[This could be put forward as Section 791 of Chapter 37 of Title 18 or an amendment to the "baby espionage" provision found at 50 U.S.C. 783.]

Section ___ UNAUTHORIZED DISCLOSURE

(a) PROHIBITION.--Whoever, being an officer or employee of the United States, a former or retired officer or employee of the United States, any other person with authorized access to classified information, or any other person formerly with authorized access to classified information, knowingly and willfully discloses, or attempts to disclose, with intent or reason to believe that the disclosure will harm national security, any classified information involving or relating to foreign intelligence, counterintelligence, or covert action and acquired as a result of such person's authorized access to classified information to a person (other than an officer or employee of the United States) who is not authorized access to such classified information, knowing or having reason to know that the person is not authorized access to such classified information, shall be fined not more than $10,000, imprisoned not more than 3 years, or both.

(b) LIMITATION.—Nothing in this section shall be construed to apply to the press.

(c) DEFINITION.—In this section:

(1) the term "authorized", in the case of access to classified information, means having authority or permission to have access to the classified information pursuant to the provisions of a statute, Executive Order, regulation, or directive of the head of any department or agency who is empowered to classify the information, an order of any United States court, or a provision of any Resolution of the Senate or Rule of the House of Representatives which governs release of classified information by the respective House of Congress; and

(2) the term "officer or employee of the United States" means civil officers and employees (as defined in sections 2104 and 2105 of Title 5) and officers and enlisted members of the armed forces (as defined in section 1010 of Title 10); and

(3) the term "classified information" means information or material designated and clearly marked or represented, or that the person knows or has reason to believe has been determined by appropriate authorities, pursuant to the provisions of a statute or Executive Order,

as requiring protection against unauthorized disclosure for reasons of national security; and

(4) the term "foreign intelligence" means foreign intelligence as defined in section 3 of the National Security Act of 1947, as amended (50 USC 401a); and

(5) the term "counterintelligence" means counterintelligence as defined in section 3 of the National Security Act of 1947, as amended (50 USC 401a); and

(6) the term "covert action" means covert action as defined in section 503(e) of the National Security Act of 1947, as amended (50 USC 413b).

and §§ 791, 792, 794, 2388 and 3241 of this title]. U.S. v. American Socialist Soc., S.D.N.Y.1919, 260 F. 885, affirmed 266 F. 212, certiorari denied 41 S.Ct. 12, 254 U.S. 637, 65 L.Ed. 451.

Statute prohibiting anyone with documents relating to the national defense from wilfully delivering them to any person not entitled to receive them applied to conduct of government employee in "leaking" information to a British magazine. U.S. v. Morison, D.C.Md.1985, 604 F.Supp. 655, appeal dismissed 774 F.2d 1156.

Statute prescribing punishment for one who "permits" classified information to be removed from proper place of custody does not necessarily imply the involvement of third party, and statute applied to accused who inadvertently removed classified materials along with personal effects from his desk. U.S. v. Roller, U.S. Armed Forces 1995, 42 M.J. 264, certiorari denied 116 S.Ct. 676, 516 U.S. 1029, 133 L.Ed.2d 524.

10. Instruments or appliances

Evidence established that radar receivers, accessory power units and radar transmitter repossessed from plaintiff by Navy Department were "instruments" or "appliances" "relating to national defense" within this section. Dubin v. U. S., Ct.Cl.1966, 363 F.2d 938, 176 Ct.Cl. 702, certiorari denied 87 S.Ct. 1019, 386 U.S. 956, 18 L.Ed.2d 103.

11. Elements of offense

There is no requirement of bad faith purpose on part of accused under Federal Espionage Act provision prohibiting willfully retaining classified information. U.S. v. McGuinness, CMA 1992, 35 M.J. 149, certiorari denied 113 S.Ct. 1364, 507 U.S. 951, 122 L.Ed.2d 743.

Conduct prohibited by espionage statute presupposes compromise of classified material through gross negligence by one who has authorized possession of, or has been entrusted with, the material by permitting it to be removed from its proper place of custody by third party. U.S. v. Chattin, NMCMR 1991, 33 M.J. 802, review granted in part 35 M.J. 208, affirmed 36 M.J. 374, certiorari denied 113 S.Ct. 1365, 507 U.S. 951, 122 L.Ed.2d 743.

In retaining classified documents which accused had reason to know could be used to the injury of the United States or to the advantage of a foreign nation, and by failing to return them to duly authorized officer, accused violated provision of the Federal Espionage Act prohibiting a person who has possession of classified information from willfully retaining it and failing to deliver it. U.S. v. McGuinness, NMCMR 1991, 33 M.J. 781, review granted in part 35 M.J. 209, affirmed 35 M.J. 149, certiorari denied 113 S.Ct. 1364, 507 U.S. 951, 122 L.Ed.2d 743.

