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Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers

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LEAK PROSECUTIONS AND THE FIRST AMENDMENT: NEW
DEVELOPMENTS AND A CLOSER LOOK AT THE
FEASIBILITY OF PROTECTING LEAKERS

HEIDI KITROSSER*

ABSTRACT

This Article revisits the free speech protections that leakers are due in light of recent commentaries and events. Among other things, the Article critiques arguments to the effect that the Obama Administration's uptick in leak prosecutions does not threaten the system of free speech because plenty of classified information still makes its way into newspapers and the absolute number of leaker prosecutions remains very low. Such positions overlook the slanted impact that prosecutions and investigations are likely to have—and reportedly have had—on the speech marketplace. The Article also explains that even though the increase in prosecutions and other recent developments, including new government surveillance practices, heightens existing strains on the marketplace of ideas, the developments themselves are not the source of those strains. The core source is a legal framework in which the government is assumed to have a wide leeway to prosecute leaks of classified information with only a very minimal burden to show possible national security harm and no obligation to assess the value of the information at stake. This framework, particularly when combined with the classification system's dramatic overbreadth, leaves the door wide open for content-targeted prosecutions and slanted chilling effects corresponding to

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administration-unfriendly views. Recent developments simply highlight and exacerbate these problems. The developments illuminate the need for First Amendment standards that meaningfully define and limit the subsets of classified information whose conveyance the government can prosecute constitutionally. In past work, I have proposed such standards. In this Article—building partly on the facts of recent leak cases and partly on this Article's own responses to recent commentaries—I elaborate on those standards and their potential applications.

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INTRODUCTION

The Obama Administration is walking a political and legal tight-rope of late, committed to demonstrating both that it has the will and the ability to stop leaks of national security information to the press, and that it supports and protects national security journalism. This high-wire act was inspired, at least partly, by external pressures. From the beginning, the administration faced skepticism about its national security bona fides and pressure to stop national security leaks.¹ At the same time, the administration has prosecuted more leakers of classified information than all previous administrations combined.² Although transparency advocates had already criticized the administration's prosecution record, a far louder outcry followed revelations that it had aggressively pursued journalists' records in the course of investigating leaks.³ Most alarming to some was the fact that the administration had referred to a journalist as an alleged leaker's criminal coconspirator in a warrant application pertaining to a leak investigation, heightening concerns that the administration might prosecute journalists for publishing stories containing classified information.⁴ In the wake of the revelations and ensuing outcry, the administration sought to assure journalists that its commitment to stopping leakers is equaled by its belief in a free press.⁵

Describing the balance that the administration strives to strike, President Obama told an audience at the National Defense University on May 23, 2013, that "we must enforce consequences for those who break the law and breach their commitment to protect classi-

1. Leonard Downie Jr., *The Obama Administration and the Press*, COMM. TO PROTECT JOURNALISTS (Oct. 10, 2013, 10:00 AM), <https://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php> [<http://perma.cc/WP6M-SK23>].

2. See, e.g., Adam Liptak, *A High-Tech War on Leaks*, N.Y. TIMES, Feb. 12, 2012, at SR5; Daniel Politi, *Obama Has Charged More Under Espionage Act Than All Other Presidents Combined*, SLATE (June 22, 2013, 3:32 PM), http://www.slate.com/blogs/the_slatest/2013/06/22/edward_snowden_is_eighth_person_obama_has_pursued_under_espionage_act.html [<http://perma.cc/C35-844E>].

3. See *infra* Part III.A.

4. See *infra* text accompanying notes 118-19.

5. Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), available at <http://perma.cc/5793-EN3B>.

fied information. But a free press is also essential for our democracy.... Journalists should not be at legal risk for doing their jobs.”⁶ Indeed, the administration indicated that it would not prosecute Julian Assange of WikiLeaks because it believed that it “could not do so without also prosecuting U.S. news organizations and journalists” who published the classified information.⁷

The notion that it is both legally sound and logically desirable to accord few, if any, protections to those who leak classified information to the press, while providing the press broad protections for publishing such information, is not a new one.⁸ To the contrary, a number of commentators have adopted this “mixed approach” over the years. Indeed, the mixed approach can fairly be described as the mainstream position on classified information leaks and publications, both because of its number of prominent adherents and because it strikes a middle ground between alternatives.⁹ Furthermore, although the case law leaves room for argument in different directions, it is fair to say that it most closely approximates the mixed approach.¹⁰

6. *Id.*

7. Sari Horowitz, *Julian Assange Unlikely to Face U.S. Charges over Publishing Classified Documents*, WASH. POST (Nov. 25, 2013), http://www.washingtonpost.com/world/national-security/julian-assange-unlikely-to-face-us-charges-over-publishing-classified-documents/2013/11/25/dd27decc-55f1-11e3-8304-caf30787c0a9_story.html [http://perma.cc/BUM8-WSXH].

8. See *infra* Part II.B (discussing the mixed approach).

9. See *infra* Part II.B; see also Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT'L SEC. L. & POL'Y 409, 418-19 (2013); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 515-17 (2013) (referring to the mixed approach as “the source/distributor divide” and noting some of its prominent adherents).

10. See *infra* Part I.B for a discussion of the case law as it relates to leaker prosecutions. As I explain there, the case law provides substantial support for the view that leakers are largely unprotected under the First Amendment. I also note, however, that the case law is not entirely one-sided and offers some support for speaker protective arguments as well. See Kitrosser, *supra* note 9, at 419-21, 429-38. As for press protections, although the case law is not definitive on that front either, it provides strong bases to support the notion that the press is substantially protected when it publishes classified information. See, e.g., Geoffrey R. Stone, *WikiLeaks and the First Amendment*, 64 FED. COMM. L.J. 477, 486-89 (2012) (discussing relevant case law). For examples of legal scholars deeming the case law to reflect the mixed approach, see Yochai Benkler, *A Free Irresponsible Press: WikiLeaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 363-65 (2011) (interpreting the case law largely to reflect the mixed approach but noting some uncertainty

In discussing the mixed approach and its alternatives, it is important to be clear on the relationship between constitutional and nonconstitutional arguments. For example, although the Obama Administration indicates that it will not prosecute journalists for publishing classified information, it has not stated that it lacks a legal right to do so. Indeed, some of the administration's arguments in litigation to prosecute leakers suggest that its constitutional power to punish classified information's conveyance is broad enough to cover press publications.¹¹ Others propose statutory protections for leakers that extend beyond the First Amendment rights that they believe leakers possess.¹²

This Article discusses classified information leaks insofar as they relate to the Constitution, particularly to the First Amendment. In discussing the mixed approach, for example, the Article refers predominantly to the constitutional version of the approach—that is, to the notion that the press deserves strong First Amendment protections whereas leakers warrant few, if any, of the same. Nonetheless, as this Article's analysis reflects, matters of policy and practice are hardly irrelevant to the First Amendment questions at issue. For one thing, given the First Amendment's relative lack of textual or historical guidance, speech and press clause inquiries necessarily entail consideration of the theories and purposes underlying the clauses and how best to implement them through standards or apply them to particular facts. Furthermore, analyses of administrative practices and their effects—whether or not those practices are motivated by constitutional reasoning—can be very informative as to the practical impacts of particular legal standards on the speech marketplace. Such information, in turn, is relevant to questions of how best to achieve constitutional goals.

as to journalists' protections where their efforts to obtain classified information go beyond passively receiving it); Pozen, *supra* note 9, at 515-16; and Stone, *supra*, at 483-89.

11. See *infra* notes 64-65 and accompanying text.

12. Compare Benkler, *supra* note 10, at 363 ("There is little doubt that the government has the power to prosecute its own employees, particularly those whose employment relates to national security and who have access to classified information by dint of their public employment, for revealing classified materials."), with Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL'Y REV. 281, 285-86 (2014) (supporting a public accountability defense for leakers).

Whether its expressed commitment to a mixed approach is motivated by constitutional or policy concerns or both, developments in the Obama Administration provide important occasion to revisit the question of the First Amendment protections due to leakers. The administration's unparalleled numerical record of prosecuting cases, combined with new technological surveillance tools and the administration's known uses of the same, offer a new vantage point from which to consider the impact of leak prosecutions on the speech marketplace, and to assess the practice of the mixed approach in particular. More so, these developments have sparked important new commentaries by other observers.

This Article builds on my own earlier analyses in light of recent events and commentaries. Elsewhere, I have argued that the principles and purposes underlying the First Amendment and the separation of powers demand a level of skepticism toward classification decisions, and a valuing of information about government, that can only be reflected in meaningful constitutional protections for leakers.¹³ This is particularly so in light of the unique constitutional roles of executive branch employees and contractors.¹⁴ Government insiders have a relationship of trust with the government that outsiders lack.¹⁵ Yet insiders also are uniquely positioned to learn very valuable information that may wrongly be kept from the public and that can only come to light through insider interventions.¹⁶ Some degree of substantive judicial oversight of leak prosecutions, rather than near-total deference to executive classification judgments, is thus constitutionally necessary. These views are, as I have explained, also bolstered by the history of the classification system, including the fact that the system has been characterized by rampant overclassification and misuse.¹⁷

The instant Article expands on these points. Among other things, the Article critiques recent arguments to the effect that leak crack-downs do not threaten the system of free speech because plenty of classified information still makes its way into newspapers and the

13. See Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 884-86; Kitrosser, *supra* note 9, at 411-13.

14. See Kitrosser, *supra* note 9, at 426-27.

15. *Id.* at 424.

16. *Id.* at 424-26.

17. *Id.* at 421-29.

absolute number of leaker prosecutions remains very low. Such positions overlook the slanted impact—both directly and indirectly through chilling effects—that prosecutions and investigations are likely to have on the speech marketplace. In other words, even if the total quantity of classified information in newspapers remains unchanged, a strong risk exists that its substantive content will shift, on balance, to that which is more politically palatable to administrations.

And although recent developments—including the numerical increase in leak prosecutions and new government surveillance and investigative practices—may heighten the likelihood and extent of these effects on the marketplace of ideas, the core problem is not the developments themselves. Rather, the problem, at its deepest root, is a legal framework in which the government is assumed to have a wide leeway to prosecute leaks of classified information with only a minimal burden to show possible national security harm and no obligation to assess the value of the information at stake. This framework, particularly when combined with the classification system's dramatic overbreadth and the longstanding practice of tacitly authorizing leaks from the top of the executive branch, leaves the door wide open for content-targeted prosecutions, or at minimum for slanted chilling effects corresponding with administration-friendly viewpoints or subject matters. New developments simply highlight these fundamental problems. They also illustrate the need for First Amendment standards that define and limit, in some meaningful way, the subsets of classified information whose conveyance can be prosecuted constitutionally. Relatedly, this Article expands on the nature and feasibility of such standards.

Part I of this Article charts out the existing statutory and doctrinal landscape for leaker prosecutions. It explains that the existing statutory scheme grants near-total discretion to the executive branch to prosecute leaks of classified information. Although the relevant judicial precedent is more mixed, it provides support for the conventional wisdom that leakers are almost entirely unprotected as a constitutional matter. Part II provides intellectual context for assessing the most recent debates and developments concerning leaker prosecutions. Specifically, it summarizes the three major categories of scholarly argument regarding the constitutionality of

leak prosecutions. First, the “executive discretion” approach supports broad government powers to punish not only leakers, but the press and other third-party publishers of classified information. Second, the mixed approach combines a broad executive discretion to prosecute leakers with substantial First Amendment protections for the press. The third category, the “speaker protective” approach, on the other hand, accords both leakers and publishers substantial First Amendment protections. The speaker protective approach consists largely of arguments that I have made in previous writings on the topic. Part II’s iteration of the approach also incorporates more recent work by other scholars.

Part III turns to recent developments relating to leaker prosecutions. It provides an overview of major developments, including the rise of leak prosecutions in the Obama Administration, new government surveillance practices, new technologies available to leakers, and journalists’ reports on their sources’ reactions to Obama Administration practices. Part III.A cites arguments by commentators to the effect that these new developments, on balance, threaten free speech and information flow. Part III.B cites arguments by mixed approach and executive discretion proponents to the effect that such free speech concerns are overblown. These commentators suggest that the executive branch is simply attempting to right a balance that technology and a growing disrespect for confidentiality rules have tilted heavily against national security secrecy.

Part IV argues that new developments heighten the risks posed by the existing legal framework to free speech and information flow. More importantly, these changes highlight the dangers intrinsic in a system that gives the executive branch virtual legal *carte blanche* to prosecute leakers of classified information. Part IV also elaborates on legal standards that might properly reconcile leaker protections with national security and with legitimate executive personnel control needs.

