Whistle While You Work!

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Abstract

The prosecution of whistleblowers under the Espionage Act of 1917 appears, troublingly, to be a persecution of political dissent. Indeed, scholars have noted that this law has a "silencing" effect on free speech. As the Framers of our Constitution made clear —and political figures of all ilk thereafter have corroborated —the ability for individuals to speak out against the government is an essential quality in our republic. Government whistleblowers epitomize this quality: they criticize the government from within and, for this reason, their speech ought to be protected. However, far too often government whistleblowers are conflated with bad faith actors who seek to expose the actions of government for their gain exclusively. To differentiate between these two groups courts can use, among other things, the Brandenburg *decision in order to help identify the "likeliness" or "imminence" of the supposed threat that whistleblowers offer. By contrast, without a necessary differentiation between these similar groups, the subjective assault on government whistleblowers also highlights how the legal attacks on these individuals may amount to a kind of viewpoint discrimination. Lastly, given that this power is largely vested in the executive branch, the prosecution of whistleblowers appears to violate the separation of powers. Thus, while courts interpretations of the Espionage Act of 1917 must change, more importantly, government whistleblowers must be granted greater liberties to share information with the public moving forward.*

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I. Introduction

The chief jewel in our Constitutional crown is widely seen as the First Amendment.[1] Though this, of course, is not to overlook the others, the First Amendment stands alone for what it represents: all ideas are welcome, especially those that challenge the authority of government.[2] More to the point, the Framers of our Constitution saw dissent—challenging authority—as a crucial component to a successful republic.[3] To that point, our electoral mechanisms hinge on gathering and disseminating damning information along with favorable expressions to enable voters to make informed decisions about various candidates.[4] Implied in this doctrine is the idea that particularly salacious details about individuals could be suppressed should they infringe on one's pursuit to hold office.[5] Put another way, should one claim that a given act of speech is "dangerous" or defamatory, it could lead to suppression and, by extension, a crippling of citizens' "check" on government.[6] Such is the power of dissent: it is the public's means of countering the powers of the government.[7]

But there exists a heretofore narrow category of speech which is both indicting *and* potentially "dangerous": whistleblowing, specifically done by government employees.[8] In short, whistleblowing is a form of speech which raises awareness to government malfeasance from

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[1] *See U.S. Institutions - Why is the First Amendment Important?*, VOICE OF AM. (Feb. 20, 2017), https://editorials.voa.gov/a/the-importance-of-the-first-amendment-/3733070.html [https://perma.cc/YX2L-SYQX]; AmericanRhetoric.com, *Antonin Scalia - On American Exceptionalism,* YOUTUBE (Feb. 19, 2006), https://www.youtube.com/watch?v=Ggz_gd--UO0 [https://perma.cc/YFW9-J9XZ].
[2] *See Freedom of Expression*, AM. C.L. UNION, https://www.aclu.org/other/freedom-expression [https://perma.cc/BTP7-6U4C] (last visited Mar. 13, 2021).
[3] *See The Right to Dissent is Crucial to American Democracy,* WILSON CTR. (Oct. 16, 2008), https://www.wilsoncenter.org/article/the-right-to-dissent-crucial-to-american-democracy [https://perma.cc/KEC6-YT3N].
[4] *See* Ronald J. Krotoszynski, Jr., *Whistleblowing Speech and the First Amendment*, 93 IND. L.J. 267, 268 (2018).
[5] *See id.* at 297.
[6] *See* Andrew Cohen, *The Most Powerful Dissent in American History*, ATLANTIC (Aug. 10, 2013), https://www.theatlantic.com/national/archive/2013/08/the-most-powerful-dissent-in-american-history/278503/ [https://perma.cc/7G4N-K2EU].
[7] *See id.*
[8] *See* Krotoszynski, *supra* note 4, at 274.

within—whistleblowers, by definition, are the only ones who could possibly be privy to the intimate actions of government.[9] To date, however, whistleblowers have been prosecuted by, among others, various Presidential administrations: the two most recent administrations set, and appear poised to break, the record for whistleblower charges respectively.[10]

This should not be the case, however. In particular, these attacks against whistleblowers are driven by devious subjectivity: it is in the hands of government, composed of the very actors our framers were wary of,[11] to determine what constitutes threats to "national security,"[12] for example. Similarly, what amounts to a "matter of public concern" is equally dependent on the whims of the state given the apparent vagueness of the Espionage Act of 1917.[13] To this end, courts should reign in this ambiguous statute for it fails to protect individuals from speaking out, not unlike how sharing a politically charged pamphlet might.[14] In short, government employees' whistleblowing contributes to broader democratic debate and, in this vein, functions similarly, perhaps, to dissent.

To be sure, there no doubt exists a category of whistleblowing which poses a threat to national security without the requisite "public interest" in mind. In other words, "[n]ot all government employee speech has equal worth in the marketplace of ideas."[15] This other strand of ostensible whistleblowing, then, should be combatted. Yet, there has been a conflation

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[9] *See id.* at 271.

[10] *See* Catherine Taylor, *Freedom of the Whistleblowers: Why Prosecuting Government Leakers Under the Espionage Act Raises First Amendment Concerns*, 74 NAT'L LAW. GUILD REV. 209, 220, 224 (2018).

[11] *See* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 434 (1983); *The Constitution: How Did it Happen?*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/constitution/how-did-it-happen [https://perma.cc/Q39N-U5QX] (last visited Mar. 18, 2021).

[12] *See* Robert D. Epstein, *Balancing National Security and Free-Speech Rights: Why Congress Should Revise the Espionage Act*, 15 COMMLAW CONSPECTUS 483, 484 (2007).

[13] *See id.* at 484–86, 492; *WikiLeaks and the Espionage Act of 1917*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/journals/news-media-and-law-summer-2011/wikileaks-and-espionage-act/ [https://perma.cc/DW6P-4RZW] (last visited Mar. 18, 2021).

[14] *See* Schenck v. United States, 249 U.S. 47, 51–52 (1919).