12. Knowledge and intent

Scienter, that is, intent or reason to believe that information to be obtained is to be used to injury of the United States, or to advantage of any foreign nation, is essential element under this section and section 794 of this title. U.S. v. Enger, D.C.N.J.1978, 472 F.Supp. 490.

13. Negligence

Accused's failure to safeguard classified material after discovering that he had removed it from its place of custody violated his continuing duty to safeguard information when it was discovered and taken away by unauthorized third parties; while not authorized to have material with him outside secure area, accused was nevertheless entrusted with its care once he discovered it was in his possession. U.S. v. Roller, NMCMR 1993, 37 M.J. 1093, review granted in part 39 M.J. 385, affirmed 42 M.J. 264, certiorari denied 116 S.Ct. 676, 516 U.S. 1029, 133 L.Ed.2d 524.

14. Injury

Under former §§ 31 to 42 of Title 50 [now this section and §§ 791, 792, 794, 2388 and 3241 of this title] providing for the punishment of persons who obtain or deliver information relating to the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, the evil punished was the obtaining or furnishing of the guarded information either to the hurt of the United States or to the gain of another nation, and it was not necessary to prove that the "advantage" to a foreign nation was an advantage as against the United States and that the information obtained was to be used to the injury of the United States. Gorin v. U.S., U.S.Cal.1941, 61 S.Ct. 429, 312 U.S. 19, 85 L.Ed. 488, rehearing denied 61 S.Ct. 617, 312 U.S. 713, 85 L.Ed. 1144, rehearing denied 61 S.Ct. 618, 312 U.S. 713, 85 L.Ed. 1144.

Actual harm or benefit need not be proven by the Government before a service member can be found guilty of espionage activity in violation of statute; Government need only prove that the information was intended to be used to injure or advantage. U.S. v. Allen, NMCMR 1990, 31 M.J. 572, review granted in part 32 M.J. 222, affirmed 33 M.J. 209, certiorari denied 112 S.Ct. 1473, 503 U.S. 936, 117 L.Ed.2d 617.

15. Diplomatic immunity

Unilateral action by the Union of Soviet Socialist Republics in granting defendants charged with espionage a diplomatic rank of second secretary, whatever its import within the Soviet Union, was of no extraterritorial effect and did not confer diplomatic immunity upon defendants charged with espionage. U.S. v. Enger, D.C.N.J.1978, 472 F.Supp. 490.

Even if United Nations employee had received American diplomatic visa, such circumstance per se would not be of decisive importance in ruling on his claim of diplomatic immunity from criminal prosecution. U. S. v. Melekh, S.D.N.Y.1960, 190 F.Supp. 67.

An alien who was an employee of the United Nations who was never notified to the United States as attached to the Soviet Embassy or recognized by Department of State as one entitled to diplomatic immunity, who was not eligible to receive American diplomatic visa, who did not receive American visa, but who, on each occasion when he received an American visa, received a nondiplomatic one, was not entitled to immunity from criminal prosecution, notwithstanding facts that his government had conferred diplomatic rank upon him and that he had entered United States on diplomatic passport. U. S. v. Melekh, S.D.N.Y.1960, 190 F.Supp. 67.

Charter of the United Nations, art. 105, granting to representatives of members such privileges and immunities as are necessary for independent exercise of their function granted no immunity from prosecution on indictment charging conspiracy to violate this section and § 951 of this title relating to representatives of foreign governments against alien who was employee of United Nations and whose only claim to diplomatic immunity came from original appointment to diplomatic rank by his government and from diplomatic passport. U. S. v. Melekh, S.D.N.Y.1960, 190 F.Supp. 67.

Third Secretary of the Ministry of Foreign Affairs of the U.S.S.R., who had a Soviet diplomatic passport bearing a United States diplomatic visa, and who was an employee of the United Nations, was not clothed with diplomatic immunity, so as to be immune to prosecution for conspiracy to violate and for violation of this section, where he did not enter as an emissary from the U.S.S.R. to the United States, was never received as such, was never attached to Soviet embassy, and never acted in a diplomatic capacity in United States. US v. Coplon, S.D.N.Y. 1950, 88 F.Supp. 915.

Certification by the Department of State of the United States that Third Secretary of the Ministry of Foreign Affairs of the U.S.S.R. who was employed by the United Nations, did not enjoy diplomatic status in the United States so as to be clothed with diplomatic immunity, was binding on district court in prosecution for conspiracy to violate and for violation of this section. US v. Coplon, S.D.N.Y. 1950, 88 F.Supp. 915.

