

CLASSIFIED INFORMATION LEAKS AND FREE SPEECH

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This article provides a timely response to the recent trend toward “cracking down” on classified information leaks and the absence of significant scholarship, theory, and doctrine on classified information leaks. The article begins by explaining the President’s vast secret-keeping capacity and the capacity’s manifestation in the classification system. This capacity is particularly manifest in the problems, at least partly intrinsic, of broad executive branch classification discretion and overclassification. The author then describes the major constitutional arguments for deference to political branch decisions to criminalize classified information leaks and publication of the same: such leaks are not speech but conduct; such leaks—even if speech—fall within the political branches’ wide ranging power to protect national security; and the judiciary lacks the expertise to second-guess such political branch decision making. The author refutes these arguments by explaining that a common thread underlying them is the notion of vast deference to political branch—particularly executive branch—determinations regarding what information disclosures constitute national security threats. The author contends that this notion’s fatal flaw is that the Constitution’s speech- and transparency-related checks and balances not only do not vanish upon the wielding of a classification stamp, but are of special constitutional importance in this context given the vast secret-keeping capacities of the executive branch. Finally, the author considers the doctrinal implications of the preceding analysis and proposes judicial standards to test the First Amendment validity of prosecutions for classified information leaks.

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INTRODUCTION

Currently pending in the Eastern District of Virginia is an unprecedented prosecution under the Espionage Act of 1917.¹ Judge Ellis, the District Court Judge in the case, writes that “defendants are accused of the unauthorized possession of information relating to the national defense, which they then orally communicated to others, *all within the context of seeking to influence United States foreign policy relating to the Middle East by participating in the public debate on this policy.*”² The case, *United States v. Rosen & Weissman*, marks the first reported prosecution by the U.S. government against private citizens for exchanging classified information in the course of concededly nonespionage activities—specifically, political lobbying.³ Never before has such a prosecution been brought against members of the general public or the press, as opposed to current or former government employees.⁴ Until 2005, only a single Espionage Act prosecution had been brought at all for activities—such as publication or lobbying—outside of a classic espionage or spying context.⁵

Judge Ellis denied the defendants’ motion to dismiss the indictment, deeming their alleged communications within the purview of the Espionage Act and deeming any First Amendment concerns satisfied.⁶ The latter conclusion was based on his interpretation of the statute as covering sufficiently narrow categories of information, including classified information that relates to the national defense, that could potentially

1. *United States v. Rosen*, No. 1:05cr225 (E.D. Va. May 8, 2007).

2. *See United States v. Rosen*, No. 1:05cr225, slip op. at 42 (E.D. Va. Aug. 9, 2006) (emphasis added).

3. *See infra* notes 4–5 and accompanying text; *see also United States v. Rosen*, No. 1:05cr225 at 42 (order denying motion to dismiss, Aug. 9, 2006); Memorandum of Law in Support of Defendants Steven J. Rosen’s and Keith Weissman’s Motion to Dismiss the Superseding Indictment at 2–7, 11, *United States v. Rosen*, No. 1:05cr225 (E.D. Va. Jan. 19, 2006) [hereinafter *Rosen’s & Weissman’s Memorandum of Law in Support of Motion to Dismiss*].

4. *See* Nat Hentoff, *Chilling Free Speech*, WASH. TIMES, May 8, 2006, at A19; Scott Shane & David Johnston, *Pro-Israel Lobbying Group Roiled by Prosecution of Two Ex-Officials*, N.Y. TIMES, Mar. 5, 2006, at N21 (“Federal prosecutors are using the Espionage Act for the first time against Americans who are not government officials, do not have a security clearance and, by all indications, are not a part of a foreign spy operation.”).

5. *Rosen’s and Weissman’s Memorandum of Law in Support of Motion to Dismiss*, *supra* note 3, at 11 (citing statement by Attorney General John Ashcroft, *Report to Congress on Unauthorized Disclosures of Classified Information* (Oct. 15, 2002)). This Article uses the single prosecution figure cited by Attorney General Ashcroft. The Ashcroft reference is to *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), discussed *infra* at Part II.A.2. There was, however, an additional prosecution brought in the 1970s against Daniel Ellsberg for leaking the Pentagon Papers. Ellsberg was indicted and the case went to trial, but the case was dismissed before a verdict due to government improprieties. *See* SANFORD J. UNGAR, *THE PAPERS & THE PAPERS* 242, 274 (1972); Eli J. Lake, *Trouble for Journalists: Low Clearance*, NEW REPUBLIC, Oct. 10, 2005, at 13, available at <http://www.tnr.com/doc.mhtml?i=20051010&s=lake101005>.

6. *Rosen*, No. 1:05cr225 at 25–28, 47–49, 58–59 (order denying motion to dismiss, Aug. 9, 2006).

harm the United States if disclosed, and that defendants knew could cause such harm.⁷

Judge Ellis's view of this category's narrowness notwithstanding, it could encompass wide swaths of information central to policymaking, to effective journalism and to public oversight.⁸ Indeed, when one considers the rampant problem of overclassification⁹ and the ease with which information can be deemed to relate to the national defense and to be potentially harmful if disclosed, it is difficult to envision any important foreign- or defense-policy information that could not reasonably be deemed within the category. As one observer writes, "[n]ational-security reporters can't cover the beat without encountering information that brings them crashing into [the Espionage Act.]"¹⁰ Another notes:

[I]f it's illegal for Rosen and Weissman to seek and receive "classified information," then many investigative journalists are also criminals—not to mention former government officials who write for scholarly journals or the scores of men and women who petition the federal government on defense and foreign policy. In fact, the leaking of classified information is routine in Washington, where such data is traded as a kind of currency. And, while most administrations have tried to crack down on leaks, they have almost always shied away from going after those who receive them—until now. At a time when a growing amount of information is being classified, the prosecution of Rosen and Weissman threatens to have a chilling effect—not on the ability of foreign agents to influence U.S. policy, but on the ability of the American public to understand it.¹¹

United States v. Rosen & Weissman reflects a broader trend toward cracking down on classified information leaks.¹² The Bush administration and some of its supporters have argued for some time that the Espionage Act provides a statutory basis to prosecute both government employees who leak classified information, and journalists and members of the public who pass on or even willingly receive such information.¹³

7. *Id.*; Transcript of Hearing on Motions at 10–11, *United States v. Rosen*, No. 1:05cr225 (E.D. Va. Nov. 16, 2006).

8. For discussion of statute's potential breadth as so interpreted, see *infra* notes 151–56 and accompanying text.

9. See *infra* Part I.C.2.

10. Jack Shafer, *A Gitmo for Journalists*, SLATE, Mar. 14, 2006, <http://www.slate.com/id/2138058/>.

11. Lake, *supra* note 5, at 16.

12. See, e.g., Gail Russell Chaddock, *A Surge in Whistle-Blowing . . . and Reprisals*, CHRISTIAN SCI. MONITOR, Feb. 16, 2006, at 1, available at <http://www.csmonitor.com/2006/0216/p01s01-uspo.html>; Porter Goss, Op-Ed., *Loose Lips Sink Spies*, N.Y. TIMES, Feb. 10, 2006, at A25; Hentoff, *supra* note 4.

13. See, e.g., *A Sudden Taste for the Law*, N.Y. TIMES, May 24, 2006, at A26; Hentoff, *supra* note 4; Walter Pincus, *Press Can Be Prosecuted for Having Secret Files, U.S. Says*, WASH. POST, Feb. 22, 2006, at A3; Gabriel Schoenfeld, *Has the New York Times Violated the Espionage Act?*, COMMENT., Mar. 2006, at 23, available at <http://www.commentarymagazine.com/viewarticle.cfn?id=10036>; Scott Sherman, *Chilling the Press*, NATION, July 17, 2006, at 4, available at <http://www.thenation.com/doc/20060717/sherman>; Scott Johnson, *Did the New York Times Break the Law With its Wire-Tapping Story?*, WKLY. STANDARD, Jan. 24, 2006, http://www.weeklystandard.com/Utilities/printer_preview.asp?idArticle=6631&R=EB9524AED (last visited Jan. 27, 2008); Fred Kaplan, *Spies Like Us*, SLATE,

They suggest further that such prosecutions are consistent with the First Amendment.¹⁴

Another example of this trend is the response of the Bush Administration to the leak of the classified program in which the National Security Agency for years spied without warrants, and in apparent contravention of statutory authority, on Americans' international phone calls.¹⁵ The administration has gone on the offensive in response to these leaks, threatening to prosecute journalists and their sources.¹⁶ A grand jury was convened to investigate the leaks.¹⁷ The administration also has used the program's classified status defensively, denying security clearance to Justice Department ethics attorneys to investigate the leaks and thus shutting down the investigation.¹⁸

As these examples demonstrate, the ability to classify information is an enormously powerful tool of the modern presidency. And the underdeveloped and deeply undertheorized state of the law on classified information leaks has left a major analytical vacuum. This vacuum is susceptible to being filled with a reflexive willingness to slash informed public debate at its root in the name of national security.

The central chasm in existing theory and doctrine on classified information leaks—apart from how little of it exists—is that it fails to adequately integrate the separation of powers and free speech issues raised by the punishment of such leaks. Supporters of wide discretion to punish leaks invoke two closely related arguments. First, they argue that such leaks are not speech in the first place but are conduct that fall within the discretion of the political branches, particularly the executive branch, to punish. Second, they argue that even if such leaks are speech, their relationship to national security means that the political branches, particularly the executive branch, must have wide discretion to punish them.¹⁹ Conversely, opponents of broad leak punishments tend to focus pre-

Mar. 17, 2006, <http://www.slate.com/id/2138277/> (last visited Jan. 27, 2008); Jack Shafer, *Bill Keller in Chains*, SLATE, Mar. 9, 2006, <http://www.slate.com/id/2137792/> (last visited Jan 27, 2008).

14. See, e.g., *United States v. Rosen*, No. 1:05cr225, slip op. at 40 (E.D. Va. Aug. 9, 2006) (order denying motion to dismiss) (citing government's "proposed categorical rule that espionage statutes cannot implicate the First Amendment"); *Does the First Amendment's Freedom of the Press Clause Place the Institutional Media Above the Law of Classified Secrets?: Hearing Addressing Obligations of the Media With Respect to Publication of Classified Information Before the H. Permanent Select Comm. on Intelligence*, 109th Cong. 6 (2006) [hereinafter *Eastman Statement*] (statement of Dr. John C. Eastman); Hentoff, *supra* note 4; Johnson, *supra* note 13.

15. See, e.g., Heidi Kitrosser, "Macro-Transparency" as Structural Directive: A Look at the NSA Surveillance Controversy, 91 MINN. L. REV. 1163, 1163-64 (2007).

16. See, e.g., *A Sudden Taste for the Law*, *supra* note 13; Hentoff, *supra* note 4; Pincus, *supra* note 13; Sherman, *supra* note 13; Shafer, *supra* note 13.

17. See Scott Shane, *Leak of Classified Information Prompts Inquiry*, N.Y. TIMES, July 29, 2006, at A10.

18. See Neil A. Lewis, *Bush Blocked Ethics Inquiry, Official Says*, N.Y. TIMES, July 19, 2006, at A14; Eric Lichtblau & Scott Shane, *Bush is Pressed Over New Report on Surveillance*, N.Y. TIMES, May 12, 2006, at A1; Scott Shane, *With Access Denied, Justice Dept. Drops Spying Investigation*, N.Y. TIMES, May 11, 2006, at A34; *Tap-Dancing as Fast as He Can*, N.Y. TIMES, July 20, 2006, at A20.

19. See *infra* Part II.

dominantly on the First Amendment and do not engage the separation of powers arguments in any depth. Arguments for First Amendment protection thus are vulnerable to objections based on the power of the political branches, and especially of the President, to designate and protect national security secrets.²⁰

Ironically, confronting the separation of powers arguments not only makes arguments for broad speech protections more complete, but substantially bolsters them. Such confrontation makes plain several points. First, as a descriptive matter, the classification system is largely a product of wide-ranging executive branch discretion that breeds rampant overclassification.²¹ Second, these two features—broad executive discretion and vast overclassification—are, to a degree, intrinsic in any classification system and in fact are an outgrowth of the President's constitutional capacity to keep secrets.²² Third, the vast range of information classified makes it largely inevitable that leaks often will provide information about vital public policy issues. It is entirely antithetical to First Amendment doctrine and theory for such information exchanges to be made illegal by little more than the wielding of a classification stamp.²³ Fourth, the relationship of such speech to national security does not place it solely within the control of the political branches. To the contrary, the national security related powers of the political branches—particularly the executive branch's vast secret-keeping capacity—makes speech and transparency related checks particularly crucial in this realm.²⁴

In short, once lie is given to the notions that classified information leaks are not speech and that classification status is presumptively reliable, the core question is whether the Constitution nonetheless counsels substantial deference to political branch judgments regarding national security related speech suppression. The answer is no, not simply because government speech suppression in this context is as dangerous as in other contexts, but because such suppression in fact is more dangerous in this than in other contexts. As suggested above, the President's Article II capacities enable him to oversee a vast classification system. This can be inferred from constitutional structure and history, and also has been borne out over time as the classification system and the administrative infrastructure to implement it have grown dramatically.²⁵ But with such capacity for, and realization of, a secrecy system, come substantial implications for an informed populace and hence for the First Amendment and the very structure of self-government. And the particular form of Presidential secrecy that is classification is so broad and so scattered in

20. *See infra* Part III.C.2.a.

21. *See infra* Part I.C.

22. *See infra* Part I.C.

23. *See infra* Parts I.C, III.

24. *See infra* Part III.

25. *See infra* Part I.

its manifestations that it cannot effectively be matched through discrete information requests from Congress or other government players. Instead, the First Amendment demands some breathing room for disclosure by those within the vast secret-keeping infrastructure as well as by the press and the public to whom information might be leaked.²⁶

This analysis explains the intuition that the press and the public should be very highly protected from prosecution for classified information publication. This intuition is largely correct, although it does not preclude punishment that would meet stringent First Amendment standards.²⁷ This Article's analysis also sheds light on the constitutional balance that must be struck in prosecuting government employees for information leaks. On the one hand, government employees serve as functionaries of Article II, subject to Presidential judgments with respect to national security secrets. In this sense, they bear an Article II responsibility that the press and the general public lack. On the other hand, they have special First Amendment value given their access to information within a vast and powerful secret-keeping system. Government employees thus merit a more moderate level of protection than do the press and the public, but a level substantially greater than that reflected by the automatic or presumptive criminalization of classified information leaks.²⁸

Part I explains the President's vast secret-keeping capacity and the capacity's manifestation in the classification system. This capacity is particularly manifest in the problems, at least partly intrinsic, of broad executive branch classification discretion and vast overclassification. Part II describes the major constitutional arguments for deference to political branch decisions to criminalize classified information leaks: such leaks are not speech but conduct; such leaks—even if speech—fall within the political branches' wide-ranging power to protect national security; and the judiciary lacks the expertise to second-guess such political branch decision making. Part III refutes these arguments. It explains that a common thread underlying them is the notion of vast deference to political branch—particularly executive branch—determinations regarding what constitutes a national security threat. It contends that this notion's fatal flaw is that the Constitution's speech and transparency related checks and balances not only do not vanish upon the wielding of a classification stamp, but are of special constitutional importance in this context given the vast secret-keeping capacities of the executive branch. Part IV considers the doctrinal implications of the analysis preceding it, proposing judicial standards to test the First Amendment validity of prosecutions for classified information leaks.

