

# Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information

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## INTRODUCTION

The stakes are higher now than ever before in determining the First Amendment protections due government insiders who leak classified information to the press. Prior to the George W. Bush administration, only one person in American history had been successfully prosecuted for such a leak, and only two prosecutions had been brought.<sup>1</sup> The Bush administration placed greater heat on leakers. It successfully prosecuted one leaker and opened investigations against others.<sup>2</sup> The Obama administration turned the heat to levels that are stifling. By the end of its third year, the Administration had initiated six prosecutions, doubling the number previously brought by all past administrations combined.<sup>3</sup>

The rise in prosecutions, coupled with other developments – most notably a series of disclosures from the WikiLeaks website – has brought a renewed focus to the First Amendment status of classified information and those who disseminate it. Most of the attention and concern, however, have centered on the protections due non-governmental third parties who publish information that is leaked to them. A common, albeit not unanimous, refrain among academic commentators is that third-party publishers merit substantial First Amendment protections.<sup>4</sup> Commentators warn, for example, that prosecuting WikiLeaks would open the proverbial door to prosecuting *The New York Times* or other

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1. See, e.g., Scott Shane, *Administration Takes a Hard Line Against Leaks to the Press*, N.Y. TIMES, June 11, 2010, at A1; Eli J. Lake, *Trouble for Journalists: Low Clearance*, NEW REPUBLIC, Oct. 10, 2005, at 13.

2. See Heidi Kitrosser, *What If Daniel Ellsberg Hadn't Bothered?*, 45 IND. L. REV. 89, 111 (2011); Heidi Kitrosser, *Supremely Opaque?, Accountability, Transparency, and Presidential Supremacy*, 5 U. ST. THOMAS J. L. & PUB. POL'Y 62, 105-106 (2010).

3. Charlie Savage, *Ex-C.I.A. Officer Charged in Information Leak*, N.Y. TIMES, Jan. 24, 2012, at A1.

4. For dissenting views to the effect that the press and other third-party leakers merit considerably weaker protection than the conventional wisdom would have it, see, for example, Gabriel Schoenfeld, *Has The New York Times Violated the Espionage Act?*, COMMENTARY, Mar. 2006; John C. Eastman, *Listening to the Enemy: The President's Power To Conduct Surveillance of Enemy Communications During Time of War*, 13 ILSA J. OF INT'L & COMP. L. 49, 57-66 (2006).

traditional news sources that regularly publish classified information.<sup>5</sup> Similar concerns were expressed when the Bush administration brought the first prosecution in history against two government outsiders to whom classified information was leaked.<sup>6</sup>

Yet commentators are notably less outspoken on the topic of protecting government insiders who leak information to the press in the first place. There simply has not been much sustained academic focus on the topic. Of the commentary that exists, the common view is that publishers must be strongly protected under the First Amendment, while leakers can be punished with little or no constitutional difficulty.<sup>7</sup> The distinction is said to turn largely on the fact that persons with authorized access to classified information are in special positions of trust and thus have effectively waived protections against prosecution for leaks.<sup>8</sup> To be sure, this argument and related points have their dissenters.<sup>9</sup> Nonetheless, a comprehensive case for providing leakers with substantial First Amendment protections from prosecution remains to be made.<sup>10</sup>

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5. See, e.g., 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, 314, 365 (2011); Jonathan Peters, *Wikileaks, The First Amendment, and the Press*, HARV. L. & POL'Y REV., Apr. 18, 2011, available at <http://hlpronline.com/2011/04/wikileaks-the-first-amendment-and-the-press> (for prepared statement of Stephen I. Vladeck, Professor of Law, American University Washington College of Law and testimony of Geoffrey R. Stone, Professor and Former Dean, University of Chicago Law School); *Espionage Act and the Legal and Constitutional Issues Raised by Wikileaks, Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 71 (2010).

6. See, e.g., Jack Shafer, *A Gitmo for Journalists*, SLATE (Mar. 14, 2006), available at [http://www.slate.com/articles/news\\_and\\_politics/press\\_box/2006/03/a\\_gitmo\\_for\\_journos.html](http://www.slate.com/articles/news_and_politics/press_box/2006/03/a_gitmo_for_journos.html); Lake, *supra* note 1, at 16.

7. For commentary that defends strong press protections, but notes in passing that leakers likely warrant relatively little protection, see, for example, Benkler, *supra* note 5, at 363-364; Mary Rose Papandrea, *The Publication of National Security Information in the Digital Age*, 5 J. NAT'L SEC. L. & POL'Y 119, 127-128 (2011). For commentary that directly considers leaker protections and reaches similar conclusions, see, for example, Geoffrey R. Stone, *Wikileaks, the Proposed Shield Act, and the First Amendment*, 5 J. NAT'L SEC. L. & POL'Y 105, 111-114 (2011); William E. Lee, *The Role of Whistleblowers To Facilitate Government Accountability* 57 AM. U. L. REV. 1453, 1473, 1486-1489, 1529 (2008); Keith Werhan, *Rethinking Freedom of the Press After 9/11*, 82 TUL. L. REV. 1561, 1595-1598 (2008).

8. See Stone, *supra* note 7, at 111-113; Lee, *supra* note 7, at 1486-1489; Werhan, *supra* note 7, at 1597-1598.

9. See Mika C. Morse, Note, *Honor or Betrayal? The Ethics of Government Lawyer-Whistleblowers*, 23 GEO. J. LEGAL ETHICS 421, 422-424 (2010) (discussing democratic and constitutional value of national security whistleblowers, particularly those who are government lawyers); James A. Goldston, et al., Comment, *A Nation Less Secure: Diminished Public Access to Information*, 21 HARV. C.R.-C.L. L. REV. 409, 436-459 (1986) (advocating strong leaker protections); cf. Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AMER. U. L. REV. 1531, 1533-1535, 1546 (2008) (suggesting that the dearth of federal whistleblower protections is of concern, though not taking a position on whether and to what extent such protections should exist).

10. While I argued for strong leaker protections in an earlier article, that article focused on protections both for leakers and for third-party publishers. It also was written before the developments of the Obama administration and before some of the important scholarship, to which this essay responds, was published. See generally Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881 (2008).

This article argues that, contrary to the conventional wisdom, leakers merit robust First Amendment protections against prosecution. In Part I, the article summarizes the two major arguments against protection. The first, more sweeping position is that all leaks of “classified speech” – meaning the unauthorized conveyance or retention of classified information by anyone, whether a government insider or third-party publisher – are fully or largely unprotected. The second, more nuanced view is that classified speech must be protected when disseminated by third-party publishers, but that government insiders who leak classified information should be little shielded from prosecution. In addition to summarizing these positions as taken in academic and political forums and legal briefs, Part I discusses aspects of the case law that support them.

Part II challenges the views summarized in Part I. It explains that there is widespread consensus that a major concern underlying the First Amendment’s speech and press clauses is the need for information flow to support constitutional democracy. Furthermore, the executive branch itself is designed to enable insiders and outsiders to discover and respond to executive misdeeds. The free speech and press clauses are among the mechanisms that support this design. These mechanisms would lose essential meaning if speech could be stripped of most or all First Amendment protection by virtue of its being stamped “classified,” or if executive branch insiders – the only persons structurally situated to discover executive misdeeds – were stripped of protection by virtue of their insider status. These theoretical points are very much bolstered by the twin realities of massive over-classification and selective leaks of classified information from the top of the executive branch. Given these realities, a wide discretion to prosecute classified information leaks amounts to a roving commission to punish or chill speech that embarrasses or otherwise displeases high-level executive branch officers. Part II concludes by observing that while aspects of judicial doctrine are helpful to those who champion leaker prosecutions, there is precedent supporting leaker protection.

Part III discusses the doctrinal standards that should apply to punishments of classified information leaks. The complicated constitutional status of government insiders and the potential value and danger of leaks call for delicate calibration. Standards must reflect both the dangers of leaks and those of excessive chilling. They also must reflect the two sides of a leaker’s constitutional status: as insider subject to executive control and as source of potentially valuable information. These multiple and conflicting considerations counsel different levels of First Amendment protection depending on whether the leaker is punished by the government in the latter’s capacity as employer or whether she is punished through criminal or civil penalties. In the former cases, the government’s claim of right over the employee is at its apex, although free speech values also hang in the balance. In such cases, the balancing test developed by the Supreme Court for evaluating employment-based repercussions against government employees should be applied. In the prosecutorial and civil punishment contexts, a higher level of protection is warranted. Courts also

should consider varying the government's burden with the level of punishment sought in civil and criminal actions.

Part III also addresses objections to calibrating First Amendment protections based on a penalty's institutional nature or severity. It explains that calibrating by institutional context – that is, by whether one is punished by government in its capacity as employer or as sovereign – is consistent with existing doctrine. What would require new justification is not institutional calibration, but extending government's leeway to fire or demote to the criminal or civil punishment context. Furthermore, calibration based on institutional context is warranted as a matter of constitutional theory. Calibration based solely on a penalty's severity, on the other hand, is on more tenuous doctrinal and theoretical footing. Part III also explains, nonetheless, that severity-based calibration is not without doctrinal precedent and that it is warranted in at least some cases as a matter of constitutional theory.

Finally, one clarifying point and two notes on this project's scope are in order. First, this article refers alternately to insider leakers of classified information as "government insiders" or "government employees." The term employee is used somewhat loosely, as leakers may include government employees, former employees, or contractors who obtained classified information through the access privileges of their positions. Second, this essay does not directly address statutory provisions for punishing leakers. The United States does not have an "official secrets" act that makes it categorically illegal to retain or disseminate classified information. Nonetheless, the breadth and malleability of the Espionage Act – which has been the primary vehicle used to prosecute leaks or publications of classified information – mean that the Act can be interpreted similarly to an official secrets act.<sup>11</sup> The extent of any First Amendment protections must be considered in order to determine whether certain applications of the Act or other existing or future statutes are constitutional. Third, this essay also does not directly consider statutory whistleblower protections. Congress does, of course, have the power to pass such laws, and several such statutes exist. Nonetheless, these statutes leave serious gaps and points of uncertainty for whistleblowers. This is particularly so for national security whistleblowers who handle classified information.<sup>12</sup> More importantly, however comprehensive a set of protections Congress may or may not enact, the First Amendment remains the ultimate protective backstop. As we shall see in Part

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11. See, e.g., Kitrosser, *What If Daniel Ellsberg Hadn't Bothered?*, *supra* note 2, at 107-108 and sources cited therein; Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 395-396 (1986) (noting that "[t]he legislative history of" §§793(d) and (e) of the Act "indicates that Congress did not understand them to criminalize conduct engaged in for publication purposes. But how they can be narrowed to effectuate this understanding is a mystery").

12. See, e.g., Vladeck, *supra* note 9, at 1533-1537, 1542-1546; Mary Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L. J. 233, 245-248 (2008); Morse, *supra* note 9, at 439-442.

III, courts should consider statutory or regulatory whistleblower provisions in applying the relevant First Amendment standards to particular facts. Where a leaker bypasses statutory whistleblower procedures, for example, courts may consider that fact in determining the objective reasonableness of the leaker's belief that her leak would serve the public interest and that it would cause little harm. The inquiry also should take into account the adequacy of the statutory procedures. This is a very different thing, however, from the view that statutory or regulatory procedures can substitute for the protections of the First Amendment.<sup>13</sup>

#### I. THE TWO MAJOR CATEGORIES OF ARGUMENT AGAINST PROTECTING LEAKERS

##### A. *A Broad-Brush Approach: Classified Information Leaks, Conveyances, or Retentions Merit Little or No First Amendment Protection*

###### 1. Executive Branch Legal Positions, Public and Academic Commentary

In seeking to prosecute insider leaks or possession or – in the case of the George W. Bush administration – third-party transmittal of classified information, the Obama, Bush, and Reagan administrations have argued that such prosecutions do not implicate the First Amendment in any way. For example, the Obama administration argued in prosecuting alleged leaker Thomas Drake that “[a] restriction upon the retention of classified documents is an inhibition of action, not protected free speech.”<sup>14</sup> In the alternative, the Administration argued that even if the possession of such documents is speech, it is speech “integral to criminal conduct” and thus unprotected.<sup>15</sup>

As if anticipating the Obama administration's first two arguments, the Bush administration argued in *United States v. Rosen* that even third-party, oral dissemination of classified information is not speech and warrants no First Amendment protection.<sup>16</sup> The Administration deemed classified information property, and its unauthorized dissemination pure theft.<sup>17</sup> Alternatively, the Administration urged that even if such transmission constitutes speech, it is categorically unprotected speech because it is classified and “relates to the national defense.”<sup>18</sup> The Reagan administration also appears – extrapolating from court opinions in *United States v. Morison* – to have made arguments very

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13. In *Garcetti v. Ceballos*, the Court came uncomfortably close to embracing just such a substitution rationale in the limited context of government employee speech that constitutes a part of the employee's job. See *Garcetti v. Ceballos*, 547 U.S. 410, 425-426 (2006).