The status of a citizen of the Union of Soviet Socialist Republics as employee of United Nations conferred upon him no privilege or immunity which would constitute obstacle to his apprehension, trial or conviction for offenses of conspiracy to violate and of violations of this section. US v. Coplon, S.D.N.Y.1949, 84 F.Supp. 472.

16. Title to or possession of appliances

Plaintiff's title to and possession of radar receivers and accessory power units and radar transmitters which were instruments or appliances relating to national defense within this section were completely vulnerable so that all that was required to destroy them was demand for possession by proper official. Dubin v. U. S., Ct.Cl.1966, 363 F.2d 938, 176 Ct. Cl. 702, certiorari denied 87 S.Ct. 1019, 386 U.S. 956, 18 L.Ed.2d 103.

Under this section, plaintiff, though lawfully in possession of government property relating to national defense because of mistake made by government employees, had no right to keep possession of the property, and his keeping it,

1144, rehearing denied 61 S.Ct. 618, 312 U.S. 713, 85 L.Ed. 1144.

Former § 31 of Title 50 [now this section], construed as presenting a question of fact for determination of the jury regarding what was or was not connected with the "national defenses", did not violate U.S.C.A.Const. Amends. 5 and 6. Gorin v. U.S., U.S.Cal.1941, 61 S.Ct. 429, 312 U.S. 19, 85 L.Ed. 488, rehearing denied 61 S.Ct. 617, 312 U.S. 713, 85 L.Ed. 1144, rehearing denied 61 S.Ct. 618, 312 U.S. 713, 85 L.Ed. 1144.

Former §§ 31 to 42 of Title 50 [now this section and §§ 791, 792, 794, 2388 and 3241 of this title] were constitutional. U.S. ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, U.S.Dist.Col.1921, 41 S.Ct. 352, 255 U.S. 407, 65 L.Ed. 704. See, also, O'Connell v. U.S., Cal.1920, 40 S.Ct. 444, 253 U.S. 142, 64 L.Ed. 827.

Former §§ 31 to 42 of Title 50 [now this section and §§ 791, 792, 794, 2388 and 3241 of this title] were not unconstitutional as an entirely, because in conflict with U.S.C.A.Const. Amend. 1, guaranteeing freedom of speech and of the press. Abrams v. U.S., U.S.N.Y.1919, 40 S.Ct. 17, 250 U.S. 616, 63 L.Ed. 1173, 17 Ohio Law Rep. 367, 17 Ohio Law Rep. 415. See, also, Equi v. U.S., Or.1919, 261 F. 53, 171 C.C.A. 649, certiorari denied 40 S.Ct. 219, 251 U.S. 560, 64 L.Ed. 414.

The contention that some of the matters dealt with in former §§ 31 to 42 of Title 50 [now this section and §§ 791, 792, 794, 2388 and 3241 of this title] were punishable under the Constitution as treasonable, or not at all, and that alleged attempt to cause disloyalty, mutiny, and refusal of military and naval duty, denounced by the law, cannot be punished, not being treason, was unsound. Frohwerk v. U.S., U.S.Mo.1919, 39 S.Ct. 249, 249 U.S. 204, 63 L.Ed. 561.

Subsec. (f) (2) of this section governing the reporting of the abstraction of a document relating to national defense is not unconstitutionally vague because of its lack of a scienter requirement since injury to the United States can be inferred from conduct of the sort charged. U. S. v. Dedeyan, C.A.4 (Md.) 1978, 584 F.2d 36.

Phrase "not entitled to receive" in statute prohibiting those with access to national defense information from wilfully communicating, delivering, or transmitting the information to a person not entitled to receive it was not unconstitutionally vague as applied to defendant who "leaked" information to a British magazine, as authorization to possess documents and entitlement to receive them could be determined by reference to classification system under which defendant worked as a government employee. U.S. v. Morison, D.C.Md.1985, 604 F.Supp. 655, appeal dismissed 774 F.2d 1156.

Application of Federal Espionage Act to case where accused had appropriate security clearance and initially came into possession of classified documents in performance of his official duties did not violate Fifth Amendment notice requirement; accused was clearly on notice he was not authorized to retain classified materials and store them in his home given that he told military judge during his plea inquiry that he had worked with classified materials for the past 16 years and he knew he had no authority to retain the materials and store them in his home. U.S. v. McGuinness, CMA 1992, 35 M.J. 149, certiorari denied 113 S.Ct. 1364, 507 U.S. 951, 122 L.Ed.2d 743.

