A Handyman's Guide to Fixing National Security Leaks: An Analytical Framework for Evaluating Proposals to Curb Unauthorized Publication of Classified Information

Addressing the House of Representatives on October 29, 1987, Congressman Doug Bereuter proclaimed:

> Our Nation cherishes among its fundamental freedoms the right of free speech. If we are to preserve the right of free expression and our other basic freedoms, we must defend our democratic way of life from adversaries who would destroy it. The first line of defense in guarding free expression, therefore, is to protect our Nation's secrets.
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> Unfortunately, too many in our government, both in Congress and the executive branch, forget that there exists a basic and fundamental relationship between remaining silent and preserving the right to speak freely.[1]

The paradox that limitations on speech are necessary to preserve freedoms of speech colorfully illustrates the inevitable conflict in American democracy between national security interests and first amendment rights.[2] To remain secure against adversaries, a nation must be able to maintain the secrecy of national security plans and operations.[3] Demands for secrecy, however, directly contravene

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[1] 133 Cong. Rec. E4273 (1987). The Honorable Doug Bereuter is a Republican representative from Nebraska.

[2] The first amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I (emphasis added).

[3] The concept of national security evades precise definition. Arguably, the concept could encompass all aspects of governing a nation, including domestic and foreign policy. For the purposes of this note, the term "national security" will be used in accordance with what Professor Emerson refers to as the "self defense" notion of national security. See Emerson, National Security and Civil Liberties, *in* The First Amendment and National Security 83 (1984). The "self defense" notion focuses on matters involving the use of force inside the United States or the aggressive actions of unfriendly foreign nations, rather than non-forceful attempts to alter or affect the United States' policies and interests.

democratic notions of unrestricted public debate and the need for the government to be held accountable for its actions.

The difficulty in balancing conflicting national security and free speech interests is exemplified by the problem of national security leaks, i.e., the media's publication of classified national security information. The problem of national security leaks is not susceptible to easy solution because not all leaks are inherently harmful and some leaks result in the furtherance of democratic ideals.[4] Enacting draconian measures to plug leaks poses a serious threat to genuine first amendment concerns and will always generate fervent criticism in the legal and academic communities. In contrast, efforts to curtail and punish traditional acts of espionage, such as the selling of information to hostile countries, generate little controversy as such acts are of no utility to the public and do not raise legitimate first amendment concerns.[5]

Given this inevitable clash of interests, efforts to curb unauthorized publication of national security information must carefully ac-

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Id.

[4] See infra notes 36-62 and accompanying text.

[5] Utility concerns aside, traditional acts of espionage are abhorred also because the motivating force behind the acts is often pecuniary reward, an intention to harm the United States or an effort to prevent the revelation of previous wrongdoing (blackmail scenarios). In contrast, the government official who writes a book containing sensitive information or leaks such information to the media is perceived as less culpable because usually he lacks an intention to harm the United States or an understanding that his acts are in fact harmful. For the most part, the media is perceived in the same light. Though, in theory, a newscast or newspaper can receive some pecuniary rewards in the form of an increase in viewers or circulation, the decision to publish "leaks" is often based on a self-perceived duty to enhance public knowledge and debate of the issues.

Thomas Martin, the deputy assistant attorney general in the Civil Division of the Department of Justice during the Carter administration, described the typical leaker of the 1970s as follows:

> Typically these individuals did not seek to advantage a particular foreign government, nor were they paid by one. They were authors drawing on information gained in government intelligence work. They were idealists convinced that the world would be a better place if particular secret information were available to the public. They were journalists who took from Vietnam and Watergate the proposition that disclosure of government secrets is inherently a public service and even a primary responsibility of the profession.

Martin, National Security and the First Amendment: A Change in Perspective, 68 A.B.A. J. 680, 681 (1982).

In light of these normative considerations, there is overwhelming support for the imposition of criminal sanctions on the perpetrators of traditional espionage, but little consensus on applying such sanctions to "leaking" government officials or the media. See Espionage Act, 18 U.S.C. §§ 791-799 (1982); infra notes 17, 50, 172-82 and accompanying text. For a discussion of the difference between leaks and traditional espionage, see Emerson, supra note 3, at 89; infra notes 78-81 and accompanying text.

commodate both the exigencies of national security and the interests of free speech. The government's current inability to prevent leaks of classified information is well recognized.[6] Whether pervasive leaking warrants comprehensive leak-plugging reform, however, is a contentious subject.[7] In the past, the government has relied predominantly on administrative sanctions[8] and the use of pre-publication review by the Central Intelligence Agency and the National Security Agency[9] as methods of leak-plugging. The 1980s, however, have witnessed heightened attempts by the government to curb leaking.[10] The Reagan administration attempted with some success to expand the use of pre-publication review to other government employees and contractors.[11] Moreover, in April 1988, the United States Court of Appeals for the Fourth Circuit upheld the govern-

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[6] For discussions or evidence of the pervasiveness of leaking, see Leaks of Classified National Defense Information - Stealth Aircraft: A Report of the House Investigations Subcomm. of the Comm. on Armed Services, 96th Cong., 2d Sess. 1 (1980)[hereinafter "Stealth Aircraft Hearings"]; Espionage Laws and Leaks: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence, 96th Cong., 1st Sess. 146 (1979); National Security Decision Directive 84: Hearings Before the Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess. 103-113 (1984) [hereinafter "Directive 84 Hearings"]; Kaiser, A Proposed Joint Committeee on Intelligence: New Wine in an Old Bottle. 5 J. L. & Pol. 127, 134 n.38 (1988).

[7] For a sampling of the competing opinions on leaking see the transcript of a conference sponsored by the Standing Committee on Law & National Security on July 17, 1985, published as National Security Leaks: Is There a Legal Solution? (1986).

