

Questions for the Record from the Senate Committee on the Judiciary,
Subcommittee on Terrorism and Homeland Security Hearing,
“The Espionage Statutes: A Look Back and A Look Forward”

Question from Senator Cardin

During the Subcommittee hearing, reference was made to the *Rosen and Weissman* case. In that case, the District Court held that the government was required to prove, in a prosecution involving the transmittal of *intangible* “national defense information” under section 793(e), that the defendant had reason to know that the information he or she transmitted could harm the United States. What is your view as to the impact of the lower court’s ruling on the government’s ability to prosecute: (a) classic espionage cases; and (b) cases involving government employees or private persons who may have motives other than intending to harm the United States or aid a foreign country?

Response from Ken Wainstein

The District Court in United States v. Rosen and Weissman issued two rulings that could raise the government’s burden in a leak prosecution. First, the Court required the government to show that the defendant *knew* that disclosure of the information he allegedly leaked was potentially harmful to the United States. This added to the statutory element in a case involving the disclosure of intangible (oral) national defense information that the defendant “ha[d] reason to believe [that information] could be used to the injury of the United States or to the advantage of any foreign nation.” Second, the Court decided that in a case involving conspiracy to leak intangible national defense information, the defendant can be found guilty only if he “*intended* that such injury to the United States or aid to a foreign nation result from the disclosures.”

Were these additional elements required by the judge in U.S. v. Rosen and Weissman to be applied in other cases, there would be an impact on the government’s ability to prosecute under the espionage statutes. The impact would probably not be that significant in cases involving classic espionage, as the government typically has strong evidence that the defendant knew and intended that his disclosure would injure the United States and aid a foreign government.

The impact could be significant, however, in the prosecution of cases involving the leak of classified information from a government employee to the media, the type of case that was the focus of our May 12, 2010 hearing. The government may be able to surmount the first additional element and prove that a government employee charged with such a leak knew that the disclosure was potentially harmful to the United States. It could often do that by eliciting testimony that the classification system is based on potential harm to the United States and that the defendant employee received instruction or training to that effect.

The real difficulty arises with the second requirement imposed in the Rosen and Weissman case -- that the defendant intended to injure the United States or aid a foreign

nation with the disclosure to the media. As we discussed at the hearing, media leakers are often motivated by interests having nothing to do with injuring our government or aiding another. Some are motivated, for example, by the feeling of self-importance they derive from showing others they are in the know, while others might be leaking information out of a genuine desire to improve the government by exposing and righting a perceived wrong in the government's operations -- both motives that would likely not satisfy the intent element in the Rosen and Weissman case. In the latter case, for example, the leaker is acting based on his perception that disclosure will enhance, rather than injure, the interests of the United States. As a result, the prosecution of such a leaker will be handicapped if the government has to prove that he intended to harm the U.S. or aid a foreign nation, with the result that the already challenging cases involving media leaks will become even more difficult to prosecute.