I. THE STATUTORY AND DOCTRINAL LANDSCAPE

A. *Statutory Avenues to Prosecute Leakers*

Despite the common assumption that it is categorically illegal to leak or publish classified information, the United States has never had an official secrets act that creates such blanket illegality.¹⁸ Prosecutors instead must turn to somewhat more qualified statutory provisions. The law most heavily relied upon, given the relative breadth of its provisions, is the Espionage Act.¹⁹ Sections (d) and (e) of the Act prohibit willfully disseminating, “to any person not entitled to receive it”:

any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.²⁰

Section (d) applies to anyone with lawful access to the information.²¹ The section also bars such persons from “willfully retain[ing] the same and fail[ing] to deliver it on demand to the officer or employee of the United States entitled to receive it.”²² Section (e) applies to persons with unauthorized access to the information.²³ It also prohibits them from “willfully retain[ing] the same and fail[ing] to deliver it to the officer or employee of the United States entitled to receive it.”²⁴

18. See, e.g., Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL'Y REV. 219, 219 (2007).

19. See Jessica Lutkenhaus, Note, *Prosecuting Leakers the Easy Way: 18 U.S.C. § 1641*, 114 COLUM. L. REV. 1167, 1169 (2014) (“The espionage statutes ... have received the vast majority of the attention surrounding leak prosecutions.”).

20. 18 U.S.C. § 793(d), (e) (2012).

21. *Id.* § 793(d).

22. *Id.*

23. *Id.* § 793(e).

24. *Id.*; see also *United States v. Kim*, 808 F. Supp. 2d 44, 52 (D.D.C. 2011) (indicating that retention clauses might apply only to tangible items).

Courts have read the “not entitled to receive it” language in light of the classification system. In other words, they interpret the statute to mean that those persons who are authorized, under the classification system—which is largely a product of executive order and related regulatory actions—to receive classified information are entitled to receive it under the terms of the statute.²⁵ Conversely, those not authorized to receive such information under the classification system are not entitled to receive it within the statute’s terms.²⁶

Given the breadth and malleability of the remaining statutory requirements, the bare fact that information is classified typically will be enough to bring it within the statute’s protections. The requirement that information “relat[es] to the national defense” is quite expansive on its face. And courts consistently “construe[] [it] broadly to include information dealing with military matters and more generally with matters relating to United States foreign policy and intelligence capabilities.”²⁷ Although courts have imposed two additional limits on the phrase, both track the statute’s other textual requirements. The two limits are that information must be “closely held by the government”²⁸ and must “be potentially damaging to the United States or useful to an enemy of the United States.”²⁹ The first requirement largely maps onto the statute’s not-entitled-to-receive element, particularly insofar as the element gains content through reference to the classification system. The second requirement tracks the textual requirement that the information’s “possessor has reason to believe” that it “could be used to the injury of the United States or to the advantage of any foreign nation.”³⁰

A government insider thus could, theoretically, face Espionage Act prosecution for passing virtually any classified information to a third party, including a journalist.³¹ A number of other statutes,

25. See *Kim*, 808 F. Supp. 2d at 54-55.

26. See *United States v. Morison*, 844 F.2d 1057, 1075 (4th Cir. 1988); see also *Kim*, 808 F. Supp. 2d at 54-55.

27. *United States v. Rosen*, 445 F. Supp. 2d 602, 619-20 (E.D. Va. 2006).

28. *Id.* at 620-21.

29. *Id.* at 621-22.

30. 18 U.S.C. § 793(d), (e) (2012).

31. See, e.g., Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM. U. L. REV. 1531, 1534 (2008) (noting that given the Act’s breadth, “it

too, have been or could be used to prosecute leakers.³² For those concerned with this statutory terrain, one obvious path is to seek statutory changes. Indeed, some important statutory proposals have been raised.³³ Realistically, however, given the current statutory framework and the unlikelihood of near-term dramatic changes, the question of First Amendment protections—that is, the extent to which the First Amendment limits the government’s ability to prosecute persons who leak classified information—is particularly crucial.

B. Judicial Precedent and Leaky Government Insiders

There is but a single federal appellate court case on the constitutional protections from prosecution owed to leakers. That case, *United States v. Morison*, upheld Samuel Morison’s conviction for leaking classified satellite photos to the press.³⁴ In his opinion for the court, Judge Russell characterized Morison’s actions as pure theft, deeming no “First Amendment rights ... implicated” by his prosecution.³⁵ Two of the three panel judges did, however, concur separately to make clear their view that the prosecution implicated the First Amendment.³⁶ “[W]hile both concurring judges embraced a deferential role for the judiciary,”³⁷ they provided little detail as to the level of deference that they would demand.³⁸

Although the Supreme Court itself has yet to decide a leak prosecution case, it has considered leakers’ rights in the context of a contractual dispute. In the 1980 case of *Snepp v. United States*, the Court upheld a contract in which former CIA agent Frank Snepp had agreed to submit any writings about the CIA to the agency for

appears that there can never be a ‘legal’ public disclosure of classified national security information under the Espionage Act”).

32. See, e.g., Benkler, *supra* note 12, at 293, 315; Lutkenhaus, *supra* note 19, at 1168-72; Vladeck, *supra* note 18, at 228-31.

33. See, e.g., *The Espionage Act: A Look Back and a Look Forward: Hearing Before the Subcomm. on Terrorism and Homeland Sec. of the S. Comm. on the Judiciary*, 111th Cong. 12-14 (2010) (written testimony of Stephen I. Vladeck, Professor of Law, American University Washington College of Law); Benkler, *supra* note 12, at 302-11.

34. *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).

35. *Id.* at 1068-70.

36. *Id.* at 1080-81 (Wilkinson, J., concurring); *id.* at 1085-86 (Phillips, J., concurring).

37. Kitrosser, *supra* note 9, at 430.

38. For a more detailed discussion of the concurring opinions, see *id.* at 430-31.

prepublication review.³⁹ The Court also approved a constructive trust against proceeds garnered by Snepp for writings not submitted for review. The Court emphasized Snepp's contractual agreement, the fact that the agreement was designed to protect classified information from disclosure, and the tight fit between Snepp's "fiduciary and contractual" breaches and the constructive trust remedy that the Court approved.⁴⁰ The *Snepp* Court barely addressed the First Amendment questions raised, dispensing of them in a single footnote.⁴¹

There are persuasive arguments against extending *Snepp* to the context of leaker prosecutions or otherwise applying it beyond its facts. The most obvious reason is the virtual absence of attention paid by the *Snepp* Court to the First Amendment. Furthermore, the Court relied heavily on the close fit between the constructive trust remedy and Snepp's contractual breach,⁴² making the case an inapt vehicle for addressing criminal prosecutions. Finally, *Snepp* was rife with procedural irregularities. In his petition for certiorari, Snepp asked the Court to consider the constitutionality of the injunctive and damages remedies upheld by the appellate court.⁴³ The government responded with a conditional cross-petition, asking the Court, if it granted Snepp's certiorari petition, also to review the appellate court's rejection of the constructive trust remedy that the trial court had approved.⁴⁴ The Court's per curiam opinion focused almost exclusively on the issues raised by the government, leading the dissent to argue that the Court had effectively denied Snepp's petition for certiorari and thus lacked jurisdiction over issues raised in the conditional cross-petition.⁴⁵ Moreover, the Court decided the case without benefit of merits briefs or oral argument.⁴⁶

Another line of cases—those involving the free speech protections due to government employees against termination or other

39. 444 U.S. 507, 513 n.8, 515-16 (1980) (per curiam).

40. *Id.* at 510-12, 515-16.

41. *Id.* at 509 n.3.

42. *Id.* at 515-16.

43. *Id.* at 524 (Stevens, J., dissenting).

44. *Id.* at 524-25; see also Diane F. Orentlicher, *Snepp v. United States: The CIA Secrecy Agreement and the First Amendment*, 81 COLUM. L. REV. 662, 665 n.23 (1981).

45. *Snepp*, 444 U.S. at 524-25 (Stevens, J., dissenting).

46. Archibald Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 9-10 (1980); Orentlicher, *supra* note 44, at 665 n.23.

employment-based discipline—also are relevant. These cases sometimes are referred to as the “*Pickering*” cases for the first case in the series, *Pickering v. Board of Education*.⁴⁷ In these cases, the Supreme Court established that government employees sometimes are protected from being fired or disciplined for speech on matters of public concern. To determine whether an employee may be punished in a given case, courts must apply the “*Pickering* balance,”⁴⁸ which balances “the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”⁴⁹ In the 2006 case, *Garcetti v. Ceballos*, the Court clarified that these protections do not apply to speech “made pursuant to the employee’s official duties.”⁵⁰ Most recently, in the 2014 case of *Lane v. Franks*, the Court made clear that speech does not fall within the *Garcetti* exception simply because it conveys information that an employee learned in the course of their employment.⁵¹

There are potential implications, both positive and negative, for leakers from the *Pickering* cases. On the one hand, the cases suggest that the government has much greater leeway over the speech of its employees than over ordinary citizens. Furthermore, some have looked at the balancing test in particular and deemed it quite clearly to favor the government’s right to control classified information leaks by its employees or contractors, with possible exceptions for leaks that expose government illegality. On the other hand, the Court in the *Pickering* cases “acknowledge[d] the importance of promoting the public’s interest in receiving the well-informed views of government employees engaging in civic discussion.”⁵² Indeed, the Court emphasized in *Lane* that its “precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value

47. 391 U.S. 563 (1986).

48. *Connick v. Meyers*, 461 U.S. 138, 150 (1983).

49. *Id.* at 140 (quoting *Pickering*, 391 U.S. at 568).

50. 547 U.S. 410, 413 (2006); *see also id.* at 418-423.

51. 134 S. Ct. 2369, 2378-80 (2014).

52. *Garcetti*, 547 U.S. at 419.

precisely because those employees gain knowledge of matters of public concern through their employment.”⁵³

Finally, it bears noting that the U.S. Court of Appeals for the D.C. Circuit, in the 2007 case of *Boehner v. McDermott*, stated that “those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information.”⁵⁴ In *United States v. Kim*, the U.S. District Court for the District of Columbia cited this statement in denying Stephen Kim’s motion to dismiss his indictment for allegedly leaking classified information to the press.⁵⁵ The *Boehner* court’s statement, and the *Kim* court’s reliance on the same, are subject to two precedent-based objections. First, the courts are mistaken in deeming the statement to follow from the Supreme Court case of *Aguilar v. United States*.⁵⁶ The *Aguilar* Court upheld a federal judge’s conviction for revealing a wiretap order to its subject.⁵⁷ Citing *Snepp*, the *Aguilar* Court explained that “[a]s to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public.”⁵⁸ This statement tells us only that the voluntary commitment element is a factor that lowers the level of constitutional protection relative to what it otherwise would be. It does not mean that First Amendment protections fail to apply at all. Indeed, the *Aguilar* Court stressed that the relevant statute targeted only disclosures of wiretap orders or applications intended to impede the same.⁵⁹ The Court also cited the obvious state interests in preventing this narrow set of disclosures.⁶⁰ Second, the *Boehner* Court’s sweeping statement is belied by a wealth of Supreme Court case law, including *Lane v. Franks* and the earlier *Pickering* cases, which made clear that “public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that

53. *Lane*, 134 S. Ct. at 2379.

54. 484 F.3d 573, 579 (D.C. Cir. 2007).

55. 808 F. Supp. 2d 44, 56-57 (D.D.C. 2007).

56. See *Boehner*, 484 F.3d at 579; *Kim*, 808 F. Supp. 2d at 57.

57. *United States v. Aguilar*, 515 U.S. 593, 595, 609 (1995).

58. *Id.* at 606.

59. *Id.* at 602.

60. *Id.* at 605-06.

public employers may not condition employment on the relinquishment of constitutional rights.”⁶¹

On balance, then, there is ample support for the conventional wisdom that judicial precedent supports broad executive discretion to prosecute leakers. This is particularly so in light of *Morison* and the absence of any other federal appellate court cases to the contrary. That said, commentators are too quick to assume that the case law is nothing but bad news for leakers. *Snepp*, for one, is readily distinguishable from leak prosecution cases. And there are persuasive arguments that the government employment cases not only are distinguishable from prosecution cases, but also include points that can be marshalled to support leaker protections.

II. THE CORE POSITIONS IN DEBATES OVER LEAKER PROTECTIONS

Before describing the major scholarly positions on leaker protections, a word of clarification is in order. Typically, leaker protections are discussed at least partly in relation to the protections due to third-party publishers who publish leaks, particularly members of the press. For example, part of the rationale of mixed approach proponents is that the impact of low leaker protections on the marketplace of ideas is counterbalanced by the high protections accorded to the press.⁶² In my own work on speaker protections in this Article and elsewhere, I explain that leakers’ special constitutional role demands that they receive protections that are robust but not as extensive as those due to members of the press.⁶³

Thus, although this Article’s focus is on leaker protections, the Article also refers to press protections when it is useful. In summarizing the major scholarly approaches to leaker protections, then, this Part also discusses, to the extent useful for context and clarity, the vision that each approach manifests toward third-party publisher protections.

61. *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014).

62. See *infra* notes 82-87 and accompanying text.

63. See *infra* Part V.C.

A. The Executive Discretion Approach

Members of the executive discretion camp would accord the executive very broad discretion to punish not only insiders who leak classified information to which they gained access through their insider status, but also members of the press or other third-party publishers who publish the information. The position effectively entails the view that those who leak or publish classified information deserve little, if any, protection under the First Amendment.