14. Government's Response to Defendant's Motion To Dismiss Counts One Through Five of the Indictment, *United States v. Drake*, 818 F. Supp. 2d 909 (D. Md. Mar. 11, 2011) (No. 10 CR 00181 RDB).

15. *Id.*

16. 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. Mar. 31, 2006) (No. 1:05 cr225).

17. *Id.*

18. *Id.* at 34.

similar to those later employed in the Bush and Obama administrations.<sup>19</sup> That is, in prosecuting Samuel Morison for leaking classified information to the press, the Administration apparently argued that Morison had engaged in no speech, but instead had committed theft.<sup>20</sup>

The premise that classified leaks – and even third-party publications – are non-speech crimes, or at minimum that classification status is conclusive on the issue whether speech is too dangerous to disclose, also is manifest in much public and political discourse. For example, some politicians and public commentators deem employees who leak classified information, and media figures that publish the information, akin to enemy combatants, terrorists, or traitors; some have even called for such persons to be executed.<sup>21</sup> The same premise underlying these dramatic statements was manifest in Senator Joe Lieberman’s successful call for Internet service providers “hosting WikiLeaks to immediately terminate [their] relationship with them,” and in related boycotts of WikiLeaks by credit card companies and other service providers.<sup>22</sup>

19. See *United States v. Morison*, 844 F.2d 1057, 1068-1070 (4th Cir. 1988); *United States v. Morison*, 604 F. Supp. 655, 664 (D. Md. 1985)

20. *Morison*, 844 F.2d at 1077.

21. See, e.g., *Senate GOP Leader: WikiLeaks Head a “Terrorist,”* SALON, Dec. 5, 2010, available at [http://www.salon.com/news/feature/2010/12/05/us\\_us\\_wikileaks\\_mcconnell](http://www.salon.com/news/feature/2010/12/05/us_us_wikileaks_mcconnell) (citing Senator Mitch McConnell’s call to prosecute Julian Assange as a terrorist); Helen Kennedy, *WikiLeaks Should Be Designated a “Foreign Terrorist Organization,”* Rep. Pete King Fumes, DAILY NEWS.COM (Nov. 28, 2010), available at [http://www.nydailynews.com/news/world/2010/11/28/2010-11-28\\_media\\_unveils\\_classified\\_documents\\_via\\_wikileaks\\_website\\_in\\_explosive\\_release\\_of.html](http://www.nydailynews.com/news/world/2010/11/28/2010-11-28_media_unveils_classified_documents_via_wikileaks_website_in_explosive_release_of.html) (citing similar call by Representative Pete King); Glenn Greenwald, *WikiLeaks Reveal More Than Just Government Secrets*, SALON (Nov. 30, 2010), [http://www.salon.com/news/opinion/glenn\\_greenwald/2010/11/30/wikileaks/index.html](http://www.salon.com/news/opinion/glenn_greenwald/2010/11/30/wikileaks/index.html) (quoting former Alaska Governor Sarah Palin who accused Assange of “treason” and urged that he be pursued “with the same urgency that we pursue Al Qaeda and Taliban leaders”); James Hohmann, *Gingrich Faults Obama Administration Over WikiLeaks*, POLITICO (Dec. 5, 2010), available at [http://www.politico.com/blogs/politicolive/1210/Gingrich\\_faults\\_Obama\\_administration\\_for\\_WikiLeaks\\_handling.html](http://www.politico.com/blogs/politicolive/1210/Gingrich_faults_Obama_administration_for_WikiLeaks_handling.html) (describing former Speaker of the House Newt Gingrich’s call to treat Julian Assange as an enemy combatant); *Attack by WikiLeaks: Assange is an Enemy of the U.S., But the U.S. Keeps Too Many Secrets*, WALL STREET J., Dec. 1, 2010, at 13 (arguing that those who provide classified information to Wikileaks should be subject to the death penalty and that Assange should be treated as an enemy combatant); Robert Booth & Haroon Siddique, *How WikiLeaks Altered the Way We See the World in Just a Week*, THE GUARDIAN (Dec. 4, 2010), available at <http://www.guardian.co.uk/media/2010/dec/04/wikileaks-world-week-cables> (citing former Arkansas Governor Mike Huckabee’s conclusion that Bradley Manning should be executed for providing classified files to Wikileaks); Joe Garofoli, *Fanning the Flames: Melanie Morgan’s Swing from Liberal to Right-Wing Radio Shouter May Not Have Happened Overnight, But It’s Permanent – And Profitable*, S.F. CHRONICLE, Oct. 8, 2006, at CM-8 (quoting San Francisco talk radio host’s view that editors of newspapers that publish classified information can be convicted of treason and executed).

22. See Benkler, *supra* note 5, at 313-314, 338-342; Mark Townsend, *Paypal Joins Internet Backlash Against WikiLeaks*, THE GUARDIAN (Dec. 4, 2010), available at <http://www.guardian.co.uk/media/2010/dec/04/paypal-internet-backlash-wikileaks>; Dan Gillmor, *Online, the Censors Are Scoring Big Wins*, SALON (Dec. 3, 2010), available at [http://www.salon.com/technology/dan\\_gillmor/2010/12/03/the\\_net\\_s\\_soft\\_underbelly/index.html](http://www.salon.com/technology/dan_gillmor/2010/12/03/the_net_s_soft_underbelly/index.html); Charles Arthur, *WikiLeaks Cables Visualisation Pulled After Pressure from Joe Lieberman*, THE GUARDIAN (Dec. 3, 2010), available at <http://www.guardian.co.uk/world/blog/2010/dec/03/wikileaks-tableau-visualisation-joe-lieberman>; Glenn Greenwald, *More Joe Lieberman-Caused Internet Censorship*, SALON (Dec. 2, 2010), available at [http://www.salon.com/news/opinion/glenn\\_greenwald/2010/12/02/censorship/index.html](http://www.salon.com/news/opinion/glenn_greenwald/2010/12/02/censorship/index.html).

A somewhat less radical premise, but one conducive to similar conclusions, is that the President – acting either directly or through the many executive branch subordinates to whom the power to classify information is delegated – must have the final word as to when speech is too dangerous to be disclosed. From this perspective, it need not necessarily be the case that classified speech is not speech, or that all classified information truly is too dangerous to disclose. Rather, in an imperfect world of imperfect decision-making, someone must make the final call as to when information is too dangerous to disclose, and that person is the President, whether acting directly or through subordinates. To proponents of this view, including some academic commentators, this is the case either because the presidency is the institution most competent to have the final word, or because the Constitution demands that he have this authority, or both.<sup>23</sup>

## 2. Doctrinal Support

This section discusses doctrinal support for the position that conveying or retaining classified information without authorization, however and by whomsoever, warrants little if any First Amendment protection. In short, this sub-section analyzes support in the case law for the notion that classified information carries a very different constitutional status than virtually any other type of information or speech about government or public policy. For adherents to this view, the rigorous judicial safeguards that the First Amendment would otherwise demand when speech is punished for its content simply do not apply in the classified information context.

The Supreme Court has decided no cases that directly involve prosecutions for leaking or publishing classified information. Nonetheless, some statements by the Court and individual Justices in related cases reflect the view that classification may effectively remove, or substantially diminish, any First Amendment protections that would otherwise attach to those who disseminate information. For example, while the Court famously refused, in *New York Times Co. v. United States*, to authorize an injunction to stop *The New York Times* from publishing the Pentagon Papers, three members of the Court suggested in concurrences that post-publication criminal punishment of *The New York Times* might be permissible, and three members dissented on the ground that they would have granted a prior restraint.<sup>24</sup> In a dissenting opinion joined by Chief

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23. See GABRIEL SCHOENFELD, NECESSARY SECRETS 64-65, 187-191, 204 (2010); Eastman, *supra* note 4, at 57-58, 64-66.

24. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (denying government request for prior restraint); *id.* at 730-731, 733 (White, J., concurring) (concurring – in an opinion by Justice White joined by Justice Stewart – “only because of the concededly extraordinary protection against prior restraints” and noting that newspapers will not be “immune from criminal action” if they proceed to publish the documents that the government sought to restrain); *id.* at 743 (Marshall, J., concurring) (noting that “we are not faced with a situation where Congress has failed to provide the Executive with broad power to protect the Nation from disclosure of damaging state secrets,” as

Justice Burger and Justice Blackmun, Justice Harlan deemed the judiciary's role in reviewing the executive's judgment on foreign affairs, including whether to suppress information, "very narrowly restricted."<sup>25</sup>

In the 1980 case of *Snepp v. United States*, the Supreme Court upheld a contract whereby former CIA agent Frank Snepp had agreed to submit any writings about the CIA to the agency for pre-publication review. The Court also approved a constructive trust against proceeds garnered by Snepp for writings not submitted for review.<sup>26</sup> While the *Snepp* Court emphasized the existence of a contractual agreement, it also placed much weight on the review's purpose to protect classified information. The Court explained that "[w]hen a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA – with its broader understanding of what may expose classified information and confidential sources – could have identified as harmful."<sup>27</sup> The Court suggested that the government's interest would be much less significant were the information unclassified. Indeed, some lower courts have cited *Snepp* for the proposition that "[t]he government has no legitimate interest in censoring unclassified materials,"<sup>28</sup> and, thus, "may not censor such material, contractually or otherwise."<sup>28</sup> For the *Snepp* court and lower courts, then, the fact that information is classified greatly enhances the government's constitutional power to control its dissemination through contractual conditions of employment.

This theme is echoed in some other lower court opinions. Indeed, in the only federal appellate court opinion to rule directly on the constitutionality of prosecuting leakers, the U.S. Court of Appeals for the Fourth Circuit, in *United States v. Morison*, characterized an employee's leak of satellite photos to the press as pure theft.<sup>29</sup> It deemed no "First Amendment rights . . . implicated" by his prosecution.<sup>30</sup> Judge Russell's 1988 opinion for the court in that case relied heavily on Morison's position as a government employee who had signed

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statutes provide for post-publication criminal penalties); *id.* at 752, 755-759 (Harlan, J., dissenting) (dissenting – in an opinion by Justice Harlan joined by Chief Justice Burger and Justice Blackmun – from the Court's denial of the prior restraint sought by the government).

25. *Id.* at 756 (Harlan, J., dissenting).

26. *Snepp v. United States*, 444 U.S. 507, 513 n.8, 515-516 (1980).

27. *Id.* at 512.

28. *Wilson v. CIA*, 586 F.3d 171, 185 (2d Cir. 2009) (quoting *McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir. 1983) and citing *Snepp*, 444 U.S. at 513 n.8, for the proposition that "[i]f in fact information is unclassified or in the public domain, neither the CIA nor foreign agencies would be concerned"); *see also Snepp*, 444 U.S. at 511 ("the government does not deny – as a general principle – Snepp's right to publish unclassified information"); *McGehee*, 718 F.2d at 1141 (quoting *United States v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir. 1972) and citing *Snepp*, 444 U.S. at 513 n.8, for the proposition that unclassified information may not be restricted by contract or otherwise); *cf. Weaver v. U.S. Information Agency*, 87 F.3d 1429, 1435-1436, 1442 n.4 (D.C. Cir. 1996) (deeming review requirement for unclassified information acceptable because it does not entail punishments for unapproved publications, indicating that serious First Amendment problems would exist were punishments imposed).

29. *Morison*, 844 F.2d at 1068-1070.