26. See *infra* Part III.

27. See *infra* Part III.C.2.b.i.

28. See *infra* Part III.C.2.b.ii.

I. THE SECRET-KEEPING CAPACITIES OF THE EXECUTIVE BRANCH

A. *The President's Evolving Constitutional Capacity for Secret-Keeping*

It is well-known that the presidential office was designed in part to facilitate “secrecy [sic] . . . dispatch . . . vigor and energy.”²⁹ Alexander Hamilton famously extolled the presence of these qualities in the Constitution’s unitary President (as opposed to a multiheaded presidential office).³⁰ “Hamilton, positing that ‘[e]nergy in the executive is a leading character in the definition of good government,’ explained that ‘unity is conducive to energy’ because ‘[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number’”³¹ John Jay, also writing in *The Federalist*, praised the President’s capacity for secrecy in the context of treaty negotiations.³²

It is virtually inevitable that the President’s constitutional capacity for secrecy expands dramatically over time. First, secrets logically breed more secrets. For example, the execution of a project in secret naturally creates subsets of secrets as to the nature of the execution, including any mistakes made along the way.³³ This is true even if the fact of the project and its secret execution itself is public and even if the President does not stray from the project’s public parameters. Of course, in reality, very real risks also exist that a license to conduct one project in secret will lead to the unilateral undertaking of other, unauthorized secret projects under cloak of the authorized project.³⁴

Second, the ability of secrets to breed more secrets is particularly advanced in the context of policy execution, including the carrying out of military ventures. Such policy execution is precisely what the President is charged to do under the Constitution.³⁵ The discretion that necessarily inheres in policy execution, including the formation of subpolicies, makes

29. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 (Max Farrand ed., 1966) (quoting George Mason: “The chief advantages which have been urged in favor of unity in the Executive, are the secrecy [sic], the dispatch, the vigor and energy”); *id.* at 70 (quoting James Wilson to similar effect); see also Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 511–12, 521–22 (2007) (citing these historical points).

30. See THE FEDERALIST No. 70, at 423–24 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

31. Kitrosser, *supra* note 29, at 511 (quoting THE FEDERALIST No. 70 (Alexander Hamilton), *supra* note 30).

32. THE FEDERALIST No. 64 (John Jay), *supra* note 30, at 392.

33. See Kitrosser, *supra* note 29, at 494, 529 (referring to layers of secrets within secrets).

34. A current example of this is the recently revealed use of warrantless surveillance by the National Security Agency, which had been authorized by statute only to carry out warranted surveillance with warrants obtained in a special, secretive process. See, e.g., JAMES RISEN, STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION 42–59 (2006). Similar observations have been made about the CIA’s evolution. See KATHRYN S. OLMSTED, CHALLENGING THE SECRET GOVERNMENT: THE POST-WATERGATE INVESTIGATIONS OF THE CIA AND FBI 13 (1996) (noting that the CIA “had been established with minimal public debate at the dawn of the Cold War era and had taken on unanticipated duties in relative secrecy over the subsequent years”).

35. See U.S. CONST. art. II, § 1, cl. 1; *id.* at § 2; *id.* at § 3; see also Kitrosser, *supra* note 15, at 1167–73.

such execution rife with the potential to take new and unexpected turns.³⁶ To the extent that such execution is conducted in secret, layers of secrets necessarily accompany the layers of activity that take place.³⁷ This is true, again, even where the President does not veer from the parameters of the initial, publicly known project. It also is true regardless of whether courts have gone too far in permitting broad and ambiguous delegations by Congress to the executive branch.³⁸ Judicial constraints (or lack thereof) aside, executive discretion, including its policy-making elements, is intrinsic to the very fact of execution.³⁹

Third, the continuing advance of technology enhances the capacity of the government's "doer," meaning its executive. The Church Committee—a U.S. Senate Committee formed to investigate executive branch abuses—explained more than thirty years ago that "[n]ew technological innovations have markedly increased the [executive branch] agencies' intelligence collection capabilities, a circumstance which has greatly enlarged the potential for abuses of personal liberties."⁴⁰ This observation was made in tandem with the Committee's observation that "[t]he intelligence agencies are generally responsible directly to the President and because of their capabilities and because they have usually operated out of the spotlight, and often in secret, they have also contributed to the growth of executive power."⁴¹ Technology advances thus catalyze the vicious cycle of enhanced executive power and secrecy. Such advances enhance the executive's capacity to operate, thus increasing the layers of discretionary and secret activity that may occur. Secrecy also enhances executive power,⁴² thus increasing the range of executive activities that may be conducted in secret.

B. *Presidential Secrecy and Bureaucratic Secrecy*

The President's constitutional capacity for secrecy largely extends throughout, and is enhanced by the great breadth of, the executive branch. This is true both factually and theoretically. Factually, of course, the executive branch and its duties have expanded dramatically

36. See, e.g., *Printz v. United States*, 521 U.S. 898, 927 (1997) ("Executive action that has utterly no policymaking component is rare . . ."); *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("[A] certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action.").

37. See *supra* notes 33, 34.

38. See, e.g., *Mistretta*, 488 U.S. at 415–21 (Scalia, J., dissenting) (arguing that the *Mistretta* Court permitted too broad a legislative delegation and referring to the inevitability and longstanding acceptance of broad delegations generally).

39. See *supra* note 36 and accompanying text.

40. S. REP. NO. 94-755, pt. 1, at 10 (1976) (Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities Book I).

41. *Id.*

42. See, e.g., OLMSTED, *supra* note 34, at 96; ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 331–32 (1973).

throughout our nation's history.⁴³ And with that expansion have come equally dramatic rises in the amount of information kept secret and in the infrastructure to create and support official secrecy.⁴⁴ As explained in Subpart C, official secrecy has become a very large bureaucratic industry unto itself. This state of affairs is theoretically unsurprising, as it is a manifestation of the President's evolving constitutional secrecy capacity. As Saikrishna Prakash notes: "Without the assistance of Cabinet Secretaries, attorneys, file clerks, and millions of others, the Chief Executive would not be able to fully realize most, if not all, of his executive powers."⁴⁵ Of course, the President is constitutionally dependent on Congress to provide him with officers, departments, funding, and laws to execute.⁴⁶ Once created, however, these bureaucratic components absorb and enhance much of the President's constitutional capacity for secrecy. They benefit from, and add to, executive discretion in carrying out legislative delegations, executive capacity to use such discretion in secret, and executive ability to exploit technology.

These factual and theoretical points are consistent with basic theories of bureaucracy. As Max Weber notes:

Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of "secret sessions": in so far as it can, it hides its knowledge and action from criticism The concept of the "official secret" is the specific invention of bureaucracy, and nothing is so fanatically defended by the bureaucracy as this attitude⁴⁷

There is one caveat to the notion that the bureaucracy absorbs and enhances the President's constitutional capacity for secrecy. With the greater number of people who hold official secrets comes a greater potential for unauthorized information leaks. This, of course, raises the question at the heart of this article—whether such leaks are a constitutionally healthy and protected means to counteract the bureaucracy's vast secret-keeping capacity, or whether such leaks constitutionally may, perhaps even should, be punished. For purposes of this Subpart, it suffices to note descriptively that the potential for leaks grows with the number of official secrets and official secret-keepers.⁴⁸

43. See, e.g., OLMSTED, *supra* note 34, at 43–44; SCHLESINGER, JR., *supra* note 42, at viii–x.

44. See *infra* Part I.C.

45. Saikrishna Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1159 (1999).

46. *Id.* at 1154–64.

47. MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 233–34 (H.H. Gerth & C. Wright Mills trans. and eds., 1946), *quoted in* DANIEL PATRICK MOYNIHAN, *SECRECY* 143 (1998).

48. This observation has been made many times, perhaps most famously by Justice Stewart who observed that "when everything is classified, then nothing is classified." *N.Y. Times v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

C. *The Rise and Rise of the Classification System*

Nowhere is the secret-keeping capacity of the President—and of the executive branch by extension—more manifest than in the classification system. This Subpart explains some important aspects of the classification system's development and its current state.

1. *The Predominant Role of the Executive Branch*

Perhaps the most important characteristic of the classification system is that, descriptively, it is almost entirely under the control of the executive branch. This is so with respect to most aspects of classification policy and also with respect to the system's implementation.

a. Policy

With respect to policy, the core directives as to what types of materials shall be classified, how they shall be classified, and any declassification procedures stem almost entirely from executive order.⁴⁹ This is the case with respect to all but a few very narrow categories of information—such as atomic energy information—the classification of which are provided for by statute.⁵⁰ This has been the case for the entire history of the classification system. Prior to 1940, official secrets were designated only within and by the armed forces.⁵¹ In 1940, President Franklin Roosevelt issued the first executive order on classification,⁵² essentially “confer[ing] presidential recognition . . . on the military classification system.”⁵³ In 1951, President Truman issued his own executive order on classification, “extend[ing] the system to non-military agencies [by] authorizing *any* executive department or agency to classify information when it seemed ‘necessary in the interest of national security.’”⁵⁴

Because the classification system is based largely on executive orders, its “standards tend to change when a new party is swept into the

49. See, e.g., DANIEL PATRICK MOYNIHAN, REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at XXXVIII, 5, 11–13 (1997); HAROLD C. RELYEA, SECURITY CLASSIFIED AND CONTROLLED INFORMATION: HISTORY, STATUS AND EMERGING MANAGEMENT ISSUES 2–5 (2007); SCHLESINGER, JR., *supra* note 42, at 338–41.

50. See, e.g., NATHAN BROOKS, CONG. RESEARCH SERV. REP., THE PROTECTION OF CLASSIFIED INFORMATION: THE LEGAL FRAMEWORK 2 n.7 (2004), available at <http://firstamendmentcenter.org/pdf/CRS.security4.pdf>; S. DOC. NO. 105-2, at 5, 15, 23–24.

51. RELYEA, *supra* note 49, at 2.

52. *Id.*

53. SCHLESINGER, JR., *supra* note 42, at 339.

54. *Id.* at 340. President Truman's executive order also was the first classification order to identify the Constitution as its legal basis. *Id.* President Roosevelt had attempted, albeit not very convincingly, to claim some statutory authorization for his executive order. *Id.* at 339. President Truman purported to derive his authority from Article II of the Constitution. *Id.* at 340. Subsequent Presidents have followed Truman's lead, deeming Article II sufficient authority for them to establish a governmentwide official secrecy program. BROOKS, *supra* note 50, at 1–2 (2004); SCHLESINGER, JR., *supra* note 42, at 340.

White House.”⁵⁵ A commission appointed in the 1990s to study the classification system (hereinafter “The Moynihan Commission,” for its chairman, Senator Daniel Patrick Moynihan) noted in 1997:

Over the last fifty years, with the exception of the Kennedy administration, a new executive order on classification was issued each time one of the political parties regained control of the Executive Branch. These have often been at variance with one another . . . at times even reversing outright the policies of the previous order.⁵⁶

The Moynihan Commission added that “officials opposed to the specifics of a given order” at times “have resisted complying with and enforcing policies, essentially waiting out an administration in the hope that the order will be replaced.”⁵⁷

A few examples from the current administration’s classification order exemplify some of the topics that classification orders typically cover and changes that new administrations can bring. The current executive order is similar to the Clinton Administration’s order in its general description of the information that may be classified. Such information includes (with italicized words indicating additions by the current administration): “military plans, weapons systems, or operations”; “foreign government information”; “intelligence activities (including special activities), intelligence sources or methods, or cryptology”; “scientific, technological, or economic matters relating to the national security, *which includes defense against transnational terrorism*”; “United States Government programs for safeguarding nuclear materials or facilities”; “vulnerabilities or capabilities of systems, installations, *infrastructures*, projects, plans, *or protection services* relating to the national security, *which includes defense against transnational terrorism*,” or “*weapons of mass destruction*.”⁵⁸ Information within a listed category may be classified if a classifier finds that its disclosure “reasonably could be expected to result in damage to the national security.”⁵⁹ The Clinton Administration’s order directed that information “shall not be classified” whenever there “is significant doubt about the need to classify” it.⁶⁰ The Bush Administration’s order omits this admonition.⁶¹ Similarly, the Bush order omits a Clinton-era directive to classify information at the lower of two

55. BROOKS, *supra* note 50, at 3.

56. *Id.* (quoting DANIEL PATRICK MOYNIHAN, REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at 11 (1997)).

57. S. DOC. NO. 105-2, at 12.

58. Exec. Order No. 13,292, § 1.4, 3 C.F.R. 196 (2004), *reprinted as amended in* 50 U.S.C. § 435 (Supp. III 2003), *available at* <http://www.fas.org/sgp/bush/eoamend.html> [hereinafter Exec. Order No. 13,292] (amending Executive Order 12,958). For a redline version indicating Bush Administration’s additions, see Bush Executive Order 13,292 on Classified National Security Information—Additions and Deletions, <http://www.fas.org/sgp/bush/eo13292inout.html> [hereinafter Exec. Order No. 13,292 redline].

59. The Bush Administration added a notation that the national security “includes defense against transnational terrorism.” Exec. Order No. 13,292, *supra* note 58, § 1.1(a).

60. See Exec. Order No. 13,292 redline, *supra* note 58 (see deleted language at § 1.1).

61. *Id.*

classification levels when there is doubt as to which of the levels is appropriate.⁶² The Bush Administration also added a provision directing that “[t]he unauthorized disclosure of foreign government information is presumed to cause damage to the national security.”⁶³ The Bush Administration also removed a Clinton-era provision prohibiting the reclassification of properly declassified and publicly released information, replacing it with a conditional right to reclassify such information.⁶⁴

b. Implementation

The executive branch not only makes most classification policy, it implements virtually all of it. The latter is a very basic aspect of separated powers, with the executive charged to execute policies, including its own classification scheme.⁶⁵ While this point is elementary, its significance for executive secret-keeping power should not be overlooked. As the Moynihan Commission observed, “a policy is only as good as its implementation.”⁶⁶ This is true partly because of the element of policy discretion intrinsically present in most policy implementation.⁶⁷ The line between policy making and policy implementation is particularly blurred in a system with directives so broad, and implementation decisions so numerous, as the classification system.