2. Construction

Considered in conjunction with structure and purposes of Espionage Act as a whole and with other sections of the Act in pari materia with it, statute prohibiting those with access to national defense information from wilfully communicating, delivering, or transmitting the information to a person not entitled to receive it was not intended to apply narrowly to "spying" but was intended to apply to disclosure of secret defense material to anyone "not entitled to receive it." U.S. v. Morison, C.A.4 (Md.) 1988, 844 F.2d 1057, certiorari denied 109 S.Ct. 259, 488 U.S. 908, 102 L.Ed.2d 247.

3. Construction with other laws

Section 484 of Title 40 with respect to the disposal of surplus government property was intended to protect purchasers against the peril of failure of the selling government officers to take all preliminary steps required by that section to make the property available for sale to the public and was not intended to make it lawful, in the face of this section for [illegible] U.S. v. Allen,

4. Power of Congress

Congress has power to break down into separate offenses various aspects of espionage activity and to make each separate aspect punishable. Boeckenhaupt v. U. S., C.A.4 (Va.) 1968, 392 F.2d 24, certiorari denied 89 S.Ct. 162, 393 U.S. 896, 21 L.Ed.2d 177.

5. Prior law

Under former §§ 31 to 42 of Title 50 [now this section and §§ 791, 792, 794, 2388 and 3241 of this title] it was a crime to obtain or deliver with intent or reason to believe that they are to be used to the injury of the United States, or to the advantage of a foreign nation, things described in sections referring to any sketch, photograph, plan, model, etc., connected with the national defense, and any document, writing, sketch, photograph, etc., relating to the national defense without regard to their connection with places and things listed in former § 31 of Title 50 [now this section] relating to any vessel, aircraft, work of defense, etc., connected with the national defense. Gorin v. U.S., U.S.Cal.1941, 61 S.Ct. 429, 312 U.S. 19, 85 L.Ed. 488, rehearing denied 61 S.Ct. 617, 312 U.S. 713, 85 L.Ed. 1144, rehearing denied 61 S.Ct. 618, 312 U.S. 713, 85 L.Ed. 1144.

6. Offenses

Under international law, spying is not a crime, and the offense against the laws of war consists of being found during the war in the capacity of a spy. U.S. v. McDonald, E.D.N.Y.1920, 265 F. 754, appeal dismissed 41 S.Ct. 535, 256 U.S. 705, 65 L.Ed. 1180.

This section prescribing penalty for loss of classified messages through gross negligence may be applied to continuing illegal acts. U. S. v. Gonzalez, AFCMR 1981, 12 M.J. 747, affirmed 16 M.J. 428.

7. Information

Information communicated and delivered or attempted to be communicated and delivered need not be classified to constitute a violation of espionage statute prohibiting communication of information relating to the national defense, if the information requested is not generally accessible to the public. U.S. v. Allen,

8. National defense

Under former §§ 31 to 42 of Title 50 [now this section and §§ 791, 792, 2388 and 3241 of this title] providing for the punishment of persons obtaining or delivering information connected with or relating to the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, the term "national defense" was a generic concept of broad connotations and referred to the military and naval establishments and the related activities of national preparedness. Gorin v. U.S., U.S.Cal.1941, 61 S.Ct. 429, 312 U.S. 19, 85 L.Ed. 488, rehearing denied 61 S.Ct. 617, 312 U.S. 713, 85 L.Ed. 1144, rehearing denied 61 S.Ct. 618, 312 U.S. 713, 85 L.Ed. 1144.

Classified government documents transmitted to representatives of Socialist Republic of Vietnam during 1977 Paris negotiations between that country and the United States by defendants, which included information relating directly to United States military, American POW's in Indochina and names of sources for intelligence in Vietnamese government, related to the national defense within meaning of this section. U. S. v. Truong Dinh Hung, C.A.4 (Va.) 1980, 629 F.2d 908.

9. Persons within section

Espionage statutes, prohibiting those with access to national defense information from wilfully communicating, delivering, or transmitting the information to a person not entitled to receive it, applied to military intelligence employee who made unauthorized transmittal of satellite-secured photographs to periodical publisher. U.S. v. Morison, C.A.4 (Md.) 1988, 844 F.2d 1057, certiorari denied 109 S.Ct. 259, 488 U.S. 908, 102 L.Ed.2d 247.

Subsec. (f) (2) of this section requiring the reporting of the abstraction of a document relating to national defense is applicable to a civilian mathematician working on United States Department of Defense contracts in private industry. U. S. v. Dedeyan, C.A.4 (Md.) 1978, 584 F.2d 36.