[15] RONALD J. KROTOSZYNSKI, THE DISAPPEARING FIRST AMENDMENT 89 (2019).

between whistleblowing which has raised public consciousness around an issue and that which was done as spying or for financial payments.[16] In short, then, these extraordinary latter circumstances require extraordinary responses—but far too often, whistleblowing, which catalyzes change in some form, is coupled with speech which offers little to the public.[17] Critically, this delineation—what speech is in the public's interest versus what is dangerous noise—can fall within the precedent established by *Brandenburg v. Ohio,* which says that the "guarantees of free speech and free press" can be prohibited if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[18] Should a government employee's speech be directed towards leading an "imminent lawless action" or be a direct threat to the United States, our current precedents dictate that these acts should not be dismissed as benign.[19] Contrast this form of whistleblowing, however, with the case of Edward Snowden. Snowden's disclosures have "set off a national debate over the proper limits of government surveillance" and "opened an unprecedented window on the details of surveillance by the N.S.A., including its compilation of logs of virtually all telephone calls in the United States and its collection of e-mails of foreigners from the major American Internet companies, including Google, Yahoo, Microsoft, Apple[,] and Skype."[20] For this government employee, the public interest necessitated action.[21] The *Brandenburg* standard, then, makes it

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[16] *See* Jimmy Wales, *Edward Snowden is a saint, not a sinner*, CNN, (Oct. 21, 2016, 9:22 AM), https://www.cnn.com/2016/10/17/opinions/snowden-made-internet-safer-wales/index.html [https://perma.cc/CUP8-5CDH].
[17] *See* Reuben A. Guttman, *Whistleblowers and the Rule of Law*, AM. CONST. SOC'Y (Oct. 21, 2019), https://www.acslaw.org/expertforum/whistleblowers-and-the-rule-of-law/ [https://perma.cc/L72J-CNG3].
[18] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[19] *Id.*
[20] Scott Shane, *Ex-Contractor Is Charged in Leaks on N.S.A. Surveillance*, N.Y. TIMES (June 21, 2013), https://www.nytimes.com/2013/06/22/us/snowden-espionage-act.html [https://perma.cc/7XM3-YYJG]. *See also* Glenn Greenwald, *On the Espionage Act Charges Against Edward Snowden*, GUARDIAN (June 22, 2013), https://www.theguardian.com/commentisfree/2013/jun/22/snowden-espionage-charges [https://perma.cc/Z5GB-6F9X].
[21] *Id.*

clearer how one's "speech" may come at the expense of, despite being for, the public.[22] The *Brandenburg* standard also ensures that government officials' own views hold little influence over the merits of an employee's blown whistle; the higher threshold for prosecution mandates a similarly high standard of violation, not just the belief of wrongdoing.[23]

Moreover, then, the judiciary—not just whistleblowers, or even Congress—is an essential role in this conversation. Simply put, an active judiciary restores its function, regaining usurped authority that, to date, has strangely been saved for the executive branch and, most of all, has the authority to ground this debate beyond simple legislation.[24] In other words, the judiciary alone can establish the parameters moving forward as to which speech is permissible as firmly established within the Constitution, not grounded in a flexible law.

Therefore, I will outline Parts II and III both the historical origins and theories for protecting politically dissident speech. Thereafter, I will define what a government whistleblower is within this framework and contrast it with other similar—but necessarily different—forms of speech or, critically, other kinds of perceived whistleblowing (Part IV). These points will, in concert, highlight both what makes a government employee's whistleblowing so essential for our democratic process, and why a deference to *Brandenburg* ensures that this speech is protected (Part V). Part V will also outline how, in accordance with these democratic principles, government whistleblowers act as dissidents. Finally, this essay will outline why the judiciary—and not the other branches of government—is so essential to this process (Part VI). Decisions with this goal in mind will restore important functions of courts,

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[22] *See Brandenburg*, 394 U.S. 444.
[23] *See id.*
[24] *See Despite Laws, Federal Whistleblowers Still Face Problems*, FED. NEWS NETWORK (Feb. 17, 2020), https://federalnewsnetwork.com/workforce-rightsgovernance/2020/02/despite-laws-federal-whistleblowers-still-face-problems/ [https://perma.cc/QJ75-JM5E].

embolden the invaluable separation of powers, and ground the right for government employees to speak out, not in fickle legislation, but in the Constitution itself.

Part II: The Political Origins of Free Speech

In pursuing the development of a free society, the Framers of our Constitution were keen on expanding the rights of free expression.[25] For one, James Madison (the oft-cited chief architect of the Constitution[26]) cited *Cato's Letters*.[27] These letters "focused upon the relationship between speech and the political process and the concern about the procedures of speech limitation drawn from parliamentary privilege, and united these lessons with the extension of rights of speech to all people derived from the abolition of censorship."[28] Madison borrowed from Cato and stated that "[t]he people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty shall be inviolable."[29] For Madison, then, speech stands out as central to maintaining the republic which the Framers of our Constitution articulated.[30] Consequently, Madison's observation gives us, the readers today, a glimpse into why speech is so important to those who ratified the Bill of Rights.

Yet, Madison is, of course, not alone in amplifying this valued doctrine.[31] In fact, he may not even be the most vocal. Benjamin Franklin sought to inextricably tether free speech to the

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[25] *See* Bogen, *supra* note 11, at 459–61.
[26] *See The Life of James Madison*, JAMES MADISON'S MONTPELIER, http://www.montpelier.org/learn/the-life-of-james-madison [https://perma.cc/P4FK-T7K2] (last visited Mar. 13, 2021).
[27] *See* Bogen, *supra* note 13, at 445.
[28] *Id.* at 446.
[29] *Id*. at 445.
[30] *See id.*
[31] *See* Daniel Baracsky, *Benjamin Franklin*, FIRST AM. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1438/benjamin-franklin [https://perma.cc/B5UN-ABP] (last visited Mar. 13, 2021).

health of the country.[32] In one such instance, like Madison, Franklin published *Cato's Letters*. Franklin's motivations for publishing these letters, decades before the long, hot summer in Philadelphia, were personal: his own brother was imprisoned for criticizing the colonial governor of Massachusetts.[33] Franklin's case highlights how speech provides a cornerstone on which to build a liberal government: it is the citizens' counterweight to the whims of the state.[34] Perhaps this is why the quote that "it is the first responsibility of every citizen to question authority"[35] is so often attributed to Franklin: even if he did not actually say this explicitly, it would have fit nicely into his views of speech and, broadly, his view that it is the duty for citizens to dissent.