[8] See, e.g., 5 U.S.C. § 7532 (1982) (the head of an agency can discharge or suspend agency employees when the action is "necessary in the interests of national security"). Such sanctions have rarely been used for leaking. For some examples of when such sanctions have been applied against low-level leakers, see Smith, Prior Restraint: Original Intentions and Modern Interpretations, 28 Wm. & Mary L. Rev. 439, 465 n.188 (1987). See also Leaks v. Public Service Announcements, N.Y. Times, May 11, 1986, at D14, col. 1 (discussing the Reagan administration's dismissal of Michael Pillsbury, Assistant Under Secretary of Defense).

[9] The Supreme Court upheld the CIA's use of pre-publication review in Snepp v. United States, 444 U.S. 507 (1980) (per curiam). Snepp had signed an agreement with the CIA promising not to publish any "information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without prior specific approval by the Agency." Id. at 508. See also United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972), cert. denied, 409 U.S. 1063 (1972).

[10] See generally Freedom at Risk: Secrecy, Censorship, Repression in the 1980s (R. Curry ed. 1988) [hereinafter "Freedom at Risk"].

[11] In 1983, President Reagan promulgated National Security Directive 84, which expanded the use of pre-publication review to all federal employees with authorized access to classified information. See generally, Note, National Security Directive 84: An Unjustifiably Broad Approach to Intelligence Protection, 51 Brooklyn L. Rev. 147 (1984) [hereinafter Note, National Security Directive 84]. In response to intense criticism, Reagan suspended application of the pre-publication procedures of Directive 84. Id. at 150. Nonetheless, the use of pre-publication review still increased prodigiously during the Reagan Administration. See Freedom at Risk, supra note 10, at 11-12.

ment's use of the Espionage Act of 1917[12] to convict a government employee, Samuel Morison, who had leaked classified photographs to a British magazine.[13] Thus, in practice the United States has taken steps toward a secrecy system similar to that established by Great Britain's Official Secrets Act, under which all unauthorized disclosures are treated as harmful and worthy of enhanced secrecy measures, like criminal sanctions.[14]

This note will not focus on the propriety of a particular method of leak-plugging, such as pre-publication review,[15] administrative

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[12] 18 U.S.C. §§ 791-799 (1982).

[13] United States v. Morison, 844 F.2d 1057 (4th Cir. 1988). See generally Burkholder, The *Morison* Case: The Leaker as Spy, *in* Freedom at Risk, supra note 10, at 117-39; Note, The Constitutionality of Section 793 of the Espionage Act and its Application to Press Leaks, 33 Wayne L. Rev. 205 (1986) (construing the lower court's *Morison* decision, 604 F. Supp. 655 (D. Md. 1985), which was affirmed on appeal, as a valid application of constitutional standards). Justice Wilkinson commented in *Morison* that the only issue before the court was the constitutionality of one particular conviction. 844 F.2d at 1085 (Wilkinson, J., concurring). Although his statement is indeed correct, the *Morison* decision itself established a dangerous precedent respecting free speech interests. In his concurring opinion, Judge Philips acknowledged that the Espionage Act was an "unwieldy and imprecise instrument for prosecuting government 'leakers' to the press." Id. at 1085 (Philips, J., concurring). However, all three judges concluded that the Espionage Act was constitutionally applied to Morison's leak because of accompanying limiting jury instructions which defined the statutory elements and ensured that the leak had to be "related to defense" and "potentially damaging" to the United States. Id. at 1071-76 (Russel., J), at 1084-85 (Wilkinson, J., concurring), at 1086 (Philips, J., concurring). Judge Wilkinson commented that jury instructions could be varied on a case-by-case basis to cure any constitutional infirmities. Id. at 1084 (Wilkinson, J., concurring). Nonetheless, relying on limiting jury instructions to cure constitutional infirmities provides little assurance that speech interests will be adequately recognized and protected. Jury instructions may vary among judges facing the same issue, and the instructions may be perceived differently by different juries. Moreover, requiring the government to prove that the leak is "potentially damaging" is supposed to prevent conversion of the Espionage Act into an official secrets act, see infra note 49, because classification status is thus "merely probative, not conclusive" of damage. Id. at 1086 (Philips, J. concurring). However, as Judge Philips admitted, the "potential damage" requirement "still sweeps extremely broadly", given the fact that almost all defense information will be of some potential damage to national defense. Id. See Lewis, National Security: Muting the "Vital Criticism," 34 UCLA L. Rev. 1687, 1699-1700 (1987) (criticizing the requirement of only "potential damage", as opposed to "actual damage"). Thus, if the *Morison* decision is not overturned by the Supreme Court, the United States will have taken a significant step toward an official secrets regime. Exactly how much closer we will have moved depends on how Congress reacts to the decision, whether the executive commences extensive prosecutions, and whether the decision is interpreted broadly by other courts.

[14] See The Administration's Unofficial Secrets Act, N.Y. Times, Aug. 3, 1986, at D23, col. 2; Freedom at Risk, supra note 10, at 3-29. For discussion of Great Britain's Official Secrets Act, see infra note 49.

