

ESPIONAGE: NOW, WITH NO DAMAGE ENVISIONED

A recently unsealed decision from Colleen Kollar-Kotelly just changed the interpretation of the Espionage Act for Washington DC to cover leaks that wouldn't even harm the US.

Judge Colleen Kollar-Kotelly ruled that the prosecution in the pending case of former State Department contractor Stephen Kim need not show that the information he allegedly leaked could damage U.S. national security or benefit a foreign power, even potentially. Her opinion was a departure from a 30 year old ruling in the case of *U.S. v. Morison*, which held that the government must show that the leak was potentially damaging to the U.S. or beneficial to an adversary. (In that case, Samuel L. Morison was convicted of unauthorized disclosure of classified intelligence satellite photographs, which he provided to Jane's Defence Weekly. He was later pardoned by President Clinton.)

"The Court declines to adopt the *Morison* court's construction of information relating to the 'national defense' insofar as it requires the Government to show that disclosure of the information would be potentially damaging to the United States or useful to an enemy of the United States," Judge Kollar-Kotelly wrote in a May 30 opinion. The opinion was redacted and unsealed (in partially illegible form) last week.

The prosecution must still show that the defendant "reasonably believed" that the information "could be used to the injury of the United States or to the advantage

of a foreign nation” and that the defendant “willfully” communicated it to an unauthorized person. But it would no longer be necessary for prosecutors to demonstrate that the information itself could potentially damage national security or benefit an adversary.

Imagine how this ruling could empower prosecutors in the AP UndieBomb 2.0 investigation, in which the AP’s story reported only that the US had thwarted an UndieBomb plot. They didn’t report it until after the White House said they had cleared up a sensitive issue relating to the plot (which in practice ended up being the drone death of Fahd al-Quso).

This would make it easier for the government to prosecute AP’s sources for leaking information that even the government had suggested, to the AP, wouldn’t harm US interests.

And of course, all that builds on top of the now routine treatment of leaks to the press as Espionage, something fairly unusual before the Obama Administration.

Frightening.