Importantly, the reverence for political dissent did not die with the Framers among later major political figures. In reference to the right to citizens to criticize the president, then-former President Theodore Roosevelt famously—or maybe infamously—stated:

> [That] it is absolutely necessary that there should be full liberty to tell the truth about [the president's] acts, and this means that it is exactly necessary to blame [the president] when [the president] does wrong as to praise [the president] when [the president] does right. Any other attitude in an American citizen is both base and servile. To announce that there must be no criticism of the President, or that we are to stand by the President, right or wrong, is not only unpatriotic and servile, but is morally treasonable to the American public.[36]

Once again, Roosevelt, not unlike his political predecessors, spoke to the importance for citizens or others to be granted the right to speak their mind, to be afforded the protection to speak the truth regardless of whether or not the actions of a given figure may be right or wrong. Madison, Roosevelt, and especially Franklin, all carry on Cato's mission: "every citizen has a

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[32] *See id.*
[33] *See id.*
[34] *See id.*
[35] Marco den Ouden, *Question Authority*, FOUND. FOR ECON. EDUC. (Aug. 1, 2016), https://fee.org/articles/question-authority/#:~:text=Benjamin%20Franklin%20said%2C%20%22It%20is,the%20greatest%20enemy%20of%20truth.%22&text=It%20makes%20sense%20to%20respect%20some%20authority [https://perma.cc/5RCM-AK5X].
[36] *Quotations from the Speeches and Other Works of Theodore Roosevelt*, THEODORE ROOSEVELT ASS'N, https://www.theodoreroosevelt.org/content.aspx?page_id=22&club_id=991271&module_id=339333 [https://perma.cc/S76R-5443] (last visited Mar. 18, 2021).

right to engage in honest and accurate criticism of government, and pleaded for caution in the punishment of unprotected speech."[37]

But what does this all really signify? In short, these personal defenses—from those who created, or those in whom the public trusts to defend, the Constitution—give us a glimpse, again, as to what these freedoms entailed and, more importantly, the fundamental protections that came with them. To this end, we can look to those like the triumvirate listed above to see where we measure up in the carrying on *their* mission. Put more plainly, a look to the Framers and other political figures can help us better assess where our jurisprudence protects citizens' rights as intended.

Part III: How Does Speech Fit Within Our Jurisprudence?

Now, despite this ostensibly broad freedom, courts have still placed restrictions on forms of speech. In particular, the Supreme Court in *Brandenburg* has explained that the First Amendment does not protect language that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[38] In other words, the Court has erred towards allowing broad political protections, but none too extensive so as to allow *everything*. Of course, then, there are limits on speech—just as there are limits on what constitutes any one of the provisions of the Bill of Rights.[39]

But, by and large, contemporary courts have sought to establish protections within this framework. Notably in *New York Times Company v. United States*,[40] the Supreme Court ruled

[37] Bogen, *supra* note 11, at 446.
[38] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[39] District of Columbia v. Heller, 554 U.S. 570, 626 (2008) ("Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.")
[40] *See* N.Y. Times v. United States, 403 U.S. 713, 713 (1971).

that prior restraints on salacious government publications are unconstitutional.[41] The roots of this case find themselves during the Vietnam era: when Department of Defense employee Daniel Ellsberg leaked classified documents to the press, the Nixon Administration sought to put an end to their publication.[42] The Supreme Court disagreed and, in a 7–2 decision, found that, save for incredibly particular circumstances, prior restraints on the press violated the First Amendment's guarantees.[43] Justice Hugo Black wrote that limiting what a newspaper publishes "would make a shambles of the First Amendment."[44] Black, in fact, cited Cato's argument—that free speech is "the great [bulwark] of liberty"—and went on to say that "the original Constitution . . . [determined that] no branch of government could abridge the people's freedoms of press, speech, religion, and assembly."[45] The argument did not end there, though: Justice Black disagreed with the notion that Congress could make laws solely in the name of "national security" for it granted the President "inherent power" which could "destroy the fundamental liberty . . . of [which] the very people the Government hopes to make 'secure.'"[46] What's more, Justice Black's decision stated that "national security" is, in and of itself, too broad and vague—and comes "at the expense of informed representative government."[47]

However, the *N.Y. Times* decision departed significantly from the finding in *Schenck v. United States*[48] and *Abrams v. United States*[49] from earlier in the 20th century. Like Daniel Ellsberg in *N.Y. Times*, the defendants in both of these cases were charged under the Espionage

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[41] *See id.* at 713.
[42] *See id.*
[43] *See id.* at 717.
[44] *Id.* at 715.
[45] *Id.* at 716.
[46] *Id.* 718–19.
[47] *Id.* at 719.
[48] *See* Schenck v. United States, 249 U.S. 47, 52 (1919).
[49] *See* Abrams v. United States, 250 U.S. 616, 616 (1919).

Act of 1917 ("Espionage Act").[50] In *Schenck*, unlike in *N.Y. Times*, the Court found that the danger posed during wartime justified the restriction on First Amendment rights to freedom of speech.[51] Charles Schenck opposed the United States' draft and, as part of his efforts to "counter the war effort . . . organized [and] distribut[ed] 15,000 leaflets to . . . draftees encouraging them to resist the draft."[52] The Supreme Court unanimously upheld Schenck's conviction, citing the fact that "circumstances" played a significant role in their conclusion. Under normal times, the leaflets would be protected - but the war effort was, presumably, too important.[53] Justice Oliver Wendell Holmes Jr. authored the opinion of the Court, stating that Schenck had violated the Espionage Act by trying to obstruct the draft by disseminating pamphlets advocating against it and that the Espionage Act did not violate Schenck's First Amendment right to free speech.[54] Accordingly, the Court found that "attempts made by speech or writing could be punished just like other attempted crimes."[55] Notably, too, this case established a "clear and present danger" standard for evaluating the merits of one's free speech protections which tested speech limitations on a "case-by-case" basis.[56] This standard allowed courts to determine whether the "state would be justified in limiting that speech."[57]