[15] See Note, National Security Directive 84, supra note 11, at 151 (arguing that the expansive pre-publication procedures of Directive 84 were overbroad and unconstitutional); Anawalt, A Critical Appraisal of Snepp v. United States: Are There Alternatives to Government Censorship?, 21 Santa Clara L. Rev. 697, 724-26 (1981) (the *Snepp* decision was incorrectly decided as the pre-publication provision signed by Snepp was overbroad and not sufficiently tailored to meet the government's legiti-

sanctions,[16] criminal sanctions[17] or legal injunctions.[18] Rather, the author assumes that an appropriate leak-plugging system could utilize to some extent each of these secrecy measures. The purpose of this note, therefore, is to provide a framework of analysis for reviewing any proposal to curb leaks, whether the measures are comprehensive or limited in scope. Accordingly, this note will discuss the extent to which leaks actually endanger national security and will provide the general considerations and goals that any leak-plugging proposal should take into account. In effect, this note will answer the following questions: (1) are all leaks harmful to national security? and if not, what types of leaks, i.e., the disclosures of what types of information, actually are harmful?; (2) should leak-plugging measures treat alike the government official who leaks information and the media that eventually provides publication?; and (3) in light of separation of powers' concerns, what roles should the

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mate secrecy interests); Comment, The Constitutionality of Expanding Pre-publication Review of Government Employees' Speech, 72 Calif. L. Rev. 962, 964 (1984) (Congress should pass a law forbidding pre-publication review of government employees' speech).

[16] It is frequently argued that the use of administrative sanctions alone does not sufficiently deter leaking. See, e.g., Note, Plugging the Leak: The Case for a Legislative Resolution of the Conflict Between the Demands of Secrecy and the Need for an Open Government, 71 Va. L. Rev. 801, 805 n.17 (1985) [hereinafter Note, Plugging the Leak]. The current pervasiveness of leaking would seemingly support this contention. See supra note 6. However, administrative sanctions have rarely been used. See supra note 8. Consequently, the deterrence value of existing administrative sanctions would be enhanced significantly if the government began seriously disciplining or discharging leakers on a more regular basis. See M. Halperin & D. Hoffman, Top Secret: National Security and the Right to Know 85 (1977) (arguing that administrative and political sanctions are a "more credible and appropriate" response to leaking than criminal sanctions).

[17] There is little support in the United States for adoption of official secrets legislation that would impose criminal sanctions for the unauthorized release of all classified information. See infra notes 49-50. See also Smith, supra note 8 , at 470-71 (criminal sanctions should not be used against the media). But cf. Comment, supra note 15, at 1013-14 (criminal sanctions are preferable to pre-publication review). Nonetheless, scholars and officials have recognized that the use of criminal sanctions may be appropriate in limited situations. See, e.g., Richardson, 20 Loy. L. Rev. 45, 58 (1974) ("a carefully designed system of criminal sanctions is appropriate where the information is genuinely and directly related to the maintenance of our national defense or to the successful conduct of our foreign relations"); Note, Plugging the Leak, supra note 16, at 859-65 (the authors propose the creation of an independent administrative agency for determining which types of classified information are so sensitive that the added protection of criminal sanctions is necessary); M. Halperin & D. Hoffman, supra note 16, at 84 (noting serious problems inherent in any criminal sanctions scheme, the authors state that such sanctions should be limited to special cases, like atomic energy and cryptographic information, where the threat to national security is well-defined and particularly egregious).

[18] See Jeffries, Rethinking Prior Restraint, *in* The First Amendment and National Security, supra note 3, at 29 ("a rule of special hostility to administraive pre-clearance is fully justified, but a rule of special hostility to injunctive relief is not"); Smith, supra note 8, at 470-72 (arguing that the first amendment prohibits enjoining the media from publication).

three separate branches of government play in the introduction of leak-plugging reforms?

Part One, divided into four sections, argues that an effective balancing of national security and free speech interests requires categorizing unauthorized disclosures of classified information into two groups: leaks which promote national interests and those which impair national interests. Any leak-plugging proposal must attempt to deter the latter, without plugging the former. The first section, Section A, briefly discusses recognition by the judiciary and scholars of the general need to balance national security and free speech interests.

The next two sections demonstrate that this need for interest balancing does not terminate once information becomes classified for nondisclosure. Section B argues that "official secrets" legislation is incompatible with first amendment protections and would endanger national interests. Any proposal to curb leaks must recognize that plugging all unauthorized disclosures would not promote the nation's best interests. In turn, Section C demonstrates that certain leaks seriously injure national interests and should be deterred. The final section, Section D, discusses some factors, considerations and presumptions for categorizing leaks in a manner that effectively balances national security and free speech interests.

Part Two argues that the primary targets of any leak-plugging proposal should be the leakers of information, as opposed to the eventual publishers. Imposing controls on the media is justifiable only in narrow circumstances. Finally, Part Three focuses on the appropriate role of the three branches of government, concluding that Congress is best suited to enact appropriate leak-plugging reforms.

I. Toward a Proper Balancing of Interests: The Need to Categorize Leaks

A. The Need for Balancing

Under the Jeffersonian model of free expression, the purpose of the first amendment is to promote self-rule, by allowing the citi-

zenry to deliberate on issues in an informed manner.[19] In theory, a common goodwill emerges from the open deliberative processes which is distinct from private preferences.[20] Consequently, government secrecy is an anathema to Jeffersonian democracy since it precludes effective deliberation by the citizenry and, theoretically, allows private factions to control the government processes.[21] "Public deliberation, helping to create a political community, is a crucial means of ensuring that the common good is brought about."[22]

In light of such considerations, some members of the legal community have espoused an "absolutist" interpretation of the first amendment, under which concerns for national security can never override free speech protections.[23] The greater weight of legal and

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[19] See Sunstein, Government Control of Information, 74 Calif. L. Rev. 889, 890-91 (1986). See also Tulsky, Judicial Review of Presidential Initiatives, 46 U. Pitt. L. Rev. 421, 454 (1985) ("the policy underlying the first amendment is that an informed public, bringing pressure to bear on its elected representatives, should guide the actions of government"); Wiggins, Government Operations and the Public's Right to Know, 19 Fed. Bar J. 62, 62 (1959) ("[t]he United States Constitution and the government it summoned into being were shaped. . . by the broadest acceptance of the idea that man is a rational creature, entitled to know about his governance and have a voice in it"). For discussion of various first amendment theories, see generally Richards, A Theory of Free Speech, 34 UCLA L. Rev. 1837 (1987); Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 Duke L.J. 1.