In litigation to prosecute leakers—and in one case initiated during the George W. Bush Administration to prosecute third-party speakers—administrations consistently articulate the most extreme version of the executive discretion position, which is that classified information is not speech at all. Rather, classified information is government property and its conveyance is theft.⁶⁴ A slight variant on the argument is that even if classified information is speech, it is speech integral to committing a crime in light of statutes that forbid the unauthorized conveyance of national defense information. Its conveyance—whether by leak or by third-party publication—thus deserves no protection under the First Amendment.⁶⁵

Some scholars offer a considerably more sophisticated version of the executive discretion position. They acknowledge that executive discretion is no panacea, but deem it the best option among nonideal alternatives.⁶⁶ In a world of imperfect information and decision making, someone must have the final word, as a constitutional matter, as to when information is too dangerous to disclose.⁶⁷ That person

64. The George W. Bush Administration took this position in *United States v. Rosen*, the only prosecution in history directed against third parties—specifically, lobbyists—rather than government insiders for disseminating classified information. *See, e.g.*, Government's Supplemental Response to Defendant's Motion to Dismiss the Superseding Indictment at 22, 29-30, *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006) (No. 1:05CR225) [hereinafter Government's Response]. The Obama Administration has made very similar arguments in the context of prosecuting leakers. *See* Consolidated Response of the United States to the Defendant's Pretrial Motions at 33-34, *United States v. Kim*, 808 F. Supp. 2d 44 (D.D.C. 2011) (No. 10-225 (CKK)) [hereinafter Consolidated Response].

65. *See* Government's Response, *supra* note 64, at 27-28; Consolidated Response, *supra* note 64, at 30-31.

66. *See* RAHUL SAGAR, *SECRETS AND LEAKS: THE DILEMMA OF STATE SECRECY* 125-26 (2013).

67. *See* GABRIEL SCHOENFELD, *NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW* 64-65 (2010).

is the President, whether acting directly or through subordinates with classification authority.⁶⁸ Those taking this view ground it in the President's relative expertise and democratic legitimacy.⁶⁹ They also deem this position consistent with the Constitution.⁷⁰

In keeping with the relative nuance of some executive discretion commentary, executive discretion proponents do not deny the fact of overclassification. To the contrary, they acknowledge and lament it. Nonetheless, they maintain that executive discretion is the only viable approach to unauthorized disclosures and that overclassification must be dealt with separately. For example, Rahul Sagar discusses the problem of overclassification and acknowledges executive discretion's costs to the free flow of information.⁷¹ He even takes the view that classified information disclosures are morally justified in limited circumstances.⁷² Still, Sagar opposes protecting such disclosures legally. Speaking of press protections, he reasons:

If we allow private actors to ignore classification markings, then we ought to ask ourselves why we have established a classification system in the first place. The point is not that officials do not engage in overclassification. Rather, it is that if we do not want private actors to undermine the public authority that we have created through law and armed with expertise and information, then we must accept, warts and all, the decisions produced by a classification system designed, authorized, and funded by publicly elected officials. Conversely, to the extent the prevailing system is flawed, the appropriate remedy must be public reform directed by our chosen representatives, not subversion by under-informed private actors.⁷³

68. *Id.*

69. *Espionage Act and the Legal Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 52-53, 56-57, 59-65 (2010) (written testimony of Gabriel Schoenfeld, Senior Fellow, Hudson Institute, Washington, D.C.; Resident Scholar, Witherspoon Institute, Princeton, N.J.); SAGAR, *supra* note 66, at 13, 109-26; SCHOENFELD, *supra* note 67, at 64-65, 187-91, 204.

70. SAGAR, *supra* note 66, at 16-30; SCHOENFELD, *supra* note 67, at 64-65; John C. Eastman, *Listening to the Enemy: The President's Power to Conduct Surveillance of Enemy Communications During Time of War*, 13 ILSA J. INT'L & COMP. L. 49, 57-58, 64-66 (2006).

71. SAGAR, *supra* note 66, at 111-16.

72. *Id.* at 126.

73. *Id.* at 113.

Gabriel Schoenfeld similarly agrees that overclassification is a substantial problem that the government must address, but that constitutional leeway for publishers or for low-level leakers is unwarranted.⁷⁴ His views are well captured in his discussion of Daniel Ellsberg's leak of the Pentagon Papers. Schoenfeld acknowledges that in retrospect, it may be the case that "the release of the information contained in the Pentagon Papers did not pose any sort of tangible threat to American security."⁷⁵ He also criticizes the poor judgment inherent in the Nixon Administration's heavy-handed responses to the leak.⁷⁶ Still, Schoenfeld maintains that "at root Ellsberg's leak was an assault not only on orderly government but—in a polity that has an elected president and elected representatives—an assault on democratic self-governance itself."⁷⁷ Ellsberg had "taken the law into his own hands and was prepared to do so again, which is precisely why he deserved to be stopped and punished."⁷⁸

B. The Mixed Approach

Adherents to the mixed approach strike a middle ground between speaker protective and executive discretion approaches. They would accord few, if any, First Amendment protections to insiders who leak classified information but would strongly protect third-party publishers, particularly members of the press, who publish the same information.⁷⁹

74. See Gabriel Schoenfeld, *Secrecy, Leaks, and Selective Prosecution*, HOOVER INST. 1, 5-9, 13-14 (Jan. 19, 2012), [http://media.hoover.org/sites/default/files/documents/Emerging Threats_Schoenfeld.pdf](http://media.hoover.org/sites/default/files/documents/Emerging%20Threats_Schoenfeld.pdf) [<http://perma.cc/AAX5-GNDZ>] (citing the problem of overclassification and suggesting that the President or Congress authorize some high-level presidential appointees to pass on classified information, but making clear his continued support for executive discretion to prosecute all leakers not given such allowances). Schoenfeld does note in passing that "we also need better protection for genuine whistleblowers." *Id.* at 13. Because he does not elaborate, it is not clear if he would support statutes or regulations offering protection for certain types of disclosures to the press or only for internal executive branch disclosures or disclosures to Congress. Nor is it clear what disclosures he would deem "genuine" whistleblowing. Still, this is a welcome statement and it is the reason that I refer in the text to his opposing "constitutional" leeway rather than any type of "legal" leeway.

75. SCHOENFELD, *supra* note 67, at 186.

76. *Id.* at 186, 188.

77. *Id.* at 187.

78. *Id.* at 191.

79. See, e.g., Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security*

Of the two major justifications for the approach, the first, or waiver justification, is that government insiders who access classified information by virtue of their insider status have waived any First Amendment rights to disseminate the same. The notion is that the leaker has no right to share information that she accessed solely by virtue of her position of trust with the government, a position at least implicitly—and virtually always explicitly—conditioned on a promise of nondisclosure.⁸⁰ At the same time, mixed theory proponents believe that third parties not in relationships of trust with the government owe no special duty of secrecy to the government. As such, they are entitled to roughly the same free speech protections for publishing classified information as for publishing unclassified information.⁸¹

The second major justification is the “practical balance” rationale to the effect that the mixed position best balances national security secrecy needs with a free press. This rationale is frequently linked to Alexander Bickel’s view that the First Amendment ordains an “unruly contest between the press, whose office is freedom of information and whose ambition is joined to that office, and government, whose need is often the privacy of decision making and whose servants are ambitious to satisfy that need.”⁸² From this contest, or

Leaks and the First Amendment, 94 B.U. L. REV. 449, 451 & n.6 (2014) (describing this approach and citing a number of its adherents).

80. See, e.g., *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 5-8 (2010) [hereinafter *Espionage Act Hearing*] (written testimony of Geoffrey R. Stone, Edward H. Levi Distinguished Service Professor of Law, University of Chicago); William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1461, 1473, 1487-89, 1529 (2008); Keith Werhan, *Rethinking Freedom of the Press After 9-11*, 82 TUL. L. REV. 1561, 1597-98 (2008); see also Cass R. Sunstein, *Government Control of Information*, 74 CALIF. L. REV. 889, 914, 916, 918-19 (1986) (describing waiver justification and closely related arguments that the instant Article groups with waiver).

81. See, e.g., *Espionage Act Hearing*, *supra* note 80, at 9-10; Geoffrey R. Stone, *Secrecy and Self-Governance*, 56 N.Y.L. SCH. L. REV. 81, 92-93 (2011-2012); Werhan, *supra* note 80, at 1597-98.

82. ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 87 (1975). In fact, as Cass Sunstein pointed out nearly three decades ago, the question of leaker protections does not fit perfectly into Bickel’s framework. Sunstein, *supra* note 80, at 912-13. It is not clear, after all, whether leakers are a part of government’s “team” in the contest, or whether they are off the team by virtue of having leaked. *Id.* Nonetheless, the contest metaphor, or the “disorderly situation,” as Bickel also calls the combined phenomena of the government’s right to protect its secrets and the press’s right to publish that which it manages to obtain, frequently is invoked to describe the mixed approach. See, e.g., Adrian Vermeule, *The Invisible Hand in Legal and*

“disorderly system,” emerges “the optimal assurance of both [secrecy] and freedom of information.”⁸³ Proponents of the mixed approach do not insist that it results in some theoretical ideal.⁸⁴ Like the more sophisticated versions of the executive discretion approach, some iterations of the mixed approach frame it as a realistic, if imperfect, way to confront the epistemic difficulties of assessing and balancing the value and dangers of particular leaks and publications. Whereas executive discretion proponents deem deference to executive classifiers to be the best solution with respect to both leaks and publications, advocates of the mixed approach split the difference in light of the dangers and benefits of executive control.

Geoffrey Stone nicely captures the practical balance rationale for the mixed approach. He argues that when it comes to insider leakers, we do and should “*overprotect*[] the government’s legitimate interest in secrecy relative to the public’s legitimate interest in learning about the activities of the government.”⁸⁵ This allows for a “clear and easily administrable rule for government employees.”⁸⁶ And when it comes to third-party publishers, we do and should “*overprotect*[] the right to publish, as compared to a case-by-case balancing of costs and benefits.”⁸⁷ Quoting Bickel, Stone concludes:

This is surely a “disorderly situation,” but it seems the best possible solution. If we grant the government too much power to punish those who disseminate information useful to public debate, then we risk too great a sacrifice of public deliberation. If we grant the government too little power to control confidentiality at the source, then we risk too great a sacrifice of secrecy and government efficiency. The solution is thus to attempt to reconcile the irreconcilable values of secrecy and accountability by guaranteeing *both* a strong authority of the government to

Political Theory, 96 VA. L. REV. 1417, 1421 (2010) (describing Bickel’s contest metaphor and “optimal” disclosure language as applying directly to the mixed approach); Note, *Media Incentives and National Security Secrets*, 122 HARV. L. REV. 2228, 2228, 2233-34 (2009).

83. BICKEL, *supra* note 82, at 86.

84. Indeed, of the unruly contest more broadly, Bickel said: “like democracy, in Churchill’s aphorism, it is the worst possible solution, except for all the other ones.” *Id.* at 87.

85. Stone, *supra* note 10, at 487 (emphasis added).

86. *Id.*

87. *Id.* at 488 (emphasis added).

prohibit leaks *and* an expansive right of others to disseminate them.⁸⁸

C. The Speaker Protective Approach

Under a speaker protective approach, both leakers and publishers warrant substantial First Amendment protections. This does not mean that either should receive absolute protection. Nor does it mean that each should receive the same level of protection as the other. Nonetheless, each should receive significant protections under the First Amendment. Elsewhere, I make the case for this approach in some depth. This Subpart summarizes those arguments.

1. The Basic Constitutional Case

The case for speaker protectiveness begins with the notion that to convey classified information is to speak within the First Amendment. Contrary to the position consistently taken by the executive branch, including the current administration in litigating leak prosecutions,⁸⁹ such conveyance is not only speech, but is very high value speech under the First Amendment. Indeed, although scholars and Justices disagree in many respects over particulars of First Amendment theory and doctrine, the one point of clear consensus is that speech about government, its activities, and particularly speech about possible government abuses, is at the very core of the First Amendment and its underlying principles and purposes.⁹⁰ This does not tell us, of course, how we should weigh such speech's value against competing interests or who should conduct such weighing. It does tell us, however, that more is needed under the First Amendment to justify punishing the conveyance of classified information than simply to call it conduct rather than speech or otherwise to deem it outside of the First Amendment.

If the core remaining question is who must decide whether to punish such conveyance, the speaker protective position is that the answer cannot, consistent with the Constitution, be that the executive has nearly unfettered discretion to make such decisions through

88. *Id.* at 489.

89. See *supra* note 64 and accompanying text.

90. For detailed discussion and citations, see Kitrosser, *supra* note 9, at 421-22.

its classification and prosecutorial powers. Even if one were to look no further than the consensus that the First Amendment protects speech that helps the people to oversee and check their governors, nonprotective approaches are problematic. It is only logical that government insiders sometimes are the only possible sources of such speech. And although there are sound reasons against according them an unfettered right to engage in such speech, there are equally sound bases against according the executive an unchecked power to dictate, via the classification stamp, what they may and may not share. Indeed, such executive power conflicts directly with the well-established notion that free speech is a crucial counterweight to the fallibility and potential abuses and mistakes of our governors.⁹¹

This same logic also militates strongly against deeming executive branch employees or contractors—the only people in a position to access certain information about government’s doings—to have fully waived their First Amendment rights, even when they have signed nondisclosure agreements. Their First Amendment rights are grounded not only in their individual interests, but also in their societal value as potential sources of information. Indeed, this is the very concept underlying the Supreme Court’s recognition in the *Pickering* line of cases that “the First Amendment interests at stake extend beyond the individual speaker” as the public has an interest “in receiving the well-informed views of government employees.”⁹² More pointedly, the same notion underscores the “well settled” position that “a State cannot condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression.”⁹³

When we move beyond free speech theory to the separation of powers and government structure, the case for speaker protectiveness becomes stronger still. So many details of the constitutional text—including but not limited to the fact of a single President, the division of the appointments power between the President and the Senate, Congress’s constitutional ability to delegate some inferior officer appointments away from the President, the absence of

91. *See id.* at 422 & n.64.