Holmes redeemed himself in the eyes of free speech advocates perhaps, following the Justice's later dissent in *Abrams*.[58] The facts of this case do not break all that dramatically from

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[50] *See id.*; Epstein, *supra* note 12, at 487.
[51] *See* Schenck v. United States, 249 U.S. 47, 52 (1919).
[52] Joshua Waimberg, *Schenck v. United States: Defining the limits of Free Speech*, NAT'L CONST. CTR.: CONST. DAILY (Nov. 2, 2015), https://constitutioncenter.org/blog/schenck-v-united-states-defining-the-limits-of-free-speech/#:~:text=Schenck%20and%20Baer%20appealed%20their%20convictions%20to%20the%20Supreme%20Court.&text=Additionally%2C%20even%20though%20the%20Act,just%20like%20other%20attempted%20crimes [https://perma.cc/4DV8-TGB3].
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *See* Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 297 (1998).

its predecessor: during the United States military operations in Russia, Russian immigrants in the United States felt that "th[e] use of force in their home country [was] an effort to undermine the new Soviet government" thus leading them to "circulat[e] literature calling for a general strike…[which] would undermine the U.S. war effort."[59] Accordingly (and as mentioned), like Schenck, these individuals were charged with violating the Espionage Act.[60] The Court followed its script to that point upholding the convictions, again stating that there are limits on free speech and stated that the "[p]rotections on speech are lower during wartime when the speech has a detrimental effect on national security."[61] As it came up in *Schenck*, outside circumstance, said the Court, plays a role in the degree to which one is afforded protection under the Constitution. These rights were not "inviolable," in direct conflict with the Framers belief

However, Justice Holmes found himself dissenting this time, stating that "the ultimate good desired [by a society] is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[62] Therefore, Justice Holmes sought to have the Court—and individuals more broadly—defer to the marketplace of ideas: the only reasonable standard by which an individual may appropriately "test" their ideas is subjecting them to kinds of scrutiny, itself only possible with a wide range of free speech protections.[63]

Moreover, Holmes not only broke with the present Court but his past self as well. Holmes narrowed his *Abrams* "clear and present danger" framework, stating that the Court may

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[59] *Abrams v. United States, 250 U.S. 616 (1919)*, JUSTIA, https://supreme.justia.com/cases/federal/us/250/616/ [https://perma.cc/MZ8K-FT5K] (last visited Mar. 14, 2021).
[60] *See* Abrams v. United States, 250 U.S. 616, 617 (1919).
[61] *Abrams v. United States*, *250 U.S. 616 (1919)*, JUSTIA, https://supreme.justia.com/cases/federal/us/250/616/ [https://perma.cc/84CZ-5U6V]. See 250 U.S. at 627–28.
[62] *See* 250 U.S. at 630 (J. Holmes, dissenting).
[63] *See id.*

only seek to curtail speech which "produces or is intended to produce clear and imminent danger that will bring about . . . certain substantive evils that the United States constitutionally may seek to prevent."[64] Notice, here, that a danger need not just be "present" but "imminent" as well. Thus, while *Abrams* was largely vindicated in this decision, it did not come without warning: Holmes sought to clarify his own standard, elucidating that the case-by-case tests of old may inappropriately qualify benign political speech as unprotected.

Notwithstanding Holmes's protests, the "clear and present danger" examinations lasted for nearly five decades.[65] These cases—and this standard—set the stage for *Brandenburg v. Ohio*, the case in which the Court ultimately tailored its assessments.[66] When Clarence Brandenburg, a leader of the Ku Klux Klan, gave a speech at a Klan rally, he was charged under a Ohio law which outlawed advocating for "crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform," in addition to doing so "with [a] society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."[67] While this conviction may have been upheld under the views of old, a unanimous Court broke with precedent and, instead, found that the Ohio law violated the First Amendment.[68] Furthermore, the Court clarified its standard moving forward: the Court determined that speech can be prohibited if it is "directed [at] inciting or producing imminent lawless action" *and* it is "likely to incite or produce such action."[69] Gone were the days of "clear and present danger," replaced now with "likely and imminent lawless action."[70]

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[64] *See id.* at 627.
[65] *See* Brandenburg v. Ohio, 395 U.S. 444, 444 (1969).
[66] *See id.* at 447.
[67] *Id.* at 444–45.
[68] *Id.* at 445–49.
[69] *Id.* at 447.
[70] *Id.*

Part IV: Where Whistleblowers Fit Within These Precedents—and What Doesn't Belong

The *Brandenburg* standard, importantly, frames the discussion on government whistleblowers. However, it is first necessary to define what exactly is a whistleblower. As a first approximation, a whistleblower is an individual who "is someone inside an organization who sees a problem going uncorrected—like waste, fraud, abuse, crime or something that poses a threat to public safety and security—and tells outsiders about it."[71] In more general terms, though, a whistleblower is "someone who brings problems to light in any number of ways."[72] Yet, these, of course, may over-simplify the terms as "the government . . . [defines] a whistleblower only as someone who follows certain procedures that channel a complaint to its internal oversight mechanisms—chiefly, inspectors general and congressional oversight committees."[73]

Even with these disparate definitions, though, what a true government whistleblower is not, by my estimation, is an employee (current or former) who undermines a specific operation with direct consequences for personal gain. Take the example of Edward Snowden: Snowden was a government employee who, during his tenure at the National Security Agency, alerted the public to the United States surveillance program.[74] Snowden's revelations "about the existence of a massive domestic spying program set off a national debate about the relative importance of national security, and anti-terrorism efforts, versus information privacy" —information that "only an insider—a whistleblower—could credibly confirm the existence of."[75] Snowden did

[71] Charlie Savage, *How the Law Protects Intelligence Whistleblowers, and Leaves Them at Risk*, N.Y. TIMES (Oct. 3, 2019), https://www.nytimes.com/2019/10/03/us/politics/whistleblower-complaint.html [https://perma.cc/U88U-XJP7].
[72] *Id.*
[73] *Id.*
[74] *See* Wales, *supra* note 16.
[75] Krotoszynski, *supra* note 4, at 271.