30. *Id.*



non-disclosure forms. Yet the opinion also rested implicitly on the special status of classified information and the executive's control of the same. Among the cases invoked at length by Judge Russell were *Snepp* and an earlier Fourth Circuit case, *United States v. Marchetti*.<sup>31</sup> Like *Snepp*, *Marchetti* had involved a former CIA employee's pre-publication clearance agreement. As the *Snepp* Court would later do, the *Marchetti* court emphasized that the executive branch's control over employee speech is substantially heightened in the context of classified information, given the President's constitutional authority to keep secrets and protect national security.<sup>32</sup> Indeed, the *Marchetti* court stated that the First Amendment would preclude equivalent restraints on government employees "with respect to information which is unclassified or officially disclosed."<sup>33</sup>

Finally, three recent district court opinions provide partial support for those who deem classified information unprotected or substantially less protected than other speech. In rejecting Thomas Drake's motion to dismiss the government's indictment against him for allegedly leaking classified information, the U.S. District Court for the District of Maryland, which sits within the Fourth Circuit, cited its circuit's controlling precedent in *United States v. Morison*. The *Drake* Court cited *Morison* for the proposition that the statute under which Drake was prosecuted was not overbroad in violation of the First Amendment, as Drake remained free under it to discuss unclassified information.<sup>34</sup>

Two opinions of the U.S. District Court for the Eastern District of Virginia – also within the Fourth Circuit – in *United States v. Rosen* are somewhat more mixed in assessing the First Amendment protections due third parties who disseminate leaked information. On the one hand, a 2006 opinion issued in response to the defendants' motion to dismiss the indictment on First Amendment grounds suggested that classification might effectively be decisive in making speech punishable.<sup>35</sup> Yet a subsequent opinion softened the potential extremity of the earlier one. Among other things, the second opinion, issued in February 2009, clarified that the jury must independently determine if the Espionage Act's criteria for illegal communications are met.<sup>36</sup> It explained:

[E]vidence that information is classified is, at most, evidence that the government intended that the designated information be closely held. Yet, evidence that information is classified is not conclusive on this point . . . . Further, the government's classification decision is inadmissible hearsay on the second

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31. *Id.* at 1069-1070.

32. *Marchetti*, 466 F.2d at 1312, 1315-1318.

33. *Id.* at 1313; *see also id.* at 1317 ("We would decline enforcement of the secrecy oath . . . to the extent that it purports to prevent disclosure of unclassified information.")

34. *United States v. Drake*, 818 F. Supp. 2d 909, 917-918 (D. Md. 2011).

35. *See Heidi Kitrosser, Classified Information Leaks and Free Speech*, *supra* note 10, at 902-903 (citing *Rosen*, No. 1:05cr225, slip op. at 53-56 (E.D. Va. Aug. 9, 2006) (order denying motion to dismiss)).

36. *United States v. Rosen*, 599 F. Supp. 2d 690, 695 (E.D. Va. 2009)

prong of the . . . [statutory definition of national defense information,] namely whether unauthorized disclosure might potentially damage the United States or an enemy of the United States.<sup>37</sup>

Still, the February 2009 opinion marks a far cry from the First Amendment protections ordinarily applied when speech is prosecuted as a threat to national security. Ordinarily – that is, at least where speech does not include classified information – speech can be punished as a threat to national security only when it is intended and is likely to cause imminent illegal activity.<sup>38</sup>

*B. A Finer-Grained Approach: Even If Third-Party Publishers Are Protected, Leakers Ought Not To Be*

1. An Overview of Major Arguments to the Effect that Insider Status Removes or Substantially Diminishes Protection

From the view that classified information warrants little or no protection, it follows that neither third-party publications nor insider leaks to the press warrant much, if any, protection. Yet the more common position takes a mixed approach – namely, government insiders who leak classified information warrant little or no constitutional protection, while third-party publishers who publish leaked information must be strongly protected.<sup>39</sup> This mixed approach starts from the premise that classified information is speech that warrants full protection when conveyed by one not in a position of trust with respect to it. Yet that premise is joined by one or two other premises. One additional premise is that persons who access classified information by virtue of an employment or contractual relationship with the government are in positions of trust with respect to that information. As such, they have waived much if not all of their constitutional rights to convey it.<sup>40</sup> The second premise is that the mixed approach is a necessary, if inescapably chaotic, means to balance free speech and free press interests against the executive’s duty to guard national security. Professor Geoffrey Stone articulated the latter premise in recent congressional testimony:<sup>41</sup>

This [mixed approach] 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

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37. *Id.*

38. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

39. See *supra* note 7.

40. See *supra* note 8.

41. Elsewhere, Stone clarifies that he would strongly protect classified leaks that reveal illegal government conduct. Geoffrey R. Stone, *Secrecy and Self-Government*, 56 N.Y.L. SCH. L. REV. 81, 91 (2011); see also Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL’Y REV. 185, 195-197 (2007) (making the same point in substantially more detail).

control confidentiality “at the source,” then we risk too great a sacrifice of secrecy and government efficiency. The solution is thus to reconcile the opposing values of secrecy and accountability by guaranteeing *both* a strong authority of the government to prohibit leaks *and* an expansive right of other[s] to disseminate them.<sup>42</sup>

## 2. Doctrinal Support for According Insiders Little or No Protection

As we have seen, there is very little case law directly addressing leaker protections from prosecution. Yet in the one such federal appellate court opinion and in cases involving pre-publication review, the concept of waiver figures prominently. In *Morison*, Judge Russell’s opinion for the Court emphasized that Morison had committed theft by stealing classified photographs to which he had special access as a security-cleared employee of the Navy. The opinion also stressed that Morison had agreed, as a condition of his employment and security clearance, not to disclose classified information without authorization.<sup>43</sup> And in *Snepp*, the Supreme Court deemed Snepp’s employment relationship with the CIA to have “involved an extremely high degree of trust.”<sup>44</sup> The trust relationship was made explicit, said the Court, in the pre-publication-review agreement that Snepp signed.<sup>45</sup> Most importantly, the Court stressed that the remedy it approved – a constructive trust on Snepp’s proceeds – was perfectly tailored to Snepp’s “fiduciary and contractual” breaches.<sup>46</sup>

Waiver themes invoked by courts in other contexts also have been drawn upon by courts addressing classified information leaks. In the 2009 decision *Wilson v. CIA*, the Second Circuit upheld Valerie Plame Wilson’s pre-publication agreement with the CIA as applied to stop the publication of information that, while public knowledge, remained classified.<sup>47</sup> In so holding, the Court cited the 1995 case of *United States v. Aguilar*.<sup>48</sup> In *Aguilar*, the Supreme Court upheld the conviction of a federal judge for revealing the fact of

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42. *Espionage Act and the Legal and Constitutional Issues Raised by Wikileaks, Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 19-20 (2010) (statement of Geoffrey R. Stone, Professor and Former Dean, University of Chicago Law School). Professor Stone cited the work of Alexander Bickel, who first invoked the phrase “disorderly situation” to make a very closely related point. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 80 (1975). Bickel did not spell out his view on the prosecution of government leakers in particular. He did, however, embrace the general proposition that “government may guard mightily against . . . leaks, and yet must suffer them if they occur.” He endorsed, in short, an “adversary game between press and government,” although he did not specify whether leaker prosecutions are among the legitimate means by which the government may “guard mightily against . . . leaks.” *Id.* at 80; see also Lillian R. BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 512-515 (1980) (endorsing Bickel’s notion of a “contest” between government and press, though without specifying the place of leaker prosecutions in the contest).

43. *Morison*, 844 F.2d at 1068-1069.

44. *Snepp*, 444 U.S. at 510.

45. *Id.* at 510-511.

46. *Id.* at 515-516.

47. *Wilson v. CIA*, 586 F.3d 171, 174 (2d Cir. 2009).

48. *Id.*

a wiretap order to its subject.<sup>49</sup> The *Wilson* Court cited *Aguilar* for the proposition that:

when a government employee “voluntarily assume[s] 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.”<sup>50</sup>

And in 2011, the U.S. District Court for the District of Columbia, rejecting Stephen Kim’s motion to dismiss his criminal leak prosecution, cited the D.C. Circuit’s decision in *Boehner v. McDermott*.<sup>51</sup> Specifically, it cited the *Boehner* court’s view that pursuant to *Aguilar*, “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.”<sup>52</sup>

Some commentators deem another line of judicial precedent – that involving the free speech protections due government employees against termination or other employment-based discipline – bad news for leakers seeking protection from prosecution. In these cases – sometimes referred to as the *Pickering* line of cases after the earliest in the series, *Pickering v. Board of Education* – the 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 balance “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.”<sup>53</sup> In the 2006 case of *Garcetti v. Ceballos*, the Court clarified that these protections do not apply to speech “made pursuant to the employee’s official duties.”<sup>54</sup> At least one academic commentator interprets *Garcetti* to mean that employees who leak classified information have no First Amendment protection from prosecution because they accessed the information as a result of their government employment.<sup>55</sup> Another commentator concludes that the *Pickering* balance applies to classified information leaks, but that the result is a broad government leeway to punish leaks through discharge or criminal prosecution.<sup>56</sup> The latter

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49. *United States v. Aguilar*, 515 U.S. 593, 595, 605-606 (1995).

50. *Wilson*, 586 F.3d at 183.

51. *United States v. Kim*, 808 F. Supp. 2d 44, 57 (D.D.C. 2011) (quoting *Boehner v. McDermott*, 484 F.3d 573, 579 (D.C. Cir. 2007)).

52. *Id.*

53. *Connick v. Myers*, 461 U.S. 138, 140 (1983) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

54. *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006). *See also id.* at 418-423.

55. Vladeck, *supra* note 9, at 1534-1535, 1540-1541.

56. Stone, *Government Secrecy vs. Freedom of the Press*, *supra* note 41, at 195.

commentator does, however, consider leaks that reveal illegal government conduct protected under *Pickering* balancing.<sup>57</sup>

## II. THE CASE FOR SUBSTANTIALLY PROTECTING LEAKERS FROM PROSECUTION

### A. *Constitutional Text, Structure, and Principle*

This section counters, as a matter of constitutional first principle, the major arguments against leaker protections. The constitutional cases for protecting third-party publishers and for protecting insider leakers are deeply intertwined. For instance, the executive branch is deliberately structured to help ensure that the public will learn of executive abuses and incompetence. One aspect of this design is an appointments process meant to filter out sycophants who would conspire to hide presidential misdoings. As this example reflects, constitutional mechanisms for funneling important inside information to the public cannot so neatly be separated from protections for the very insiders who leak such information against their superiors' wishes. This section thus explains why both classified speech generally, and leaked information from government insiders about national security and public policy in particular, presumptively merit robust constitutional protections.

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>58</sup> Given the vagueness of the phrase “freedom of speech,” commentators and courts long have sought to discern its underlying principles and apply them to concrete cases.<sup>59</sup> Notwithstanding the occasional exception,<sup>60</sup> even self-described originalists generally do not target the free speech or press clauses as vessels for narrow founding era expectations as to how the clauses would be applied. Indeed, the view – which is prominent and longstanding though by no means undisputed – that the clauses originally

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57. *Id.* (“Applying the *Pickering* standard, the government has no legitimate interest in keeping secret its own illegality, and the public has a compelling interest in the disclosure of such information”). Similarly, some lower court opinions deem *Snepp* to have implicitly applied *Pickering* balancing to classified information leaks. *See, e.g.,* *Weaver v. United States Information Agency*, 87 F.3d 1429, 1439-1443 (D.C. Cir. 1996); *id.* at 1439-1440 (citing *Zook v. Brown*, 865 F.2d 887 (7th Cir. 1989)).

58. U.S. CONST. amend. I.

59. The literature is vast. A small but eclectic sampling of works in this area include, *e.g.*, STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Seana Valentine Shiffirin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011); Susan H. Williams, *Feminist Jurisprudence and Free Speech Theory*, 68 TUL. L. REV. 1563 (1994).

60. One notable exception is found in a recent dissenting opinion by Justice Thomas. There, he invoked the founders' child-rearing practices to conclude that the First Amendment today protects neither the right of minors to see or hear speech that their parents do not wish for them nor the right of speakers to convey such speech to minors. *See Brown v. Entm't Merchs. Ass'n.*, 131 S.Ct. 2729, 2751-2761 (2011) (Thomas, J., dissenting).

were meant predominantly to protect against prior restraints,<sup>61</sup> has had no directly restrictive impact on modern free speech doctrine or commentary.<sup>62</sup> Instead, arguments about free speech long have centered on debates over the broad principle or principles underlying that clause and how to apply the same.

