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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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