Of the several million individuals with some form of classification authority in the United States,⁶⁸ about 4000 have “original classification” authority.⁶⁹ This level of authority entails explicit policy discretion in two major respects. First, original classifiers make “initial determination[s] . . . that information requires extraordinary protection, because unauthorized disclosure of the information could reasonably be expected to cause damage to national security.”⁷⁰ Second, original classifiers sometimes create classification guides. Such guides are instructions for “derivative classifiers.” Each guide “pertains to a particular subject and identifies the elements of information about that subject that must be

62. *Id.* § 1.2 (see deleted language).

63. *Id.* § 1.1(c).

64. *Id.* § 1.7(c).

65. See BLACK'S LAW DICTIONARY 610 (8th ed. 2004).

66. DANIEL PATRICK MOYNIHAN, REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at 39 (1997).

67. See *supra* notes 36, 39 and accompanying text.

68. In 1999, the Moynihan Commission Report cited a figure of roughly three million persons with some form of classification authority, including government employees and government contractors. S. DOC. NO. 105-2, Chairman's Foreword, at xxxix. This number very likely has increased since that time, based on the dramatic increase in original classifiers. Compare, e.g., *id.* (noting that there were 1336 original classifiers as of 1999), with INFO. SEC. OVERSIGHT OFFICE, 2005 REPORT TO THE PRESIDENT 9 (2006) [hereinafter ISOO 2005 REPORT] (noting that there were 3959 original classifiers as of 2005).

69. The exact number as reported in 2005 is 3959. ISOO 2005 REPORT, *supra* note 68.

70. *Id.* at 10.

classified, as well as the level and duration of classification for each such element.”⁷¹

The remaining several million persons with classification authority are “derivative classifiers.”⁷² In theory, derivative classifiers lack policy discretion because they only classify items derivative of “that which has already been classified.”⁷³ In actuality, of course, determining what is derivative of already classified information—short of exact replicas of the latter—itself entails discretion. This is particularly so where the basis for derivative classification is the following of classification guides. The potentially ad hoc nature of such discretion is compounded where derivative classifiers lack proper training. In its 2005 report to the President on classification activity, for example, the Information Security Oversight Office⁷⁴ noted that “the majority of State [Department] employees [had] not yet received formal training in the use of [their] guide.”⁷⁵

c. The Extent to Which Executive Control of a Classification System Is Inevitable

While interbranch policy directives and oversight can and should be enhanced, substantial executive branch discretion and control is inevitable in any far-reaching classification system. There is no question that congressional and judicial reticence to interfere with executive branch secrecy partly explains why there is so little effective statutory guidance or congressional or judicial oversight of the classification system.⁷⁶ As I argue later in this article, such reticence misconstrues the constitutional responsibility and capacity of each branch to manage executive branch secrecy.⁷⁷ A changed understanding and a resulting increase in legislative directives and in meaningful congressional and judicial oversight would help to bring checks and balances to the official secrets realm.⁷⁸ At the same time, potential changes necessarily are limited, short of a dramatic statutory narrowing or elimination of the classification system. Execu-

71. *Id.* at 12.

72. *See supra* note 68.

73. ISOO 2005 REPORT, *supra* note 68, at 10.

74. “ISOO” is a part “of the National Archives and Records Administration . . . and receives its policy and program guidance from the National Security Council” It “oversees the security classification programs in both Government and industry and reports annually to the President on their status.” *Id.* at unnumbered page immediately following top cover page.

75. *Id.* at 11.

76. *See, e.g.*, DANIEL PATRICK MOYNIHAN, REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at 15 (1997); Robert P. Deyling, *Judicial Defiance and De Novo Review in Litigation over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67, 85–88 (1992).

77. *See infra* Parts III.B, III.C.

78. *See, e.g.*, S. DOC. NO. 105-2, at xxii–xxiv, 11–16; Deyling, *supra* note 76, at 111–12.

tive branch implementation of any system is inevitable, along with broad executive discretion and de facto policy making.⁷⁹

Oversight, too, necessarily is limited in its impact. Congress is structurally equipped only to make discrete information requests as issues come to its attention. While this oversight function is important, it is no match for a vast system that produces millions of new classified items each year. Judicial oversight also is limited to individual cases as they arise. At present, for instance, the judiciary's main oversight role occurs when an individual seeks information under the Freedom of Information Act ("FOIA"), the request is refused on the ground that the information is classified, and the individual challenges the propriety of classification before a judge as FOIA provides.⁸⁰ Even if the judiciary did not routinely defer to executive branch decisions in such cases,⁸¹ the cases' isolated and protracted natures make them poor structural matches for the classification system as a whole. In short, executive branch discretion and control of the classification system can be mitigated, but they inevitably are substantial.

2. *Overclassification*

There long has been widespread concern across the political spectrum about the existence of rampant overclassification.⁸² J. William Leonard, the current director of the Information Security Oversight Office,⁸³ acknowledges a problem of "excessive classification."⁸⁴ Leonard says that he has "seen information classified that [he's] also seen published in third-grade textbooks."⁸⁵ Former New Jersey governor and 9/11 Commission Chairman Thomas Keane has said that "three-quarters of the classified material he reviewed for the [9/11] Commission should not have been classified in the first place."⁸⁶ Senator John Kerry made a similar point a decade earlier about his review of classified documents on POW/MIA Affairs for the Senate Committee on Foreign Relations: "I do not think that more than a hundred, or a couple of hundred, pages of the thousands of documents we looked at had any current classification importance, and more often than not they were documents that remained

79. See *supra* notes 36–39 and accompanying text; see also S. DOC. NO. 105-2, at 15 (noting that under the Report's proposed statute, "[t]he President would retain the authority to implement the law . . . as long as such procedures remained within the general boundaries of the law").

80. See Deyling, *supra* note 76, at 67–82.

81. See *id.* at 67–68, 82–88.

82. See *infra* notes 84–90 and accompanying text.

83. See *supra* note 74 for a description of "ISOO."

84. *Emerging Threats: Overclassification and Pseudo-Classification: Hearing Before the Subcomm. on National Security, Emerging Threats, and International Relations of the H. Comm. on Government Reform*, 109th Cong. 45, 50 (2005) (statement of J. William Leonard, Director, Information Security Oversight Office, National Archives and Records Administration).

85. Scott Shane, *Since 2001, Sharp Increase in the Number of Documents Classified by the Government*, N.Y. TIMES, July 3, 2005, at A1.

86. 108 CONG. REC. S9714 (2004) (statement of Sen. Wyden).

classified or were classified to hide negative political information, not secrets.”⁸⁷ The Moynihan Commission observed that “[t]he classification system . . . is used too often to deny the public an understanding of the policymaking process, rather than for the necessary protection of intelligence activities and other highly sensitive matters.”⁸⁸

This problem is not unique to any one party, President, or era. Rather, the problem spans the life of the classification system. The immediately preceding quotes come from Republicans and Democrats alike and concern both past and present classification systems. As a further example, Senator Moynihan—both in his own capacity and as chairman of the Moynihan Commission—assessed the damage of excessive secrecy and classification throughout World War II and the Cold War.⁸⁹ And roughly three decades ago, a Senate committee formed to investigate intelligence abuses deemed “[e]xcessive secrecy,” a tool that long had been utilized to “shield the existence of constitutional, legal and moral problems.”⁹⁰

In another striking example, Erwin N. Griswold, the former solicitor general of the United States who fought on behalf of the Nixon administration to restrain publication of the classified Pentagon Papers, acknowledged years after the litigation that “I have never seen any trace of a threat to the national security from the [Papers’] publication. Indeed, I have never seen it even suggested that there was such an actual threat.”⁹¹ In the same discussion, Griswold deemed it “apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another.”⁹²

Statistics give an additional sense of the classification system’s reach. As noted earlier, there presently are several million persons with some form of classification authority.⁹³ The number of new classification decisions—including combined original and derivative decisions to classify—for the past six years for which figures are available are: 14,206,773 (FY 2005);⁹⁴ 15,645,237 (FY 2004);⁹⁵ 14,228,020 (FY 2003);⁹⁶ 23,745,329 (FY 2002);⁹⁷ 33,020,887 (FY 2001);⁹⁸ 23,220,926 (FY 2000).⁹⁹

87. DANIEL PATRICK MOYNIHAN, REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at xxxii (1997) (internal citation omitted).

88. *Id.* at xxi.

89. MOYNIHAN, *supra* note 47, at 125–201; *see also* S. DOC. NO. 105-2, at xl–xliv.

90. S. REP. NO. 94-755, pt. 2, at 292 (1976) (Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Book II).

91. Erwin N. Griswold, *Secrets Not Worth Keeping*, WASH. POST, Feb. 15, 1989, at A25.

92. *Id.*

93. *See supra* note 68 and accompanying text.

94. ISOO 2005 REPORT, *supra* note 68, at 13.

95. INFO. SEC. OVERSIGHT OFFICE, 2004 REPORT TO THE PRESIDENT 15 (2005) [hereinafter ISOO 2004 REPORT].

It should be possible to mitigate overclassification through better checks and balances, such as the enhanced statutory and oversight checks discussed in the preceding subsection.¹⁰⁰ One potential mitigating measure is a statutory provision proposed by the Moynihan Commission in 1999 requiring classifiers to weigh secrecy needs against public interests in disclosure.¹⁰¹ Declassification measures have been implemented in the past with some limited success.¹⁰²

Yet while the problem likely can be mitigated, a nontrivial amount of overclassification seems inevitable in any major classification system. This is so largely for the reasons explored above in Part I.B regarding the inevitability of overreaching secrecy within any powerful executive branch.¹⁰³ The fact that overclassification is as old as the classification system itself, albeit with ebbs and flows in degree, supports this understanding.

II. CURRENT APPROACHES TO PRESIDENTIAL SECRECY: CONFLATING STRENGTH WITH PREROGATIVE

Arguments favoring strong political-branch discretion to punish classified information leaks boil down to a conflation of strength with prerogative (or to what I call the “strength equals prerogative” approach). Such arguments, in short, equate the President’s broad constitutional *capacity* to keep secrets with a constitutional *prerogative* to keep secrets in the face of counter-forces such as congressional requests for information or classified information leaks. The strength equals prerogative approach often is taken directly, although sometimes it is taken indirectly. One indirect form of the approach is the argument that information exchanges transform speech into conduct when information is classified by the executive branch. This argument equates the executive’s vast secret-keeping capacity with a constitutional prerogative to remove speech from the realm of constitutional protection and to place it within the realm of executive discretion. Another indirect form is the argument that only the political branches—particularly the President—are capable of understanding whether and when information leaks should be

96. INFO. SEC. OVERSIGHT OFFICE, 2003 REPORT TO THE PRESIDENT 19 (2004) [hereinafter ISOO 2003 REPORT].

97. INFO. SEC. OVERSIGHT OFFICE, 2002 REPORT TO THE PRESIDENT 23 (2003) [hereinafter ISOO 2002 REPORT].

98. INFO. SEC. OVERSIGHT OFFICE, 2001 REPORT TO THE PRESIDENT 2 (2002) [hereinafter ISOO 2001 REPORT].

99. INFO. SEC. OVERSIGHT OFFICE, 2000 REPORT TO THE PRESIDENT 15–18 (2002) [hereinafter ISOO 2000 REPORT].

100. See *supra* Part I.C.1.c.

101. DANIEL PATRICK MOYNIHAN, REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at 14 (1997).

102. See, e.g., INFO. SEC. OVERSIGHT OFFICE, REPORT TO THE PRESIDENT: AN ASSESSMENT OF DECLASSIFICATION IN THE EXECUTIVE BRANCH (2004); ISOO 2000 REPORT, *supra* note 99, at 1–7.

103. See *supra* Part I.B.

punished. This argument equates the capacities of the political branches—particularly the President—to designate national security secrets with a singular ability, and hence conclusive authority, to do the same.¹⁰⁴

This Part explains the flawed nature of all three versions of the strength equals prerogative approach. It uses the approach and its three major manifestations as foci to outline the existing state of the case law and related discourse.

A. *Case Law and the Strength Equals Prerogative Approach to Classified Information Leaks*

I. *Pentagon Papers*

The most famous case involving the publication of national security secrets is *New York Times v. United States*,¹⁰⁵ commonly called the “Pentagon Papers case.” The case was initiated by the Nixon administration, which sought to enjoin the New York Times and the Washington Post from publishing excerpts from a leaked classified historical study on Vietnam policy.¹⁰⁶ The administration sought a prior restraint rather than postpublication prosecution. Therefore, it did not rely on the Espionage Act or other statutory or regulatory authority, as no statute or regulation authorized prior restraints. Instead, the administration argued that it had inherent authority to request, and courts had inherent authority to grant, a prior restraint based on the national security dangers that publication purportedly would cause.¹⁰⁷

The Supreme Court denied the request for a prior restraint.¹⁰⁸ The terse *per curiam* opinion did not mention the separation of powers. It rested solely on First Amendment grounds, citing the uniquely high threshold to obtain a prior restraint and noting that the government did not meet that threshold.¹⁰⁹ In the concurring and dissenting opinions, however, six Justices evinced leanings toward the strength equals pre-

104. As reflected in this paragraph and in the case law analysis below, these arguments generally are not couched as “political question” arguments. Nonetheless, one might opine that they effectively invoke the political question doctrine by counseling leaving matters to one or both political branches for reasons of relative expertise or constitutional prerogative. See, e.g., *Baker v. Carr*, 369 U.S. 186, 208–17 (1962) (explaining political question doctrine and its major elements). Regardless of the label affixed to the arguments, however, their component elements, as detailed in this Part, remain the same, and thus remain subject to this Article’s objections. See *id.* at 217 (noting the “impossibility of [resolving political question claims] by any semantic cataloguing”).

105. 403 U.S. 713 (1971).

106. See *United States v. N.Y. Times Co.*, 328 F. Supp. 324, 325–26 (S.D.N.Y.), *remanded and stay continued*, 444 F.2d 544 (2d Cir.), *rev’d*, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (*per curiam*).

107. See *N.Y. Times*, 403 U.S. at 718–19 (Black, J., concurring); *id.* at 732 (White, J., concurring).

108. *Id.* at 714.

109. *Id.* (*per curiam*).

rogative approach and suggested that statutes or even regulations authorizing postpublication prosecutions might be constitutional.

The three dissenters would have gone furthest, remanding to consider whether even a nonstatutory, nonregulatory prior restraint was warranted. Justice Harlan's dissent, joined by Chief Justice Burger and Justice Blackmun, relied heavily on the strength equals prerogative approach to explain this conclusion:

I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power. Constitutional considerations forbid "a complete abandonment of judicial control." Moreover the judiciary may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned—here the Secretary of State or the Secretary of Defense—after actual personal consideration by that officer. . . . But in my judgment the judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security. "[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow.¹¹⁰

Among the concurring Justices, Justice Stewart, in a concurrence joined by Justice White, relied heavily on the strength equals prerogative approach. Referring approvingly to the possibility of executive regulations to authorize punishing information leaks, he argued:

The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. . . . [I]t is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts

110. *Id.* at 757–58 (Harlan, J., dissenting) (internal citations omitted).

know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.¹¹¹

Justice Stewart joined the majority judgment only because no statutes or regulations authorized the punishment sought and because the very high threshold for imposing a prior restraint without such authorization was not clearly met. Notably, he lamented that the Court had been asked “to perform a function that the Constitution gave to the Executive, not the Judiciary.”¹¹²

The concurrences by Justice White, joined by Justice Stewart, and by Justice Marshall addressed the types of punishments that statutes or regulations might authorize for classified information leaks. Both concurrences suggested that the Espionage Act already might authorize postpublication prosecutions and that the constitutional standard for affirming any convictions would be less severe than for obtaining a prior restraint.¹¹³ These concurrences thus left a door wide open for the post-publication prosecution of classified information leaks.