not, to present a counterfactual narrative, share this information as a means to start a likely insurrection nor did not he share this information with a foreign power in exchange for a reward.[76] Either of these types of leaks would have a degree of imminence associated with lawless action (financial payment, say, in exchange for actionable intel).[77] These types of leaks are ultimately what should drive the decision to expose an individual to legal scorn; one's position alone should not automatically create some new standard to allow for the prosecution of one's speech. Put another way, while whistleblowers' positions may confer upon them greater access to information than a layperson, the information that they share requires a particular context that is the key—and solely legitimate—basis for prosecuting government whistleblowers.[78]

For this reason, courts can reapply *Brandenburg* to the whistleblowing context: the mere act of whistleblowing does not insulate an individual from the law (just as an act of speech which calls for imminent violence does not protect an individual from criminal culpability).[79] However, the information that an individual shares contributes significantly to their free speech claims.[80] *Brandenburg*'s precedent dictates that, should a blown whistle lead to an "imminent" threat to the country's national security operations, this speech fails to adequately fall within the realm of publicly acceptable information.[81] The imminence in this whistleblowing context derives, principally, from the fact that an individual may attempt to share information not as an employee speaking out but as an agent for another party.[82] In other words, courts can reapply *Brandenburg*'s "imminent" and "likely" threat standards to assess the actions of whistleblowers:

[76] *See* Greenwald, *supra* note 19.
[77] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[78] *See* Krotoszynski, *supra* note 5, at 275–76.
[79] *See Brandenburg*, 395 U.S. at 447.
[80] Krotoszynski, *supra* note 5, at 276.
[81] *See Brandenburg*, 395 U.S. at 447.
[82] *See* Krotoszynski Jr., *supra* note 5, at 300.

the content of a whistleblower's speech can be colored by probable and provable motivations which, in turn, would make otherwise protected speech a possible crime.

To that end, not all speech necessarily belongs to this category. As Professor Ronald J. Krotoszynski, Jr. stated in a piece on a similar theme:

> [A]lthough not all government employee speech is whistleblowing speech, only government employee speakers can engage in whistleblowing . . . because they are uniquely situated to provide the body politic with the information it must have to ensure government accountability though the democratic process and, accordingly, merits independent and enhanced . . . protection from more generic [or invidious] government employee speech.[83]

Such is the paradox that courts alone can overcome as we will explore in a subsequent section, a proverbial "not all rectangles are squares" situation.[84] As a government employee, there is an understanding or assumption of trust which implicitly curtails whistleblowers' ability to speak out—yet, at the same time, as a product of one's employment, these individuals alone are able to share internal government information with the public.[85]

<u>Part V: Why Protect the Speech of Whistleblowers?</u>

Thus, it is to this specific end that government whistleblowers should be afforded broad speech protections: the information they share, by nature of being related to the internal workings of government, mandates transparency and, at the very least, provides information to

[83] *See* Krotoszynski, *supra* note 4, at 276 (footnote omitted).
[84] As some of us may remember from our primary school math classes, in order to classify some quadrilaterals, the instructions were to look at the angles and see whether the opposite sides were parallel. However, both squares and rectangles have two sets of parallel sides and ninety-degree angles. The difference, of course, lies in the length of the respective sides. Thus "all squares are rectangles" —because they share the angle and parallel side features—"but not all rectangles are squares," for they feature differing side lengths.
[85] *See WikiLeaks and the Espionage Act of 1917*, *supra* note 13.

the public which can dictate how citizens may vote.[86] To date, courts have been largely reluctant to afford government whistleblowers speech protections because of their employment status: they are, as a result of their position, privy to sensitive information in a way that purely private actors are not.[87] In *Garcetti v. Caballos,* the Supreme Court ruled that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communication from employer discipline."[88] For the purposes of employment, this standard may be reasonable enough (though it still leaves much to be desired).[89] However, for the purposes of protecting whistleblowers against legal persecution, it is an inadequate standard to say the least. What's more, this standard may be reminiscent of the circumstantially influenced protections of *Abrams* and *Schenck*. In short, as with these cases, context plays a critical role: then, in times of war, the government could restrict certain kinds of speech just as it may, now, limit the speech of its employees. However, doing so naturally in either case limits the breadth of discourse and the exchange of ideas – thus, flying in the face of the First Amendment's principals.

From the perspective of citizens, the information a government whistleblower shares functions as a check of sorts against government in two ways: one, it potentially curtails suspect government action out of the government's fear of public exposure; two, it simply alerts the public to the internal functioning of their representatives. For the first proposition, the potential for an employee to speak out against government overreach from within may curtail excesses before they begin. Again, let us return to the Snowden example: perhaps had the government

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[86] *See* Kate Ruane, *Whistleblowers are Public Servants. We Must Protect Them*, AM. C.L. UNION (Nov. 15, 2019), https://www.aclu.org/news/free-speech/whistleblowers-are-public-servants-we-must-protect-them/ [https://perma.cc/8TAZ-5CW6].
[87] *See* Garcetti v. Ceballos, 547 U.S. 410, 424 (2006).
[88] *Id.* at 421.
[89] *See* Epstein, *supra* note 12, at 512.

been prepared to defend its warrantless surveillance program, its unlawful extents may never have developed.[90] Simply put, the notion that information may reach the public's ears from a source within the government could preempt malfeasance insofar as employees may act as internal counterweights to the government's actions.