[20] Sunstein, supra note 19, at 891.

[21] Id. at 892 (under Jeffersonian theory, "[g]overnment secrecy should be distrusted, for if information is withheld from the public, an important limitation on self-interested representation will be eliminated. . . .Public discussion, subjecting both governmental processes and private preferences to critical scrutiny, should reduce the likelihood that powerful private groups will have undue influence over the processes of government"). For further discussion and criticism of the "self-governance" concept, see BeVier, An Informed Public, An Informing Press: The Search for a Constitutional Principle, 68 Calif. L. Rev. 482, 503-06 (1980). BeVier notes that the Constitution established a representative democracy in which public issues are to be decided by public representatives, not a direct democracy. Id. at 505. See also Sunstein, supra note 19, at 897 (full public disclosure may not be necessary or desirable when elected representatives are making the political decisions). This seems to argue for effective congressional oversight of executive secrecy decisions, rather than an absolute right of the public to know government activities.

[22] Sunstein, supra note 19, at 891.

[23] Two of the more ardent proponents of the "absolutist" approach have been Justices Black and Douglas. In New York Times Co. v. United States, 403 U.S. 713 (1971) (popularly known as the Pentagon Papers case), Justice Black commented (per curiam):

> The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.

Id. at 719. Similarly, Justice Douglas argued:

> The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. . . Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health.

academic authority, however, recognizes that the Constitution was framed with an understanding of the need for secrecy in areas of national security and that legitimate concerns for the nation's security can supersede some interests in free speech.[24] Gerhard Casper notes that "[e]xplicit language in the constitution, reinforced by structural considerations and by persistent government practice recognize confidentiality as a legitimate interest. . . . In the constitutional balancing of the [citizenry's interests in information and secrecy] the first amendment plays a significant role, but not necessarily a decisive one."[25] Thus, "[a]ny attempt to gauge the application of constitutional protections and privileges without considering national security factors which may be involved is truly to dismiss what in fact is part of our law."[26]

The "absolutist" doctrine has never been supported by a majority of Supreme Court justices.[27] Supreme Court decisions on free speech, including those specifically treating national security concerns, have consistently advocated a balancing of interests approach.[28] Under such an approach, the Court will allow the

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Id. at 723-24. Under the absolutist approach, "rights of free expression are not subject to balancing." Smith, supra note 8, at 448. See infra notes 150-71 and accompanying text for discussion of absolutist interpretations of the "press clause."

[24] Many scholars have noted that the framers expressly recognized the need for the government to keep some information confidential. See, e. g., Casper, Comment: Government Secrecy and the Constitution, 74 Calif. L. Rev. 923, 923-26 (1986); D. Hoffman, Governmental Secrecy and the Founding Fathers: A Study in Constitutional Controls (1981); Sofaer, Executive Power and The Control of Information: Practice Under the Framers, 1977 Duke L.J. 1, 1-45; Warner, National Security and the First Amendment, *in* The First Amendment and National Security, supra note 3. In fact, Thomas Jefferson, considered one of the most forceful proponents of open government, actually increased the use of secrecy by the executive branch during his presidency. See Hoffman, supra, at 244-56; Sofaer, supra, at 14-15. Thus, examination of early history "undercuts the argument that presidents lack discretion to withhold information." Sofaer, supra, at 45. Moreover, even staunch supporters of first amendment protections have recognized that some abridgment of free speech is justified by strong national security concerns. See, e.g., Emerson, supra note 3, at 94. Consequently, the real source of contention is not the legal propriety of speech restrictions per se, but rather defining exactly when and where such restrictions are permissible, i.e., it is the contentious problem of line drawing.

[25] Casper, supra note 24, at 926. Professor Casper presents the journal secrecy clause in U.S. Const., article 1, section 5 and the statement and account clause in article 7, section 9 as examples of express recognition in the Constitution of the need for some confidentiality. Id. at 924.

[26] Warner, supra note 24, at 61.

[27] See New York Times v. United States, 403 U.S. 713, 761 (1970) (Blackman, J., dissenting); Smith, supra note 8, at 449. See infra notes 142-44, 163 and accompanying text.

[28] See, e.g., Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976). See also infra notes 142-44 and accompanying text. See generally M. Halperin & D. Hoffman, Freedom vs. National Security: Secrecy & Surveillance (1977) (providing an overview of Supreme Court attempts to balance the constitutional rights of individuals with the requirements of national security).

abridgement of speech if the danger posed by allowing the speech is of sufficient severity.[29] The Supreme Court has recognized that the protection of national security is a compelling state interest justifying restrictions on the freedoms of speech and press.[30] Accordingly, the government can constitutionally prohibit or limit certain activities covered by the first amendment, when a legitimate national security interest exists and the restrictions are properly tailored to effectuate or protect the interest.[31]

The need for government to maintain the confidentiality of sensitive national security information is generally recognized.[32] The cornerstone of the government's attempt to balance free speech and security interests is the government's classification system, traditionally established by executive order.[33] Section 552(c)(1) of the Freedom of Information Act exempts from compelled public disclosure information which has been properly classified.[34] In addition, government employees with access to classified information usually execute as a condition of employment an agreement not to disclose the information publicly without proper authorization.[35]

Balancing of speech and security interests should not, however, terminate once information becomes classified. Interest balancing must be conducted throughout the classification system, e.g., when designating classification status or enacting secrecy enforcement measures, in order to counter the proclivity of government classifiers for excessive secrecy. Any proposal to curb leaks must recognize that plugging all disclosures of classified information would seri-

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[29] *Nebraska Press Assn.*, 427 U.S. at 562.

[30] See Department of Navy v. Egan, 108 S. Ct. 818, 824 (1988); Haig v. Agee, 453 U.S. 280, 307 (1981); Snepp v. United States, 444 U.S. 507, 509 n.3 (1980).