2. United States v. Morison

Prior to *United States v. Rosen & Weissman*, *United States v. Morison*¹¹⁴ was the only prosecution brought under the Espionage Act in response to information that was leaked for publication rather than utilized in a classic espionage or spying context.¹¹⁵ Samuel Morison was an employee of the Naval Intelligence Support Center (“NISC”). As an employee, he had signed a nondisclosure agreement regarding classified and other sensitive information. While still employed by NISC, he leaked satellite photographs of a Soviet air carrier to *Jane’s Fighting Ships* (*Jane’s*), an annual British publication about international naval operations. Morison had had an ongoing relationship with *Jane’s* and at the time of the leak was seeking permanent employment from *Jane’s*.¹¹⁶ He was convicted under the Espionage Act for leaking classified national defense information.¹¹⁷

111. *Id.* at 728–30 (Stewart, J., concurring).

112. *Id.* at 730.

113. *Id.* at 741–47 (Marshall, J., concurring); *id.* at 733–36 (White, J., concurring).

114. 844 F.2d 1057 (4th Cir. 1988).

115. Technically, there was one other prosecution—that of former Defense Department employee Daniel Ellsberg for leaking the papers that sparked the *Pentagon Papers* case. The Ellsberg prosecution was dismissed on nonmerits grounds at the district court level, however, due to ethical improprieties by the government. SANFORD J. UNGAR, *THE PAPERS AND THE PAPERS* 4, 6–9 (1972) (Columbia Univ. Press., Morningside ed. 1989); *see supra* note 5.

116. *Morison*, 844 F.2d at 1060–61.

117. *Id.* at 1062–63.

The Fourth Circuit upheld his conviction through a majority opinion and two concurrences.¹¹⁸ Each opinion relied on a somewhat different version of the strength equals prerogative approach. The majority crafted a very strong version of the approach, equating the leak of national defense information, once classified by the executive branch, as conduct that falls outside of the First Amendment.¹¹⁹ This point was categorical, applicable regardless of whether the information was leaked for public consumption.¹²⁰

Judge Wilkinson concurred in the majority opinion,¹²¹ but wrote separately to express a somewhat more nuanced view. Judge Wilkinson rejected the notion that First Amendment rights were not implicated in the case¹²² and relied instead on the expertise component of the strength equals prerogative approach. He explained that while “aggressive” judicial balancing may be called for in some First Amendment contexts, it is not appropriate with respect to national security information leaks.¹²³ He opined that “questions of national security and foreign affairs are ‘of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.’”¹²⁴ Courts thus, Wilkinson asserted, should be highly deferential in examining classified information leak prosecutions and convictions.¹²⁵ Judge Phillips’s concurrence largely echoed Judge Wilkinson’s approach, although Judge Phillips expressed a bit more reticence about the First Amendment implications of too deferential a judicial examination.¹²⁶

3. United States v. Rosen & Weissman

United States v. Rosen & Weissman currently is pending in the Eastern District of Virginia.¹²⁷ Both Rosen and Weissman were lobbyists for the American Israel Public Affairs Committee (“AIPAC”). According to the District Court, “AIPAC is a pro-Israel organization that lobbies the United States executive and legislative branches on issues of interest to Israel, especially U.S. foreign policy with respect to the Middle East.”¹²⁸ Rosen and Weissman were indicted under the Espionage Act.¹²⁹ The District Court summarizes the indictment as follows:

118. See generally *id.*

119. *Id.* at 1068, 1069–70, 1074–75.

120. *Id.* at 1068, 1069–70.

121. *Id.* at 1080 (Wilkinson, J., concurring).

122. *Id.* at 1081–82.

123. *Id.* at 1082–83.

124. *Id.* at 1083 (internal citation omitted).

125. *Id.* at 1084.

126. *Id.* at 1085–86 (Phillips, J., concurring).

127. *United States v. Rosen*, No. 1:05cr225 (E.D. Va. May 8, 2007).

128. *United States v. Rosen*, No. 1:05cr225, slip op. at 2 (E.D. Va. Aug. 9, 2006) (order denying motion to dismiss).

In general, the . . . indictment [against Rosen and Weissman] alleges that in furtherance of their lobbying activities, defendants (i) cultivated relationships with government officials with access to sensitive U.S. government information . . . (ii) obtained the information from these officials, and (iii) transmitted the information to persons not otherwise entitled to receive it, including members of the media, foreign policy analysts, and officials of a foreign government.¹³⁰

Rosen and Weissman filed a motion to dismiss the indictment.¹³¹ They argued, among other things, that the relevant Espionage Act provisions violate the First Amendment facially and as applied to them.¹³² They posited that their information exchanges constitute core political speech that cannot be punished on the basis of content unless such punishment passes strict scrutiny.¹³³ Strict scrutiny is the scrutiny level generally applied to content based regulations of speech.¹³⁴ Citing the importance of a public well informed about foreign policy, the defendants argued that it cannot withstand strict scrutiny to “penaliz[e] the retransmission of information by persons involved in policy advocacy (or, for that matter, the press), and who did not obtain the information illegally.”¹³⁵ They concluded that the Espionage Act provisions are unconstitutional as applied to them. They also deemed the act facially overbroad because it appears generally to criminalize transmissions such as theirs.¹³⁶

In response, the U.S. government took the extreme strength equals prerogative position that the First Amendment was not implicated at all, as the defendants’ behavior was conduct, not speech.¹³⁷ The government cited *United States v. Morison* to the effect that “the First Amendment simply does not protect the type of conduct prohibited by the espionage statutes.”¹³⁸ The government took this argument beyond the context of proprietary information, suggesting that even political branch judgments that advocacy threatens national security implicate conduct and not speech.¹³⁹ Toward this end, the government approvingly cited long dis-

129. Rosen’s & Weissman’s Memorandum of Law in Support of Motion to Dismiss, *supra* note 3, at 3–4.

130. *Rosen*, No. 1:05cr225, slip op. at 3 (E.D. Va. Aug. 9, 2006) (order denying motion to dismiss).

131. See Rosen’s & Weissman’s Memorandum of Law in Support of Motion to Dismiss, *supra* note 3.

132. *Rosen*, No. 1:05cr225, slip op. at 7 (E.D. Va. Aug. 9, 2006) (order denying motion to dismiss).

133. Rosen’s & Weissman’s Memorandum of Law in Support of Motion to Dismiss, *supra* note 3, at 40–45. The defendants rested this argument in part on the verbal nature of the prohibited communications. They suggested that conduct, not speech, might have been at issue had documents been transmitted. *Id.* at 43–44.

134. *Id.* at 43–44.

135. *Id.* at 52.

136. *Id.* at 54–58.

137. See Government’s Supplemental Response to Defendants’ Motion to Dismiss the Superseding Indictment at 22–27, *United States v. Rosen*, No. 1:05cr225 (E.D. Va. March 31, 2006) [hereinafter Government’s Supplemental Response].

138. *Id.* at 22.

139. *Id.* at 23–24.

credited Supreme Court opinions from 1919 upholding convictions under the Espionage Act for expressions of opposition to U.S. foreign and military policies.¹⁴⁰ The government cited these opinions to demonstrate that, “[f]rom the earliest days of the espionage statutes’ history, the conduct prohibited therein has never been protected by the First Amendment.”¹⁴¹

The district court denied defendants’ motion.¹⁴² In so doing, it also adopted a strength equals prerogative approach, albeit one somewhat more moderate than that urged by the government. The court rejected the government’s position that activities covered by the Espionage Act categorically are undeserving of First Amendment protection.¹⁴³ It deemed defendants’ information exchanges to “implicate the core values the First Amendment was designed to protect.”¹⁴⁴ Yet despite taking this view, the court set the bar for determining whether national security concerns outweigh speech value so low as to defer almost categorically to executive branch decisions to suppress information. The court suggested that only a loose assessment of “‘the competing social interests’ at stake” was in order.¹⁴⁵ In conducting this assessment, it found the Espionage Act provision under which defendants were prosecuted for information disclosure sufficiently narrow, both facially and as applied to defendants.¹⁴⁶ As construed by the court, the statutory provision punishes the disclosure of information that is “‘potentially damaging to the United States or . . . useful to an *enemy* of the United States,’”¹⁴⁷ that defendant knows has such potential,¹⁴⁸ and that is closely held by the government (e.g., classified).¹⁴⁹ So construed, the court found that “the statute is narrowly and sensibly tailored to serve the government’s legitimate interest in protecting the national security, and its effect on First Amendment

140. *Id.* at 23–24 (citing *Schenck v. United States*, 249 U.S. 47 (1919), and *Frohwerk v. United States*, 249 U.S. 204 (1919)). For reference to these cases’ long discredited reasoning and holdings, see, for example, Dale Carpenter, *Unanimously Wrong*, 2006 CATO SUP. CT. REV. 217, 217 n.2. Furthermore, as the Eastern District of Virginia points out in its order denying the motion to dismiss of defendants Rosen and Weissman, even *Schenck* and its progeny “did not adopt a categorical rule that prosecutions under the Espionage Act did not implicate the First Amendment, but carefully weighed the government’s interest in prosecuting the war against the defendants’ First Amendment interests.” *Rosen*, No. 1:05cr225, slip op. at 43 (E.D. Va. Aug. 9, 2006) (order denying motion to dismiss).

141. Government’s Supplemental Response, *supra* note 137, at 23.

142. *Rosen*, No. 1:05cr225, slip op. at 67 (order denying motion to dismiss).

143. *Id.* at 40.

144. *Id.* at 45.

145. *Id.* at 45 (quoting *United States v. Morison*, 844 F.2d 1057, 1082 (4th Cir. 1988)).

146. *See id.* at 59, 63.

147. *Id.* at 56 (citing *Morison*, 844 F.2d at 1084 (Wilkinson, J., concurring) (emphasis added by district court); *Morison*, 844 F.2d at 1086 (Phillips, J., concurring)).

148. *Id.* at 58–59; Transcript of Hearing on Motions at 10–11, *United States v. Rosen*, No. 1:05cr225 (E.D. Va. Nov. 16, 2006). The District Court interpreted this knowledge provision to require the government, when prosecuting defendants for disclosing intangible information, to show a “likelihood of . . . [a] bad faith purpose to either harm the United States or to aid a foreign government.” *Rosen*, No. 1:05cr225, slip op. at 34 (E.D. Va. Aug. 9, 2006) (order denying motion to dismiss).

149. *Rosen*, No. 1:05cr225, slip op. at 62 (E.D. Va. Aug. 9, 2006) (order denying motion to dismiss).

freedoms is neither real nor substantial as judged in relation to this legitimate sweep.”¹⁵⁰

In practical effect, the district court’s analysis may differ little from the government’s proposed approach. It is difficult to imagine many disclosures relating to the national defense that could not be deemed to pose some “conceivable threat to national security.”¹⁵¹ It is for this reason that, in the realm of speech not involving proprietary information, the Supreme Court adopted a very strict standard to assess whether the speech endangers national security.¹⁵² It is not difficult to demonstrate some attenuated link to national security of which a discloser must reasonably be aware. While the district court construed the knowledge element to encompass a “likelihood of . . . bad faith purpose” to cause the relevant harms in oral disclosure prosecutions, it found no such provision for tangible disclosure prosecutions.¹⁵³ Furthermore, the relatively open-ended set of harms with respect to which “bad faith” must be shown may prevent the latter element from having much bite when it does apply.¹⁵⁴ Given the relative weakness of the statute’s knowledge and harm elements, then, conviction may well turn on the requirement that the information be closely held by the government.¹⁵⁵ If that is the case, the district court’s standard differs little from that advocated by the government, with executive branch classifications largely conclusive of the constitutionality of prosecution. Such an approach also differs little from that used in *United States v. Morison* and suggested in several *Pentagon Papers* opinions. Indeed, the district court relied heavily on both sets of opinions in its analysis.¹⁵⁶

Finally, the district court posited that the Espionage Act provisions punishing the dissemination of information from those in positions of “trust with the government,” such as government employees, clearly are constitutional.¹⁵⁷ Citing *Morison*, as well as cases approving contractually driven prior restraints on publication by former government employees, the court concluded that “Congress may constitutionally subject to criminal prosecution anyone who exploits a position of trust to obtain

150. *Id.* at 63.

151. The “conceivable threat” language is used by the district court, which it quotes from Judge Wilkinson’s concurring opinion in *Morison*. *See id.* at 56 (citing *Morison*, 844 F.2d at 1085 (Wilkinson, J., concurring)).

152. *See* discussion *infra* Part III.B.1.

153. *See supra* note 148.

154. *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 217 (2004) (explaining that even a subjective intent requirement is insufficiently protective of speech when it is not clear what intended harms, and what degree of imminence for the same, must be shown).

155. *See supra* note 149 and accompanying text.

156. *See Rosen*, No. 1:05cr225, slip op. at 53–56 (E.D. Va. Aug. 9, 2006) (order denying motion to dismiss).

157. *Id.* at 49–51.

and disclose [national defense information] to one not entitled to receive it.”¹⁵⁸

B. The Strength Equals Prerogative Approach in Scholarship and Public Discourse

As with the case law, there is a relative dearth of scholarship on classified information leaks and free speech. That which exists tends to take a moderately speech-protective, First Amendment centered approach.¹⁵⁹ Yet elements of a strength equals prerogative approach can be discerned in other areas of scholarship involving Presidential information control. This most notable is the case in scholarship about executive privilege doctrine. In that context, the President’s capacity for secrecy is equated with at least a qualified prerogative on the President’s part to keep secrets from an inquiring Congress.¹⁶⁰ As Saikrishna Prakash has pointed out in this context, it is logically flawed to equate capacity with legal prerogative.¹⁶¹ I have taken that point somewhat further in writing about executive privilege, arguing that the capacity (or strength) equals prerogative argument overlooks a structural and historical directive to balance the President’s capacity for secrecy against checking forces, such as an inquiring Congress.¹⁶² The problems with a strength equals prerogative approach are discussed in more detail in Part III. For now, it suffices to note that the basic elements of an Article II driven approach to that effect exist in scholarship, despite the relative dearth of scholarship specific to classified information leaks.