For the latter of these two propositions, the whistleblower's shared information reveals, in the most candid of ways, the internal operations of government, which adds to the information pool for voters. To borrow from Professor Krotoszynski again, it is critical that "the voters must have access to relevant information about the successes—and failures—of those who currently hold office" because "the electoral process cannot serve as an effective means of ensuring government accountability for both its actions and its failures to act."[91]

Thus, government whistleblowers require more First Amendment protections because their speech meaningfully opposes the actions of government. While *Brandenburg* may offer courts a rubric to assess the cases of individual whistleblowers, fundamentally, those who act in the name of checking government (without the nefarious ulterior motivations, of course) act as dissidents.[92] Briefly, let us return to President Roosevelt in order to illustrate this point. Roosevelt stipulated that it is antithetical to our government's values "[t]o announce that there must be no criticism of the President, or that we are to stand by the President, right or wrong, is not only unpatriotic and servile, but is morally treasonable to the American public."[93] In our present state of whistleblower assessments, the government—particularly the executive—acts as the judge and jury in determining whether the government's actions are "right or wrong" with no

[90] *See* Krotoszynski, *supra* note 4, at 270 ("Since time immemorial, however, government officers will race to claim responsibility for successes but are far more reticent to acknowledge—much less take responsibility for—government failures. All of the relevant incentives run toward attempting to hide or cover up instances of corruption, malfeasance, or ineptitude.").
[91] *Id.* at 268.
[92] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).
[93] THEODORE ROOSEVELT ASS'N, *supra* note 32.

room for individuals to question it's actions. Of course, as already stated, this violates not only the spirit of our First Amendment protections but the spirit of the system of governance the Framers sought to put in place. Plainly, the prosecution of individuals who share information in "the public's interest," is patently counter to our constitutional norms.

Or, should Roosevelt prove insufficiently capable of providing an appropriate understanding of the view of whistleblowing as a form of dissent, let us look to *Cato's Letters*, (which Madison and Franklin reproduced in different instances).[94] In the essay *Of Freedom of Speech: That the Same is Inseparable from Publick Liberty*, Cato states that the notion that "[individuals] ought to speak well of their governors, is true, while their governors deserve to be well spoken of; but to do public mischief, without hearing of it, is only the prerogative and felicity of tyranny: a free people will be showing that they are so, by their freedom of speech."[95] The standard does not stop there: Cato continues to write that "[w]hen [the actions of government] are honest, they ought to be publicly known, that they may be publicly commended; but if they be knavish or pernicious, they ought to be publicly exposed, in order to be publicly detested."[96] Taken from the latter, the actions of the government should be made known to the public because, from the former, when the government conducts mischievous actions the public ought to be made aware. To this specific point, the litigious silencing of this speech appears to be a tyrannical assault on liberty by and for the State in a way evocative of dictatorships that silence similar kinds of dissidents. Without, then, the requisite "imminent lawlessness" (footnote

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[94] *See* Daniel Baracskay, *Benjamin Franklin*, FIRST AM. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1438/benjamin-franklin [https://perma.cc/B294-T89U] (last visited Mar. 20, 2021); James H. Read, *James Madison*, FIRST AM. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1220/james-madison [https://perma.cc/B294-T89U] (last visited Mar. 20, 2021).

[95] 1 JOHN TRENCHARD & THOMAS GORDON, *Of Freedom of Speech: That the Same is Inseparable from Publick Liberty*, *in* CATO'S LETTERS OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 96, 97 (Ronald Hamowy ed. 1995) (1724) (alteration in original).

[96] *Id.* at 100 (alteration in original).

needed here for case quote) derived from *Brandenburg* which the State should combat, there appears to be little justification for individuals to face prosecution; unless, in the words of Cato, these prosecutions are to only ensure that the State can "do public mischief."[97]

In turn, these points highlight the fact that "whistleblower" is an incomplete moniker to bestow on these individuals. While, yes, they may expose the wrongdoings of the government, they also function similarly to private individuals who simply criticize the government's actions when the information is already publicly known. It would seem to be ludicrous to label writers who slander government actions today as political criminals; of course, their speech is understood to be protected under the Constitution. This is not to say that government employees may be held to a different standard—perhaps they should differ in some small way from private citizens as to the full extent of their liberties.[98] Rather, it is simply to illustrate how whistleblowing operates in a similar space to that of broader political dissents for the purposes of making information known to the public. *This* liberty is essential and ought to be immutable for, as already described, our republic will function at full health only when citizens (government employees and private alike presumably) can critique the actions of their government.

Part VI: Why Using Courts is Necessary

All this may be well and good, but how—or more to the point, why—may the judiciary insert itself into this debate? Indeed, to date, much of this conversation has featured the other branches of government, with the notable exceptions of cases like *Garcetti* recently.[99] Should

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[97] 1 JOHN TRENCHARD & THOMAS GORDON, *Of Freedom of Speech: That the Same is Inseparable from Publick Liberty*, *in* CATO'S LETTERS OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 96, 97 (Ronald Hamowy ed. 1995) (1724) (alteration in original).

[98] *See generally* Krotoszynski, *supra* note 4.

[99] Garcetti v. Ceballos, 547 U.S. 410, 423 (2006).

courts enter the fray, it will no doubt be better able to define whistleblowers within this framework and, notably, establish this liberty as grounded in the Constitution. However, a court-as-interlocutor does not just benefit the ostensible primary actors: courts, too, stand to restore their authority. From *Marbury v. Madison* onward,[100] the judicial branch stands as the gatekeeper for interpreting the law. Such is, almost painfully obvious, the function of this arm of government. Yet, with respect to the issue of government whistleblowing, the judiciary has implicitly abdicated its responsibility. Specifically, courts have largely failed to reexamine the Espionage Act, the principal piece of legislation used to charge some of the highest profile government whistleblowers—namely, Edward Snowden, Chelsea Manning, and but more still.[101]

To start, let us examine the language of the Espionage Act itself. Of the several sections, one perhaps carries the most weight—Section 793—as it relates to information disclosures and provides a significant amount of uncertainty.[102] Subsections 793(a) and (b) criminalize "obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States."[103] Please note, this section allows for one to have a reasonable belief that any given piece of information may be used with the intent to cause "injury" the United States.[104] But that's not all: under subsections 793(d) and (e), an individual need only "willfully"[105] communicate information which communicate information which "may be easier for prosecutors to demonstrate since it does not require a showing of

