again. For example, in the "Defense Response to Prosecution Motion to Preclude Reference to Actual Harm" the defense is arguing how the Government appears to be inconsistent with its position on the damage assessments of the leak. The defense states, "notable, the Government does not state that the absence of harm is not relevant to the charged offenses; rather, it states that [redacted fragment] is not relevant to any of the charges." (*United States v Manning***).** That is to say, the Government is being unclear in relaying the damage caused by Manning's actions. Harm in this instance relates back to the issue of national security. The alleged harm brought on by Manning's leaks would pose a threat to national security. Therefore, this again demonstrates how the major discussion being weighed the most throughout the Manning trials was more related to national security threats than the public interest. All in all, the issue of national security threats was where the focus lied without granting attention to the issue of public interest.

Conclusions: Where was the Public Interest Considered?

Balancing Act of Leaking and Issue of Public Interest			
	Illicit Act Defined by Formal Law (i.e. the Espionage Act)	**Court Factoring Whether Punishment was/is "Necessary in a Democratic Society"**	***Conclusion: Balanced?***
Daniel Ellsberg	Yes	Yes	Yes
Thomas Andrews Drake	Yes	No	No
John Kiriakou	Yes	No	No
Chelsea Manning	Yes	No	No

Chapter 8

Conclusion

In sum, when it came to whether each of the aforementioned whistleblowers were justified under Rawls' criteria for committing acts of civil disobedience, Daniel Ellsberg, Thomas Andrews Drake, John Kiriakou, Chelsea Manning, and Edward Snowden supported the hypothesis. Meanwhile, John Kiriakou and Chelsea Manning failed to meet the hypothesis. If we recall, from Rawls' perspective, in order to have their acts justified there needs to be some sort of basic liberties being violated and the whistleblower needs to have exhausted all reasonable legal channels. This means that whistleblowing is the last resort. For Daniel Ellsberg, an example of the basic rights being violated was the United States supporting French efforts to suppress independence movements in Indochina. Then as for the use of legal channels before leaking what he knew to the press, Ellsberg did so through acts such as alerting Congress as well as some of his superiors.

Similarly, the findings were the same for Thomas Andrews Drake. The violation of basic principles in this case was a citizen's right to privacy due to the NSA's use of ThinTread which ultimately spied on American citizens without a specific legal basis. Then in respect to the steps he took before leaking the information, he exhausted all reasonable courses of action by voicing what he found troubling to his superiors as well as others at the NSA such as the Inspector General, NSA lawyers, and a member of the House Intelligience Committee. However, years had passed and nothing. Therefore, he was justified under Rawls to release the information. Last, when looking at the case of Edward Snowden you can see that it is similar to the previously mentioned whistleblowers especially in regard to Drake. The basic rights being violated here, like in Drake's case, is the right to privacy which was once again being attacked by the NSA. Then, for example,

when it came to Snowden's use of legal channels, it was also similar in that all of Snowden's previous attempts to report what he deemed to be troubling were fruitless. Consequentially, this made any other attempt seem pointless. Thus, in these cases, in a Rawlsian world, these three whistleblowers were justified in their actions because they met both of his criteria and thus supported my hypothesis.

On the other hand, there were those who did not fully meet the criteria and were therefore not justified in their acts of "civil disobedience", and thus did not support the hypothesis. In the John Kiriakou case, for example, the basic liberty that was violated was the value of human life; as many opposers of the implementation of waterboarding, such as the international community, would agree. However, when it came to using all reasonable channels Kiriakou did not meet that standard. According to him, his actions would have resulted in no changes. This was reasonably so, since his superiors were in fact aware of the usage of the waterboarding technique. Therefore, according to him, there would be no point to do so. However, this line of thinking caused Kiriakou to fail to meet the second standard of Rawls' justification criteria; causing his actions to be unjustified. Similarly, it is this train of thought which caused Chelsea Manning to fail to meet Rawls' criteria. Like Kiriakou, Manning met the first criteria. For example, the basic liberty being violated was the value of a human life as seen by the footage of the military hurting civilians. Thus, she reported it. However, she failed to meet the second standard when she decided based on her own knowledge and feelings that it would be best to release the information straight to the public. Like Kiriakou, she made no effort to attempt going through the chain of command. As a result, this cost her the justification of her act of leaking in a Rawlsian view. All in all, this reiterates the fact that not all of these observed whistleblowers would have been justified under a Rawlsian view, and thus not supporting the original hypothesis.