Much of the recent public discourse in favor of prosecuting classified information leaks also reflects a strength equals prerogative approach. In this context, the approach often manifests itself in a form similar to the “conduct” argument discussed above.¹⁶³ That is, proponents of prosecuting classified information leaks often treat the fact of classification as conclusive of the existence of grave national security harms from leakage. Perhaps the most extreme example of such thinking is a statement by a San Francisco talk radio host to the effect that editors whose newspapers publish classified information can be convicted of treason and executed.¹⁶⁴ The statements of others—from members of the administration and Congress to private citizens—less provocatively as-

158. *Id.* at 50–51. Lawrence Franklin, the Defense Department employee who allegedly leaked information to Rosen and Weisman, also had been charged under the Espionage Act. Franklin pled guilty to Espionage Act violations in the fall of 2005. *Id.* at 2 n.3.

159. See discussion of relevant free speech arguments, *infra* Part III.C.2.a.

160. See Kitrosser, *supra* note 29, at 505–06 (citing arguments to this effect by Mark Rozell).

161. See Prakash, *supra* note 45, at 1176.

162. See Kitrosser, *supra* note 29, at 495, 522, 524–27.

163. See *supra* Part II.A.

164. See Joe Garofoli, *Fanning the Flames: Melanie Morgan’s Swing from Liberal to Right-Wing Radio Shouter May Not Have Happened Overnight, But It’s Permanent—And Profitable*, S.F. CHRON., Oct. 8, 2006, at CM-8.

sume that classified information leaks necessarily are so harmful as to merit prosecution and conviction. In 2000, for example, only a veto by President Clinton stopped a bill that would have automatically made it a crime to reveal classified information.¹⁶⁵ The current administration chose not to champion such a bill only upon assurance by the Justice Department that it would use the Espionage Act to accomplish the same end.¹⁶⁶ Additionally, some commentators make the strength equals prerogative argument more directly, opining that the President must have the final word as to which information is too dangerous to reveal.¹⁶⁷

III. TOWARD A STRENGTH MEETS CHECKING APPROACH TO PRESIDENTIAL SECRECY

This Part explains the fallacy of the strength equals prerogative approach to executive branch secrecy and introduces the strength meets checking approach to the same. Subparts A and B explain that the indirect forms of the strength equals prerogative approach—the conduct and expertise arguments—break down upon examination. This leaves us with the approach in its purest form, as an argument that the executive branch’s unique capacity for secrecy equates with a legal prerogative to enforce the same. Subpart C explains why that argument not only crumbles upon inspection, but is constitutionally backward. The Constitution instead counsels what I call a strength meets checking approach.

A. *The Fallacy of the “Conduct” Argument: National Security Leaks Often Are High Value Speech*

As explained earlier, the conduct version of the strength equals prerogative argument is that information exchanges are not speech when the information is labeled secret by the government. Instead, the exchange of such information is an act of violating a government secrecy mandate, the criminalization of which poses no First Amendment problem.¹⁶⁸ This

165. Lake, *supra* note 5, at 14; Dan Eggen, *Little is Clear in Law on Leaks*, WASH. POST, Apr. 28, 2006, at A7.

166. Lake, *supra* note 5; Eggen, *supra* note 165.

167. See, e.g., *Eastman Statement*, *supra* note 14, at 4–5 (deeming it an “extraordinary claim” that journalists may second-guess the propriety of classifications); *id.* at 12–13 (citing special need for executive branch secrecy as part of argument for prosecuting journalists who leak classified information); Susan Burgess, *The Big Chill: An Espionage Act Case in a Virginia Federal Court Exposes the Murky Standards Governing National Security Discussions*, NEWS MEDIA & L., Spring 2006, at 4, 6, available at <http://www.rcfp.org/news/mag/30-2/cov-thebigch.html> (quoting conservative commentator Gabriel Schoenfeld and FBI to the effect that the press should not override government determinations as to what is a legitimate national security secret); Robert G. Kaiser, *Public Secrets*, WASH. POST, June 11, 2006, at B1 (“Some readers ask us why the president’s decisions on how best to protect the nation shouldn’t govern us, and specifically our choices of what to publish.”); Johnson, *supra* note 13 (“It is doubtful that even [New York Times Executive Editor Bill] Keller believes that he is in a better position than the president to judge the consequences of the publication . . .”).

168. See *supra* Part II.A.

is the position taken by the U.S. government in *United States v. Rosen & Weissman*¹⁶⁹ and by the panel majority in *United States v. Morison*.¹⁷⁰ As we have seen, the view also is instrumental in the public and political discourse about classified information leaks.¹⁷¹

It has been observed that “simply labeling speech ‘conduct’” is an analytical nonstarter where speech is regulated for its content.¹⁷² That observation applies here. Classified information exchanges are deemed illegal because their speech content has been classified as too dangerous to reveal. This might suggest grounds on which the speech can be restricted,¹⁷³ but it does not turn the speech into conduct.¹⁷⁴ Nor does the tautology that the speakers engage in the conduct of violating laws against their speech turn the speech into conduct. As Eugene Volokh notes, “the point of modern First Amendment law is that speech is often protected even though it violates a law restricting it. . . . Such laws . . . are nonetheless speech restrictions, and courts rightly evaluate them—and often strike them down—under the First Amendment.”¹⁷⁵

Classified information exchanges not only are speech, but often are very high value speech. Under virtually any theory of free speech value, speech about government is deeply protected.¹⁷⁶ Whether because of its relationship to self-governance or to individual autonomy, the First Amendment value of government-related speech is widely acknowledged by theorists.¹⁷⁷ That speech about government is at the core of the First Amendment’s value also is an article of faith throughout Supreme Court doctrine. For example, in *New York Times v. Sullivan*, the Court famously situated defamation law against “the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹⁷⁸

The principle that speech about government is of core First Amendment value extends to information sharing as well as opinion sharing. The right to express viewpoints would mean little if government

169. See *supra* notes 137–41 and accompanying text.

170. See *supra* notes 119–20 and accompanying text.

171. See *supra* notes 163–66 and accompanying text.

172. See, e.g., Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1286, 1311–26, 1336–39, 1347–48 (2005).

173. See *infra* Part IV (considering judicial standards that should apply to restrictions on classified information leaks).

174. Cf. Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 847–48, 872–73 (2005) (discussing very fine line between unprotected speech and fully protected, deeply valued speech).

175. Volokh, *supra* note 172, at 1315–16.

176. Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95, 127–29 (2004).

177. See *id.*; see also *id.* at 129 nn.184–85.

178. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

could stifle the exchange of facts underlying such viewpoints. The Supreme Court has embraced this logic many times. In *Thornhill v. Alabama*, for example, the Court struck down a law restricting labor-related picketing because the law impacted information flow on a matter of public importance.¹⁷⁹ The restriction, the Court noted, covered “nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern.”¹⁸⁰ The *Thornhill* Court also cited the relationship between speech’s informing function and constitutional history, noting that “[t]he exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of [speech and press freedoms] as adequate to supply the public need for information and education with respect to the significant issues of the times.”¹⁸¹ The Court employed similar reasoning in *Grosjean v. American Press Co.*, in which it struck down a special tax targeting the media.¹⁸² The *Grosjean* Court explained that “the predominant purpose of [the free press clause] was to preserve an untrammelled press as a vital source of public information . . . [I]nformed public opinion is the most potent of all restraints upon misgovernment.”¹⁸³

More recently, in *Bartnicki v. Vopper*, the Court relied on the informing value of free speech and a free press to invalidate federal and state privacy statutes as applied against a private citizen and a radio station for disseminating illegally intercepted cellular telephone conversations.¹⁸⁴ In the intercepted conversations, members of a teachers’ union discussed a labor dispute.¹⁸⁵ The *Bartnicki* Court made clear that its analysis was limited to the factual context at hand, in which “respondents played no part in the illegal interception . . . their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else . . . [and] the subject matter of the [intercepted] conversation was a matter of public concern.”¹⁸⁶ Turning to the merits, the *Bartnicki* Court explained that a prohibition on disclosure clearly is a prohibition on speech: “If the acts of “disclosing” and “publishing” information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the

179. See *Thornhill v. Alabama*, 310 U.S. 88, 105–06 (1940).

180. *Id.* at 104; see also *id.* at 102 (“In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.”).

181. *Id.* at 102.

182. See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250–51 (1936).

183. *Id.* at 250.

184. See *Bartnicki v. Vopper*, 532 U.S. 514, 534–35 (2001).

185. *Id.* at 518.

186. *Id.* at 525.

category of expressive conduct.”¹⁸⁷ The Court elaborated that sanctioning the disclosure of “truthful information of public concern” not only implicates speech, but “implicates the core purposes of the First Amendment.”¹⁸⁸

Nor does the fact that a government employee has agreed not to release classified information as a condition of employment transform all employee disclosures into the “pure” conduct of breaching an agreement. Because the relevant condition is a condition on speech, and particularly on core political speech, one must assess whether the condition is an unconstitutional one, generally or as applied to a particular disclosure or punishment.¹⁸⁹ Furthermore, even where a condition is acceptable for some purposes—say, for obligating an employee to submit any publications for government clearance¹⁹⁰ the speech is not stripped of all First Amendment value and protection to the extent that other restrictions, such as criminal punishment, are imposed.¹⁹¹

In short, if discussing government policy is core political speech, that status does not magically change whenever the policy is labeled classified. This is not to say that leaking or publishing classified information cannot legitimately be punished. It is to say, however, that the legitimacy of punishment raises questions far more difficult than whether the leak or publication is conduct.¹⁹²

B. The Fallacy of the Expertise Argument: The President Is Not Uniquely Advantaged to Have the Final Say on Punishable Information Leaks

A major tenet of the strength equals prerogative argument is, as noted above, that the political branches, predominantly the executive branch, are uniquely well situated to designate national security secrets.¹⁹³ This argument has intuitive appeal. Indeed, one can relate both to the intellectual point and to an element of psychological comfort in telling ourselves that there is at least one—the President—who is uniquely on top of things. One who, alone or with the help of a close circle, knows all that needs to be known and has the judgment to know what is too dangerous to reveal.¹⁹⁴ Unfortunately, as recent events pain-

187. *Id.* at 527 (internal citation omitted).

188. *Id.* at 533–34.

189. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 417–18 (2006).

190. *See, e.g.*, *Snepp v. United States*, 444 U.S. 507, 507–09, 509 n.3 (1980) (per curiam) (dismissing in a footnote Snepp’s contention that such an agreement is an unconstitutional prior restraint on speech).

191. *See generally id.* While the Court’s dismissive approach to Snepp’s claim is very troubling, it suffices for our purposes to note that even this approach does not preclude the possibility of a speech-protective response to a different type of restriction, such as postpublication prosecution.

192. *See supra* text accompanying notes 168–71.

193. *See supra* text accompanying notes 108, 118–23.

194. *See, e.g.*, SCHLESINGER, JR., *supra* note 42, at 331 (stating, to describe the mindset borne of the “secrecy system,” “[w]e must trust the President because only he knows the facts”).

fully remind us, this cannot be taken as an article of faith. Indeed, when we scratch the surface of the expertise claim, little of substance remains.

As an initial matter, it is fair to say that secrecy determinations are “policy” determinations insofar as they entail weighing the costs and benefits of secrecy and openness in particular cases. On the surface, this point could be said to support an expertise argument like Judge Wilkinson’s in *United States v. Morison*, to the effect that broad deference is warranted in the realm of national security secrets because such matters are policy matters ““of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.””¹⁹⁵ Upon further probing, however, this argument comes apart.

1. *The Judiciary Already Heavily Scrutinizes National Security Rationales for Speech Suppression*

First, heavy scrutiny of national-security based policy arguments to suppress speech is nothing new to the judiciary. The Supreme Court settled upon a heavy standard of scrutiny to assess national security arguments for speech suppression outside the realm of government secrets. In the landmark case of *Brandenburg v. Ohio*,¹⁹⁶ the Supreme Court held that one cannot constitutionally be punished for speech linked to terrorism or to other dangerous activity unless the speech is intended to incite, and likely to incite, imminent, lawless action.¹⁹⁷ The *Brandenburg* Court thus made clear that the judiciary has the final word in weighing the necessity of prosecution for speech deemed dangerous. The legislature passes legislation authorizing prosecution and the executive branch makes case-by-case prosecution decisions, but ultimately the judiciary must heavily scrutinize any prosecutions.

2. *The Relative Advantages and Disadvantages of Political-Branch Decision Making*

Second, as the respective histories of the *Brandenburg* test and of classification reflect, the political branches offer relative advantages and disadvantages as decision makers regarding national security related speech. The obvious advantages of the political branches are their respective abilities to acquire volumes of complicated knowledge about national security. The executive branch can acquire such knowledge in the course of implementing the law and engaging in activities including military ventures, foreign affairs, and surveillance. Congress can acquire such knowledge through oversight. Furthermore, the national security

195. *United States v. Morison*, 844 F.2d 1057, 1083 (4th Cir. 1988) (internal citation omitted); see *supra* note 124 and accompanying text.

196. 395 U.S. 444 (1969).

197. *Id.* at 447–48.

activities of the legislature and executive can be ongoing and responsive to world events as they arise. The judiciary, in contrast, is limited to considering cases when they arise in the courts, solely on the basis of record evidence and argument.

Yet the political branches also have major disadvantages as decision makers in the realm of national security related speech. Congress's major disadvantage is its limited institutional ability to constrain executive overreaching. That Congress must pass legislation authorizing any executive branch prosecutions is a crucial structural protection for free speech.¹⁹⁸ But this step, while necessary, is far from sufficient to safeguard First Amendment interests. While Congress's open, deliberative nature makes it better situated than the executive to consider constitutional issues, Congress's political nature makes it an inappropriate final decision maker to limit individual constitutional rights.¹⁹⁹ Furthermore, as discussed earlier, Congress at most can outline general classification policies and criminal infringements. It is the executive who inevitably exercises vast discretion in classifying information and in deciding when to prosecute leaks and publications. And the executive brings substantial disadvantages to the table as final decision maker regarding national security related speech.

The lack of an institutionally open, dialogic structure for executive branch decision making lends itself to a culture of "groupthink" that secrecy fosters and exacerbates. And such culture only enhances the demand for secrecy so as to preserve itself and its members' powers. This point is a basic insight of Weberian theory,²⁰⁰ as well as a logical inference from executive branch structure.²⁰¹ Furthermore, the point manifests itself in our vast classification system and in overclassification.²⁰² Perhaps most strikingly, the point also manifests itself in current and historical instances of executive branch secrecy that appear to have been deeply, even fatally, counterproductive. As I have observed elsewhere:

[C]ountless scholars, journalists, legislators and executive branch officials have noted secrecy's judgment-clouding and security-hindering effects in relation to historic and current events. For examples of such criticism, one needs to look no further than commentary on the 2003 invasion of Iraq. It has been argued repeatedly that the reticence of the press and of Congress to ask difficult questions prior to the invasion of Iraq combined with the Bush administration's penchant for secrecy created an insular White House

198. Cf. *N.Y. Times Co. v. United States*, 403 U.S. 713, 718–19 (1971) (Black, J., concurring) (reference to fatal absence of congressional authorization for the prior restraint sought by the government); *id.* at 730 (Stewart, J., concurring) (same); *id.* at 732–33 (White, J., concurring) (same); *id.* at 741–42 (Marshall, J., concurring) (same).