The quest to identify free speech principles has captured the attention of countless scholars over many decades and engendered much disagreement. Nonetheless, there is at least one point of virtual unanimity: whatever else the freedom of speech may encompass, it undoubtedly includes a right to convey information and opinion about government.<sup>63</sup> This point also encompasses – sometimes implicitly and sometimes explicitly – the notion that such communications are means to oversee and check government.<sup>64</sup>

Protecting speech that helps to facilitate and check self-government indeed is a central purpose of the free speech and free press clauses from the perspectives of constitutional structure and principle more broadly. The speech and press clauses naturally should be read in conjunction with the larger document of which they form a part.<sup>65</sup> As I detail in other work, a major feature of that document's separated powers system is its scheme for containing executive energy.<sup>66</sup> While the executive is designed to have energetic capacities – including a capacity to keep secrets – it is also structured to maximize the chances that abuses of those capacities will be detected and remedied. Indeed, Federalist proponents of ratification routinely assured Americans that the fact of a single President – as opposed to a multi-member body – would enable the President to act with energy while facilitating the ready detection of his misdeeds. For example, in the same essay of *The Federalist* in which Alexander

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61. See *Near v. Minnesota*, 283 U.S. 697, 713-714 (1931) (statement of this conventional view); see JEFFREY A. SMITH, *PRINTERS AND PRESS FREEDOM* 164 (1988) (description and rejection of the strongest version of this view – that the free press clause “meant freedom only from . . . prior restraint”); see also *id.* at 4-13.

62. To the extent that the view influences doctrine, it does so by contributing to the very strong presumption against prior restraints on speech. See *Near v. Minnesota*, 283 U.S. 697, 713-716 (1931). It has not, however, resulted directly in limits on protections against other types of restrictions.

63. See *supra* note 35. Each of these works deems such speech either central to the First Amendment's purpose, or encompassed in a broader free speech value or set of values.

64. The seminal work on the checking value in First Amendment theory is Professor Blasi's article of that title. See Blasi, *supra* note 59. In addition to detailing the checking value, the article explores the value's relationship to other major theories of free speech value. *Id.* at 548, 553-554, 557-565.

65. This would be true in any event, but it is particularly so in light of the historical backdrop against which the First Amendment was created. Federalists had issued assurances that Congress lacked the power, under Article I of the original Constitution, to regulate speech or the press. Anti-Federalists disputed that these freedoms were adequately protected by Article I and insisted that the Constitution be revised to protect them explicitly. There thus was a consensus in debates on the original document that the document either did or must protect speech and press. See, e.g., David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 467-475 (1983).

66. See, e.g., Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 623-629, 632-634 (2009); Heidi Kitrosser, *Macro-Transparency as Structural Directive: A Look at the NSA Surveillance Controversy*, 91 MINN. L. REV. 1163, 1173-1178 (2007).

Hamilton boasted of a single President's energetic capacities, Hamilton hastened to add that such unity gives "the people . . . the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it."<sup>67</sup> Similarly, a ratification proponent wrote in the *Virginia Independent Chronicle* that "secrecy and dispatch" will attach to the unitary presidential office and also championed the fact that "[t]he *United States* are the *scrutinizing spectators* of [the President's] conduct, and he will, always, be the distinguished object of *political jealousy*."<sup>68</sup> The free speech and free press clauses fit like puzzle pieces into this constitutional design. Without broad freedoms to gather and disseminate information from within the executive branch, the larger structure would crumble.

That the First Amendment serves in part to contain executive power is in no way undermined by its framing as a directive to Congress. A core means by which the Constitution contains executive energy is that it grants the lawmaking power to Congress alone.<sup>69</sup> It does not accord the President prerogatives to restrain speech unilaterally. It thus would have been nonsensical for the First Amendment to admonish the President to "make no law . . ." Indeed, Anti-Federalists made clear their fears that Congress would pass speech-restrictive laws absent textual guarantees of free speech and a free press.<sup>70</sup> Such fears would not have applied to the President, who had no lawmaking power.

The history underlying the speech and press clauses confirms their role in supporting the larger constitutional structure. For example, the American colonists were deeply influenced by a series of British essays published in the 1720s under the pseudonym "Cato." In Essay Number 15, Cato wrote:

Whoever would overthrow the Liberty of a Nation must begin by subduing the Freeness of Speech; a thing terrible to publick Traytors.

. . . .

That Men ought to speak well of their Governours, is true, while their Governours deserve to be well spoken of, but to do publick Mischief without Hearing of it is only the Prerogative and Felicity of Tyranny . . . .

. . . .

Freedom of Speech is the great Bulwark of Liberty; they prosper and Die together . . . . Freedom of Speech therefore being of such infinite importance to the Preservation of Liberty; every one who loves liberty ought to encourage Freedom of Speech.<sup>71</sup>

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67. THE FEDERALIST NO. 70, at 348 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

68. 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 245 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (emphasis added).

69. See, e.g., Kitrosser, *Macro-Transparency*, *supra* note 66, at 1168-1169.

70. See *supra* note 41.

71. Blasi, *supra* note 59, at 530.

Cato's "bulwark of liberty" language was repeated often by Americans both before and after the Revolution in explaining the necessity of a free press<sup>72</sup> and free speech.<sup>73</sup> Eighteenth-century Americans also consumed, penned, and circulated similar sentiments.<sup>74</sup> For instance, shortly before the Revolution, "hoping to make allies of the settlers in Quebec, [the Continental Congress] approved a declaration explaining to the northern neighbors the goals of the American endeavor:

The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, in its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.<sup>75</sup>

In the constitutional ratification process, the role of speech and press freedoms as pillars of democracy and the rule of law were acknowledged alike by Federalists – who insisted that the original Constitution implicitly protected speech and press – and Anti-Federalists – who demanded the explicit textual protection that became the First Amendment.<sup>76</sup> Those who went on to "draft[] the First Amendment," like "their mentors . . . placed great emphasis on the role free expression can play in guarding against breaches of trust by public officials."<sup>77</sup> In short, there was no dispute among members of the founding generation that government oversight was among the most important ends of free speech and a free press.

The First Amendment's promise would be empty indeed if its protections did not extend to information that the President wishes to keep secret. This includes information from government insiders, who alone are structurally situated to reveal it. Indeed, Federalists and Anti-Federalists alike, in the framing and ratification debates, deemed it crucial that the presidential office be designed to prevent insiders from hiding executive misconduct. Federalists boasted that by declining to annex a council to the President through Article II, they had deprived the President of a group that would eagerly do his bidding and hide his

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72. Some recent scholarship concludes that as a matter of original meaning, "the press" referred to the printing press, which was the only technology of the time whereby the written word could be disseminated en masse. In England, control of this technology had been an extremely effective form of censorship. See, e.g., Eugene Volokh, *Freedom for the Press as an Industry, or the Press as a Technology? From the Framing to Today*, 160 U. PENN. L. REV. 459, 462 (2011); Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 316, 328-330, 339-352 (2008).

73. See, e.g., Anderson, *supra* note 65 at 463, 473, 478, 491-493 (for reference to American uses of the "bulwark of liberty" language).

74. See, e.g., Blasi, *supra* note 59 at 530-535.

75. Anderson, *supra* note 65, at 463-464.

76. *Id.* at 467-475, 490-491.

77. Blasi, *supra* note 59, at 527.



secrets. Anti-Federalists, on the other hand, insisted that the department heads would form a de facto council to play a sycophantic, secret-keeping role on the President's behalf.

One constitutional supporter urged that: "The executive power is better to be trusted when it has no screen. Sir, we 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."<sup>78</sup> Another observed:

It has . . . been objected, that a Council of State ought to have been assigned the President. The want of it, is, in my apprehension, a perfection rather than a blemish. What purpose would such a Council answer, but that of diminishing, or annihilating the responsibility annexed to the character of the President. From the superiority of his talents, or the superior dignity of his place, he would probably acquire an undue influence over, and might induce a majority of them to advise measures injurious to the welfare of the States, at the same time that he would have the means of sheltering himself from impeachment, under that majority.<sup>79</sup>

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. 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."<sup>80</sup> Yet this unhappy state of affairs would far less likely follow, he predicted, from appointments contingent on Senate approval.

Anti-Federalist George Mason argued, on the other hand, that:

The President of the United States has no Constitutional Council (a thing unknown in any safe and regular government) he will therefore be unsupported by proper information and advice; and will generally be directed by Minions and Favourites . . . or a Council of State will grow out of the principal officers of the great departments; the worst and most dangerous of all ingredients for such a Council, in a free country; for they may be induced to join in any dangerous or oppressive measures, to shelter themselves, and prevent an inquiry into their own misconduct in office.<sup>81</sup>

Another council proponent evinced similar concerns, noting that "the supreme executive powers ought to have been placed in the president, with a small

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78. 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 635 (Merrill Jensen ed., 1976).

79. *Id.* at 44.

80. THE FEDERALIST NO. 76 (Alexander Hamilton), *supra* note 67, at 373.

81. *Supra* note 68, at 44.

independent council made personally responsible for every appointment to office or other act, by having their opinions recorded.”<sup>82</sup>

While the founders disagreed on the means to ensure executive accountability and to protect against self-serving secrecy, all agreed that these were crucial goals. Their shared idea – that the executive’s energetic capacities must be checked through internal and external mechanisms to bring to light executive misbehavior – is manifest not only in historical materials, but throughout the text and structure of Articles I and II of the Constitution.<sup>83</sup>

It is deeply antithetical to these constitutional principles for the executive to have free reign to muzzle employees or third parties simply by deeming categories of information off limits. This is not to say that there are no countervailing factors that favor executive information control. It is only to say that the latter are not the only values in the constitutional balance. Of equal constitutional weight is the value of information and informed opinion from government insiders.

### *B. Theory Meets Reality: The Classification System*

Of course, it is not enough to recite constitutional principles in the abstract. Ultimately, these abstractions must be applied to facts in the real world. This brings us back to the information classification system. Specifically, it brings us to the question of whether classification justifies a weaker level of First Amendment protection than constitutional principles would otherwise dictate for speech involving inside information about government. The answer is no, for reasons both logical and empirical. Logically, free speech principles demand that executive inclinations to punish speech about the executive be checked by forces independent of the executive. Nor does it suffice to leave the extent of such checks to Congress’s discretion. After all, the First Amendment explicitly limits Congress’s lawmaking power in the realms of speech and press. Beyond the obvious textual point, statutes that deem speech punishable in part or in whole for its classified status, where classification decisions are matters of executive discretion, effectively place the First Amendment status of government information in the hands of the executive.

Experience confirms that the political branches are woefully inadequate at self-policing against overreach in the classification system. The President largely determines classification policy unilaterally, through executive orders that can change between administrations.<sup>84</sup> Furthermore, the application of these broad policies is delegated to an enormous number of government employees and

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82. *Supra* note 78, at 635.

83. *See, e.g.*, Heidi Kitrosser, *Macro-Transparency* at 1167-1168; *see also* HEIDI KITROSSER, ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION (forthcoming 2013) (Chapter 3).

84. *See, e.g.*, REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at 5, 11-13, 15 (1997) [hereafter S.Doc. No. 105-2]; HAROLD C. RELYEA, SECURITY CLASSIFIED AND CONTROLLED INFORMATION: HISTORY, STATUS AND EMERGING MANAGEMENT ISSUES 2-5 (2007); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 338-341 (1973). A few discrete categories of information

contractors. At present, well over a million persons have such authority. Of these, 2,378 persons had “original classification” authority as of the end of fiscal year 2010.<sup>85</sup> The average number of original classifiers between fiscal years 1980 and 2008 was 5,400.<sup>86</sup> Original classifiers are “authorized to determine what information, if disclosed without authorization, could reasonably be expected to cause damage to national security.”<sup>87</sup> Additionally, original classifiers create classification guides. Such guides are instructions for “derivative classifiers.” A guide “is a set of instructions . . . which identifies elements of information regarding a specific subject that must be classified and establishes the level and duration of classification for each such element.”<sup>88</sup> The remaining several million persons with classification authority are derivative classifiers.<sup>89</sup> In theory, derivative classifiers lack policy discretion because their decisions are derived from original classification decisions.<sup>90</sup> In actuality, determining what is derivative of already classified information – short of exact replicas of the latter – itself entails discretion. This is particularly so where the basis for derivative classification is the following of classification guides.