[100] Marbury v. Madison, 5 U.S. 137, 177 (1803).
[101] *See* Greg Myre, *Once Reserved for Spies, Espionage Act Now Used Against Suspected Leakers*, NPR (June 28 2017, 8:07 AM), https://www.npr.org/sections/parallels/2017/06/28/534682231/once-reserved-for-spies-espionage-act-now-used-against-suspected-leakers [https://perma.cc/K3PL-L3ZE]; David Asp, *Espionage Act of 1917*, FIRST AM. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1045/espionage-act-of-1917 [https://perma.cc/4L7K-47GZ] (last visited Mar. 20, 2021).
[102] Lindsay B. Barnes*, The Changing Face of Espionage: Modern Times Call for Amending the Espionage Act,* 46 MCGEORGE L. REV. 511, 518 (2014).
[103] 18 U.S.C. § 793 (a)–(b) (2009).
[104] 18 U.S.C. § 793 (a)–(b) (2009).
[105] 18 U.S.C. § 793 (d)–(e) (2009).

specific intent."[106] As it pertains to "intent," prosecutors can demonstrate it in two ways: "purpose" (the act or desire to bring about a result[107]), or "knowledge"[108] (the awareness that a result follows from an action[109]). Consequently, it is typically under the latter two of these subsections that many of the mentioned government whistleblowers have subsequently been charged.[110]

Accordingly—and perhaps unsurprisingly—challenges have been brought against this section on this basis.[111] In *United States v. Rosen*, Steve Rosen and Keith Weissman were charged under Section 793(e) when they allegedly conspired "to obtain and transmit information relating to Iran and other Middle East nations to those not entitled to receive such reports."[112] Subsequently, the defendants "argued that the statute, as applied to them, is unconstitutionally vague, abridges their First Amendment rights to free speech and to petition the government, and is facially overbroad."[113] Among their arguments, the defendants also argued that Section 793(e) itself is unconstitutionally vague as it relates to the phrase "information relating to the national defense."[114] The premise of this defense stems from the Due Process Clause in the Constitution which combats "arbitrary and discriminatory enforcement."[115] Judge T.S. Ellis III, writing for the District Court for the Eastern District of Virginia, largely rejected this claim, though.[116]

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[106] Barnes, *supra* note 90, at 519.
[107] *Purpose*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining purpose as "an objective goal, or end").
[108] Barnes, *supra* note 90, at 530.
[109] *Knowledge*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining knowledge as "an awareness or understanding of a fact or circumstance").
[110] Barnes, *supra* note 90, at 519 ("The government charges and ultimately prosecutes or pleads out many leakers under section 793(d) or 793(e), likely because the subsections are extremely broad and do not require any specific criminal intent . . . .").
[111] *See* Epstein, *supra* note 12, at 500.
[112] *Id.* at 499; United States v. Rosen, 445 F. Supp. 2d 602, 607 (E.D. Va. 2006).
[113] Epstein, *supra* note 12, at 500.
[114] *Id.* at 501.
[115] *Id.* at 506.
[116] *Id.* at 500–01.

While Judge Ellis was sympathetic to the idea that the language was not clear, he believed that it was not "vague."[117]

Judge Ellis's justification, though, was largely consistent with precedent. In *Gorin v. United States*, the Supreme Court ruled that the Espionage Act is not unconstitutionally vague because it is limited by intent and imminence.[118] But, recent incidents of individuals charged under the Espionage Act have raised questions regarding this reasoning.[119] Specifically, the "reason to believe" standard allows "the executive branch to punish individuals lacking bad faith intent through a lengthy prison sentence or costly fine."[120] Consider the Snowden example again: in his own words, Snowden acted, not out of bad faith, but because he feared that individuals could not meaningfully oppose the United States' power.[121] Snowden's case may not be an isolated incident it seems: as the American Civil Liberties Union notes, "[a]s it stands, the Espionage Act makes no distinction between a civic-minded whistleblower who releases something . . . which reveals illegal government activities, and a spy who sells genuinely damaging documents to a foreign government."[122]

This, then, is why it is necessary for courts to intervene. Plainly, the judiciary ought to revise its present conception of the Espionage Act for two distinct reasons: one, the recent—and likely to be continued—prosecution of government whistleblowers highlights how the executive branch takes advantage of this vague statute; two, Congress has largely failed to act to the detriment of its constituents.[123] The justification grounding the urgency in overcoming this state

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[117] *See id.* at 501.
[118] Gorin v. United States, 312 U.S. 19, 27–28 (1941).
[119] *See* Myre, *supra* note 89.
[120] Epstein, *supra* note 12, at 512.
[121] *See* CITIZENFOUR (HBO Films 2014).
[122] *See* Jay Stanley, *Reality Winner is Latest to Face Prosecution Under Awful World War I Espionage Act*, AM. C.L. UNION (July 11, 2017, 1:15 PM), https://www.aclu.org/blog/national-security/secrecy/reality-winner-latest-face-prosecution-under-awful-world-war-i [https://perma.cc/H3LR-BUJ2] (alteration in original).
[123] *See* Krotoszynski, *supra* note 4, at 301.

of affairs with the former rests in the necessity to separate the powers of our government.[124] One cannot reasonably, for the previously outlined reasons, expect a fair consideration of their case if the executive is vested with the authority to charge an individual and subsequently determine his or her guilt based on its own standards.[125] In short, then, formally "constitutionalizing" the right of whistleblowers to speak out—not deviating from, but amplifying, the Founder's vision of our Constitution—re-establishes the judiciary's indispensable function and takes away the wrongly delegated authority from the executive to, *de facto*, make legal judgements.[126]

But, to this end, courts' precedents allow for this scheme to persist. While to be sure, courts supposedly consider the imminence and intent of a charge under the Espionage Act (given the *Gorin* precedent[127]), they break from their own standard as to what constitutes a threat—and, more to the point, what makes up a threat with imminence. The current standard—derived, in part, from *Pickering v. Board of Education*—dictates that a balancing test must help courts ascertain whether certain speech was in the public's interest.[128] Justice David Souter, dissenting in *Garcetti*, noted that the majority needed to adjust to incorporate the *Pickering* doctrine.[129] But, broadly speaking, *Brandenburg*, may have proven even more useful: it is not just whether an individual's actions serve the public's interest—such a view may, like the "reason to believe" standard of the Espionage Act, place too much authority with one entity; rather, the standard for