199. See, e.g., STONE, *supra* note 154, at 185 (referring to 1918 Sedition Act as "most repressive legislation in American history").

200. See *supra* text accompanying note 47.

201. See *supra* Part I.A–B.

202. See *supra* Part I.C.

environment in which debate was stifled, “groupthink” flourished, and questionable data on weapons of mass destruction were embraced while predictions of a peaceful, post-invasion Iraq similarly went unquestioned.

....

Similar concerns have been raised about the negative impact of secrecy on homeland security, both prior to, and in the wake of, 9-11.

....

Similar analyses about more distant historical events [including the Vietnam War and the Cold War] abound.

....

[There also is a risk] that secrecy not only will be misused by well-meaning yet overzealous officials, but that it will intentionally be misused by those set on manipulating public debate toward their own ends. Indeed, McCarthy’s exploitation of government secrecy calls to mind Vice President Cheney’s recent attempts to perpetuate the theory of a link between Al Qaeda and Saddam Hussein through vague public allusions to evidence in the administration’s possession of which others, including the 9-11 Commission, supposedly were not aware. Similarly, concerns long have been raised about executive branch “spinning of information” through selective declassification or leakage of otherwise classified information.²⁰³

In short, examples past and present abound of the disadvantages that offset any advantages of executive branch decision making regarding government secrecy.

a. Lessons About Relative Competence from the *Brandenburg* Line of Cases

Lessons about the relative advantages of the branches in the realm of national security related speech are reflected in the history leading to the *Brandenburg* decision. The Supreme Court first considered the constitutional protection for political advocacy in a series of 1919 cases during World War I.²⁰⁴ In these cases, the Court upheld convictions for speech best characterized as heated advocacy about the draft, militarism, and capitalism.²⁰⁵ In the first of these cases, *Schenck v. United States*, the Court introduced the now-famous admonition that:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and

203. Kitrosser, *supra* note 29, at 537–41 (internal citations omitted).

204. See *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

205. For discussions to this effect, see, e.g., STONE, *supra* note 154, at 195–98, 203–07; Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1166–69 (1982).

present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.²⁰⁶

While the phrase “clear and present danger” sounds fairly speech protective,²⁰⁷ it leaves substantial room for maneuvering. Indeed, the Court, as just noted, applied the standard to uphold the punishment of heated political speech of at most diffuse practical consequence. By leaving the level of First Amendment protection so malleable, the Court deferred substantially to the political branches—to Congress’s judgment in passing the applicable legislation and to executive branch prosecutions. The Court at times was very explicit about this deference. In *Frohwerk v. United States*, one of the 1919 cases, the Court explained that “[w]hen we consider that we do not know how strong the Government’s evidence may have been we find ourselves unable to say that the articles could not furnish a basis for a conviction [for obstructing military recruitment.]”²⁰⁸ Such deference reached its height in the 1925 case of *Gitlow v. New York*,²⁰⁹ where the Court held that legislation specifying the content of criminally dangerous advocacy is constitutional if reasonable on its face and as applied by the executive branch.²¹⁰ The Court reversed course in 1969 when it adopted the *Brandenburg* standard.²¹¹ The Court also repudiated *Gitlow*’s holding in later cases when it explained that “[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.”²¹² These doctrinal turnabouts reflect historical lessons learned about the inadequacy of political branch judgments to protect free speech, particularly in wartime, and the competence and duty of the judiciary to check these judgments.²¹³

Brandenburg’s recognition of the judiciary’s competence and duty to check political branch judgments reflects not only a history of political branch abuses but also at least two realities of judicial oversight. First, as noted above, the political branches, especially the executive branch, possess substantial institutional knowledge about national security that the

206. *Schenck*, 249 U.S. at 52.

207. See, e.g., STONE, *supra* note 154, at 194; Redish, *supra* note 205, at 1166.

208. *Frohwerk*, 249 U.S. at 209.

209. 268 U.S. 652 (1925).

210. *Id.* at 668–71.

211. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969).

212. *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). See also sources cited in *Landmark Commc’ns*, 435 U.S. at 843–44.

213. This point is illuminated by juxtaposing this doctrinal evolution, see, e.g., HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 227–36 (Jamie Kalven ed.) (1988) (describing liberalizing evolution from *Schenck* to *Brandenburg*); Kitrosser, *supra* note 174, at 853 n.43 (same), with the historical consensus as to the dramatic, speech-infringing abuses wrongly permitted by decades of wartime judicial deference, see, e.g., STONE, *supra* note 154, at 179, 303–07; *supra* note 205 and accompanying text.

judiciary does not possess.²¹⁴ Given its functions, the judiciary does not gather or study such information on a regular basis apart from specific cases that come before it. But this is no different from the judiciary's relationship to complex factual information possessed by parties in many cases. This is true in the realms both of private parties litigating factually complex cases and of government agencies litigating complex environmental, financial, scientific, or other matters.²¹⁵ In such cases, parties bring the courts up to speed through evidence and briefings. Among the judiciary's strengths in this respect are its familiarity with studying complex factual records and accompanying briefings, its ability to demand additional information and expert assistance from the parties, and its ability to call in court-appointed experts for additional assistance. Most of the well-known incitement cases do not appear to have raised issues so complicated as to call for such measures.²¹⁶ But the fact that courts can and do inform themselves with respect even to very complex cases seems implicit in the judicial embrace of heavy scrutiny in *Brandenburg*.

Second, the doctrinal evolution leading to and including *Brandenburg* reflects an understanding not only that the judiciary can be educated in areas outside of its expertise, but that the judiciary is obligated to undertake such education to reach issues within its spheres of advantage and responsibility. With respect to free speech and free press issues, judicial independence combined with the judiciary's relative legal expertise makes the judiciary a crucial final check. This is not to say that the judiciary is impervious to political pressure. Indeed, as much wartime case law on individual rights reflects, the judiciary too is susceptible to "war hysteria."²¹⁷ Still, given its independence and its orientation in legal principal, the judiciary is relatively advantaged as a final check on the political branches in the realms of free speech and free press. Indeed, the judiciary, recognizing its own susceptibility to national security hysteria, can impose doctrinal standards on itself that make it more difficult, albeit

214. See *supra* text accompanying notes 193–95.

215. It is true that the Administrative Procedure Act (APA) generally counsels judicial deference in courts' review of agencies' factual and policy conclusions. See 5 U.S.C. § 706 (2000). There are, however, two important caveats to this general rule. First, some agencies' organic statutes supplant the APA's judicial review standards with heavier scrutiny levels. See, e.g., 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 11.2, 11.3 (4th ed. 2002). This suggests that the APA's standards largely reflect a judgment that agencies should have leeway to effectuate their own statutory mandates, not a judgment that courts lack the expertise to heavily scrutinize agency actions. Second, the Supreme Court has stated that courts must take a thorough and probing look at agency actions to determine whether even the relatively lenient APA standards are met. See, e.g., *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 43 (1983); *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415–16 (1971).

216. The major incitement cases have involved relatively straightforward fact patterns that courts approached from essentially common sense perspectives, assessing perceived potential harms in light of the articulated judicial test. See generally, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

217. STONE, *supra* note 154, at 179; see also, e.g., *id.* at 160, 170–80, 192–98, 297–307.

not impossible, for it to repeat old mistakes.²¹⁸ The *Brandenburg* test reflects such an effort.²¹⁹

Such self-imposed doctrinal restraint also reflects the judiciary's correct perception that it does not weigh policy concerns in the same manner as does a legislature or executive. Rather, the judiciary initially must determine the appropriate weight to give the various policy factors in light of the constitutional interests at stake. For example, it is commonly said that *Brandenburg* is responsive to earlier, dissenting statements by Justice Holmes to the effect that the First Amendment is grounded in the belief that social good is best "reached by free trade in ideas."²²⁰ In this sense, the *Brandenburg* test is motivated not simply by the notion that free speech must be weighed against other values such as security and efficiency, but that the latter values themselves suffer when speech is restricted.²²¹ The drawing of this conclusion and of resulting doctrinal tests falls well within the expertise of the judiciary.

b. Expertise and the Secrecy Factor

In the context of government secrets, the expertise factor takes on two additional twists. First, one might argue that government secrets involve unusually complex matters of foreign affairs and national security. Second, one might argue that the government cannot convey this complexity to courts without revealing state secrets. Both of these arguments should be rejected.

The secrecy-based complexity point suffers from the same failings as do arguments about national security complexity generally. With secrecy, as with national security related speech matters generally, the political branches have relative advantages and relative disadvantages as final decision makers. As with cases about national security speech generally, executive branch expertise should generally be conveyable to courts. This point is illustrated by an observation made by Meredith Fuchs of the National Security Archive. Fuchs analyzes judicial treatment of national security secrets in contexts including challenges to information withholding under the Freedom of Information Act²²² and motions by the government to dismiss cases against it to protect "state

218. See Kitrosser, *supra* note 174, at 871–72 (describing relative speech protectiveness of certain types of standards).

219. See *id.* at 872, 853 n.43.

220. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); see also Kitrosser, *supra* note 174, at 853 n.43.

221. Or that this notion, "at any rate is the theory of our Constitution." *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

222. See Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 156–63 (2006) (discussing judicial review of FOIA exemption claims based on information classification); see also text accompanying *supra* note 80 (explaining how such claims arise).

secrets.”²²³ Fuchs concludes that courts typically defer very heavily to executive expertise claims, generally failing even to review the claimed secrets *in camera*.²²⁴ Yet “[i]nterestingly,” she notes, “while the judiciary has taken a deferential approach when faced with [secrets not revealed to it], it has taken a very different approach when faced with known ‘secrets,’” or secrets that leaked out in whole or in part prior to the litigation.²²⁵ Fuchs calls the *Pentagon Papers Case* a “perfect example” of the latter.²²⁶ There, the papers already had been published in part prior to the litigation, and the courts required the government to reveal remaining secrets *in camera* to explain why their publication would be dangerous. Of course, the Supreme Court ultimately deemed the government’s showing insufficient.²²⁷ As Fuchs astutely observes, “[n]o clear reason explains why the Court would judge itself more competent to assess the need to keep information secret simply because the information had already been leaked to the press.”²²⁸ And courts typically have far more time to familiarize themselves with relevant information than was the case in the very rushed *Pentagon Papers* litigation.²²⁹ Given these realities, it is not surprising that Chief Judge Patricia Wald of the U.S. Court of Appeals for the D.C. Circuit once lamented “that the courts may be approaching too timidly what is, in my view, their clear responsibility to inquire into whether national security claims override traditional constitutional rights or liberties.”²³⁰

Nor is a state secrets argument—that is, an argument that courts should defer to the executive branch to avoid probing national security secrets²³¹—itself viable in the context of classified information leak prosecutions. Courts have made clear that the government may not use a state secrets argument to curtail their proof burden in a criminal prosecution.²³² Rather, courts have allowed the government to use the privilege to withhold information or to have the plaintiff’s case dismissed only when it is sued civilly.²³³ Because the state secrets doctrine cannot be used to restrain a defendant’s criminal defense, the government must make the choice between prosecuting with any information that they

223. See Fuchs, *supra* note 222, at 167–68 (discussing judicial review of state secrets claims); see also, e.g., Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007) (describing state secrets doctrine); William G. Weaver & Robert M. Palitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 86–87 (2005) (same).

224. See Fuchs, *supra* note 222, at 163–68.

225. *Id.* at 170.

226. *Id.*

227. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

228. Fuchs, *supra* note 222, at 170.

229. For discussion of the very rushed nature of the litigation, see *N.Y. Times Co.*, 403 U.S. at 752–56 (Harlan, J., dissenting).

230. Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. PITT. L. REV. 753, 764 (1988).

231. See *supra* note 223.

232. Chesney, *supra* note 223, at 1285–86.

233. *Id.*

deem relevant, prosecuting but withholding some information, or foregoing prosecution. Given the defense rights acknowledged by the courts, it is entirely inappropriate to lighten judicial scrutiny to minimize the risk of disclosure to the judiciary.

In any event, the risk of disclosing state secrets is unlikely to pose serious practical problems for two reasons. First, a prosecution, as opposed to a prior restraint, occurs after publication has taken place. As such, the information at issue will likely have been leaked or published already. Second, to the extent that additional information disclosure is necessary because the leaks were incomplete or because additional secrets must be disclosed to educate the court, courts are well-equipped to handle security concerns. Commentators have suggested a number of viable security measures, including *in camera* review, the preparation of summary indexes by the government with information sufficient to evaluate the claimed secrecy needs, and the use of special masters to assess secrecy needs.²³⁴

C. *The Fallacy of the “Pure” Strength Equals Prerogative Argument: Strength Meets Checking*

The failure of the conduct and expertise arguments leaves us with the strength equals prerogative argument in its purest form: that the executive branch’s substantial capacity to keep secrets implies a legal prerogative to enforce secret keeping in the face of structural or individual-rights based checks. This argument not only is wrong, it gets things backwards. First, while it is true that the Constitution creates an executive branch with significant secret-keeping capacity, this does not necessarily encompass a legal prerogative to silence those who compromise secrecy. Second, constitutional structure, text, and history suggest that the executive’s capacity for secrecy is a necessary evil that should be subject to checking by robust structural and individual forces. Section 1 discusses structural checking mechanisms on executive branch secrecy. Section 2 discusses individual rights based checking mechanisms, including the potential to leak and disseminate official secrets.