Given this background, it is not surprising that experts across the political spectrum long have acknowledged rampant overclassification. J. William Leonard, the former director of the Information Security Oversight Office in the George W. Bush administration, acknowledges a problem of “excessive classification.” Leonard says that he has “seen information classified that [he’s] also seen published in third-grade textbooks.”<sup>91</sup> At a 2004 congressional hearing, both Leonard and Carol A. Haave, then the Defense Department’s Undersecretary for Intelligence, estimated that “probably about *half* of all classified information is overclassified.”<sup>92</sup> In 1991, Rodney B. McDaniel, who had been Executive Secretary of the National Security Council in the Reagan administration, esti-

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are classified by statute. *See, e.g.*, Nathan Brooks, *The Protection of Classified Information: The Legal Framework* (Cong. Research Serv. RS21900), Aug. 5, 2004, at 2 n.7.

85. INFO. SEC. OVERSIGHT OFFICE, 2010 REPORT TO THE PRESIDENT 1 (2011) [hereinafter ISOO 2010 Report].

86. INFO. SEC. OVERSIGHT OFFICE, 2009 REPORT TO THE PRESIDENT 4 (2010) [hereinafter ISOO 2009 Report]; *see also* ISOO 2010 Report, *supra* note 85, at 2, 4-5 (discussing recent downward trend in number of original classification authorities).

87. ISOO 2010 ISOO Report, *supra* note 85, at 4.

88. *Id.* at 8.

89. Precise numbers of derivative classifiers are not recorded given the fluid means by which they are designated. A 1997 Report of the Commission on Protecting and Reducing Government Secrecy estimated that “three million government and industry employees . . . have the ability to mark information as classified.” S.Doc. No. 105-2, *supra* note 84, at 31.

90. ISOO 2010 Report, *supra* note 85, at 8.

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

92. *Espionage Act and the Legal and Constitutional Issues Raised by Wikileaks*, Hearing Before the H. Comm. on the Judiciary, 111th Cong. 27 (2010) (statement of Abbe D. Lowell, Partner, McDermott Will & Emery LLP) (emphasis in original) (citing *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing*, Hearing Before the Subcomm. on Nat’l Security, Emerging Threats and Int’l Relations, Comm. on Gov’t Reform, 108th Cong. 82-83 (2004)).

mated that “only 10% of classification was for ‘legitimate protection of secrets.’”<sup>93</sup> Former New Jersey governor and 9/11 Commission Chairman Thomas Kean has said that “three-quarters of the classified material [I] reviewed for the [9/11] Commission should not have been classified in the first place.”<sup>94</sup> The Moynihan Commission, led by Senator Daniel Patrick Moynihan in the 1990s to study government secrecy, observed in its 1997 report that “[t]he classification system . . . is used too often to deny the public an understanding of the policymaking process, rather than for the necessary protection of intelligence activities and other highly sensitive matters.”<sup>95</sup> And Erwin N. Griswold, former Solicitor General under President Richard M. Nixon, deemed it “apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another.”<sup>96</sup> Statistics give an additional sense of the classification system’s reach. As noted above, there presently are well over a million persons with some form of classification authority.<sup>97</sup> The number of new classification decisions – including combined original and derivative decisions to classify – averaged 16.1 million per year from FY 1996 through FY 2009.<sup>98</sup>

Coupled with over-classification is the widespread practice of selective, “authorized” leaking from the top.<sup>99</sup> The White House orchestrates leaks so frequently as to have spawned the well worn joke that “the ship of state is the only vessel that leaks from the top.”<sup>100</sup> By selectively leaking only self-serving information, an administration can steer public sentiment in its favor. Administrations also leak information as “trial balloons to test public reaction to policy options without formally committing to them.”<sup>101</sup> Theodore Roosevelt is cred-

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93. *Id.* at 84 (statement of Thomas S. Blanton, National Security Archive, George Washington University) (citing statement of Rodney McDaniel).

94. 108 CONG. REC. S9714 (2004).

95. S. Doc. No. 105-2, *supra* note 84, at xxi.

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

97. *Supra* note 89.

98. ISOO 2009 Report, *supra* note 86, at 9. For the classification statistics from FY 2010 and comparisons between them and earlier years’ numbers, see ISOO 2010 Report, *supra* note 85, at 8-12.

99. *See, e.g., Espionage Act and the Legal and Constitutional Issues Raised by Wikileaks, Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 48, 51 (2010) (testimony of Gabriel Schoenfeld, Ph.D., Senior Fellow, Hudson Institute) (discussing common practice of authorized leaking); *The Espionage Statutes: A Look Back and a Look Forward, Hearing Before the Subcomm. on Terrorism and Homeland Security*, 111th Cong. 7, 10-11, 14 (statement and testimony of Jeffrey H. Smith, Partner, Arnold and Porter) (same).

100. This quote has been attributed to journalist James Reston. *See* David E. Rosenbaum, *First a Leak, Then a Predictable Pattern*, N.Y. TIMES, Oct. 3, 2003, at A16.

101. Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists’ Confidentiality, 1795-2005*, 43 SAN DIEGO L. REV. 425, 444 (2006) (describing Theodore Roosevelt’s use of this strategy); *see also* Papandrea, *supra* note 12, at 251-252 (describing the ubiquity of and strategies behind authorized leaks from the top); William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1469-1470 (2008) (same).

ited as the original master of strategic leaking from the White House.<sup>102</sup> Yet Roosevelt was hardly the last to employ this technique. The four most recent books of journalist Bob Woodward alone are “filled with classified information that [Woodward] could only have received from the top of the government” in the Obama and George W. Bush administrations.<sup>103</sup> Given the ubiquity of leaks from the top and the enormous number of secrets kept by the government, “leaks of classified information, including classified national security information, have become one of the primary ways the government communicates information to the public.”<sup>104</sup>

Given the twin realities of massive over-classification and widespread selective leaks from the top, a broad executive discretion to prosecute classified information leaks is a powerful means for the executive – both through actual prosecutions and through fear of the same – to manipulate information flow. Such discretion can generate a deeply slanted chilling effect. Those who leak information that paints an administration in a bad light have much to fear in an environment where prosecutions occur or are threatened regularly.

These realities complement the theoretical problems of any scheme that enables the executive to qualify First Amendment protections for speech about itself. Such a scheme is profoundly in tension with a constitutional structure designed to ensure executive accountability and to do so partly through free speech and a free press.

### C. *Confronting the Doctrine*

Leakers who seek constitutional protection must, of course, confront judicial precedent. As we have seen, there are aspects of existing doctrine that bode poorly for leakers. Leakers can respond to these doctrinal elements with the following four points. First, much of the precedent can be limited to the facts. For example, despite some sweeping statements in the Fourth Circuit’s opinion for the Court in *Morison*, two of the three panel judges indicated that some classified leak prosecutions might raise serious First Amendment problems. This argument is elaborated in C.1. below. Second, where courts have leeway either to depart from or narrowly interpret precedent – for example, the Fourth Circuit could overrule *Morison*, courts outside of the Fourth Circuit could choose not to follow it, and district courts within the Fourth Circuit could decline to extend it beyond its facts – courts should do so. They should do so partly in light of the constitutional arguments from first principles articulated above. Additionally, they should do so in light of the third point, which is that a

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102. See, e.g., Kielbowicz, *supra* note 101, at 444; Papandrea, *supra* note 12, at 236.

103. Jane Mayer, *The Secret Sharer*, NEW YORKER, May 23, 2011, 46, 57 (quoting Jack Goldsmith); see also Michael Isikoff, “Double Standard” in *White House Leak Inquiries?*, NBCNEWS.COM (Oct. 18, 2012), available at [http://www.msnbc.msn.com/id/39693850/ns/us\\_news-security](http://www.msnbc.msn.com/id/39693850/ns/us_news-security); Jack Goldsmith, *Classified Information in Woodward’s “Obama’s Wars,”* LAWFARE (Sept. 29, 2010), available at <http://www.lawfareblog.com/2010/09/classified-information-in-woodwards-obama-s-wars/>.

104. Papandrea, *supra* note 12, at 236.

wide swath of First Amendment precedent itself comports with the arguments from first principles. This third point is addressed in C.2 below. Fourth and finally, leakers and publishers at minimum should argue that the political branches – both Congress in passing legislation and the executive branch in exercising prosecutorial discretion – ought to act in a manner consistent with constitutional first principles and with the protective elements of judicial doctrine, as described below in C.2.

### 1. The Limits of Anti-Leaker Aspects of Doctrine

#### *a. The Limits of Doctrinal Suggestions to the Effect that Classified Speech Deserves Little Protection*

As we have seen, there is an important strain of thought in the case law to the effect that classified information deserves far less protection than unclassified speech. The limited doctrinal reach of this reasoning stems partly from its scarcity. Many questions simply have not been decided by any federal court, or have been decided only by a single federal appellate court. Furthermore, of the few relevant judicial opinions, some are careful to note that greater protections might be warranted under different circumstances.<sup>105</sup>

As we have seen, the only federal appellate court to rule directly on the constitutionality of prosecuting classified leaks or publications was the Fourth Circuit in *United States v. Morison*. There, the court considered Samuel Morison's prosecution for leaking classified satellite photos to the press.<sup>106</sup> Judge Russell's opinion for the court contained statements to the effect that the case involved pure theft and implicated no First Amendment rights.<sup>107</sup> Nonetheless, two of the three panel judges concurred separately to make clear their view that the prosecution did implicate the First Amendment.<sup>108</sup> And while both concurring judges embraced a deferential role for the judiciary, the extent of deference prescribed by either – and thus agreed upon by a majority of the *Morison* court – is unclear. Concurring Judge Wilkinson suggested that very strong deference is in order, as the alternative “would be grave.”<sup>109</sup> Yet he also expressed confidence that sources who reveal very important stories, such as “corruption, scandal, and incompetence in the defense establishment,” were unlikely to be prosecuted or convicted, and that if they were, the situation could be “cured through case-by-case [judicial] analysis of the fact situations.”<sup>110</sup> Concurring Judge Phillips endorsed “Judge Wilkinson's . . . view that the First Amendment issues raised by *Morison* are real and substantial and require the

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105. See, e.g., *infra* notes 109-112.

106. See *Morison*, 844 F.2d at 1060.

107. *Id.* at 1077.

108. *Id.* at 1080-1081 (Wilkinson, J., concurring); *id.* at 1085-1086 (Phillips, J., concurring)

109. *Morison*, 844 F.2d at 1083 (Wilkinson, J., concurring).

110. *Id.* at 1084.

serious attention which his concurring opinion then gives them.”<sup>111</sup> He also accepted Judge Wilkinson’s “general estimate” that leaks exposing important news will not be punished, deeming it “the critical judicial determination forced by the First Amendment arguments advanced in this case.”<sup>112</sup>

To be sure, the *Morison* court overall was exceedingly deferential to broad statutory prosecution authorizations as applied to classified information leaks. This is deeply problematic from the perspective of free speech theory, particularly given the realities of over-classification and selective leaking from the top. Nonetheless, the concurring statements in *Morison* of two of the three judges leave room, however narrow, for case-by-case arguments to the effect that some prosecuted speech is of such high value as to warrant tougher judicial scrutiny than that accorded *Morison*. Similarly, recall that the District Court in *Rosen*, a court within the Fourth Circuit, took a more protective view still of the case-by-case fact-finding demanded where third parties are prosecuted for publishing classified information.<sup>113</sup>

While no Supreme Court precedent directly addresses classified speech prosecutions, some do, as we have seen, contain reasoning that could be deemed dismissive of any First Amendment concerns about the same.<sup>114</sup> Yet there are forceful reasons against extending such cases beyond their facts. As for *Pentagon Papers*, it would be imprudent for courts to extrapolate very much from the dissenting or concurring opinions. Prosecutions – of either leakers or the press – simply were not at issue in the case.<sup>115</sup> While this point alone counsels caution, it is further warranted in light of the tremendous time pressure under which the case was briefed, argued, and decided. As observed in Justice Harlan’s dissenting opinion:

Both the Court of Appeals for the Second Circuit and the Court of Appeals for the District of Columbia Circuit rendered judgment on June 23. The New York Times’ petition for certiorari, its motion for accelerated consideration thereof, and its application for interim relief were filed in this Court on June 24 at about 11 a.m. The application of the United States for interim relief in the *Post* case was also filed here on June 24 at about 7:15 p.m. This Court’s order setting a hearing before us on June 26 at 11 a.m., a course which I joined only to avoid the possibility of even more peremptory action by the Court, was issued less than 24 hours before. The record in the *Post* case was filed with the Clerk shortly before 1 p.m. on June 25; the record in the *Times* case did not arrive until 7 or 8 o’clock that same night. The briefs of the parties were received less than two hours before argument on June 26.<sup>116</sup>

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111. *Id.* at 1085 (Phillips, J., concurring).