[31] See, e.g., *Agee*, 453 U.S. at 309 ("when there is a substantial likelihood of "serious damage" to national security or foreign policy as a result of a passport holder's activities in foreign countries, the Government may take action to ensure that the holder may not exploit the sponsorship of his travels by the United States"). The range of permissible restrictions is broadest with respect to speech by government employees, current and former. See infra notes 142-44 and accompanying text. The range of permissible restrictions is much more limited with respect to media publication. See infra notes 163-71 and accompanying text.

[32] See United States v. Marchetti, 466 F.2d 1309, 1315 (1972) (discussing in general the government's need for secrecy). See also infra note 39.

[33] See infra note 39.

[34] 5 U.S.C. § 552(c)(1) (1982). See Environmental Protection Agency v. Mink, 410 U.S. 73 (1973) (finding there is no compelled disclosure of documents properly classified pursuant to executive order).

[35] See, e.g., *Snepp*, 444 U.S. at 508 (CIA employee).

ously injure national interests. Measures to enhance the maintenance of secrecy must be properly tailored to avoid the chilling of valuable speech.

B. A "Leak" is Not Harmful Per Se; Measures Attempting to Dry Up All Leaks Endanger Democratic Norms

If a leak is defined as the unauthorized dissemination of classified information, it is evident that not all leaks are harmful to national security.[36] Many leaks are of little or no actual threat to national security because the classification system is so overused that much classified material is relatively harmless.[37]

Indeed, overclassification represents a serious problem. "Im-

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[36] Arguably, each individual leak is harmful in that it may contribute to the overall perception that the government is incapable of stopping leakers and that leakers may act with impunity. The Supreme Court, in effect, recognized this argument with respect to the CIA's pre-publication clearance program, in *Snepp*. See 444 U.S. at 522 (Stevens, J., dissenting). Moreover, leaks which are seemingly harmless may be harmful in the sense that, collectively, they suggest that the classification system is meaningless. Thus, each individual leak may help engender the sort of attitude among government officials that increases the possibility of a leak being released that does seriously harm national security.

The above arguments, however, would not justify establishing a regime in which the unauthorized disclosures of all classified information would be completely prevented. Such a regime would be justified if all classified information was actually harmful to national security. However, in reality, any classification scheme will be subject to overclassification, given the tendency of government officials to exaggerate security interests and the incentives for officials to classify in a manner that promotes their own authority and prestige, limits their accountability for illegal, improper or embarrassing activities, and shields controversial programs from public criticism. See infra notes 39-43 and accompanying text. Given the limitations of classification reform, plugging all leaks will never be in the nation's best interests. First amendment protection should be afforded speech that promotes democratic interests and presents only an indirect or attenuated risk of harm. Consequently, the attitude problem discussed above will best be addressed through classification reform and the enforcement of sanctions against leakers of information that directly harms national security.

[37] See comment of Senator Simon, 133 Cong. Rec. 5710S (1987). See also the comments of Thomas Martin in National Security Leaks: Is There a Legal Solution, supra note 7, at 20. Former Senator Goldwater, while chairman of the Senate Intelligence Committee, commented that "the most used rubber stamp in this town is the red one that says 'Top Secret.'" 129 Cong. Rec. S14285 (1983).

For a detailed look at overclassification, see Security Classification Policy and Executive Order 12356, 29th Report by the House Committee on Government Operations, 97th Cong., 2d Sess. 43-49 (1982) [hereinafter "Security Classification Report"]. In analyzing the executive classification schemes since the Truman administration, the House Committee on Government Operations stated, "[t]here is no doubt whatsoever that classification authority is used to protect information that does not require protection in the interest of national defense or foreign policy." Id. at 43. The Committee Report referred to several studies by the General Acounting Office, including a 1979 study of documents classified by the Department of Defense, which found 24% of the documents reviewed contained examples of overclassification. Id. See also Wiggins, supra note 19, at 64-7 (listing examples of overclassification by the executive).

proper classification causes less information to be made available to the public, reduces public confidence in the system, weakens protection for truly sensitive information, and increases administrative costs."[38] Unfortunately, it is a problem which is somewhat inevitable given the executive branch's proclivity for excessive secrecy.[39] As Professors Edgar and Schmidt point out, "The Executive is inherently self-interested in expanding the scope of matters deemed secret; the more that is secret, the more that falls under executive control."[40] Similarly, Professor Jeffries notes that government officials have a propensity to overclassify given the "usual incentive to exaggerate the significance of one's own responsibilities" and the tendency of such officials to overemphasize security considerations at the expense of speech interests.[41]

Moreover, the classification system allows the executive branch, in the name of national security, to limit criticism of government policy by restricting the right of government officials to disclose to

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[38] Report of General Accounting Office, "Continuing Problems in D.O.D.'s Classification of National Security Information," 12 (LCD-80-16) (Oct. 26, 1979), quoted in, Security Classification Report, supra note 37 at 45. See also *New York Times Co.*, 403 U.S. at 729 (Stewart, J., concurring) ("For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion.").

[39] The classification scheme has traditionally been established by executive order. Congress has expressly recognized presidential authority to classify information. See *New York Times*, 403 U.S. at 741 (Marshall, J., concurring) (citing 18 U.S.C. § 798 and 50 U.S.C. § 783 as examples of congressional recognition). For a historical summary of executive classification up through the Reagan presidency, see Security Classification Report, supra note 37.