1. *Structure as a Check*

As I noted earlier, pure strength equals prerogative arguments generally arise in scholarship in the context of disputes over structural checks by Congress against executive branch secrecy.²³⁵ These arguments also surface in the limited case law about such disputes.²³⁶ An example of a structural checking dispute is where a congressional committee seeks

234. See *id.* at 1313; Fuchs, *supra* note 222, at 173–74.

235. See *supra* text accompanying notes 159–62.

236. See Kitrosser, *supra* note 29, at 501–04 (discussing executive privilege cases).

executive branch testimony or documents and the President refuses, citing executive privilege.²³⁷ The core of a pro-executive privilege argument is that the Presidential office was structured as it is partly to facilitate Presidential secret-keeping, and that allowing Congress to demand information from the President or his inferiors would obstruct this structural and historical goal.²³⁸ In short, the fundamental pro-executive privilege argument is that the President's special adeptness at secret-keeping implies a legal prerogative to keep secrets, including from an inquiring Congress. Similar arguments are made with respect to other attempts by Congress to check executive secret-keeping, such as where Congress passes a statute restricting the executive branch's ability to conduct secret domestic wiretapping.²³⁹

As I noted earlier, it simply does not follow from the executive branch's institutional skill at secret-keeping that it has a legal prerogative to keep secrets in the face of checking mechanisms, including congressional requests. Saikrishna Prakash makes this point in his analysis of executive privilege doctrine. Prakash points out that historical references to Presidential secrecy

“hardly demonstrate that the proposed executive would enjoy a constitutional right to an executive privilege.” The references instead serve only to describe “one of the common attributes of a single executive In the ordinary course, the President would be able to keep some matters secret.” Whether the President has a constitutional right to keep secrets in the face of Congressional requests is another matter.²⁴⁰

Constitutional structure, text, and history not only fail to equate Presidential secret-keeping capacity with a secret-keeping right, they indicate that Presidential capacity necessitates robust structural checking. As I have explained elsewhere, the Constitution designs a system that seems to leave room only for political branch secrecy that itself can be checked through the political process.²⁴¹ Thus, while the President has much capacity to engage in secret activities, secrecy's dangers are mitigated because Congress may pass legislation limiting such activities or permitting itself or others to obtain information under certain conditions.²⁴² This constitutional design is evidenced by a number of factors. First, there is a negative correlation between the relative openness of each political branch and the relative control that each branch has over the other. Congress is a relatively transparent and dialogue-driven branch, and its core tasks are to pass laws that the executive branch executes and to oversee such execution. The executive branch, in contrast,

237. See *id.* at 499–500 (elaborating on this example).

238. See *id.* at 501–02, 505–06, 505 n.70.

239. See Kitrosser, *supra* note 15, at 1195–99.

240. Prakash, *supra* note 45, at 1176 (internal citations omitted).

241. See Kitrosser, *supra* note 29, at 522–27.

242. *Id.* at 524–26.

is capable of much secrecy, but also is largely beholden to legislative directives in order to act. This creates a rather brilliant structure in which the executive branch can be given vast leeway to operate in secret, but remains subject to being overseen or otherwise restrained in its secrecy by the legislature.²⁴³ Second, historical references to secrecy as an advantage of the unitary President—particularly two widely cited Federalist papers²⁴⁴—also cite accountability and the ability of other branches and the people to uncover wrongdoing as a major advantage of the unitary President. This indicates, again, a balanced constitutional design whereby Presidential secrecy is expected but remains on a leash of political accountability.²⁴⁵ Third, the only explicit textual reference to secrecy occurs in Article I, Section 5 of the Constitution, which requires Congress to keep journals of its proceedings, but allows each chamber to exempt “such Parts as may in their Judgment require Secrecy.”²⁴⁶ That fact by itself does not tell us very much, as one could argue that a secret-keeping prerogative is intrinsic in the President’s executive and commander-in-chief duties. What it does reflect, however, is a constitutional structure that permits secrecy only under conditions that will ensure some political awareness of and ability to check such secrecy.

The very framing of the congressional secrecy provision as an exception to an openness mandate, combined with [a logical and historical] expectation that a large and deliberative legislative body generally will operate in sunlight . . . suggest a framework wherein final decisions as to political secrecy are trusted only to bodies likely to face internal and external pressures against such secrecy.²⁴⁷

Finally, an executive branch that can keep secrets but that can be reigned in by Congress reflects the most logical reconciliation of competing constitutional values. On the one hand, the Constitution clearly values transparency as an operative norm. This is evidenced by myriad factors, including the necessities of self-government, the First Amendment, and Article I’s detailed requirements for a relatively open and dialogic legislative process.²⁴⁸ On the other hand, the Constitution reflects an understanding that secrecy sometimes is a necessary evil, evidenced both by the congressional secrecy allowance and by the President’s structural secrecy capabilities.²⁴⁹ Permitting executive branch secrecy, but requiring it to operate within legislative parameters, themselves open and subject to revision, largely reconciles these two values.²⁵⁰

243. See Kitrosser, *supra* note 15, at 1167–78.

244. See THE FEDERALIST NO. 51 (James Madison), NO. 70 (Alexander Hamilton).

245. See Kitrosser, *supra* note 29, at 524–26.

246. U.S. CONST. art. I, § 5, cl. 3.

247. Kitrosser, *supra* note 29, at 523–24.

248. See *id.* at 515–20.

249. See *id.* at 520–22.

250. See *id.* at 522.

2. *Speech as a Check*

Structural checks are not the only means to protect the people from their government. The Constitution provides important individual-rights based checks that disable the government from taking certain actions even when the legislature and the executive are aligned. The First Amendment's free speech and related guarantees—including the free press clause and the right to petition the government—are chief among these checks. Subsection a of this Section provides a basic grounding in relevant aspects of free speech theory. It explains that existing theories provide some basis for the First Amendment protection of classified information leaks and publications. It notes, however, that substantial theoretical gaps remain. Most importantly, existing work does not confront separation of powers based objections in any depth, leaving it vulnerable to the same. Because of this omission, existing work also leaves unclear what free speech theory tells us about leakers who come from within the government, as opposed to the press or members of the public who disseminate leaked information. Subsection b attempts to fill these gaps by connecting free speech analysis and separation of powers analysis. This joint analysis strengthens the argument for substantial protection for press and public dissemination. Furthermore, it provides greater insight into the appropriate treatment of leaks by those with special access to government information.

a. What We Can Learn from Existing Theories, and What Work Remains

It is widely accepted that a core part of the First Amendment's value is its facilitation of self-government and its related utility for helping the people check mistakes and abuses by their governors.²⁵¹ This includes not only exchanging opinions but exchanging information, as the former would be meaningless without the latter.²⁵² None of these propositions are controversial in the case law.²⁵³

The scholars most closely associated with self-government theory and with checking theory, respectively, are Alexander Meiklejohn and Vincent Blasi. Each uses his theory of free speech value to address the topic of official government secrets, among other things. Meiklejohn argued, for example, that

[w]hen a free man is voting, it is not enough that the truth is known by someone else, by some scholar or administrator or legislator. The voters must have it, all of them. The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possi-

251. See *supra* notes 176–78 and accompanying text.

252. See *supra* notes 179–88 and accompanying text.

253. See *supra* notes 176–88 and accompanying text.

ble, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them.²⁵⁴

And Blasi counsels against “[a] complete prohibition on the publication of anything the government stamps ‘classified.’”²⁵⁵ Instead, Blasi would support a qualified prohibition “which provided that classification decisions had to be made carefully . . . and had to be periodically reviewed, and that criminal sanctions could be imposed only upon detailed proof that the disclosure . . . in fact caused serious harm to the government’s ability to implement a legitimate and authorized policy.”²⁵⁶ Blasi also notes generally the special importance of speech protections for government employees, given their unique access to inside information.²⁵⁷

While these theories offer important grounding for First Amendment based arguments about classified information, both leave work to be done to contend in depth with separation of powers based objections. As Lillian BeVier explains, self-government theory is open to the basic objection that the “democratic processes embodied in the Constitution prescribe a considerably more attenuated role for citizens in the actual decision of public issues” than do open government arguments grounded in self-government theory.²⁵⁸ With respect to classified information leaks, self-government theory is vulnerable to the points that the people govern indirectly and that they do so partly through a presidency structured to facilitate “secrecy, vigor and dispatch.”²⁵⁹ Checking theory addresses the indirectness of self-government, as Blasi acknowledges that citizens may “concern themselves almost exclusively with private pursuits.”²⁶⁰ Blasi argues, however, that information flow must keep the people informed enough to mobilize when government misconduct occurs.²⁶¹ Blasi’s theory leaves standing at least two important objections. First, the theory does not directly address arguments that the President’s structural role includes designating and keeping secrets for the people. As such, Blasi’s reference to special speech protections for government employees and his classified information arguments remain vulnerable to the objection that the President constitutionally is the final decision maker as to what government information is too dangerous to disclose.²⁶²

254. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 88–89 (1948).

255. Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 AM. B. FOUND. RES. J. 521, 644 (1977).

256. *Id.* at 645.

257. *Id.* at 608.

258. Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 505 (1980).

259. *See supra* note 29 and accompanying text.

260. Blasi, *supra* note 255, at 562.

261. *See id.* at 541, 605.

262. Indeed, separation of powers is addressed mainly in a paragraph in Blasi’s checking theory paper. While Blasi notes in this paragraph that public and press checks can help to bolster separated

Second, checking theory's narrowness limits its explanatory power generally and with respect to executive branch secrecy in particular. Checking theory suggests that information leaks are valuable to the extent that they check government misconduct. But the tension between official secrets and constitutional structure does not arise solely from cloaked misconduct. The tension is a broader one, between a Constitution that contemplates multiple checks and balances and a system that shields vast amounts of information from potential critics within the government and the populace. Recognition of this broader tension casts light on the extent of the damage that unfettered classification does to our system's structural and individual checking forces.

Finally, there is one more thread in the existing literature that advances arguments about classified information and free speech considerably, although it too leaves unanswered questions regarding separated powers. Alexander Bickel and Lillian BeVier, writing in 1975 and 1980 respectively, each construed the positive law as prescribing a "contest" between government and the press, with government entitled to "guard mightily" against information leaks and the press entitled to publish most information.²⁶³ More important for our purposes, both deemed this scenario consistent with the First Amendment, enabling the government to conceal information as it sees fit, while also leaving the press and the public as crucial checks against such secrecy. BeVier argues, for example, that:

A system that resolves questions of public access to government information by turning to the political marketplace, while at the same time leaving the press free to publish whatever information it can obtain by one means or another, is consistent not only with the aspect of our constitutional scheme that assigns power to decide all but questions of constitutional principle to the democratic processes but also with the aspect that checks governmental power by dividing and diffusing it among various institutions. Professor Bickel made this point when he described first amendment doctrine as creating an "adversary game between the press and government" which is analogous to the constitutional system of separation and balance of powers among the institutions of government.²⁶⁴

This adversarial conception of the press/government relationship moves us substantially closer to a satisfying theory of classified information leaks. It acknowledges the role that the government legitimately may play in safeguarding information on the people's behalf while also recognizing the danger of that role and the consequent value of a "dependably

powers, the paragraph's main point is that the existence of separated powers does not undermine the need for additional checking by the public and the press. *See id.* at 539.

263. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 79–81 (1975); BeVier, *supra* note 258, at 513–14.

264. BeVier, *supra* note 258, at 514 (quoting BICKEL, *supra* note 263, at 80).

unruly struggle” between government and press,²⁶⁵ with each checking the excesses of the other.²⁶⁶

Still, the adversary model does not grapple with the details of the separated powers system. It thus is not equipped to address counter-arguments grounded in the notion that the presidency intentionally is structured to have a unique capacity for secrecy and that this capacity encompasses the power to enforce official secrecy. While Bickel does note the importance of any secrecy laws being legislatively prescribed,²⁶⁷ neither he nor BeVier provide the tools to combat counter-arguments to the effect that the President should be autonomous in this task. Nor is the adversary model fully equipped to explain the reverse point, that even legislative sanction is insufficient to check executive branch abuses in prosecuting classified information leaks and publications. Finally, the relative inattention to Article II based considerations leaves unclear what should be made of government employees who leak information. In the contest between government and press, it is not clear whether government employees should be treated solely as part of the government secret-keeping system, solely as potential speakers, or as something in between.²⁶⁸

b. Integrating the Free Speech and Separated Powers Analyses

At this point, we can identify several factors that shed light on the free speech implications of classified information leaks and publications. First, the presidency and the executive branch constitutionally are designed to have a strong secret-keeping ability.²⁶⁹ Second, a major manifestation of this design is the classification system.²⁷⁰ This includes near total control by the President over classification policy.²⁷¹ It also includes virtually total control by the executive branch over classification implementation.²⁷² And it includes dramatic overclassification.²⁷³ While executive branch control over all classification policy is not inevitable, its control over implementation, including much *de facto* policymaking, is inevitable.²⁷⁴ A degree of overclassification also is inevitable.²⁷⁵ Third,

265. *See id.* at 513.

266. *See* BICKEL, *supra* note 263, at 80–81.

267. *See id.* at 78–79.

268. Bickel confronts the issue somewhat indirectly and in passing, noting that the distinction between press and source may blur where that person is one and the same or close, as with Daniel Ellsberg. *See id.* at 67. Bickel also confronts this indirectly in discussing the matter of press privilege and the fact that a qualified such privilege should exist to protect a degree of newsgathering while not insulating the press completely from legitimate government investigations. *See id.* at 82–85.

269. *See supra* Parts I.A., I.B.

270. *See supra* Part I.C.

271. *See supra* Part I.C.1.a.

272. *See supra* Part I.C.1.b.

273. *See supra* Part I.C.2.

274. *See supra* Part I.C.1.c.

275. *See supra* Part I.C.2.

structurally, some but not all risks of executive secret-keeping are mitigated by Congress's ability to curtail the same through legislation and oversight.²⁷⁶ Fourth, self-government and checking of governors are among the core values protected by the free speech and related clauses of the First Amendment. These clauses protect information dissemination as well as opinion sharing. They supplement the Constitution's structural checks and balances.²⁷⁷

i. Disclosures by Press and Public

The factors listed above provide substantial bases to strongly protect classified information dissemination by the press and public. Beginning with separated powers, we see that the President and the executive branch by design are especially well-equipped to keep secrets. Yet given the dangers of such capacity, Congress can impose structural checks on it. Congress can, for example, limit the categories of classifiable information by statute. Congress also can refuse to pass legislation permitting the criminal punishment of official secret disclosure. And Congress can make discrete information requests in the context of conducting oversight.²⁷⁸

But structural checks alone are not sufficient, and the Constitution protects individual rights that even Congress and the executive together may not infringe. Chief among these protections are the free speech and related clauses of the First Amendment.²⁷⁹ These protections provide an additional, deeply decentralized check on government. The complementary nature of structural and speech-based checks is exemplified by history. As Jeffrey A. Smith has chronicled, "colonial journalists . . . declared the importance of their serving as checks on the government."²⁸⁰ Even before the First Amendment was introduced, press and speech freedom from federal constraints were largely assumed from limitations on Congress's enumerated legislative powers.²⁸¹ Starting from this premise, Alexander Hamilton wrote in the *Federalist* of the complementary checks provided by intragovernmental divisions and a free press and public.²⁸² Hamilton explained that the geographic distance between citizens and the seat of the federal government will be of no serious moment, as

[t]he executive and legislative bodies of each State will be so many sentinels over the persons employed in every department of the na-

276. See *supra* Part III.C.1.

277. See *supra* Parts III.C.2, III.C.2.a.

278. See *supra* Part III.C.1 (discussing Congress's constitutional ability to impose structural checks on executive secrecy).