112. *Id.* at 1086.

113. *United States v. Rosen*, 487 F. Supp. 703, 707 (2007).

114. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

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

116. *Id.* at 753 (Harlan, J., dissenting).

The Court's decision, the concurrences, and the dissents all were issued just four days after oral argument, on June 30, 1971. Given the sense of urgency surrounding the case, one should hesitate to draw broad lessons from the dissenters' view that the prior restraint should have been continued long enough to permit thorough judicial consideration. The same caution applies to concurring statements to the effect that a prior restraint was out of order, but that the government might have other viable options, including criminal prosecution.<sup>117</sup>

*Snepp*, too, can and should be limited to its facts. It is true that the *Snepp* Court emphasized the executive's prerogative to control classified information. Given that prerogative and given *Snepp*'s employment with the CIA, the Court deemed a pre-publication review agreement a reasonable and constitutional means for the CIA to protect classified information. Yet much of the opinion's force comes in its approval of the trial court's remedy for *Snepp*'s breach of the agreement. Specifically, the Court approved a constructive trust on the proceeds of *Snepp*'s book, which *Snepp* had failed to submit to the CIA for review. A constructive trust, the court explained, is "the natural and customary consequence of a breach of trust. It deals fairly with both parties by conforming relief to the dimensions of the wrong. . . . [S]ince the remedy reaches only funds attributable to the breach, it cannot saddle the former agent with exemplary damages out of all proportion to his gain."<sup>118</sup> *Snepp* thus does not embrace an unfettered executive discretion to control classified information or an unfettered legislative discretion to authorize any means of control. To the contrary, it leaves room for fact-sensitive analyses to determine whether a given punishment for classified speech goes too far.<sup>119</sup>

Furthermore, *Snepp* was rife with procedural irregularities. In his petition for certiorari, *Snepp* had asked the Supreme Court to consider the constitutionality of the injunctive and damages remedies upheld by the appellate court. 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.<sup>120</sup> The Supreme Court's *per curiam* opinion focused on the constructive trust issue. The Court's response to *Snepp*'s First Amendment objections was shoe-horned into a single footnote. Because the Court barely addressed the issues raised by *Snepp*, the dissent argued that the Court had effectively denied *Snepp*'s petition

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117. Cf. *Edgar & Schmidt*, *supra* note 11, at 361 ("A number of the Justices volunteered readings of the espionage statutes in relation to hypothetical criminal proceedings against the publishers, reporters and information sources involved, even though such questions had not been briefed, were dreadfully difficult, and were quite unnecessary to a ruling about the injunction.").

118. *Snepp v. United States*, 444 U.S. 507, 515-516 (1980).

119. See also Goldston, et al., *supra* note 9, at 441-442 (citing the case's unusual procedural posture and "cursory attention to First Amendment questions" as an additional basis for caution in applying its holding).

120. *Snepp*, 444 U.S. at 524-25 (Stevens, J., dissenting); Goldston, et al., *supra* note 9 at 442 n.165; Diane F. Orentlicher, *Snepp v. United States: The CIA Secrecy Agreement and the First Amendment*, 81 COLUM. L. REV. 662, 665 n.23 (1981).



for certiorari and thus lacked jurisdiction over the case, given the conditional nature of the government's cross-petition.<sup>121</sup> Moreover, the Court decided the case without benefit of merits briefs or oral argument.<sup>122</sup> As Archibald Cox wrote at the time, "One would have supposed that the extent of the government's authority to silence its officials and employees and thereby deprive the public of access to information about government activity was not too obvious to deserve deliberate judicial consideration."<sup>123</sup>

*b. The Limits of the Waiver Theory in the Case Law*

As we have seen, aspects of the case law also support a second basis to deny leakers much if any First Amendment protection. This basis rests on the grounds that government insiders effectively waive rights to disclose information that they access through government employment or as a result of secrecy agreements.

The limited reach of this proposition as it appears in two important cases – *Morison* and *Snepp* – parallels the two cases' limits as they relate to the argument against classified speech protections generally. As for *Morison*, the Court's opinion – despite its sweeping rhetoric to the effect that *Morison* engaged not in speech but in theft and a violation of his employment terms – again must be viewed in light of the separate opinions of two of the three judges on the panel. While those opinions too are broadly deferential to the executive, they acknowledge that serious First Amendment issues are at stake and suggest that *Morison* does not preclude future courts from taking into account the value of particular leaks in assessing prosecutions. As for *Snepp*, the opinion's reach is limited by its remedy-specific reasoning. The *Snepp* Court did deem a former CIA employee to have waived his First Amendment rights when he agreed to submit future writings to the CIA for pre-publication review so that the agency could check for classified information. Yet an important feature of the Court's reasoning was its attention to the tight fit between the remedy that it approved – a constructive trust against book proceeds – and the nature of the contractual breach at issue. Furthermore, *Snepp*'s procedural irregularities independently warrant caution in extending its holding beyond its facts.

Moving to other cases that provide some support for the waiver theory, it also is too great a stretch to read language in *Aguilar v. United States* to mean that government employees are fully unprotected in all contexts from revealing information that they have agreed not to reveal. Recall that the Supreme Court in *Aguilar* upheld a federal judge's conviction for revealing a wiretap order to its subject. Citing *Snepp*, the *Aguilar* Court explained that "[a]s to one who voluntarily assumed a duty of confidentiality, governmental restrictions on

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121. *Snepp*, 444 U.S. at 524-525 (Stevens, J., dissenting).

122. Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 9-10 (1980); Orentlicher, *supra* note 120, at 665 n.23.

123. Cox, *supra* note 122, at 9-10.

disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public.”<sup>124</sup> 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.<sup>125</sup> The Court also cited the obvious state interests in preventing this narrow set of disclosures.<sup>126</sup> To the extent that lower courts cite *Aguilar* for the broader proposition that voluntary non-disclosure agreements erase a contracting party’s First Amendment rights, they misread it. Furthermore, to the extent that the U.S. Courts of Appeals for the District of Columbia and Second Circuits in particular have cited *Aguilar* for this overly broad proposition, they have done so in a manner unnecessary to their holdings and in cases limitable to their facts.<sup>127</sup>

The *Pickering* line of cases should not be construed to bear negatively on leakers’ constitutional protections against prosecution. As with *Snepp*, the reasoning of the *Pickering* cases is tied closely to particular remedies. Throughout the latter precedents, the Supreme Court considers government’s discretion to act as an employer to discipline its employees – that is, to fire or demote them – for their speech. The Court engages in case-by-case balancing between “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 effi-

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124. *United States v. Aguilar*, 515 U.S. 593, 606 (1995).

125. *Id.* at 602.

126. *Id.* at 605-06.

127. In *Wilson v. CIA*, the Second Circuit correctly cited *Aguilar*’s limited statement about the relative protection accorded speakers who voluntarily take on non-disclosure obligations. *Wilson v. CIA*, 586 F.3d 171, 183 (2d Cir. 2009). It went on, however, to suggest the broader point that “once a government employee signs an agreement not to disclose information properly classified pursuant to executive order, that employee ‘simply has no First Amendment right to publish’ such information.” *Id.* at 183-184. For the latter point it relied on *Snepp* and other cases specific to the issue of pre-publication review contractual enforcement. *Id.* at 183-186. Two years after *Wilson*, the D.C. Circuit framed *Aguilar*’s reasoning more broadly still. In *Boehner v. McDermott*, the D.C. Circuit wrote: “*Aguilar* stands for the principle 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.” *Boehner*, 484 F.3d 573, 579 (2007). The *Boehner* Court upheld a damages award against U.S. Representative McDermott for disclosing an illegally obtained recording of a conference call that took place among a group of other congresspersons. *Id.* at 575, 581. The court explained that Representative McDermott, as a member of the House Ethics Committee investigating a party to the phone call, had explicitly taken on special duties of confidentiality. *Id.* at 579-581. *Boehner* can and should, however, be limited to its facts, which are not incompatible with the notion that executive branch insiders who leak classified information merit a degree of First Amendment protection. *Boehner*’s characterization of the *Aguilar* Court’s reasoning is dicta, and it misstates the *Aguilar* Court’s limited position. *See id.* at 588-589 (Sentelle, J., dissenting) (criticizing the *Boehner* majority’s reading of *Aguilar* on grounds similar to those advanced here). For its part, the U.S. District Court for the District of Columbia also erred in citing *Boehner*’s mischaracterization of *Aguilar* to support its own rejection of Stephen Kim’s motion to dismiss his indictment for leaking classified information. *United States v. Kim*, 808 F. Supp. 2d 44, 57 (D.D.C. 2011).

ciency of the public services it performs through its employees.”<sup>128</sup> Underlying the employer’s side of the balance, then, is the Court’s view that public employers, like private ones, need discretion to deal with employee speech that negatively impacts the workplace. To protect such discretion, the *Garcetti* Court went so far as to deem the *Pickering* balancing test – and hence First Amendment protections – inapplicable to employees disciplined for “statements [made] pursuant to their official duties.”<sup>129</sup> Such a limit was necessary, said the Court, to avoid “constitutionaliz[ing] the employee grievance.”<sup>130</sup>

The *Pickering* cases, in short, are concerned with the government’s need for discretion *when it acts as an employer in disciplining or dismissing employees*.<sup>131</sup> The deference that the cases give government employers to fire or discipline employees for their speech – whether through the application of *Pickering* balancing or through *Garcetti*’s categorical exclusion of some speech from protection – is not translatable to the realm of criminal punishment.

Finally, recall that at least one commentator reads *Garcetti* – which deemed *Pickering*’s protections inapplicable to speech “made pursuant to the employee’s official duties” – to remove any First Amendment protections for classified information leaks because leakers access such information through their employment. Even if we assume that *Garcetti* applies to criminal prosecutions, its categorical exemption should not be construed so broadly. True, the *Garcetti* Court stated that “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.”<sup>132</sup> But the logic of *Garcetti* on the whole – and of the earlier cases on which it builds – cuts against interpreting the statement to preclude protection for information gleaned through government employment. Rather, the statement is best read to mean that speech that is itself part of one’s job is not protected. The latter interpretation is tailored to the *Garcetti* Court’s goal to avoid “constitutionaliz[ing] the employee grievance.”<sup>133</sup> The former interpretation, on the other hand, would dramatically undercut a premise – cited throughout the *Pickering* cases and reiterated in *Garcetti* itself – underlying the speech value side of the *Pickering* balance. That is, government employees have special value to add to the public debate by virtue of their inside knowledge, and the public has an important “interest in

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128. *Connick v. Myers*, 461 U.S. 138, 140 (1983) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

129. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

130. *Id.* at 420 (quoting *Connick*, 461 U.S. at 154).

131. The cases, in other words, are about “managerial prerogative.” See Rosenthal, Lawrence, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 43 (2008) (deeming managerial prerogative “critical to the outcome in *Garcetti*”).

132. *Garcetti*, 547 U.S. at 421-422; see also Vladeck, *supra* note 9, at 1540 (citing this language and interpreting it to preclude constitutional protection for leaking classified information).