Additionally, another factor that was found important to analyze was how the court dealt with the issue of whistleblowing. Was it only looking at the imminent threat to national security or also balancing it against the public interest? That is to say that the court looked at whether the punishment was on par with the democratic values of American society; or 'necessary in a democratic society. The findings, for the most part meet the second part of the hypothesis. This means the issue of public interest was not observed as a major factor or taken into consideration. Interestingly, the only case where public interest or the right of the public to know was acknowledged by the court was in the oldest case of the whistleblower case studies that were analyzed; Daniel Ellsberg. Whereas, in the remainder of the cases, arguments on threats to national security were weighed much more heavily.

In using the Inter-American Courts model for looking at free speech cases, Daniel Ellsberg's leak's threat to national security was definitely weighed during the discussion on him being charged under the Espionage Act. Additionally, it met the other prong that the Inter-American Court of Human Rights looks at; whether the punishment is "necessary in a democratic society". This came through with the discussion about whether the court should consider the people's right to know in addition to the fact that he did break rules that ultimately posed a threat to the security of the United States. Of course, there were individuals such as Solicitor General Griswold and Justice Marshall who disagreed on the subject. Nonetheless, it still remains that the court did take time to consider the issue of public interest in the Ellsberg case.

Notwithstanding that case, the same could not be said for the remainder of the cases; Thomas Andrews Drake, John Kiriakou, Chelsea Manning. These defendants did support the hypothesis. If we recall, in Drake's, Kiriakou's, and Manning's cases, the court most certainly gave weight to the threats to national security as is seen by the particular sections of the Espionage

Act that each defendant was charged under. Whether it was the act of retaining classified information or both obtaining information that the employee had access to and then leaking it to an unauthorized person which in most cases was the press, and Wikileaks in Manning's case. Then when looking at the discussions and rhetoric in these three cases, it was evident that more priority or more focus was being placed on the former factor than on issues of public interests. More often than not, if there was any mention or any discussion pertaining to the public's interest, it was usually on the part of the defense. Many times, these arguments had no acknowledgement from the court and definitely not the Government. All in all, this goes to support the hypothesis that the courts do not consider the public interest in whistleblower cases. More interestingly, this has been increasingly so post-Ellsberg and the Pentagon Papers.

Looking to the Future: Zeroing on Snowden

As previously stated, since the Snowden case has not taken place yet, we can use what we have learned from this research to help predict how a case like his would be handled if Snowden were to return to the United States and ultimately be tried for his actions. From the results of the other whistleblower cases, we can deduce that Edward Snowden would be indicted under the Espionage Act especially in regard to the section relating to leaking classified information to unauthorized persons. That appears to be the norm. Furthermore, we can predict that similar to the whistleblowers after Ellsberg: Drake, Kiriakou, and Manning, Snowden's threat to national security would be given a fine amount of weight. That is evident by the rhetoric used by the government in relation to his leaking relating to threatening national security and being a traitor. Then, ultimately, the court would not provide much attention, if any, to the issue of public interest.

The main concern is that he broke the law and betrayed the government by placing it in danger when leaking information about the federal surveillance programs.

The issue of public interest puts into question whether there needs to be some type of reform in handling whistleblower cases. As mentioned before by other members of the government, and scholars alike such as Attorney Lowell during the congressional hearing, there is a conflict between the government having control and being in charge but allowing the citizens the right to help keep the government from overstepping its bounds. In a democratic society such as the United States, American citizens have the right, to an extent, to speak out and voice their opinions on matters that are affecting them. However, in looking at how whistleblower cases have been handled, it appears that that right gets trampled when framed in terms of 'threats to national security". Thus, citizens are stripped of the rights to speak out if they sense the government is doing something that contradicts the foundation of its democracy such as the violation of basic liberties and the value of a human life. Therefore, in looking at potential reform, one angle would be to balance the issue of national security threats and the public interest. The public's right to know is what these whistleblowers claimed led them to leak each respective "classified" information. Thus, that very intent should be considered as it would be in courts such as the European Court of Human Rights or the Inter-American Court of Human Rights. If those who are put in place to safeguard the United States democracy are abusing their power unwarranted and nothing is being done, citizens have a right to do what is in their limited power to fix it. Consequentially, whistleblowers are the ones who are courageous enough to commit such an act of civil disobedience and should at least be allowed to have those very intentions taken into account in determining their outcome. Thus, helping to further the democracy of the United States.

Chapter 9

Limitations

The limitations of this research primarily were in access to primary sources in the form of case files. Fortunately, many files for each case were available. However, only certain files were available for some and then not for others. This sometimes affected the type of information that was present. For example, there were instances where primarily administrative forms made up the majority of available files for a certain case, and sometimes it was more in-depth files such as sentencing hearing transcripts, trial transcripts, and statements from the defendants in question. This sometimes prevented my research from being as close to consistent in the types of sources being used as I would have liked. Nevertheless, the information provided was still more than enough to help determine and emphasize my analyses and conclusions.

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