279. U.S. CONST. amend. I.

280. JEFFREY A. SMITH, *PRINTERS AND PRESS FREEDOM* 7 (1988).

281. See, e.g., THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 30, at 512-14.

282. *Id.*

tional administration; and as it will be in their power to adopt and pursue a regular and effectual system of intelligence, they can never be at a loss to know the behavior of those who represent their constituents in the national councils, and can readily communicate the same knowledge to the people.²⁸³

He also assured that

[t]he citizens who inhabit the country at and near the seat of government will, in all questions that affect the general liberty and prosperity, have the same interest with those who are at a distance, and that they will stand ready to sound the alarm when necessary, and to point out the actors in any pernicious project. The public papers will be expeditious messengers of intelligence to the most remote inhabitants of the Union.²⁸⁴

Free speech and structural protections thus do not merely parallel each other.²⁸⁵ They compliment each other. Each furthers openness values through means for which the other is not functionally equipped. Hence, Congress can aggressively pursue discrete topics by requesting and analyzing testimony and documents. Congress also can pass executive-restricting legislation. On the other hand, Congress is not a very fit match for a robust classification system. Congress cannot fully and effectively oversee the current system, with its broad classification categories that intrinsically lend themselves to wide implementation discretion, de facto executive policymaking, and massive use and overuse. This is not to say that structural measures cannot mitigate problems. Certainly, legislation directing and curtailing aspects of the system's policies would be very welcome.²⁸⁶ And legislation or executive orders providing for case-by-case reviews of classification decisions, as currently exist to a limited extent,²⁸⁷ similarly are necessary. Overall, however, the vast and scattered breadth of any substantial classification system—exemplified by the millions of official secrets created each year—cannot be matched by structural mechanisms alone. This is where the supplemental checking function of the press and the public come into play. The checking of scattered, nationwide mechanisms to horde information is among the major tasks preserved for the press and the public—themselves a vast, relatively decentralized group—by the First Amendment.

Even with strong First Amendment protections, the people and the press remain at a substantial disadvantage relative to the executive

283. *Id.* at 516.

284. *Id.* at 517.

285. *See, e.g., supra* note 262 (citing Vincent Blasi's discussion of the parallel relationship between the two).

286. *See* DANIEL PATRICK MOYNIHAN, REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at Chairman's Foreword, xxxvii–xxxviii (1997) (proposing statutory control of the classification system); *id.* at 11–15.

287. *See* RELYEA, *supra* note 49 at 27–29 (citing executive order provision for internal review of classification decisions); Fuchs, *supra* note 222, at 158–63 (citing statutory provision for judicial review of classification decisions).

branch. The latter creates and holds secrets in the first place. Outsiders must know where and from whom to look and often must piece together multiple pieces of information from multiple sources over time.²⁸⁸ Furthermore, the presence of strong First Amendment protection does not negate the possibility of prosecution or conviction.

In short, the strong First Amendment protections elaborated on in Part IV, and justified theoretically here, do not turn every person into a law unto herself with respect to national security information. Such protections do not diminish the bulk of the structural and practical disadvantages that the public and the press already face. Such protections simply mitigate the inroad made on the free flow of ideas by a classification system. Such mitigation is entirely consistent with, and indeed demanded by, the individual-rights based checks embodied in the First Amendment.

ii. Leaks by Government Employees

The relevant separated powers and free speech factors also shed light on the prosecution of leakers with special access to classified information. Such persons include current or former government employees or contractors who were cleared to access information that they subsequently leaked.²⁸⁹ Such leaks raise two questions somewhat distinct from those raised by press and public dissemination. First, do such leaks involve the First Amendment at all, or are they simply contractual breaches? Second, should the government insider be denied constitutional protection because they abused the trust that earned them information access in the first place?

The first question was addressed earlier in this article. I noted that the fact that a government employee has agreed not to release classified information as a condition of employment [does not] transform all employee disclosures into the “pure” conduct of breaching an agreement. Because the relevant condition is a condition on speech, and particularly on core political speech, one must assess whether the condition is an unconstitutional one, generally or as applied to a particular disclosure or punishment.²⁹⁰

Because the employment term breach does not automatically invalidate First Amendment protection, the first and the second questions merge, as we must consider the extent to which such a breach impacts First Amendment rights. Considering the applicable separated powers and free speech factors yields the conclusion that an intermediate level of protection, a level defined with more precision in Part IV, is warranted.

288. See, e.g., Robert G. Kaiser, *supra* note 167 (noting reporters must assemble a story “brick by brick”).

289. For example, in addition to the prosecutions of Rosen and Weissman, their alleged Defense Department source, Lawrence Franklin, was charged and pled guilty under the Espionage Act. See *supra* note 158.

290. *Supra* p. 908.

This conclusion is based on the position of the government employee in the balance of powers. Unlike the press and the public, government employees do not fall within the realm of critics that structurally stand outside of government, looking in, inquiring, and ready to “sound the alarm” when necessary.²⁹¹ Rather, government employees are part of the President’s Article II machinery. They thus are positioned to play some role on the side of the executive branch in the “unruly struggle” between press and government. They also have access advantages that outside speakers lack in the information control struggle. It would upset the balance of powers if insiders could exploit their special access while enjoying the same protection accorded outside speakers.

At the same time, government insiders are gatekeepers to much information of First Amendment value. Indeed, the Supreme Court has acknowledged this with respect to government employees generally: “Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it.”²⁹² The potential for high speech value is heightened in the national security context, given the secrecy and consequent public ignorance of so much information.

The government insider with special information access thus occupies a unique place from the perspective of free speech theory and doctrine. On the one hand, the insider is an Article II functionary with special constitutional responsibilities attached to that role. On the other hand, the insider possesses great free speech value, given her potential access to important policy information that may carelessly or maliciously be withheld from the public. Any leaking of information by such persons thus calls for a roughly intermediate level of speech protection, one tailored to account for each part of the constitutional balance in which the leaker plays a role.

IV. CLASSIFIED INFORMATION LEAKS AND FREE-SPEECH DOCTRINE

Part III made the theoretical case for relatively strong First Amendment protections for leaks and publications of classified information. It also explained that public and press publications merit a very high level of protection, while government employee leaks merit an intermediate protection level. Part IV considers more precisely the doctrinal standards that should apply.

291. See *supra* text accompanying note 284 (quoting THE FEDERALIST No. 84 (Alexander Hamilton)), *supra* note 30, at 516).

292. *Garcetti v. Ceballos*, 547 U.S. 410, 433 (2006) (quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam)).

A. Prosecuting the Press and the Public

From Part III's theoretical discussion, one might conclude that classified information dissemination by the press and the public should be protected at the same high level as national security related speech generally. Under this approach, such dissemination could legitimately be prosecuted only if it meets the standard outlined in *Brandenburg v. Ohio*. It could only be prosecuted, in short, if it is directed toward inciting, and is likely to incite, imminent illegal action.²⁹³

The exact importation of this standard from the advocacy realm to the realm of official secrets raises two possible objections. The first is that the "imminence" requirement does not belong in the realm of official secrets. The imminence requirement arguably reflects a marketplace conception of advocacy, whereby "the best test of truth is the power of the thought to get itself accepted in the competition of the market," and whereby opinions thus must flow freely "unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."²⁹⁴ One might argue that this logic is not responsive to the dangers created when official secrets are revealed. Such dangers extend beyond the possibility of immediate persuasion. They include the long-term undermining of secret government programs, even where such damage is not immediate.

The second possible objection is that the phrase "illegal action" does not capture the full range of serious harms that official secrets' revelation can cause. Such harms might include the gaining of knowledge by foreign persons, organizations, or nations that enable them to circumvent U.S. defenses without engaging in domestic illegality in the United States.

While both of these objections are reasonable, both are undermined by another factor to which the incitement standard responds. That factor is the malleability of judicial standards, a factor reflected in the long history leading up to the *Brandenburg* case, in which relatively loose standards often were applied to uphold convictions for political advocacy.²⁹⁵ While no standard is fail-safe, more precise standards help prevent overreaching.²⁹⁶ The imminence standard is particularly important in this respect, as it helps to protect against a historically demonstrated tendency, particularly in wartime, to punish remotely conceivable threats to national security.²⁹⁷

Given these competing concerns, the optimal standard would be a slight variation on the *Brandenburg* test. Such an adjusted test should

293. See *supra* notes 196–97 and accompanying text (citing the *Brandenburg* standard).

294. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

295. See *supra* notes 213, 215–17 and accompanying text.

296. See *supra* notes 222–23 and accompanying text.

297. See generally STONE, *supra* note 154.

respond to the different risks posed in the context of official secrets revelation versus advocacy. It also should attempt to balance any diminution in precision—such as in the strict imminence requirement—with other types of precision better tailored to the official secrets context.

This article thus proposes the following variation on the *Brandenburg* test: The revelation of official secrets cannot constitutionally result in criminal conviction unless such revelation is directed toward causing, and is likely to cause, grave damage to national security that is specific, identifiable, and imminent. Imminence includes the imminent beginning of such damage where the damage will be irreparable.

This standard largely preserves the imminence requirement, although it leaves some room for the possibility of grave harms that will not occur in full imminently. This slight leeway is balanced by accompanying requirements that the harm begin imminently, that it be irreparable, and that it be specific and identifiable. The standard also does not require that any resulting action necessarily be “illegal,” but it does require that it involve grave damage to national security. And it requires, again, that it be specific and identifiable. It also is very important that the intent requirement (“directed toward causing”) is preserved. Given the possible malleability even of imminence and “grave damage to national security” requirements, the intent requirement safeguards against punishments based on mere policy disagreements over secrecy and openness.

B. Prosecuting Government Employees

For leaks by those who had special access to the leaked information, I propose a standard along these lines: To demonstrate the constitutionality of a prosecution, the government must show that the employee lacked a substantial basis to believe that the public interest in disclosure outweighed any national security harms. In assessing this question, a court should consider whether the employee had a substantial basis to believe that any internal, government-provided channels to challenge classification were insufficient. The standard, including its consideration of internal channels for challenge, is objective. It asks, in short, whether a reasonable person in the employee’s position would have had a substantial basis to believe in the relevant factors.

Two elements of this proposed standard deserve mention. First, the standard as a whole attempts to strike a balance responsive to the competing Article II and First Amendment forces that government employees with special information access embody. The government bears the initial burden of making its case, and it would not suffice for the government to show a theoretical possibility of some harm while disregarding competing public interests in disclosure. At the same time, the government legitimately may penalize even employees who had some reasonable basis for disclosing information if the employee lacked a substantial

basis for so doing. Of course, this standard creates a fair degree of unpredictability in application. But such unpredictability is consistent with the relatively “even” competition between competing constitutional forces that employee disclosures present. In such a case, it is desirable that each player recognize that they take some risks not only in proceeding to litigation, but in engaging in behavior—whether overclassification or leaking—that could lead to litigation.²⁹⁸

Second, the standard acknowledges the relevance of internal dissent channels. This is important both as a matter of constitutional principle and of practical incentive. In terms of constitutional principle, employees are functionaries of Article II and of any legislative directives that affect their role. Employees’ directives can impact free speech by stifling the flow of information to which employees are privy. Where executive or legislative directives mitigate this risk by providing effective channels to challenge information classification, the need for judicial second-guessing is somewhat diminished. In terms of practical incentive, the proposed standard effectively encourages courts to second-guess the executive branch more vigorously where internal dissent channels are absent or are ineffective. Inefficacy might be signified, for example, by channels taking so long as to be of little use or by a history of employees being penalized for using the channels. The proposed standard thus gives the government incentive to create effective internal dissent channels.²⁹⁹

CONCLUSION

One objection that I sometimes hear in discussing this article with others is that its proposals would turn leakers and publishers of classified information into a “law unto themselves,” determining for all others what it is safe and unsafe to know. This also is a fairly popular refrain in public discourse. Indeed, *The Weekly Standard* began an editorial about recent classified information leaks by asking: “Is the New York Times a law unto itself?”³⁰⁰ Of course, neither this article nor any commentator that I know of advocates suspending all potential punishment against those who disseminate classified information. Nor is it suggested that the executive’s structural capacity to keep secrets in the first place should be

298. This point is somewhat parallel to that made by Bickel and BeVier about the desirability of an ongoing “contest” between press and government. See *supra* notes 263–66 and accompanying text.

299. For background on existing statutory protections for national security whistleblowers, see generally LOUIS FISHER, CONG. SERVICE REP., NATIONAL SECURITY WHISTLEBLOWERS (2005). See also Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2328–29 (2006) (discussing importance of internal dissent channels within executive branch).

300. See Johnson, *supra* note 13.

eliminated.³⁰¹ The objection, then, must stem from a belief in some or all of the strength equals prerogative arguments detailed in Part II of this article. If one believes that classified information legitimately is off-limits by virtue of its very designation, then it makes sense automatically to deem disseminators lawbreakers. Similarly, if one believes that only the political branches have the ability to understand, or the right to declare what shall be secret and what shall be known, then it makes sense to deem disclosures that violate their judgment categorically against the law. On the other hand, if one views classified information as information and disclosures of the same as political speech, then matters are much more complicated. At that point, the question no longer is whether prosecuting such disclosures implicates the First Amendment. Rather, the question is how best to balance the relevant First Amendment values and any competing interests. Most concretely, the question is what standards courts should apply to assess prosecutions for classified information leaks and publications.

Understanding that the question to be asked is how, and not whether, courts should weigh First Amendment interests in the balance sheds light on another refrain in current discourse: arguments that a group is inconsistent to champion the release of some classified information while decrying the release of other information. Some argue, for example, that supporters of the New York Times are hypocritical to champion the Times' release of classified information about secret government programs while decrying an alleged leak from within the Bush Administration of the classified identity of CIA agent Valerie Plame.³⁰² Yet if one deems classified information disclosures speech, then supporting some disclosures while considering others illegal is akin to supporting most instances of speech while deeming some—say, threats or imminent incitement—illegal. As with speech generally, some disclosures may indeed warrant legal punishment. But judgments as to legal impropriety should not follow automatically from the facts of classification and disclosure. Rather, such judgments must stem from properly crafted doctrinal standards. And such standards must account not only for the speech and national security interests at stake, but also for the tremendous advantages that the political branches, particularly the executive branch, have to create and keep secrets in the first place.

While this article focuses solely on prosecutions, its analysis is relevant to other restrictions on classified information disclosure, including employment based conditions and press privileges against revealing classified information sources. Detailed discussion of these matters is beyond this Article's scope. However, this article's conclusions—including

301. See *supra* p. 924–25 (explaining that “[e]ven with strong First Amendment protections, the people and the press remain at a substantial disadvantage relative to the executive branch” and that judicial protection is not absolute).

302. *Fit and Unfit to Print*, WALL ST. J., June 30, 2006.

the notion that classified information disclosures have substantial First Amendment value and the notion's differing implications for government leakers versus public and press disseminators—should bear on any detailed consideration of these related issues.

Indeed, all restrictions on the flow of information about government impact the marketplace of ideas and the people's ability to check their governors. This does not make such restrictions categorically unjustified. But categorical or near-categorical justification also must not follow from the wielding of a classification stamp. If it does so follow, then the First Amendment and the checks and balances that it supports have meager force indeed.