The order currently authorizing classification is Executive Order 12,356, signed by President Reagan on April 2, 1982. See Exec. Order 12,356, 3 C.F.R. 166 (1983), reprinted in 50 U.S.C. § 401 (Supp. 1987). For discussion of Reagan's Order see Ramirez, The Balance of Interests Between National Security Controls and First Amendment Interests in Academic Freedom, 13 J. C. & U. L. 179, 210-12 (1986); Executive Order on Security Classification: Hearings Before a Subcomm. of the House Comm. on Government Operations, 97th Cong., 2d Sess. (1982) [hereinafter "Executive Order Hearings"].

[40] Edgar & Schmidt, Curtiss Wright Comes Home: Executive Power and National Security Secrecy, 21 Harv. C.R.-C.L. L. Rev. 349, 354 (1986). After discussing the refusal of the Nixon administration to disclose its bombing campaign in Cambodia, Halperin and Hoffman concluded that "the real reason for four years of deception was to prevent Congress and the public from performing their constitutional roles in declaring war, appropriating funds, raising and supporting armies, debating policy guidelines, and evaluating the performance of elected officials." M. Halperin & D. Hoffman, supra note 16, at 20). See also Catledge, Historic Confrontation Between Government and the Press: Alive and Well Thanks to Watergate, 20 Loy. L. Rev. 1, 8-10 (1974) (the government is naturally prone to excessive secrecy).

[41] Jeffries, supra note 18, at 30. See infra note 50.

the public facts regarding current or even past policies.[42] Professor Emerson characterizes the problem as follows:

> [C]laims of national security must always be viewed with a high degree of skepticism. Governments always resent criticism or dissent and are prone to suppress such activity in the name of national security. . . The secrecy attached to many national security issues allows the government to invoke national security claims in order to cover up embarrassment, incompetence, corruption or outright violation of law. . . . To put it another way, when national security claims are advanced, there may well be a confusion of the interests of the administration in power with the interests of the nation.[43]

In this light, the classification scheme adopted by an administration is actually more a reflection of the interests or political disposition of the administration than the interests of the nation. The conflict between national security and the first amendment has been present in all administrations and, seemingly, each classification order should reflect the same balancing of national security concerns and the need for government accountability and informed public debate. Although the development and subsequent proliferation of nuclear weapons created a need for heightened secrecy that was not present before the nuclear age, since the inception of the nuclear age, it is difficult to find any new type of threat to national security that would justify significant alteration in the balance between the needs for secrecy and first amendment demands for open debate.

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[42] Justice Douglas commented in Gravel v. United States, 408 U.S. 606 (1972):

> Yet, as has been revealed by such exposes as the Pentagon Papers, the My Lai massacres, the Gulf of Tonkin "incident", and the Bay of Pigs invasion, the Government usually supresses damaging news but highlights favorable news. In this filtering process the secrecy stamp is the officials' tool of suppression and it has been used to withhold information which in "99 ½%" of the cases would present no danger to national security.

Id. at 641-42 (Douglas, J., dissenting).

[43] Emerson, supra note 3, at 84-85. See also Executive Order Hearings, supra note 39, at 12-13 (comments of Professor Cheh); M. Halperin & D. Hoffman, supra note 16, at 104 ("[t]ime and again we have seen arguments about the need for secrecy exposed for what they were: the overcautious predictions of those who simply prefer to work in secret - or covers to prevent the American public from learning the truth."); Note, A Nation Less Secure: Diminished Public Access to Information, 21 Harv. C.R. - C.L. L. Rev. 409, 449-456 (1986) [hereinafter "Note: Access to Information"] (arguing that excessive secrecy has harmed the nation's security). See generally Freedom at Risk, supra note 10 (providing a comprehensive analysis of excessive secrecy and censorship by the Reagan Administration).

Despite the continuity of national security concerns, the actual balancing of interests has changed from administration to administration depending on the disposition of the current executive. For example, the classification system authorized by President Carter[44] mandated that information was not to be classified unless its disclosure "reasonably could be expected to cause *identifiable* damage to the national security."[45] In addition, the Carter Order stated that the classification scheme was designed to "balance the public's interest in access to Government information with the need to protect certain national security information from disclosure."[46] In contrast, President Reagan's executive order on classification[47] lacked reference to a balancing of interests and removed the requisite that damage to national security be "identifiable" to justify classification.[48]

The differences between the Carter and Reagan orders demonstrate that each administration's particular view of secrecy colors the classification system adopted by the administration. Accordingly, any leak-plugging measure designed to effectively deter all leaks of classified information, such as an official secrets act,[49] would have

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[44] Exec. Order No. 12,065, 3 C.F.R. 190 (1979), revoked by Exec. Order 12,356.

[45] Id., 3 C.F.R. at 191 (emphasis added). The lowest classification level, "confidential," requires an expectancy of "identifiable damage." Id. Thus, all levels require at least such a showing.

[46] Id., 3 C.F.R. at 197.

[47] Exec. Order No. 12,356, 3 C.F.R. 166 (1983).

[48] Id., 3 C.F.R. at 166-167. The term "confidential" under the Reagan order applies to all "information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security." Id. Also, the Reagan Order states that any doubt regarding whether or not to classify is to be resolved in favor of classification (pending final determination), and any doubt as to the appropriate level of classification is to be resolved in favor of the higher level. Id. Information is to remain classified "as long as required by national security considerations." Id. 3 C.F.R. at 169. In contrast, the Carter order mandated that doubts as to classification or the level thereof should result, respectively, in no classification or use of the lower level. Exec. Order No. 12,065 3 C.F.R. at 191 (1979). Moreover, classified status was to last only six years, unless the document was "Top Secret." Top Secret" status was limited to a duration of twenty years. Id., 3 C.F.R. at 193. For general discussion of the Reagan order and comparison with the Carter order, see Executive Order Hearings, supra note 39. See also Shattuck, Federal Restrictions on the Free Flow of Academic Information and Ideas, in Freedom at Risk, supra note 10, 45, 51-3 (noting that the Reagan order rejected the "trend toward openess" which had produced the Carter order).