92. *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

93. *Id.* at 413 (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983)). In a recent article, Mary-Rose Papandrea thoroughly addresses and dismantles the waiver argument from additional perspectives, including that of contract law. Papandrea, *supra* note 79, at 520-24.

specific constitutional constraints on much presidential power coupled with Congress's expansive textual capacity to craft the law that the President executes, and the provision of a limited textual secret-keeping capacity and limited privilege for Congress and its members and the absence of either for the President—suggest a government framework within which the President has energetic capacities, including the capacity to keep secrets, but in which those capacities are subject to external and internal checks to prevent their misuse.⁹⁴

The textual indications are very much bolstered by history from the framing and ratification period. For example, supporters of the proposed Constitution insisted that the document's Framers, in declining to annex a council to the President, had deprived the President of a group that would eagerly do his bidding and hide his secrets. One supporter explained that "[t]he executive power is better to be trusted when it has no *screen*.... [W]e have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence, or inattention; he cannot roll upon any other person the weight of his criminality."⁹⁵ Alexander Hamilton went further, boasting that the President not only would lack a council behind which to hide, but that his appointed subordinates would be unlikely to shield his bad acts.⁹⁶ Appointees selected by the President and a council, Hamilton reasoned, would "possess[] the necessary insignificance and pliancy to render them the obsequious instruments of [the President's] pleasure."⁹⁷ This unhappy state of affairs would far less likely follow, he predicted, from appointments contingent on Senate approval.⁹⁸

None of this is meant to suggest that the Constitution's text and its underlying history give us precise instructions as to how to treat leakers and publishers of classified information. To the contrary, the text leaves many questions unanswered, and there was much disagreement and omission in early views on the parameters of presidential power and secrecy. Yet history, text, and constitutional

94. For detailed discussion and citations, see HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION (2015).

95. 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 495 (Merrill Jensen ed., 1976).

96. THE FEDERALIST NO. 76, at 373 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

97. *Id.*

98. *See id.* at 373-74.

structure do tell us a number of important things. First, neither the Constitution's original meaning nor its underlying principles demand that the President have legal secret keeping prerogatives. More to the point, they plainly do not require an unfettered executive ability to punish the conveyance of information that the executive marks classified. Second, underlying constitutional principles and purposes—as evidenced both by constitutional structure and history—suggest deep and widespread concerns over how best to balance secrecy's virtues against its potential abuses. Third, the Constitution and its history also reflect a dual role for government employees. This dual role parallels the broader constitutional goal of reconciling government energy (including secrecy) with the risks of its abuses. On the one hand, government employees are a part of the executive branch and thus are responsible for contributing to its energy and efficacy, including its secret-keeping efforts. On the other hand, government employees are crucial safety valves for protecting the people from abuse and incompetence, given their unique access to information otherwise invisible to the public.

Although the Constitution does not hand us a precise roadmap for handling leakers, it gives us much material with which to work. Given their crucial constitutional role as uniquely informed potential speakers, leakers must have robust First Amendment protections. Yet given countervailing considerations—including leakers' other constitutional role as part of the executive branch machinery—such protections should not be absolute or even nearly absolute. More detailed thoughts on the precise doctrinal standards that should apply are discussed in Part V. For now, it suffices to note that constitutional text, structure, and history guide us toward robust, albeit not unlimited protections, for leakers.

2. The Realities of the Classification System and the Relevance of the Same to Leaker Protections

From a theoretical perspective, reasoning purely from constitutional text, structure, and history, it is deeply problematic to empower the executive to strip First Amendment protections from government insiders for conveying any information that the executive stamps as classified. When one looks to the classification system and its history, that conclusion is bolstered dramatically.

Two aspects of the system and its history lend themselves to this effect. First, as has long been widely acknowledged across the political spectrum, there is rampant overclassification.⁹⁹ If theory and logic counsel us against deferring fully to executive classification decisions, so history confirms that classification is hardly conclusive as to whether a particular piece of information is too dangerous to convey. Second, it also has been long understood that administrations regularly and intentionally leak information from “the top.” The ubiquitous practice of selective leaking enables administrations to manipulate information flow more precisely than through classification alone.¹⁰⁰ Wide classification and prosecutorial powers, combined with selective leaking, can chill those not clearly “on message” from conveying wide swaths of information, while emboldening others to convey selected portions of the same.

Elsewhere, I elaborate at length on the fact and effects of overclassification and of selective leaks from the top. Rather than repeat those discussions here, I simply reiterate that these phenomena are largely undisputed across the political and ideological spectrum.¹⁰¹ Mixed and executive discretion proponents themselves acknowledge and even lament the phenomena. They simply disagree with speaker protectionists on the implications for the legal protections due to leakers and publishers.

III. POST-9/11 DEVELOPMENTS AND THEIR IMPACT ON THE “UNRULY CONTEST”

A. New Developments and Arguments that These Developments Strengthen the Government’s Hand

Over the past few years, commentators, myself included, have pointed to what we deem game changers in the unruly contest—developments that tilt the game too far in favor of the government.¹⁰² These developments include the Obama Administration’s

99. For detailed discussion and citations to this effect, see KITROSSER, *supra* note 94, at 62-64; and Kitrosser, *supra* note 9, at 426-29.

100. For detailed discussion and citations to this effect, see KITROSSER, *supra* note 94, at 63-64; and Kitrosser, *supra* note 9, at 428-29.

101. See KITROSSER, *supra* note 94; see also Kitrosser, *supra* note 9.

102. See, e.g., KITROSSER, *supra* note 94, at 107-12; Jack M. Balkin, *Old School/New School*

unprecedented number of leak prosecutions and new technological and legal tools that enable the government to track down leakers more easily than in the past.¹⁰³

The government's new capacities are reflected in an exchange that Lucy Dalglish, former executive director of the Reporters Committee for Freedom of the Press, had with an intelligence official at a conference.¹⁰⁴ The official told her that a subpoena for reporter James Risen—still being appealed as of this writing—“is one of the last you'll see.... We don't need to ask you who you're talking to. We know.”¹⁰⁵ The official surely was referring to the fact that evidence of journalist-source contacts can be found through phone and e-mail records, and through electronic indicia of travel and in-person meetings. The Obama Administration has followed such tracks in part through third-party subpoenas to communications, credit card, and bank companies.¹⁰⁶ Matthew Miller, a former spokesman for Attorney General Eric Holder, cited such tools as one reason for the number of recent prosecutions.¹⁰⁷ He explained that “‘a number of cases popped up that were easier to prosecute’ with ‘electronic evidence’.... ‘Before, you needed to have the leaker admit it, which doesn't happen’ ... ‘or the reporter to testify about it, which doesn't happen.’”¹⁰⁸ Indeed, the most old fashioned of journalist-source meet-ups are vulnerable to electronic discovery: “Even meetings in dark parking garages *à la* Bob Woodward in *All the President's Men* are not safe if a camera captures footage of every person that comes in and out.”¹⁰⁹

Speech Regulation, 127 HARV. L. REV. 2296, 2306-07, 2315, 2327-39 (2014); Benkler, *supra* note 12, at 282-85, 304, 324-25; Kitrosser, *supra* note 9, at 439-40; David McCraw & Stephen Gikow, *The End to an Unspoken Bargain? National Security and Leaks in a Post-Pentagon Papers World*, 48 HARV. C.R.-C.L. 473, 492-95 (2013); Papandrea, *supra* note 79, at 450-52, 460-64.

103. See *supra* note 102.

104. Liptak, *supra* note 2, at SR5.

105. *Id.* (internal quotation marks omitted).

106. See, e.g., McCraw & Gikow, *supra* note 102, at 495; Papandrea, *supra* note 79, at 459-60; Liptak, *supra* note 2, at SR5; Michael Isikoff, *DOJ Gets Reporter's Phone, Credit Card Records*, NBCNEWS (Feb. 25, 2011, 7:11 PM), http://www.nbcnews.com/id/41787944/ns/us_news-security/#.U8_-ImOiU4I [<http://perma.cc/9NXX-WXAL>]; see also Downie Jr., *supra* note 1, at 1-3, 9, 17-20.

107. Downie Jr., *supra* note 1, at 14.

108. *Id.* at 9.

109. Papandrea, *supra* note 79, at 460 & n.50 (citing Liptak, *supra* note 2, at SR5).

Journalists report that these new realities, along with high-profile revelations of broader government surveillance activities, particularly Edward Snowden's explosive disclosures regarding NSA's surveillance capacities and activities, have chilled their communications with sources.¹¹⁰ Scott Shane of the *New York Times* observes that "[m]ost people are deterred by those leak prosecutions. They're scared to death. There's a gray zone between classified and unclassified information, and most sources were in that gray zone. Sources are now afraid to enter that gray zone. It's having a deterrent effect."¹¹¹ Shane notes that some sources explicitly cite the recent spate of leak prosecutions in "rebuffing a request for background information."¹¹² *Washington Post* reporter Rajiv Chandrasekaran echoes Shane's reference to gray areas, explaining that "one of the most pernicious effects is the chilling effect created across government on matters that are less sensitive but certainly in the public interest as a check on government and elected officials."¹¹³

Two particularly striking revelations came to light in May 2013. First, the Obama administration acknowledged that it had, in investigating a 2012 Associated Press (AP) story a few months earlier, "secretly subpoenaed and seized all records for 20 AP telephone lines and switchboards for April and May of 2012."¹¹⁴ Although the targeted story involved only five AP news reporters and an editor, the seized records covered "'thousands and thousands of newsgathering calls' by more than 100 AP journalists using newsroom, home, and mobile phones."¹¹⁵ This event occurred despite four-decades-old Department of Justice regulations substantially restricting the occasions and procedures whereby journalists or their communications records can be subpoenaed.¹¹⁶ The regulations require, among other things, that subpoenas be used only as "last resort[s]" in federal

110. See, e.g., Downie Jr., *supra* note 1, at 1-4, 21-23.

111. *Id.* at 2.

112. Papandrea, *supra* note 79, at 462 & n.68.

113. Downie Jr., *supra* note 1, at 3.

114. *Id.* at 17.

115. *Id.*

116. *The Department of Justice Guidelines on Subpoenas*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (July 11, 2013), <http://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/department-justice-guidelines-subpoenas> [<http://perma.cc/GRG9-9Y64>] (explaining that the regulations have been in effect since 1970 with respect to subpoenas to journalists and that they have been in effect since 1980 with respect to subpoenas issued to telephone companies for journalists' telephone records).

investigations, that they be “‘as narrowly drawn as possible,’ [and] that the targeted news organization[s] ‘be given reasonable and timely notice’ to negotiate the subpoena[s] with Justice or to fight [them] in court” except where such “negotiations would ‘pose a substantial threat to the integrity of the investigation.’”¹¹⁷ Second, three-year-old court records were unsealed, revealing that the administration had, in 2010, secretly obtained a subpoena to access journalist James Rosen’s telephone and e-mail records as part of a leak investigation.¹¹⁸ To support its subpoena application, the administration had stated via affidavit that Rosen himself had probably violated the Espionage Act as “an aider, abettor, and/or co-conspirator” in the leak.¹¹⁹

The 2013 AP subpoena “only came out because the Justice Department used a grand jury subpoena; according to its internal rules, such a request must be made public within ninety days.”¹²⁰ In contrast, had the government “employed a national security letter ... the request for phone records would likely still be secret.”¹²¹ Jack Balkin cites this distinction in contrasting what he calls “old school” tools to police speech, such as subpoenas, with “new school” tools, including national security letters (NSLs).¹²² Like third-party subpoenas, NSLs can be used to demand that entities, including bank, credit card, or communications companies, turn over information about their customers.¹²³ What is special about NSLs is that “they can be issued by executive officials without a judicial warrant or a hearing,” and they “normally come with a gag order. The recipient may not reveal the contents of the NSL or the fact that it exists, and recipients are subject to the gag order until the government releases them, which it may never do.”¹²⁴ Balkin observes that “[t]ens of thousands of NSLs are issued secretly every year, and those who

117. Downie Jr., *supra* note 1, at 18 (summarizing and quoting parts of 20 C.F.R. § 50.10).

118. Anne E. Marimow, *A Rare Peek into a Justice Department Leak Probe*, WASH. POST (May 19, 2013), http://www.washingtonpost.com/local/a-rare-peek-into-a-justice-department-leak-probe/2013/05/19/0bc473de-be5e-11e2-97d4-a479289a31f9_story.html [<http://perma.cc/3LK5-UEVH>].