133. *Garcetti*, 547 U.S. at 420 (quoting *Connick*, 461 U.S. at 154).

receiving [their] well-informed views.”<sup>134</sup> Indeed, the D.C. Circuit in *Wilson v. CIA*, which involved Valerie Plame Wilson’s efforts to include some classified information about her CIA service in a book, observed in a footnote that “[t]his case does not implicate the concerns discussed in *Garcetti*.”<sup>135</sup> Other federal courts similarly have found *Garcetti* inapplicable to speech conducted outside of one’s employment responsibilities, even where the speech consists of information learned through, and about, that employment.<sup>136</sup>

## 2. The Doctrinal Seeds of an Affirmative Case for Protecting Leakers

Precedent also contains the seeds of an affirmative case for robustly protecting leakers. Two foundational elements of the case are the notions that information about government is of central importance under the First Amendment and that suspicion is warranted when the government seeks to shield information about itself from the public. Both ideas find substantial support in precedent. On the first point, the Supreme Court has made clear that speech on matters of public importance is at the heart of the First Amendment.<sup>137</sup> Such speech not only benefits speakers, but is vital to the constitutional system. If elections and inter-branch checks and balances are to be more than mere facades, the people must have opportunities to learn and convey information and debate ideas.<sup>138</sup> Expounding on these points, the Court has observed:

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times.<sup>139</sup>

Appreciation for the value of speech about government and public affairs is

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134. *Id.* at 419; *see also id.* at 419-420 (approvingly citing earlier cases to the effect that government employees are especially well qualified to comment on matters that pertain to their employment).

135. *Wilson v. CIA*, 586 F.3d 171, 185 n.15 (2d Cir. 2009); *see also* Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 63 n.99 (2008) (agreeing that *Garcetti* does not preclude protection for classified information leaks); Morse, *supra* note 9, at 430.

136. *See, e.g.*, *Fairley v. Fermaid*, 482 F.3d 897, 899, 902 (7th Cir. 2006) (noting that testimony by county jail guards as to knowledge of inmate abuse acquired on the job was not part of their employment duties and thus not within *Garcetti* exemption); *Pattee v. Ga. Ports Auth.*, 477 F. Supp. 2d 1253, 1257-1258, 1261 n.4 (S.D. Ga. 2006) (explaining that Georgia Port Police officer’s whistleblowing e-mails containing information acquired on the job were not covered by the *Garcetti* exemption because they were not sent in the course of his employment).

137. *See, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269-271, 273-276 (1964).

138. *See, e.g.*, *Thornhill v. Alabama*, 310 U.S. 88, 95, 101-102 (1940); *Grossjean v. Am. Press Co.*, 297 U.S. 233, 243, 249-250 (1936).

139. *Thornhill*, 310 U.S. at 101-102.

closely intertwined with fears that the government will abuse censorial powers to single out speech that it dislikes, including that which it perceives to threaten its comfort or credibility. As the material just quoted reflects, the Court recognizes the very real risk – and long history – of such abuses as important factors underlying its free speech jurisprudence. Fear of government abuse, combined with recognition of speech’s affirmative value, are manifest in doctrines designed to limit government’s discretion to punish speech for its content. Among these doctrines is the “content distinction” rule, which amounts to a strong presumption against laws or law enforcement based on the viewpoint, subject matter, or communicative impact of speech.<sup>140</sup>

Long experience also demonstrates the special risks posed where government seeks to punish speech that ostensibly threatens to cause violence or harm national security. From World War I through the early Cold War years, the Court regularly upheld prosecutions for anti-war, communist, and socialist speech. There is wide consensus in retrospect that the prosecutions were poorly justified and that the Court unduly deferred to the government in upholding them.<sup>141</sup> The Court appeared to have internalized these lessons by 1969, when it decided *Brandenburg v. Ohio*.<sup>142</sup> In *Brandenburg*, the Court announced that one cannot constitutionally be punished for speech linked to terrorism or to other dangerous activity unless the speech is intended to incite, and likely to incite, imminent, lawless action.<sup>143</sup> The *Brandenburg* Court also made clear that the judiciary has the final word in striking this balance.<sup>144</sup>

The Supreme Court’s appreciation for the informing and deliberative functions of speech and its wariness of government abuse are manifest further in the Court’s attentiveness to the chilling effect of speech restrictions. The Court has repeatedly observed that free speech is harmed not only by unwarranted punishments, but by the self-censorship of those who fear the same.<sup>145</sup> Speakers may play it safe in the face of vague or far-reaching laws, saying nothing that risks angering powerful members of society. Such reasoning was central to the Supreme Court’s opinion in *New York Times Co. v. Sullivan* establishing strong First Amendment protections for speakers accused of defaming public officials.<sup>146</sup> The Court deemed it better for protections to be so strong that some

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140. See, e.g., Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Matter and the First Amendment*, 96 NW. U. L. REV. 1339, 1339-1342, 1345-1349 (2002) (summarizing the rule and citing cases, though noting that the Supreme Court does not always treat communicative matter as content).

141. For discussions reflecting this consensus, see, e.g., GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 179-207, 403-411 (2004) and Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1166-1173 (1982).

142. See, e.g., HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 227-236 (Jamie Kalven ed., 1988) (discussing doctrinal evolution from *Schenck* through *Brandenburg*).

143. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

144. *Id.* at 447-449; see also *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 842-844 (1978).

145. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

146. *Id.*

defamatory speech will go unpunished, than so weak that “would-be critics of official conduct may be deterred from voicing their criticism.”<sup>147</sup>

These aspects of precedent lend support not only to protecting classified speech generally, but to protecting leakers in particular. A government employee, lacking the high-level political support of an authorized leaker or the resources of many third-party publishers, is especially vulnerable to chilling with respect to classified speech that high-level officials are likely to deem unwelcome for its content.

The *Pickering* line of cases shines the most direct light on the unique constitutional value of leaks from government insiders. In *Garcetti*, the Supreme Court explained that “the First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public’s interest in receiving the well-informed views of government employees engaging in civic discussion.”<sup>148</sup> Indeed, public employees can make uniquely important contributions to the speech marketplace precisely because of knowledge gained through their work. In *Pickering*, the Court observed that “[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.”<sup>149</sup>

Such speech value does not disappear in the context of national security and classified information. To the contrary, the very secrecy of these contexts heightens the value of the information flow, even as the state’s interests on the other side of the balance may be heightened as well.

### III. CALIBRATING LEAKER PUNISHMENTS AND PROTECTIONS

#### A. *The Problem With the Mixed Approach*

To be sure, the government has a compelling interest in protecting information that will harm national security if released. The executive branch also requires leeway to control its employees and operations so that it may execute the law effectively. But profound interests also counsel against excessive executive discretion to punish information leaks, and those interests too are deeply grounded in the Constitution.

Perhaps the closest that we have seen to a resolution of this tension – primarily among commentators, though also through indirect judicial suggestion – is a mixed approach whereby third-party publishers and government insiders are placed on opposite ends of the free speech spectrum. From this perspective, the former are fully protected when they publish classified information, and they

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147. *Id.*

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

149. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968).

cannot be punished unless publication is intended to, and likely does, create a danger of imminent illegality. The default status for the latter, on the other hand, is a complete lack of protection, although some exceptions might be established, for example, when the leaker can prove that the leaked information concerned illegal activity.

The mixed approach has a certain intuitive appeal. The tensions raised in the classified leaks context arise not only from competing substantive interests, but also from competing institutional roles and competencies. The mixed approach hinges protection on one's institutional relationship to classified information, that is, on whether one accessed the information through affiliation with the institution charged to protect it, or from outside of that institution. The approach thus appears, on the one hand, to support the constitutional and practical interests of the executive by according it nearly full control over its own operations and personnel. On the other hand, it leaves outsiders free to check executive secrecy by exercising their speech and press rights.

Yet despite the validity of the mixed approach's core insight – that the different institutional positions of leakers and third-party publishers are constitutionally important – the approach is oversimplified and under-protects leakers as a result. Its oversimplification – and resulting under-protection – occurs on two levels. First, the approach overlooks the constitutional role of checks from within the executive branch. As we have seen, internal checks – including informational checks against secrecy abuses – are an important feature of the constitutional scheme for the separation of powers. The First Amendment is designed partly to support this scheme. Second, the mixed approach underestimates the degree to which executive control of leakers can chill speech of public importance, cut off news to third-party publishers, and upset the flow of information among citizens.

Indeed, we are in uncharted territory at present, given the extraordinary number of leaker prosecutions brought thus far in the Obama administration. There are many reasons for this dramatic uptick. First, as I have explored elsewhere, theories of strong presidential power increasingly are moving into the mainstream, and these include theories to the effect that information ceases to be speech once it is classified by the executive branch.<sup>150</sup> While many assumed that these theories were outliers that would disappear with the George W. Bush administration, the Obama administration in fact has had more political leeway to implement these theories, albeit in different forms and with less inflammatory rhetoric.<sup>151</sup> Second, political and legal developments of the past

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150. See, e.g., Heidi Kitrosser, *Supremely Opaque?: Accountability, Transparency, and Presidential Supremacy*, 5 ST. THOMAS J. L. & PUB. POL'Y 62, 66-68, 79-80 (2010); Heidi Kitrosser, *National Security and the Article II Shell Game*, 26 CONST. COMM. 483, 483-486 (2010).

151. See, e.g., JACK GOLDSMITH, POWER AND CONSTRAINT 40 (2012) ("Because the Obama policies played against type and (in some quarters of his party) against interest, they appeared more likely to be a necessary response to a real terror threat and thus less worrisome from the perspective of presidential aggrandizement than when the Bush administration embraced essentially the same policies.").

several years have made the executive branch increasingly willing to subpoena journalists to demand source information.<sup>152</sup> Third, new investigative powers and methods have opened new avenues for the Justice Department to track down leakers, even without journalistic cooperation.<sup>153</sup>

These explanations surely are not exhaustive. In any event, the reasons for heightened executive boldness in pursuing leak prosecutions, while important and instructive, are beside the immediate point. The immediate point is simply this: It is faulty to assume that a constitutionally healthy information flow can be maintained in the face of nearly unfettered executive discretion to classify information and punish its leaking. Even if third-party publishers themselves retain broad freedoms to publish such information, they cannot do so without insider leaks. The “mixed approach” thus depends on executive restraint to operate properly. Yet as a theoretical matter, the information flow necessary to support constitutional checks and balances should not hinge on voluntary executive restraint. As a practical matter, we may be witnessing the end of executive restraint and the disintegration of any previously maintained balance.

### *B. Calibrating Leaker Protections and Punishments*

Executive branch insiders thus occupy a constitutional position more complicated than that reflected in the mixed approach. 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 citizens are subject. The executive should not be required to tolerate employees who actively undermine the execution of the law. Nor must it support employees’ use of government resources and special access privileges to do so. At the same time, executive branch insiders have a constitutional significance that is not exhausted by their role as servants of the branch. They occupy another, equally important position in the constitutional structure – that of potential checks on abuses or mistakes to which they alone may be privy.

The constitutional balance between executive control and checks on the executive thus cannot be satisfied by a scheme that grants the executive complete or near complete control over classified information leaks. What is called for is a more nuanced calibration of protections and allowable punishments. The calibration should reflect two factors. First, it must be grounded partly in the relationship between the employee’s institutional role and the

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152. See, e.g., Sandra Davidson, *Leaks, Leakers, and Journalists: Adding Historical Context to the Age of Wikileaks*, 34 HASTINGS COMM. & ENT. L. J. 27, 70-72 (2011); Laura Rozen, *Hung Out To Try*, COLUM. JOURNALISM REV. 33, 33-35 (Jan. / Feb. 2009); William E. Lee, *supra*, note 101 at 1458-1459, 1471-1473 (2008).

153. See, e.g., Adam Liptak, *A High-Tech War on Leaks*, N.Y. TIMES, Feb. 12, 2012, at SR5; Michael Isikoff, *DOJ Gets Reporter’s Phone, Credit Card Records*, MSNBC.COM (Feb. 25, 2011), available at [http://www.msnbc.msn.com/id/41787944/ns/us\\_news-security/t/doj-gets-reporters-phone-credit-card-records-leak-probe/#.UDfees3VrJM](http://www.msnbc.msn.com/id/41787944/ns/us_news-security/t/doj-gets-reporters-phone-credit-card-records-leak-probe/#.UDfees3VrJM); Samantha Fredrickson, *Tapping into the Reporter’s Notebook*, 32 NEWS, MEDIA & THE L. 10, 10-11 (2008).



punishment sought by the government. Second, it must reflect a considered balance between the constitutional value in deterring leaks and that in avoiding over-deterrence of leaks.