[49] The author of this note uses the term "official secrets act" or modifications thereof to refer to types of leak plugging legislation that label all leaks as damaging and worthy of enhanced secrecy measures, such as criminal sanctions. In theory, such proposals hope to check all unauthorized disclosures of official or classified information. The most notable official secrets act is that enacted by Great Britain. See Official Secrets Act, 1911, 1 & 2 Geo. 5, ch. 28 as amended, 10 & 11 Geo. 5, ch. 75 (1920) and 2 & 3 Geo. 6, ch. 121 (1939). The Act provides that any person who "allows any other person to have possession of any official document issued for his use alone,. . .or, without lawful authority or excuse, has in his possession any official document. . . issued for the use of some person

an egregious effect on first amendment freedoms. Not only would such measures allow the secrecy oriented executive branch to subordinate in general the public's need for open debate, but, under the current approach to classification, invariable first amendment interests would become subject to the vicissitudes of consecutive administrations.

Furthermore, the adoption of official secrets legislation would severely impair the ability of the media to promote informed public discussion of important national issues and the ability of the public to hold public officials accountable for their actions.[80] Leaks can

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other than himself, or on obtaining possession of any official document by finding or otherwise, neglects or fails to restore it to the person or authority by whom or for whose use it was issued. . . shall be guilty of a misdemeanour," which can result in imprisonment up to a maximum of two years. 10 & 11 Geo. 5, ch.75, § 1(2).

Under Great Britain's Official Secrets Act, individuals who disclose government information without authorization can be prosecuted even if the disclosure is not a genuine threat to national security. For example, in 1984, a Foreign Office clerk was sentenced to six months in prison under the Act for releasing a government document to the media, even though the government admitted that the document did not affect the safety of the country. See J. Cook, The Price of Freedom, 2 (1985). The document was an internal memo discussing "how public opinion about stationing of cruise missiles could best be managed to cause the government least embarrasssment." Id. For a lengthy criticism of Great Britain's approach to government secrecy, see generally Cook, supra. For comparisons of public access laws in various countries, see A. Lincoln, A Report by Justice: Freedom of Information, 13-15 (1978) (comparing laws in Sweden, the U.S. and Great Britain); D. Rowat, Public Access to Government Documents: A Comparative Perspective (1978) (comparing laws in Sweden, Finland, Denmark, Austria, the U.S., France, the Netherlands, Great Britain, Australia and China).

[80] In light of the speech protections afforded by the first amendment, most scholars have rejected promulgation in the United States of a broad official secrets act, which would impose criminal sanctions for the unauthorized publication or disclosure of classified information. See, e.g., Edgar & Schmidt, supra note 40, at 401; Emerson, supra note 3, at 90; Jeffries, supra note 18, at 30; M. Halperin & D. Hoffman, supra note 16, at 83-85. Professor Jeffries has written:

> In my view, such a system might also go a long way toward eviscerating the First Amendment and frustrating our national commitment to government by the people. . . There would be every reason to expect that the executive officials charged with the duty of classification would systematically overuse that authority to the detriment of political freedom and representative democracy. There would be the bureaucrat's usual incentive to exaggerate the significance of one's own responsibilities by assigning high security classifications to what one does; the predictable expert's bias toward overemphasizing the considerations that flow from that expertise; the government official's understandable tendency to discount the broad societal interest in controlling government; and the executive officer's inevitable temptation to suppress information that might prove embarrassing or damaging to his or her conception of the national interest. There would, in short, be an inherent proclivity toward pervasive and uncontrollable overbreadth in the classification of official secrets. In my view, therefore, such a scheme should be judged facially unconstitutional under the First Amendment, even if its application in a particular case could be supported by demonstration of a legitimate government interest.

Supra note 18, at 30. These first amendment concerns are not a factor in Great Britain's secrecy

promote informed public debate by allowing the media to provide effective coverage of government activities. For the most part, government officials charged with the execution of policies are the best available sources of detailed information on government policy.[51] In fact, Max Frankel, former editor of the New York Times, once proclaimed that "[w]ithout the use of 'secrets'. . .there could be no adequate diplomatic, military and political reporting of the kind our people take for granted, either abroad or in Washington and there could be no mature system of communication between the Government and the people."[52] While it must be acknowledged that use of leaks or secrets can also impair public debate,[53] unequivocally, first amendment interests in an active press and informed populace would suffer if leaking was absolutely prevented.

Aside from furthering news coverage and promoting public debate, leaks can promote the accountability of government officials. The importance of leaks in the revelation of wrongdoing by government employees is self-evident. Frequently, a government agency in its role as employer is the only organization in a position to detect the alleged activities. If the agency declines to publicly investigate the improper, embarrassing or illegal actions of its employees, the only alternative source of public disclosure may be a leak from an employee.[54] Leaks thus offset the danger that an organization's parochial perspective and self-interest will stymie the disclosure of

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system, because Great Britain does not have a written constitution. See A. Lincoln, supra note 49, at 13-15.

[51] See Cheh, Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information, 69 Cornell L. Rev. 690, 710 (1984). See also infra note 52 and accompanying text.

[52] See Affidavit of Max Frankel, Editor, New York Times, filed in New York Times v. United States, 403 U.S. 713 (1971).

[53] Information published as a leak is not always valid. The publication of erroneous or misleading "leaks" severely disinforms public debate because the government often is unable to respond appropriately with accurate information. To do so could result in the disclosure of classified information that legitimately deserves protection. See infra notes 63-68 and accompanying text.