119. *Id.*

120. Balkin, *supra* note 102, at 2339.

121. *Id.*

122. *Id.* at 2300.

123. *See id.* at 2332.

124. *Id.* at 2330-31.

know the most about the practice and its consequences are forbidden to speak about it.”¹²⁵ Balkin cites NSLs to exemplify the larger phenomenon of “new school” tools to regulate speech. One hallmark of new school regulatory tools is their cooption of private enterprises to block the speech of, deliver information about, or otherwise impact their clients or other private actors in accord with government wishes.¹²⁶ Another hallmark of new school tools is that they “emphasize[] ... low salience (or invisibility) rather than chilling effects. Both the state and the owners of private infrastructure may prefer that filtering, blocking, and surveilling be largely invisible to the general public, so that their operations appear normal, unobtrusive, and inoffensive.”¹²⁷

At first glance, journalistic and scholarly concerns over chilling effect may seem to conflict with Balkin’s observation that new school speech regulations are directed less at chilling and more at encouraging “most people to chill out.”¹²⁸ Yet the two phenomena can and apparently do quite readily coexist. Such coexistence stems from the fact that investigative tools are comprised of a mix of “known knowns,” “known unknowns,” and “unknown unknowns.” Known knowns include the fact of multiple prosecutions, hard-line statements by the administration, and investigative tactics engaged in openly or revealed after the fact. Known unknowns are exemplified by the fact that we know that thousands of NSL letters have been issued, yet we may never learn to whom many of them are directed. Unknown unknowns include the possible existence of other surveillance techniques about which we do not know, but which there is reasonable basis to guess exist in light of facts that have surfaced over the years, like those revealed by Snowden.

B. The View that New Developments Do Not Strengthen, and May Weaken, the Government’s Hand

The core response to concerns over heightened antileaker aggression is that they simply are overblown. A number of commentators point out that although the percentage increase in leak prosecutions

125. *Id.* at 2333 (footnote omitted).

126. *See id.* at 2332.

127. *Id.* at 2300.

128. *Id.* at 2300-01.

in the Obama Administration has been dramatic, the raw number of prosecutions remains quite small. For example, Jack Goldsmith argues that “the number of prosecutions [in the Obama administration] has been very small, as has the overall effort, compared to the overall number of leaks.”¹²⁹ David Pozen also observes, without drawing a definitive normative conclusion as to the legal protections due to leakers, that “it is important to keep *statistical* as well as historical perspective. Against a backdrop of ‘routine daily’ classified information leaks, a suite of eight prosecutions looks more like a special operation than a war.”¹³⁰ And Gabriel Schoenfeld, writing in 2010 from an executive discretion perspective, challenged perceptions of prosecutorial overreach by citing the then-prevailing total of three convictions in U.S. history.¹³¹ Schoenfeld protested that “[t]hree successful prosecutions for leaking classified information over the course of the last thirty years—indeed, three such cases in total over the entire sweep of American history—does not exactly constitute a reign of terror.”¹³²

Commentators also suggest that if the uptick in prosecutions signifies anything, it is the government’s tougher-than-ever task of protecting necessary national security secrets. As Goldsmith puts it, the Obama Administration’s prosecution record and investigative tactics simply mark “an attempt—and almost certainly a losing one—to restore the equilibrium that prevailed before 9/11.”¹³³ Goldsmith argues that intragovernmental concerns about the legality of certain controversial programs in the years since 9/11 have led to a spate of leaks.¹³⁴ This trend is bolstered by perceptions that the White House and top officials themselves share classified information regularly with members of the press. Goldsmith explains that “[w]idespread disrespect of the secrecy system at or

129. JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* 220 (2012).

130. Pozen, *supra* note 9, at 536.

131. SCHOENFELD, *supra* note 67, at 239.

132. *Id.*; see also, e.g., Amitai Etzioni, *A Liberal Communitarian Approach to Security Limitations on the Freedom of the Press*, 22 WM. & MARY BILL RTS. J. 1141, 1162 (2014) (noting that the number of investigations is “a tiny fraction of all of the illegal leaks”).

133. Jack Goldsmith, *Obama’s Crackdown on Leaks Won’t Stop Secrets from Coming Out*, NEW REPUBLIC (Oct. 10, 2013), <http://www.newrepublic.com/article/115132/obamas-crackdown-leaks-wont-stop-secrets-coming-out> [<http://perma.cc/ZP28-N5RE>].

134. *Id.*

near the top of government emboldened the unusual number of whistle-blowers further down who gave information to journalists and others in the last decade because they thought the government was doing something illegitimate.”¹³⁵ Gabriel Schoenfeld similarly deems the last decade or so a time of particularly egregious leaking.¹³⁶ He links the phenomenon at least partly to the ubiquity of “upper-level leaking” and to consequent “disrespect for the classification system and the rule of law throughout the government and society at large.”¹³⁷

Commentators add that leak prosecutions and investigative tactics must be ramped up not only to address the bare fact of increased leaks, but also to contend with new technologies that make the gathering and disseminating of large, indiscriminate leaks more feasible than ever. Jack Goldsmith reminds us that “[i]t took Daniel Ellsberg months to copy and sneak out of RAND the seven-thousand-page Pentagon Papers reports.”¹³⁸ In contrast, “Chelsea Manning and Edward Snowden downloaded much more information much more quickly in a much smaller (and thus easier to hide) format.”¹³⁹ Goldsmith adds that “the secrets stolen by Manning and Snowden were much harder for the government to control once out because the Internet allowed their easy (and encrypted) global dispersion.”¹⁴⁰ He concludes that “the same technologies that have empowered the government to know more about its employees and their communications with journalists have also empowered the employees and the journalists to disclose or discover more about government secrets.”¹⁴¹ New technologies thus enhance the threat posed by leaks even as they make it easier for government to track down leakers and publishers. In using technology to serve its own ends, the government seeks simply to right the balance between free speech and national security, not to tip it unduly in its favor.

135. GOLDSMITH, *supra* note 129, at 71.

136. Schoenfeld, *supra* note 74, at 3.

137. *Id.*

138. Goldsmith, *supra* note 133; *see also* DANIEL ELLSBERG, SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS 290-91, 295, 299-302 (2002) (describing the agonizingly slow and perilous process of copying the Pentagon Papers).

139. Goldsmith, *supra* note 133.

140. *Id.*

141. *Id.*

Some commentators point to the Obama Administration's response to the May 2013 subpoena revelations as evidence that cultural norms and pressures in favor of free speech are alive and well, and keep the balance of forces tilted well in favor of leakers and publishers.¹⁴² In the wake of the May 2013 revelations, President Obama reiterated his commitment to stopping leakers, but added that "a free press is also essential for our democracy. That's who we are. And I'm troubled by the possibility that leak investigations may chill the investigative journalism that holds government accountable."¹⁴³ The White House directed the Department of Justice to review its guidelines for investigations, culminating in revised policies that were announced in July 2013.¹⁴⁴ The revised guidelines "significantly narrow the circumstances under which journalists' records could be obtained."¹⁴⁵ For example, they establish a presumption in favor of notifying journalists in advance "whenever Department attorneys seek access to their records related to newsgathering activities."¹⁴⁶ The report announcing the guidelines also affirms that the Department will not subject "members of the news media ... to prosecution based solely on newsgathering activities."¹⁴⁷ The new guidelines also state that the work materials of a "member of the news media" may not be searched unless that member "is the focus of a criminal investigation for conduct not connected to ordinary newsgathering activities."¹⁴⁸ Jack Goldsmith points to the revised guidelines as one of several pieces of evidence demonstrating that "while it is fashionable to say and think that press freedoms are under siege, the opposite is true—at least when it comes to national security reporting."¹⁴⁹ Amity Etzioni similarly argues that "the press has never been stopped by the

142. See Etzioni, *supra* note 132, at 1171-72; Goldsmith, *supra* note 133.

143. Remarks by the President, *supra* note 5.

144. See U.S. DEPT OF JUSTICE, REPORT ON REVIEW OF NEWS MEDIA POLICIES (2013), available at <http://perma.cc/T6VM-X9GY>.

145. Charlie Savage, *Holder Tightens Rules on Getting U.S. Data*, N.Y. TIMES, July 13, 2013, at A1.

146. U.S. DEPT OF JUSTICE, *supra* note 144, at 2.

147. *Id.* at 1. The Report deems this simply a restatement of extant Department policy.

148. *Id.* at 3.

149. Jack Goldsmith, *Extraordinary U.S. Press Freedom to Report Classified Information*, LAWFARE (Dec. 2, 2013, 8:05 AM), <http://www.lawfareblog.com/2013/12/extraordinary-u-s-press-freedom-to-report-classified-information/> [<http://perma.cc/QW5C-WLDR>].

government even though the law allows for such action. Norms and politics are the media's strongest shield as it wields its sword."¹⁵⁰

Finally, commentators argue that the proof of the pudding—that free speech and a free press are not endangered—is in the fact that classified information leaks remain ubiquitous. Etzioni observes that “[e]ven amid Obama’s ‘war on leaks,’ the press has regularly carried reports based on insider and classified information—including top-secret documents—and there is very little indication that their government sources have been scared into silence.”¹⁵¹ Goldsmith makes the same point in criticizing a fall 2013 report by the Committee to Protect Journalists that deems the press at risk.¹⁵² He writes that “[o]ne of the inadvertently funniest aspects of [the] report is [the] serial quotations from prominent journalists who regularly report about highly classified information yet who complain ... about how hard it is to get secrets.”¹⁵³

IV. THE ONGOING NEED TO CURTAIL EXECUTIVE DISCRETION TO PROSECUTE LEAKERS

Commentaries dismissive of the free speech concerns raised by recent leak prosecutions highlight the national security exceptionalism that underlies both mixed and executive discretion approaches. These commentaries embrace a level of government control over speech that would be unthinkable outside of the national security realm. Certainly, the national security setting poses very real challenges with respect to questions of judicial expertise and capacity. Yet it is all too easy to fall prey to what I call “exceptionalism creep”: that is, the special difficulties posed by aspects of a particular topic can lead those addressing the topic to treat other aspects of it, too, in an exceptional manner. With respect to leaks, the national security factor may call for exceptional approaches to assessing harm and to determining who, as among the judiciary, the executive branch, or the legislature, can be trusted to make such an assessment. This is not to say that exceptional approaches *are* called for, and that question is dealt with in Part V. It is only to say that

150. Etzioni, *supra* note 132, at 1172.

151. *Id.* at 1161 (footnote omitted).

152. Goldsmith, *supra* note 133.

153. *Id.*

it is fair, even important, ground to consider. Yet the national security factor does *not* necessarily impact the free speech value of particular leaks, and it certainly does not automatically lessen the value of leaks as a group.

Yet the notion that leaks are exceptional with respect to their free speech value is implicit in arguments that free speech is unharmed by leak prosecutions because classified leaks remain plentiful and because the absolute number of prosecutions is low. The idea that a quantity reduction of a particular type of speech content—in this case, speech conveying classified information—is unproblematic so long as a large amount of it remains is anathema to First Amendment theory and doctrine.¹⁵⁴ Much more importantly, whatever the aggregate amount of classified information conveyed, a wide executive discretion to prosecute leaks seriously threatens to impact the substantive content of that aggregation. The notion that particular speech penalties and threats of the same may manipulate the content of the speech marketplace—particularly with respect to speech about government—would normally be viewed as a cause for tremendous alarm from the perspectives of free speech theory and doctrine.¹⁵⁵

To understand more concretely why a broad prosecutorial discretion threatens to manipulate the content of the speech marketplace, recall the permissiveness of the Espionage Act. Although not an official secrets act, the Act contains requirements that nonetheless are broad enough that one could make a plausible case for applying it to virtually any unauthorized disclosure of classified information.¹⁵⁶ Indeed, one could make a good case for applying the Act to much that is “sensitive but unclassified” because the Act does not refer specifically to the classification system but rather to the fact that the information was conveyed to someone “not entitled to

154. Indeed, in the campaign finance context, the notion that expenditure restrictions can reduce the quantity of campaign speech has long been among the Supreme Court’s core reasons for deeming such restrictions suspect. *See, e.g.,* *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2013); *Buckley v. Valeo*, 424 U.S. 1, 18-19 (1976).

155. Among the cardinal principles in free speech doctrine is the notion that government presumptively may not regulate speech on the basis of its content. *See, e.g.,* Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339, 1339-42, 1345-49 (2002) (summarizing this rule and citing relevant cases).