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[124] *See* Steven G. Calabresi, Mark E. Berghausen & Skylar Albertson, *The Rise and Fall of the Separation of Powers*, 106 NW. L. REV. 527, 548 (2012).
[125] *See* Epstein, *supra* note 12, at 512 ("Not only [does] the 'reason to believe' clause . . . yield an undesirable chilling effect on speech, [it can] also enable the executive branch to punish individuals lacking bad faith intent through a lengthy prison sentence or costly fine.").
[126] *See* Krotoszynski, *supra* note 4, at 275.
[127] *See* Epstein, *supra* note 12, at 492–93.
[128] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").
[129] Garcetti v. Ceballos, 547 U.S. 410, 434–41 (2006) (Souter, J., dissenting) (arguing for an application of the *Pickering* doctrine).

the assessment of a government whistleblower's speech should be driven by analyzing the imminence or likeliness of one's speech as a call to undermine a particular action. Failing to differentiate between these two groups allows "civic minded" individuals to be subjected to the whims of the State—and thus tantamount to silencing critiques.

Thus, despite a dearth of challenges, should one arise, the Court must overturn the precedent set by *Gorin*: it must reassess the apparent vagueness of the Espionage Act and incorporate *Brandenburg*. Others have noted already that "contrary to the stated intent [of the law], the language of the statute restricts the rights of American citizens, particularly with respect to fundamental liberties under the First Amendment."[130] Consequently, this law has a "chilling effect" on free speech.[131] Though *Brandenburg* may help overcome similarities between seemingly identical groups, in order to first overcome precedent, the courts must intercede.

Ultimately, this returns us to the beginning of this section: only courts are truly capable of delineating how a government whistleblower differs from those with malintent in mind when they act *and* courts are capable of codifying these protections within our Constitution. Of course, Congress can pass new legislation that would ideally curtail the excesses of late, but this may prove insufficient. For one, Congress has yet to pass new laws on this issue despite the mounting casualties and prescient warnings.[132] Nothing, given this sordid track record, would reasonably indicate that Congress would act now. What's more, and importantly, the Supreme Court can guarantee the constitutionally-anchored protections for whistleblowers within the First Amendment. In this way, should Congress act anyway, it will do so fully subject to the

[130] Epstein, *supra* note 12, at 483.
[131] *See id.* at 512–13 (arguing that Congress should change the "reason to believe" provision due to its "undesirable chilling effect on speech.").
[132] *See id.* at 516 (concluding that "Congress must revise the Espionage Act."). *See also* Krotoszynski, *supra* note 4, at 291–300 (arguing for a new category of free speech protection for government workers).

guarantees bestowed by the Court. After all, the current rules severely cripple individuals to speak out against the government when they see it as their civic duty. Indeed, even when the actions are deemed appropriate, a government whistleblower's prosecution amounts to "viewpoint discrimination"[133]—that is, an actor determines which speech is allowed and which is not. In turn, should the Court take a drastic turn and even deem the Espionage Act unconstitutional, this will not codify the important protections of government whistleblowers within the First Amendment—that is, these individuals will still be seen as criminals, not critics. Courts enable change for the good in this instance: at the very least, the Supreme Court can (in line with *Brandenburg*) establish new boundaries for acceptable speech which will simultaneously reassume the judicial branch's Constitutional authority to determine the merits of a given piece of legislation.

<u>**Part VII: Conclusion**</u>

In sum, the profound power and impact of a government whistleblower's actions require commensurate protections from courts. Specifically, the information that government whistleblowers provide is an invaluable component of the political process—and, to that end, the "speech" of whistleblowers falls into a category not all that different from political dissent. From the Framers onward, political figures and members of the judiciary alike have seemed keen on recognizing the power of political speech, at times to the detriment of the speaker.[134] The

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[133] *See* Kevin Francis O'Neill, *Viewpoint Discrimination*, FIRST AM. ENCYCLOPEDIA, https://mtsu.edu/first-amendment/article/1028/viewpoint-discrimination [https://perma.cc/GTR9-ZY2H] (last visited Mar. 20, 2021) (noting that judicial treatment of government employee speech is the "glaring exception" as opposed to other types of speech, because "[w]hen expression is classified as government speech, the First Amendment inquiry ends and there is no finding of viewpoint discrimination.").

[134] *See* Abrams v. United States, 250 U.S. 616, 616–24 (1919) (the Court upheld convictions under the Espionage Act against defendant for distributing pamphlets about general strikes in furtherance of their political goals); Krotoszynski, *supra* note 4, at 292–93 ("In strong contrast with the near absolute protection conveyed on a

actions of government employees should not be any different. Nevertheless, not all "whistleblowing" is created equal. Accordingly, courts should use present precedents, namely the *Brandenburg* decision which outlines how and when political speech may be silenced. The "likely" and "imminence" standard will help courts and other figures determine the strength of a whistleblower's First Amendment claims. However, this then brings us to where courts themselves benefit from this active interpretation: the current statutes, especially the Espionage Act of 1917, allow the executive branch unchecked to make these determinations. This can no longer stand. The judiciary must incorporate *Brandenburg* into its assessment of government whistleblowers as using this precedent will combat the apparent vagueness of the Espionage Act on the whole and stifle attempts to silence dissent.

Now, too, may be as good a time as any to mount this challenge: many political figures have called for a pardon Edward Snowden. Moreover, the persecution and prosecution of whistleblowers may only grow: new administrations, given the current trend, are only likely to take on whistleblowers until courts take a different tact in assessing their speech.[135] To the courts I then say this: do not let the executive or the legislature take credit for protecting the rights you are charged with defending; ensure that whistleblowers, as the First Amendment guarantees, have a right to speak out.

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government employee with respect to her partisan identity and activity, government employees who speak out on matters of public concern risk serious adverse consequences.").

[135] *See* Brittany Gibson, *All the President's Whistleblowers*, AM. PROSPECT (Oct. 18, 2019), https://prospect.org/justice/all-the-presidents-whistleblowers/ [https://perma.cc/SR43-RK4L] (brief history of legal action taken against whistleblowers in the United States).