For present purposes, three outcomes of this calibration warrant note. First, classified leaks should be treated like other government employee speech when employment sanctions such as dismissal or demotion are at issue. Under current doctrine, this means that the *Pickering* balancing test should apply when employees are disciplined for leaks. Second, the government must meet a considerably higher threshold to impose criminal or civil, rather than employment-based administrative penalties. Third, courts should consider varying the precise nature of the government's burden with the severity of the penalty sought in the criminal or civil context. I propose that efforts to impose severe sanctions – for example, prosecutions with the possibility of several years in prison or potentially bankrupting monetary penalties – require a showing that the leaker lacked an objectively *reasonable* basis to believe that the public interest in disclosure outweighed identifiable national security harms. Efforts to impose less severe sanctions – for instance, prosecutions that raise the possibility of little if any incarceration time – may warrant a lesser standard. I would propose that the government in the latter cases be required to demonstrate that the leaker lacked an objectively *substantial* basis to believe that the public interest in disclosure outweighed identifiable national security harms.

In the context of employment-based, administrative sanctions, the government's case for control is at its apex as a matter both of institutional position and leaker incentives. As for institutional position, arguments that the government needs control over its employees are most plausible when that control is tied to employment. Arguments from the employment relationship become more strained when the government seeks to step out of its employer role and into its sovereign role to prosecute employees criminally or to impose civil punishments. The institutional point also intersects with concerns over leaker incentives. Certainly, a job loss, demotion, or security clearance loss can be devastating. This is why the government must not have unfettered power to impose such sanctions, given the free speech value in insider leaks. Yet employment sanctions may pale next to the prospect of a lengthy prison sentence or bankrupting fines. The *Pickering* test – which accords the government substantial but not unfettered discretion over employee leaks – thus strikes a fair balance with respect to the government's power to impose employment-based penalties. As a practical matter, the outcome of the *Pickering* test as applied to classified information leaks may well result in a situation whereby the government is free to impose employment sanctions for leaks of classified information except where an employee exposes illegality or other fairly clear-cut wrongdoing.<sup>154</sup>

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154. This point calls to mind Professor Stone's proposal that leaks of illegal conduct be shielded from either employment-based or criminal punishment. *See supra* note 41. *But see also infra* text

In the context of prosecution, the threshold for government success must be considerably higher. As a matter of institutional position, the government as employer is very differently situated from the government as prosecutor. In a free society, government necessarily has far less control over persons qua persons than it has over persons qua government employees. This translates to a much narrower discretion on the government's part to prosecute its employees under the criminal law than to punish them through the terms and conditions of their employment. The need to strike a balance between under-detering and over-detering leaks also militates in favor of a high prosecutorial burden. Even with a high burden, the possibility of prosecution surely has a chilling effect, as does the likelihood of employment-based repercussions.

Given the importance of calibrating penalties and punishments in this context, it also is advisable for courts to consider varying the government's burden with the severity of the offense charged and the associated penalties. Such calibration is hardly unprecedented. This is particularly so in the free speech context where speech value must be balanced against different types and levels of harm, and where chilling effects complicate matters further. In the defamation setting, for example, courts long have subjected plaintiffs to burdens that vary with their status as private or public figures and with the types of damages sought.<sup>155</sup>

Finally, two additional points bear mention. First, plaintiffs' burdens in civil damages actions against leakers ought generally to parallel those of the government in criminal cases.<sup>156</sup> Thus, plaintiffs seeking punitive damages generally should be subject to the higher burden of proof described above, while plaintiffs seeking only actual damages generally should be subject to the lower burden of proof. However, there may be factors that require more tailored analysis in particular civil cases. Recall, for instance, the constructive trust at issue in *Snepp*, and the Court's analysis linking that remedy to contractual breach.

Second, leakers should be categorically protected from criminal prosecution or employment based sanctions for leaks that disclose illegal government conduct. To be clear, such protection would not suffice were it leakers' only constitutional shield. Controversy inevitably will surround questions of what is "illegal," particularly insofar as administrations can be expected to argue that

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accompanying notes 159-161 (explaining that such protection is necessary but not sufficient to satisfy First Amendment concerns in the criminal prosecution context).

155. See, e.g., ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, §11.3.5.2, *Defamation*, 1008-1018 (2d ed. 2002) (summarizing these distinctions in defamation and libel law).

156. Cf. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute."); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (stating that the reasons for imposing a high burden on defamation plaintiffs in *Sullivan* "apply with no less force merely because the remedy is criminal"). Thanks very much to Mary Rose Papandrea for suggesting that I address the question of civil damages.

some statutory violations are legal under Article II.<sup>157</sup> More fundamentally, such protection, standing on its own, would misallocate the appropriate burdens. Both constitutional reasoning and the reality of classification militate against embedding into constitutional law the presumption that classified information leaks are punishable unless they reveal particular categories of information, such as illegal conduct. Rather, the centrality of speech about government to our system, the risk of a chilling effect on speech, and well-justified fears that government will abuse secrecy and censorial powers warrant broader-based leaker protections. Nonetheless, the categorical permissibility of leaks about illegal activity, while inadequate standing alone, is a useful supplement to the other protective elements suggested above.

On this latter point, the defamation context again offers an instructive parallel. The Supreme Court long has taken the positions both that “there is no constitutional value in false statements of fact” and that the First Amendment is not satisfied by a mere defense of truth for persons accused of defamation.<sup>158</sup> The Court has explained that, under a truth defense regime:

[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which “steer far wider of the unlawful zone.” The rule thus dampens the vigor and limits the variety of public debate.<sup>159</sup>

In the context of classified information leaks, the argument for protections beyond an “illegality defense” is even stronger. The risk of deterring leaks about illegal activities roughly parallels the risk of chilling truthful speech in the defamation context. Yet in the classified leaks setting, there is another, independent basis for concern. That is the risk of stifling other valuable classified speech, beyond that exposing illegality. As we have seen, much classified speech, including but not limited to that revealing illegality, is of high value. Furthermore, wide government discretion to punish classified speech generally is a dangerous tool by which government can manipulate the flow of news and information.

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157. See, e.g., Heidi Kitrosser, *Shell Game*, *supra* note 150, at 483-486 (citing influence and ubiquity of such “exclusivity” arguments).

158. Gertz v. Robert Welch Inc. 418 U.S. 323, 340-341 (1974). The Supreme Court did, however, hedge on the question of falsity’s value in a footnote in *New York Times Co. v. Sullivan*, where it quoted John Stuart Mill to the effect that “Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’” *Sullivan*, 376 U.S. at 279 n.19.

159. *Sullivan*, 376 U.S. at 279 (internal citation omitted).

### C. Addressing Objections to Calibration

One might object to the very notion of calibrating First Amendment protections by the nature of the penalty that the government seeks to impose. An objector might point out that First Amendment protections typically hinge on what a restriction targets – whether, for instance, a law targets speech on the basis of its content and whether that content falls into an unprotected speech category – rather than the type of penalty imposed. He or she might deem it unwise to stray from this approach. Calibration could prove unwieldy. Or it might dilute speech protections, making judges more willing to approve restrictions than they otherwise would, so long as those restrictions are paired with relatively light penalties.<sup>160</sup>

In responding to these concerns, it is useful to divide calibration into two categories. The first category involves calibration based on the institutional nature of the punishment. For our purposes, that means calibration based on whether the government seeks to impose an administrative punishment in its capacity as employer – such as to fire or demote – or whether it seeks to impose a criminal or civil punishment in its capacity as sovereign. The second category entails calibration based on a punishment's severity.

With respect to institutional calibration, there is a growing scholarly literature that evaluates the extent to which courts do, and should, differentiate between speech restrictions imposed on and within different types of institutions.<sup>161</sup> This essay's focus, however, is solely on one such differentiation – that between penalties imposed by the government as employer and those imposed by the government as sovereign. The distinction is warranted for two reasons. First, it is justified as a matter of constitutional theory. As elaborated earlier, leakers occupy two very different roles in the constitutional framework from the perspectives of both separation of powers and free speech theory. In their role as parts of the executive branch machinery, the government has a strong claim to controlling them. In their role as potentially uniquely valuable contributors to the marketplace of ideas, the government has a much weaker claim to controlling them. This tension is best reconciled by giving the government relatively wide leeway to punish leakers through means tied to their status as executive branch insiders, while keeping tight reins on government punishments that target leakers' personal freedom or property apart from their insider roles.

Second, courts already rely on institutionally specific reasoning to argue that the First Amendment grants government employers substantial discretion to punish employees for their speech. As explained earlier, courts rationalize this

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160. I am very grateful to Geof Stone for raising and vigorously debating these points with me.

161. See generally Gia B. Lee, *First Amendment Enforcement in Government Institutions and Programs*, 56 UCLA L. REV. 1691 (2009); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821 (2008); Scott A. Moss, *Students and Workers and Prisoners – Oh My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635 (2007); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998).

approach in no small part by citing the government's heightened needs to control speech *when it acts as an employer*. It is extending such discretion to government in its role as *sovereign*, and not resistance to the same, that demands a new and independent justification.

As for calibration based on penalty severity, it is clearly warranted in at least two cases, and worth serious consideration in a third. First, it is clearly warranted as a basis to limit the reach of *Snepp*'s dismissive approach to the First Amendment considerations raised in that case. As discussed above, the *Snepp* Court itself relied heavily on the tight fit between the penalty imposed and the nature of *Snepp*'s transgression. Second, it is warranted as a supplemental justification for distinguishing employment-based sanctions from criminal or civil penalties. The central theoretical rationale for the institution-based distinction is the need to reconcile the tension between government employees' roles as part of the executive branch machinery and their roles as uniquely valuable potential speakers. As we have seen, this concern justifies distinguishing government's capacity to punish as an employer from its capacity to do so as a sovereign. This distinction is important not only as a matter of institutional separation, but because it balances the value of government discretion over speech against the dangers of the same. It does so by limiting the realms in which, and hence the extent to which, government can punish speech with relative ease.

A third reason to calibrate protections by penalty severity simply is to enable a more delicate fine-tuning of the competing interests at stake, even where penalties are not institutionally distinct. This rationale would apply where, for example, criminal penalties are assessed under different standards depending on their relative severity. Such an approach is not the norm in First Amendment law, though it also is not unprecedented as defamation law and the strong presumption against prior restraints reflect. As discussed above in Part III.B, a two-pronged standard for judicial review of criminal or civil leak punishments, varying with the punishments' relative severity, may be warranted in light of the competing constitutional considerations at stake and the consequent difficulty in calibrating speaker incentives. Yet given possible problems with this approach – including unwieldiness or diluted constitutional protections – this suggestion is made tentatively, as a call for further consideration. For reasons already discussed, however, judicial distinctions clearly are called for as between employment-based punishments and criminal or civil punishments.

#### CONCLUSION

Executive branch insiders who spill secrets without authorization embody a necessary paradox of the constitutional design. The executive branch is structured to run energetically, and, when necessary, with secrecy. Yet it is also built not just to withstand, but to facilitate occasional leaks. The founders, as we have seen, wanted no part of a presidency staffed with “minions and favourites,” persons whom the President could use as a “screen . . . [to] hide . . . his negli-

gence, or inattention . . . [or] criminality.”<sup>162</sup> This paradox is an aspect of the separation of powers, one that the First Amendment is designed to support.

Honoring this design entails remembering that classified information is, first and foremost, information about government. It also entails a healthy suspicion of government declarations to the effect that such information is off limits for public review. Such suspicion is justified not only as a matter of theory, but in light of the realities of massive over-classification and longstanding practices of selective leaking.

None of this is to deny that some secrets are very necessary, that some leaks deserve to be prosecuted, or that the executive branch has a constitutionally legitimate interest in managing its operations and employees. But these points must be placed in perspective. Some secrets are necessary, but many – perhaps most, if experts from across administrations and parties are to be believed – are not. Indeed, unnecessary secrecy itself can harm the national interest, including national security. More to the point, the notions that the executive alone can and must decide what shall be secret and what shall be known, and that checks on free speech can turn on these designations, are a bridge too far. These notions overlook a crucial half of the constitutional scheme for presidential power, a scheme reflected in founding assurances that the President, while capable of secrecy and vigor, will be “narrowly watched” so that the people can “discover[] with facility and clearness” his misdoings.<sup>163</sup>

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162. *See supra* notes 78, 81.

163. *See supra* note 68.