156. *See supra* note 31 and accompanying text.

receive it.”¹⁵⁷ Yet even focusing solely on the classification system, that system’s astounding reach—with millions of classification decisions made yearly¹⁵⁸—makes the Act a sweeping prosecutorial tool. In this respect, the fact of overclassification matters very much. Given widespread, cross-ideological agreement with the view expressed by former Solicitor General Griswold, who argued the Pentagon Papers case on behalf of the Nixon Administration—that “there is massive overclassification and that the principle concern of the classifiers is not with national security, but rather with government embarrassment”¹⁵⁹—it is inevitable that much classified information includes deeply valuable speech. In particular, it includes speech instrumental in helping the people and the other branches to oversee the executive. Indeed, it is not unusual for congresspersons to complain that they learned of major, highly controversial executive branch programs only after reading about them in the newspapers.¹⁶⁰ The Edward Snowden leaks mark a particularly striking example of information generating rich and vigorous debate and activity among the public, Congress, and the executive branch, all with respect to government programs that were largely unknown prior to the leaks.¹⁶¹

More important than the amount of valuable speech potentially covered by the Act, given the low absolute number of prosecutions to date, is the tremendous potential that the Act’s sweeping nature creates for discriminatory decisions to investigate or prosecute based on viewpoint or subject matter. Indeed, Yochai Benkler observes that although there is “no robust evidence that the number of national security leaks [overall] has increased in the past decade or so,”¹⁶² what “does appear to have increased ... is the number of

157. See *supra* note 20 and accompanying text.

158. See, e.g., INFO. SEC. OVERSIGHT OFFICE, 2013 REPORT TO THE PRESIDENT 3-6 (2014), available at <http://perma.cc/94J3-EXX6> [hereinafter ISOO REPORT].

159. Erwin N. Griswold, *Secrets Not Worth Keeping*, WASH. POST, Feb. 15, 1989, at A25; see also KITROSSER, *supra* note 94.

160. See, e.g., *Congress Gets More Info on NSA Spying from Newspapers than from Classified NSA Briefings*, WASHINGTON’S BLOG (Oct. 25, 2013), <http://www.washingtonsblog.com/2013/10/congress-gets-more-info-on-nsa-spying-from-newspapers-than-from-classified-nsa-briefings.html> [<http://perma.cc/J82Y-SJSU>].

161. See, e.g., Benkler, *supra* note 12, at 300-02, 321-24.

162. *Id.* at 282-83. Benkler also questions the thesis that prosecutions have increased due to the special risks of digitized leaking. He notes that “of the sixteen national security leak and whistleblowing cases of the past decade, only two—Manning and Snowden—were

national security leaks that purport to expose systemic abuse or a systemic need for accountability.”¹⁶³ Goldsmith, too, while perceiving leaks to have increased overall, takes the view that the increase stems partly from leakers’ concerns over the legitimacy of government actions and programs in the wake of 9/11.¹⁶⁴ It is unsurprising that ramped up leak investigations and prosecutions may be sparked at least partly by a rise in “accountability leaks.”¹⁶⁵ Of equal importance, the wide and obvious potential for politically motivated targeting threatens a substantial chilling effect, disproportionately impacting accountability leakers.

Any actual and potential effects on the speech marketplace can only be heightened by more aggressive prosecutorial and investigative practices, including those facilitated by new technologies. Recall, for example, the observation that today’s investigative techniques constitute a mix of “known knowns” and “known unknowns,” including ubiquitous, technologically sophisticated, and controversial methods, as well as reasonable bases to suspect the presence of additional techniques or “unknown unknowns.” This potent cocktail makes sense of journalists’ reports to the effect that their sources increasingly are reticent to speak about national security matters. Although journalists may be able to fill any quantitative gaps caused by such chill, particular stories or pieces of information surely are lost or changed in the process.

The breadth of the classification system, combined with sweeping prosecutorial discretion, thus poses a substantial threat to the free flow of information about government. Commentators are absolutely correct to call for large-scale reform of the classification system. Such reforms have been called for since at least the 1950s,¹⁶⁶ and the current administration has taken some positive steps, including decreasing the number of persons with “original” classification authority.¹⁶⁷ Nonetheless, there is little, if any, real disagreement on

facilitated by the Internet and computers.” *Id.* at 283.

163. *Id.*

164. GOLDSMITH, *supra* note 129, at 71.

165. Benkler uses the term “accountability leaks” to refer to “unauthorized national security leaks and whistleblowing that challenge systemic practices.” Benkler, *supra* note 12, at 282.

166. PUBLIC INTEREST DECLASSIFICATION BD., TRANSFORMING THE SECURITY CLASSIFICATION SYSTEM (2012), available at <http://perma.cc/6H5B-AWLG>.

167. ISOO REPORT, *supra* note 158, at 2.

the point that the system remains, and for decades has been, unwieldy and wildly overbroad in practice. More so, although it is and always will be crucial to police the system, some potential for abuse and poor judgment is intrinsic in any system that gives human beings throughout government the power to deem pieces of information too dangerous to be viewed by the public and even by many within the government.

Classification status thus is, as a matter of fact—and inevitably may be, as a matter of theory—a deeply imperfect proxy for the dangers posed by particular pieces of information. Given this reality, efforts to reform the system are not enough. It also is necessary to offer First Amendment guidelines that define and limit, in some meaningful way, the subsets of closely held information whose conveyance can constitutionally be prosecuted.

V. DOCTRINAL STANDARDS AND FEASIBILITY OBJECTIONS

A. Feasibility Objections to a Substantive Judicial Role

Before considering how courts may grapple with the doctrine and facts of particular leak prosecutions, it is helpful to revisit and elaborate on the major objections to granting courts a meaningful role in overseeing such prosecutions. Some objections are grounded in theoretical arguments to the effect that the executive has unique democratic and constitutional legitimacy to control the classification system, including by prosecuting leakers.¹⁶⁸ These concerns are addressed in this Article's arguments as to how leaker protections fit within the constitutional framework.

Beyond constitutional and democratic-legitimacy-based concerns, the most ubiquitous objection is that courts lack the expertise or information meaningfully to oversee classification decisions and leak prosecutions. The strongest form of this objection contrasts the judiciary's lack of aptitude with the executive branch's relative advantages. Executive discretion advocates in particular emphasize that executive branch officers, especially those near the top of the pecking order, have the knowledge and expertise to understand the

168. See *supra* text accompanying notes 66-70.

big picture.¹⁶⁹ This enables them to see, for example, when pieces of information that may seem innocuous in isolation could be used by terrorists to dangerous effect.¹⁷⁰ Such broad spectrum vision stems from experience with and exposure to information across different national security contexts. Such information is not readily conveyed to or processed by judges in case-by-case adjudication.¹⁷¹ Furthermore, even if such information could adequately be conveyed, exposing it in the course of litigation may itself cause harm.¹⁷² Indeed, prosecutors may elect not to proceed with otherwise worthwhile prosecutions due to potential exposures.¹⁷³

A somewhat more moderate epistemic objection is that leak classification and leak prosecution decisions do not lend themselves to clearly right or wrong answers. Such decisions entail assessing factors that are difficult, if not impossible, to balance against one another. To the extent that classification and leak prosecutions are judgment calls, having courts second guess them is at best of dubious value, and at worst dangerous given courts' relative epistemic disadvantages.¹⁷⁴ From an executive discretion perspective, this reasoning further bolsters the notion that all such questions must be left to the executive. From a mixed approach perspective, such difficulties are among the reasons to give the executive near total discretion to prosecute leakers, while balancing out the risks to free speech by according strong protections to the press.¹⁷⁵

169. See *supra* Part II.A.

170. See *supra* Part II.A.

171. See SAGAR, *supra* note 66, at 66-67, 116, 119-25; cf. Schoenfeld, *supra* note 67, at 6-9 (suggesting that it might be wise policy to exempt high-level presidential appointees from anti-leaking laws, as their position gives them democratic legitimacy and also "affords them a broader view of the consequences of leaking information than a civil servant typically enjoys").

172. See SAGAR, *supra* note 66, at 155.

173. *Id.* at 65-66, 155.

174. *Id.* at 119-25; Stone, *supra* note 10, at 481, 485. Sagar also frames this objection in terms of legitimacy. That is, to the extent that the decisions at issue are political judgments, they should be left to elected officials and their subordinates. See Sagar, *supra* note 66, at 69-70. Yet this argument, like other legitimacy-based arguments, fails to account for the salutary role of leakers in the constitutional and democratic order.

175. See Stone, *supra* note 10, at 481, 485, 487-88.

B. *General Reflections on Feasibility*

Subparts C and D discuss doctrinal standards that courts should create in the leaker protection context, and some guidelines that courts might develop over time to help them apply the same. Before turning to those points, two general reflections on expertise and institutional capacity are warranted. First, although judicial review is hardly a panacea, we must keep in mind to what we are comparing it. The executive, for all of its advantages, is not without serious defects as an originator and guardian of national security secrets. Its disadvantages include institutional likelihoods of self-serving secrecy and groupthink. Indeed, groupthink not only is a well-known product of institutional secrecy, but itself can foster unnecessary secrecy where group values and loyalties place a premium on keeping information close.¹⁷⁶ And the executive's track record on secrecy—those parts of it, of course, that are known—falls well short of exemplary. The widely known problem of overclassification already has been noted. Additionally, examples of secrets kept through other means, such as the state secrets privilege, that were eventually revealed to be unnecessary to protect national security and intended instead to hide abuses or errors, are not difficult to find.¹⁷⁷ Nor is unnecessary secrecy costless to national security. As Benkler puts it:

When a system whose insularity and secrecy disable external criticism, combined with individual cognitive and group information dynamics that contribute to poor diagnosis of the state of the world, substantial errors are inevitable. When this system is as large and complex as the national security system, and when the stakes of errors are so high, these dynamics reliably lead to periodic tragedy, abuse, or both.¹⁷⁸

Second, if it is easy to overstate the executive's expertise, it is just as easy to overstate the judiciary's haplessness. For one thing,

176. See, e.g., SISELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 210-16 (1982); ELLSBERG, *supra* note 138, at 237-38; Benkler, *supra* note 12, at 289-96.

177. Perhaps the most infamous example in this regard is *United States v. Reynolds*, 345 U.S. 1 (1952). The government's representations in that case were found decades later to have been utterly false. See KITROSSER, *supra* note 94, at 97 (discussing *Reynolds*, 345 U.S. 1).

178. Benkler, *supra* note 12, at 292.

courts are in the business of taking complicated statutory schemes and applying them to equally complicated facts in realms ranging from the scientific to the financial. In common law and constitutional realms, courts routinely translate vague or abstract directives into doctrinal rules and standards that they can feasibly apply to unpredictable sets of facts. Furthermore, extant doctrinal standards in a range of contexts commit courts to asking and answering questions, including whether particular speech poses security dangers,¹⁷⁹ whether it concerns matters of public importance,¹⁸⁰ and whether its potential disruptiveness outweighs public and speaker interests in sending and receiving the speech.¹⁸¹

Of course, the national security realm presents special challenges insofar as the relevant facts typically involve secrets that one or more parties argue cannot safely be revealed in open court. This is no small challenge. Nonetheless, as David Pozen points out, it is a challenge that can be overstated.¹⁸² Most notably, objections based on judicial secrecy concerns tend to ignore or dismiss the Classified Information Procedures Act (CIPA).¹⁸³ CIPA was enacted in 1980 to establish procedures enabling the safe use of classified information or substitutes for the same in criminal trials, and “a number of studies have extolled [its] track record in national security cases.”¹⁸⁴ As Pozen writes, “[w]hatever CIPA’s drawbacks, its history and design put the burden on those who would argue it is inadequate in leak cases, an argument that has not been elaborated.”¹⁸⁵

C. On Proposed First Amendment Standards and Doctrinal Flexibility

Turning to the doctrinal standards that courts might formulate for leak cases, then, it is useful to start by recalling leakers’ complex

179. In the context of allegedly “inciting” speech, for instance, the Supreme Court asks whether speech is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (citation omitted).

180. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 574-75 (1968).

181. *See supra* notes 48-49 and accompanying text.

182. *See generally* Pozen, *supra* note 9.

183. *Id.* at 552-53.

184. *Id.* at 552.

185. *Id.* at 553.

dual role in the constitutional order. On the one hand, insiders are a part of the executive branch's machinery. As such, they properly are subject to executive control beyond that to which ordinary persons or entities—including third-party publishers—are subject.¹⁸⁶ At the same time, insiders' constitutional significance is not exhausted by their role as servants of the branch. They occupy other, equally important positions in the constitutional structure—those of potential checks on abuses or mistakes to which they alone may be privy.¹⁸⁷

The constitutional balance between executive control and checks on the executive calls for a nuanced calibration of protections and permissible punishments for insider leakers. The calibration should reflect two factors. First, it must be grounded partly in the relationship between the employee's institutional role and the punishment sought by the government. Second, it must reflect a considered balance between the constitutional value in deterring leaks and that in avoiding overdeterrence of leaks.

Elsewhere, I have drawn a few conclusions from this calibration. First, the *Pickering* balancing test is appropriate only where the leaker is punished by the government in the latter's role as employer, such as where the leaker is fired or demoted.¹⁸⁸ A standard so deferential to the government is not appropriate when imprisonment or monetary penalties are at stake, and when the government would be exacting punishment not in its role as employer, but in its role as sovereign.¹⁸⁹ Second, courts should consider taking a cue from defamation doctrine, with its fine-tuned standards based on penalty severity, and develop standards that vary with the severity

186. Elsewhere I have suggested that third-party persons or entities who publish leaked information should receive the full First Amendment protections that would apply were the information not classified. *See supra* Part II.C. Concretely, this means that something akin to the standard for assessing punishments of speech that threaten to incite violence—whereby punishment is constitutionally permissible only if the speech is intended to, and is likely to, incite imminent illegal activity—must apply. *See Kitrosser, supra* note 13, at 927-28. I say “akin” to the incitement standard to acknowledge the possibility that slightly different standards should apply to speech that incites violence through advocacy versus speech that enables violence by disclosing information. Such variance may be appropriate in light of the different mechanisms and different time frames through which the respective types of speech may cause harm. *Id.*

187. *See generally* Kitrosser, *supra* note 9.

188. *See supra* notes 49-51 and accompanying text.

189. Kitrosser, *supra* note 9, at 441-42.

of the criminal or civil punishments sought against leakers.¹⁹⁰ Based on these conclusions, I have suggested two standards in particular. For prosecutions or civil actions seeking substantial sanctions, such as several years in prison or very large monetary penalties, courts might require the government to show that the leaker lacked an objectively *reasonable* basis to believe that the public interest in disclosure outweighed identifiable national security harms.¹⁹¹ For actions seeking less severe sanctions, courts might require the government to demonstrate that the leaker lacked an objectively *substantial* basis to believe that the public interest in disclosure outweighed identifiable national security harms.¹⁹²

Of course, there is nothing magical about any given standard or proposal. Understanding this fact may, indeed, be a key ingredient in making robust leaker protections feasible. The relevant constitutional text and history simply do not give us precise instructions on how to handle leaker prosecutions or tell us what doctrinal standards courts should apply.¹⁹³ What they do give us are indicia of the principles and purposes underlying the relevant constitutional clauses.¹⁹⁴ Because we are not constitutionally obligated to adopt particular standards or rules, there is considerable flexibility to formulate and adjust the same to achieve the relevant constitutional goals, informed by historical experience and practical considerations.

The next Subpart considers some factors that courts might look to, case-by-case, to help them apply the standards just suggested. Again, what is important is not the particulars of given standards or implementing guidelines, but rather that leaker incentives are calibrated properly in light of the relevant constitutional factors.

D. Fine-Tuning and Applying the Standards in the Courts

Taking Part V.C's proposed standards as a given, then, we can consider factors and points of guidance to which courts might look to help them apply the same. This Subpart is divided into two

190. *Id.*

191. *Id.* at 441.

192. *Id.*

193. *See supra* Part II.C.1.

194. *See supra* Part II.C.1.

sections: one discussing factors potentially relevant to the national security side of the balance and one citing factors potentially relevant to the public interest question. Needless to say, this discussion cannot come close to exhausting the list of factors potentially relevant to each side of the balance, and it is far from comprehensive. It is meant only to provide examples of factors or points of guidance likely to be relevant in many cases, and to illustrate how courts might feasibly make use of the same.

1. Points of Potential Guidance on the National Security Side of the Balance

a. Proper or Improper Classification

One means through which courts might channel the national security inquiry is by permitting defendants to argue that they had a reasonable basis to believe that the material that they disclosed was improperly classified.¹⁹⁵ Indeed, although the prosecution of Thomas Drake ended a few days before the scheduled trial with a plea bargain in June 2011, had it gone forward the defense was prepared to introduce testimony to that effect.¹⁹⁶ J. William Leonard, who had served as “Classification Czar” during the administration of George W. Bush, had been scheduled to appear at Drake’s trial, without pay, as a witness for Drake’s defense.¹⁹⁷ Leonard was prepared to testify that the classified information at issue posed no national security threat and should never have been classified in the first place.¹⁹⁸ Based on pretrial discussions between the court and

195. Patricia L. Bellia, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 YALE L.J. 1448, 1523 (2012) (explaining that courts have not interpreted existing statutes to permit such a defense, and suggesting a limited statutory defense of improper classification through an amendment to the Espionage Act); see also Pozen, *supra* note 9, at 582 n.329 (“The leak laws could pose a limited threat to the classification system if alleged violators were allowed to raise a defense of improper classification.”).

196. Scott Shane, *Complaint Seeks Punishment for Classification of Documents*, N.Y. TIMES, Aug. 2, 2011, at A16.

197. J. William Leonard, Op. Ed., *When Secrecy Gets out of Hand*, L.A. TIMES (Aug. 10, 2011), <http://articles.latimes.com/2011/aug/10/opinion/la-oe-leonard-classified-information-20110810> [<http://perma.cc/9HCG-RXGP>].

198. See Transcript of Motions Hearing at 123-24, *United States v. Drake*, 818 F. Supp. 2d 909 (D. Md. 2011) (No. RDB-10-181) (on file with author); Steven Aftergood, *Former Secrecy Czar Asks Court to Release NSA Document*, FED’N OF AM. SCIENTISTS (May 23, 2012), <http://>

the parties' attorneys, it appears likely that the court would have limited the scope of Leonard's testimony or the purposes for which the jury could consider it to a realm narrower than that suggested by this Article's proposed standards.¹⁹⁹ Nonetheless, both the court and the government appeared to take the view, reflected in those discussions, that it is feasible for a defense expert to explain to a jury, and for the jury to consider the expert's view, that information was improperly classified.²⁰⁰

Currently, there are three levels of classification: top secret, secret, and confidential. The lowest level, "confidential," applies to "information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe."²⁰¹ If a defendant establishes to a court's satisfaction that even this relatively permissive level of classification is not met, this point should be virtually decisive on the question of national security harm.²⁰² Conversely, the government may rebut the defendant's claim to effectively demonstrate that the information is properly labeled "secret" or "top secret." Although neither label in itself should be decisive, the facts necessary to prove that one or both are accurate, meaning that the information's disclosure "reasonably could be expected to cause" identified or described damage either "serious," for "secret" information, or "exceptionally grave," for "top secret" information, would be very helpful to the government with respect to the national security side of the balance.²⁰³

fas.org/blogs/secretcy/2012/05/drake_leonard [http://perma.cc/53A2-QUE2]; Leonard, *supra* note 197; Shane, *supra* note 196.

199. Although not entirely clear from the pretrial hearing transcripts or papers, one possibility is that the defense might have been allowed to present Leonard's testimony only to bolster their argument that any classified documents that Leonard did retain without authorization were retained by mistake, as Leonard did not realize, and had good reason not to know, that they were classified. Transcript of Motions Hearing, *supra* note 198, at 119-21. On the other hand, the defense also indicated that Leonard's testimony was intended in part to rebut government claims that classification status necessarily is decisive as to the danger posed by information's release. *Id.* at 122-24.

200. *Id.* at 119-20.

201. Exec. Order No. 13,526, § 1.2(a)(3), 3 C.F.R. 298 (2010).

202. *See id.* § 1.2(c).

203. *See id.* § 1.2(a)(1)-(2).

b. How and to Whom the Information is Disclosed

Courts should look not only to the nature of what was disclosed, but the circumstances in which it was disclosed. These circumstances include how and to whom the information was conveyed. For example, even information that clearly complies with the highest classification standards nonetheless may be disclosed in a manner so careful as to substantially mitigate national security concerns. A classic such scenario is one in which a leaker discloses a large set of information to a journalist so that the journalist can view all of the relevant documents in context. The leaker may do so despite knowing or having reason to believe that it would be dangerous for the journalist to disclose some of the information in the set. In such a case, certain factors may support the leaker's arguments that, despite the dangerous bits of information, she had little objective basis to believe that her action would harm national security.

One important factor relates to the leaker's care in selecting the journalist and delivering the information to her. Delivering the leak through insecure channels, for example, might amount to a reasonable basis to fear national security harm. On the other hand, taking steps to ensure that the materials were delivered solely to the chosen journalist would work in the leaker's favor, at least where there is reason for the leaker to believe that the journalist herself will take great care in extracting dangerous information before publication. With respect to the choice of journalist, the journalist's track record could be of importance. A court might ask, for example, whether the journalist has a reputation for publishing dangerous information indiscriminately, or whether the journalist instead is known to redact potentially dangerous or superfluous national security information. Courts should also consider the care with which the leaker acted in working with the journalist or offering them guidance with respect to potentially dangerous information.

Two recent examples are instructive here. The first involves Edward Snowden. Snowden, according to reports by journalist Glenn Greenwald, worked extremely closely with Greenwald and fellow journalist Laura Poitras to sift through the information that he provided to them.²⁰⁴ According to Greenwald, Snowden organized

204. GLENN GREENWALD, NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA, AND THE U.S.

and indexed the information by topic and insisted that particular pieces of information be redacted.²⁰⁵ He also used sophisticated cryptographic methods to avoid surveillance by any governments, both domestic and foreign.²⁰⁶ Of course, representations by Greenwald, Poitras, or Snowden are no more conclusive as to the truth of what took place or the broader factual context than are government assertions to the contrary. Such statements do, however, concern facts that are very relevant to determining whether Snowden's disclosures are constitutionally protected. They should be argued and resolved in litigation over leak prosecutions.

The second example involves Chelsea (formerly Bradley) Manning. Among the points disputed at Manning's court martial was whether her disclosures were made recklessly or with care to protect sensitive national security information.²⁰⁷ The prosecution argued that Manning leaked so many documents—roughly 700,000—that “there is no way he even knew what he was giving WikiLeaks.”²⁰⁸ Prosecutors also deemed Manning's decision to send her documents to WikiLeaks, rather than to an established journalistic organization, reckless.²⁰⁹ In his closing statement at Manning's court martial, prosecutor Major Ashden Fein referred to the staff of WikiLeaks as “essentially information anarchists.”²¹⁰ Manning used WikiLeaks as a “platform,” said Fein, to “ensure that all of the information was available to the world, including the enemies of the United States.”²¹¹ Contrary to these characterizations, Manning's attorney David Coombs portrayed Manning as having acted with care and deliberativeness. Coombs emphasized that the 700,000 documents leaked by Manning were a small subset of the “hundreds of millions of documents” to which she had access “as an all-source analyst,” and that Manning leaked only those that she believed were in the public interest and would not cause harm.²¹² Further

SURVEILLANCE STATE 51-53 (2014).

205. *See id.* at 29-31, 90-92.

206. *Id.* at 7-10.

207. Charlie Savage, *In Closing Argument, Prosecutor Casts Manning as “Anarchist” for Leaking Archives*, N.Y. TIMES, July 26, 2013, at A14.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. Charlie Savage, *Trial Portrays Two Sides of Private in Leak Case*, N.Y. TIMES, June

more, contrast the prosecution's argument that sharing the information with WikiLeaks was akin to "dump[ing it] onto the Internet, into the hands of the enemy,"²¹³ Coombs deemed WikiLeaks a "journalistic organization" that Manning reasonably believed would handle the information responsibly.²¹⁴

Professor Benkler testified to similar effect about WikiLeaks on behalf of the defense at Manning's court martial:

[B]oth the public perception of WikiLeaks at the time of the leak and WikiLeaks's ex-post alliance with traditional newspapers to redact and release the materials supported a finding that WikiLeaks was a channel that a reasonable leaker in early 2010 would see as an outlet able to mitigate the harms.²¹⁵

Just as with the Snowden disclosures, matters such as how and to whom Manning disclosed the documents are quite relevant and helpful for courts in applying the applicable standards. Indeed, the judge in Manning's court martial did deem such facts and competing characterizations relevant to the case.²¹⁶ She allowed them to be raised partly for purposes of sentencing, but also with respect to Manning's guilt or innocence. On the question of guilt or innocence, she deemed the issues to bear on whether "a reasonable person would ... have reason to believe that the leaked material would harm the United States."²¹⁷ As we have seen, this question is a statutory factor under the Espionage Act.²¹⁸

Although that factor is insufficiently protective in this Article's view, it nonetheless poses a question of like kind as the national security question suggested in this Article's proposed standards. As the Manning trial demonstrates, courts are capable of probing

4, 2013, at A10 [hereinafter Savage, *Trial Portrays Two Sides*]. Similarly, Coombs pointed out that "if Private Manning had not been selective and seeking to avoid harm, he would have leaked much more—like reports from confidential sources." Charlie Savage, *Defense Calls Manning's Intentions Good*, N.Y. TIMES, July 27, 2013, at A12 [hereinafter Savage, *Defense Calls*].

213. Savage, *Trial Portrays Two Sides*, *supra* note 212.

214. Savage, *Defense Calls*, *supra* note 212.

215. Benkler, *supra* note 12, at 306-07.

216. Scott Shane, *For Resourceful Lawyer, Setback in Soldier's Case*, N.Y. TIMES, Jan. 17, 2013, at A16.

217. See Shane, *supra* note 216.

218. See *supra* notes 27-30 and accompanying text.

questions of this nature—that is, questions asking whether one had an objective basis to fear national security harm—in part by assessing to whom and how materials were leaked.²¹⁹

c. Whether and How Widely the Information Already Is Known

Courts also should consider arguments by defendants to the effect that the same aspects of the leaked information that the government deems dangerous were already widely known, or known by whatever persons the government seeks to prevent from knowing them. In a different context, specifically that of cases in which the government itself resists disclosing information to the courts under the state secrets doctrine or to individual requesters under the Freedom of Information Act, courts tend to be highly deferential to government claims that information, even if widely known, technically remains closely held because it has yet to be officially confirmed by the government.²²⁰

Yet the leaks context is materially different and should be treated as such. In the leaks context, the government is not being asked to officially confirm the leaked information. To the contrary, the government is prosecuting precisely on the basis that the leak was unofficial. Because the question of national security harm should be a crucial one in the prosecution context, it may be quite relevant to a leaker's defense that the unofficially leaked information had already been made known, whether through official or unofficial channels, to the relevant persons. Given such existing knowledge, the leaker might reasonably have concluded that the information was harmless, as existing knowledge of the same had no effect. Alternatively, the leaker might have had no basis to believe that the leak would cause harms beyond any already caused.

Such a defense seems unlikely to arise in a context in which the only information conveyed was the information already known. In such a case, it is hard to see what the point of leaking would have been, and indeed such a leaker would have a difficult case to make

219. See *Savage, Defense Calls*, *supra* note 212.

220. See, e.g., *N.Y. Times Co. v. U.S. Dep't of Justice*, 915 F. Supp. 2d 508, 535-38 (S.D.N.Y. 2013); *KITROSSER*, *supra* note 94, at 105-06.

on the public interest side of the balance. Rather, such a defense might arise in a context in which the relevant information is leaked, either intentionally or inadvertently, as part of a larger discussion. A hypothetical scenario comes to mind based only very loosely on the facts underlying John Kiriakou's recent prosecution for leaking the names of CIA officers to reporters.²²¹ Suppose that a source discussed the CIA's post-9/11 involvement in waterboarding with a journalist in the days before the program was publicly known and officially acknowledged. Suppose further that in the course of those discussions, the source mentioned the names of CIA officers whose identities, though officially secret, already were widely known. In such a case, the fact that the names already were known, assuming that the source himself was aware the names were known, should be a factor helpful to the leaker's case that he lacked an objective basis to believe that the disclosure would be dangerous.²²²

2. Points of Potential Guidance on the Public Interest Side of the Balance

On the public interest side of the balance, any number of factors might serve as potential points of guidance for courts applying the standards that this Article suggests. This Section explores three such factors.

a. Reasonable Arguments Could Be Made to the Effect that Unknown Programs Were Illegal

At least one mixed approach proponent argues that leakers should be exempt from prosecution or other punishment for revealing illegal government activities.²²³ Although leakers should have at least this level of protection, by itself it is far from adequate. This is so for two reasons. First, much information of public

221. See Steve Coll, *The Spy Who Said Too Much*, NEW YORKER, Apr. 1, 2013, at 54 (chronicling the leak case of John Kiriakou, who was prosecuted for revealing CIA officers' names and whose supporters claim he was singled out for prosecution due to earlier interviews in which he claimed that the CIA had engaged in waterboarding).

222. *Id.*

223. See Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL'Y REV. 185, 195 (2007).

interest—a category that surely includes a great deal of classified information—does not necessarily involve illegal government activities. Second, it rarely, if ever, happens that the executive branch flatly concedes a program’s illegality. To the contrary, it is entirely predictable that administrations will often, if not always, claim that any statutes that they are accused of violating must be construed to permit their conduct to avoid running afoul of Article II’s grant of executive power to the President.²²⁴

What should weigh very heavily in favor of leakers on the public interest side of the balance is that a leak reveals a program or other activity, the legality of which is subject to reasonable debate. The years since 9/11 are filled with examples of leaks revealing programs that had been justified in secret on legal grounds most charitably described as debatable. A now-classic set of examples are leaks revealing programs—including warrantless wiretapping and “enhanced interrogations”—that had been conducted in secret in apparent violation of existing statutes.²²⁵ The programs had been justified by internal executive branch memoranda produced by the Office of Legal Counsel (OLC) under exceedingly insular conditions. As Jack Goldsmith wrote of this time period, which predated his own term as OLC head from late 2003 to mid-2004, the tiny, like-minded group entrusted to write the relevant legal opinions simply “blew through” any statutes that they “didn’t like ... in secret based on flimsy legal opinions they guarded closely so no one could question the legal basis for the operations.”²²⁶ In more recent days, among the earliest published of Edward Snowden’s disclosures were a series of classified orders by the Foreign Intelligence Surveillance Court (FISC) extending from 2006 through 2013.²²⁷ The FISC

224. See generally Heidi Kitrosser, *National Security and the Article II Shell Game*, 26 CONST. COMMENT. 483 (2010) (describing the growing ubiquity of such Article II-based arguments).

225. Mark Mazzetti & Scott Shane, *Memos Spell Out Brutal C.I.A. Mode of Interrogation*, N.Y. TIMES, Apr. 16, 2009, at A1.

226. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 181 (2007).

227. See GRENWALD, *supra* note 204, at 27-29, 70-71; Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J.L. & PUB. POL’Y 757, 759-60 (2014); Katherine Jacobsen & Elizabeth Barber, *NSA Revelations: A Timeline of What’s Come Out Since Snowden Leaks Began*, CHRISTIAN SCI. MONITOR (June 5, 2013), <http://www.csmonitor.com/USA/2013/1016/NSA-revelations-A-timeline-of-what-s-come-out-since-Snowden-leaks-began/June-5-8-2013> [<http://perma.cc/T8DN-ZA2R>].

operates largely in secret, hearing warrant applications brought *ex parte* by the government and issuing classified orders.²²⁸ Since the leaked orders' publication, a number of legal experts have sharply critiqued their statutory and constitutional soundness.²²⁹ Additionally, critics have argued that the orders reflect a troubling expansion of the limited role that FISC was meant to serve. As Laura Donohue writes, "Congress did not envision a lawmaking role for FISC. Its decisions were not to serve as precedent, and FISC was not to offer lengthy legal analyses, crafting in the process, for instance, exceptions to the Fourth Amendment warrant requirement or defenses of wholesale surveillance programs."²³⁰ Yet she concludes that FISC inhabits precisely such a role in the orders disclosed by Snowden.²³¹

These examples demonstrate the strong public interest in illuminating the very existence of programs so that their legality may be evaluated. They also reveal that highly secretive legal evaluations will often prove wanting, in no small part because they are unexposed to external critique. The examples help to bolster the common-sense point that if exposing clearly illegal programs is strongly in the public interest, then exposing programs, the legality of which can reasonably be debated, is of equal public interest.

b. Whether Alternative Effective Means of Disclosure Were Available and If so Were Exhausted

In evaluating the public interest side of the balance, courts also should consider the existence and adequacy of any alternatives to leaking information to the press. A strong public interest in learning particular information may be offset if it turns out that there were official channels through which release of the information could have been sought. In such a case, the public interest might have been served through means other than the leaker's going straight

228. Donohue, *supra* note 227, at 793, 823.

229. *See, e.g.*, Benkler, *supra* note 12, at 321-22 ("[T]he telephony bulk collection program [approved by the orders] likely violates the Fourth Amendment."); Donohue, *supra* note 227, at 803-06, 836-97 (arguing that the program approved by the orders violates statutory and constitutional law).

230. Donohue, *supra* note 227, at 806.

231. *Id.* at 806, 822-24.

to the press. At the same time, courts should evaluate whether the leaker had a reasonable basis to believe that any official means provided would be ineffective or that the leaker would suffer retaliation for using the official pathway. In so evaluating, courts ought to consider not only “paper” protections and official leak channels, but the executive’s, or relevant agency’s, track record in managing these leak channels. For instance, if the public interest in a particular leak was time-sensitive, it should matter to courts that the official channel or channels provided to leakers is known to be exceedingly slow. Similarly, if leakers formally are protected from retaliation for particular types of disclosures but a history of retaliation is known to exist, that history should factor into courts’ determinations as to whether leakers should have taken the theoretically protected route rather than turning to the press.

The Thomas Drake case provides an instructive example of how alternative channels might impact the weight given to the public interest side of the balance.²³² Drake, along with colleagues from the National Security Agency (NSA), had shared his concerns that the NSA was mishandling surveillance programs with a high-level staffer on the House Permanent Select Committee on Intelligence and with the “congressional committees investigating intelligence failures related to 9/11.”²³³ These congressional discussions ran afoul of a requirement that NSA employees get internal approval before contacting Congress, a rule that applies to personnel across the intelligence community.²³⁴ Drake also had helped the Department of Defense’s Inspector General (IG) investigate a complaint involving his concerns.²³⁵ Believing that these efforts were having little effect, Drake eventually leaked information to a reporter from the *Baltimore Sun*.²³⁶ The *Baltimore Sun* stories triggered an FBI

232. See Jane Mayer, *The Secret Sharer*, NEW YORKER, May 23, 2011, at 46-57.

233. *Id.* at 52.

234. *Id.*; see also *How to File a Whistleblower Complaint*, OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, <http://www.dni.gov/index.php/about-this-site/contact-the-ig/how-to-file-a-whistleblower-complaint> [<http://perma.cc/X39H-XQUB>] (last visited Apr. 13, 2015) (outlining current procedures that intelligence community members must follow before approaching the House and Senate Intelligence Committees; such procedures include first notifying and receiving clearance from the Director of National Intelligence).

235. Mayer, *supra* note 232, at 54.

236. *Id.* at 54-55.

investigation to locate its source.²³⁷ The FBI's interest reportedly was piqued because they thought that the *Sun* stories might share a source with the 2005 *New York Times* story revealing that the NSA was secretly engaged in warrantless wiretapping.²³⁸ FBI agents raided the houses of all four persons who had signed the IG Complaint with which Drake had assisted.²³⁹ "Under the law, such complaints are confidential, and employees who file them are supposed to be protected from retaliation. It's unclear if the Trailblazer complaint tipped off authorities, but all four people who signed it became targets."²⁴⁰ Drake, who had not signed the Complaint, but had assisted in its investigation, was the next to have his house raided.²⁴¹ Drake eventually was indicted more than two years after the raid, on April 14, 2010.²⁴²

Drake's preleak efforts add heft to the public interest side of his case. These efforts and their aftermath suggest that extant official channels were inadequate both on paper and in practice, and that the IG channel in particular precipitated very serious retaliation. Assuming that Drake's disclosures substantively were in the public interest, the preleak events suggest that leaking might well have been the only way to serve that interest.

c. Extent to Which Debate or Action in Fact Were Generated by a Leak

The public interest side of the balance also should be impacted in a leaker's favor by evidence to the effect that their leak generated actual public debate or official corrective actions. A classic example of such effects involves the leak of the Pentagon Papers. As I have detailed elsewhere, the Papers' leak had a dramatic effect on public attitudes about the war in Vietnam and about national security and government decision making in the United States more broadly.²⁴³

237. *Id.* at 55.

238. *Id.*

239. *Id.*

240. *Id.* at 56.

241. *Id.*

242. *Id.*; see also Indictment, *United States v. Drake*, 818 F. Supp. 2d 909 (D. Md. 2011) (No. ROB 10 CR 0181).

243. See generally Heidi Kitrosser, *What If Daniel Ellsberg Hadn't Bothered?*, 45 IND. L. REV. 89 (2011).

More recently, there is little doubt that the Snowden leaks have generated tremendous expressions of public alarm over the revealed information as well as a host of official responsive actions including information releases, program reviews, policy changes and proposed changes, litigation, and judicial rulings.²⁴⁴ As Benkler puts it, the Snowden disclosures “launched the most extensive public reassessment of surveillance practices by the American security establishment since the mid-1970s.”²⁴⁵

Although evidence that a leak actually generated substantial debate or change should bolster a leaker’s public interest argument, the absence of such evidence ought not to count against the leaker. Unlike the other national security and public interest factors mentioned in this and the previous section, the factor of actual debate or action does not lend itself to counterpart “pro” and “con” sides. Indeed, information could be of great public interest in the sense that it reveals possible illegality, policies of dubious efficacy or morality, or programs so substantial that their secrecy is presumptively illegitimate. Yet such facts may fail subjectively to *interest* the public, at least in the short run, for any number of reasons not bearing on the substantive importance of the leak.²⁴⁶

CONCLUSION

The spate of leak prosecutions and high-profile leak investigations of the past few years present both a challenge and an opportunity for First Amendment freedoms. The events challenge the free flow of information about the government’s national security activities, particularly information that may conflict with administration messaging. Yet these events also illuminate the dangers of a legal

244. See, e.g., Benkler, *supra* note 12, at 281-82; Jacobsen & Barber, *supra* note 227.

245. Benkler, *supra* note 12, at 281.

246. For instance, Jack Goldsmith observes that in the first year or two after 9/11, the *Washington Post* and other outlets published some “remarkable” stories on “top-secret counterterrorism programs.” GOLDSMITH, *supra* note 129, at 63. Yet the programs revealed in these stories, “government practices that would prove enormously controversial in a few years, were greeted by the public with silence or a nod of approval” early on. *Id.* at 64. The public’s initial lack of interest can be explained in large part as a reflection of public reluctance to question national security initiatives in the early days after 9/11. Furthermore, there was a certain tautology at work; it appears to have taken an accumulation of evidence, released over time, of numerous dubious government programs for Americans to begin to gain a real interest in such evidence. See *id.* at 64-67.

system that accords the executive virtually unfettered discretion both to classify information and to prosecute leaks of the same. Such illumination provides an opportunity to revisit this system and its comportment with basic First Amendment principles. It also marks a chance to revisit the conventional wisdom that there is little feasible alternative to unfettered executive discretion with respect to national security leaks. Most fundamentally, it invites us to consider anew if “national security is too important to be left to national security insiders.”²⁴⁷

247. Benkler, *supra* note 12, at 289.