[54] For example, subsequent to the explosion of the space shuttle Challenger, it was revealed that NASA had been aware of design defects in the shuttle prior to the accident, and even had the solution to the flaw that allegedly caused the crash. See Space Agency Hid Shuttle Problem, Panel Chief Says, N.Y. Times, May 11, 1986, at A.1, col. 5. See also Smith, supra note 8 at 468. NASA officials apparently attempted to cover up or control what information was released to the Presidential commission investigating the shuttle explosion of January 28, 1986. N.Y. Times, May 11, 1986, at A.1, col. 5. Despite these efforts, the damaging information was disclosed eventually to the commission and the public.

questionable behavior.[55] Similarly, leaks are the only source of public disclosure when the illegal activities are actually sanctioned by the president's administration or government agencies.[56]

Leaks also help counter the executive branch's natural proclivity for creating, as opposed to merely executing, policies in secret. Excessive secrecy allows the executive branch to remain unaccountable for policies that fail or contravene the general will of the citizenry. In fact, Senator Patrick Leahy remarked that members of the Senate and House Intelligence Committees, who are to be kept informed of all current intelligence activities, often learn first of such activities from the publication of leaks in the press.[57] Senator

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[55] This danger was discussed by Philip A. Lacovara, former counsel, Watergate Special Prosecutor, in a Congressional hearing discussing the role of the Justice Department in assessing whether to prosecute wrongdoers employed by the Central Intelligence Agency. See Justice Department Treatment of Criminal Cases Involving C.I.A. Personnel and Claims of National Security: Hearings Before a Subcomm. of the House Comm. on Government Operations, 94th Cong., 1st Sess. 104-15 (1975). The Central Intelligence Agency had claimed principal authority to determine whether to prosecute the illegal acts of its employees. Id. at 1-35. In assessing the Agency's actions, Lacovara stated:

> The dangers of permitting a governmental agency to be the sole judge of the legality of its employees' actions are by this time all too painfully apparent. There is of course the danger that the Agency will quash an investigation to avoid embarrassment, rather than to serve legitimate governmental objectives.
>
> Even where the Agency acts with the best of motives — and most do — it undoubtedly sees the various ramifications of a potential prosecution from the perspective of its own particular mission.
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> One would think, for example, that given its mission as the guardian of many of the Nation's secrets, the CIA would rarely conclude that the public interest would be served by a prosecution, with all the disclosure of information that is inevitably involved. But one must question whether the peculiar mission of CIA really makes it qualified to make the delicate value judgment when the interests of the Nation are best served by public prosecution of miscreant employees.

Id. at 107.

[56] Perhaps, the most notable example of the role leaks play in the disclosure of improprieties or illegalities sanctioned by the executive is the book All the President's Men, which revealed and chronicled the Watergate scandal. See C. Bernstein & B. Woodward, All the President's Men (1974). The crucial role of leaked information is highlighted by the book's dedication, which reads, in pertinent part: "To the President's other men and women — in the White House and elsewhere — who took risks to provide us with confidential information. Without them there would have been no Watergate story told by the Washington Post." Id. For examples of such activities by government agencies , see R. Brown, Illegal Practices of the Department of Justice (1920); R. Smith, D. Caulfield, D. Crook & M. Gershman, The Big Brother Book of Lists (1984).

[57] See 132 Cong. Rec. S8802 (1986) (remarks of Senator Leahy). See also H.R. 1013, H.R. 1371, and Other Proposals Which Address the Issue of Affording Prior Notice of Covert Actions to the Congress: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. of Intelligence, 100th Cong., 1st Sess., 8-9 (1987) [hereinafter "Prior Notice Hearings"] (the comments of Honorable Jim Wright regarding the failure of the Reagan administration to consult with Congress about the arm sales to Iran); Kaiser, supra note 6, at 155-56 (commenting that the Reagan administration "intentionally evaded or deceived" the congressional intelligence committees about the Iran-

Leahy's remark evinces the executive branch's inclination to circumvent institutional structures, such as the congressional intelligence committees, established to keep the executive branch accountable.[58] Although his remark is not in itself a justification for congressional oversight of intelligence activities,[59] the remark reflects the important role leaks play in limiting the ability of the executive branch to avoid institutional checks and remain unaccountable for its actions. Leaks ensure that government officials cannot maintain absolute secrecy in situations where disclosure is in the best interests of the nation, but not in the best interests of the current administration or a specific government agency.

Moreover, the threat of leaks ensures, in theory, that the government will not engage in covert activities that stray too far from popular will or accepted policy.[60] Given the natural resistance in a de-

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Contra affair and "glossed over" other operations such as the mining of Nicaragua's harbors and developing an insurgency manual for the Contras).

[58] Frederick Kaiser concludes that the Reagan administration evaded its reporting obligations to the select Committees "when it anticipate[d] criticism of a controversial operation, activity, or policy (i.e., secret arms sale to Iran) and/or fear[ed] of reporting on activities thought by some of the participants to be illegal (i.e., diversion of funds to the Contras)". Kaiser, supra note 6, at 157. See Koh, Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair, 97 Yale L.J. 1255, 1258 (1988) ("the Iran-Contra Affair was. . . the latest episode in a history of executive avoidance of legislative constraint in foreign affairs that stretches back to Vietnam.").

[59] Congressional oversight is a contentious issue separate from the issue of leaking, and thus outside the scope of this Note. For discussion of the justifications and objections raised with respect to congressional oversight, see generally, Prior Notice Hearings, supra note 57.

The subject of congressional oversight is related to leaking in that mandating the disclosure of intelligence information to Congress or committees thereof opens another potential outlet for national security leaks. This aspect of the oversight debate, however, does not involve fundamental objections to congressional oversight, such as the separation of powers' concerns that it limits the flexibility of the executive branch and violates the president's inherent constitutional authority in the field of foreign affairs. See Appendix N, Prior Notice Hearings, supra. In other words, this aspect of the debate is essentially a leaking issue, and not a fundamental constitutional objection to oversight.

Accordingly, executive branch avoidance of congressional oversight cannot be justified solely on the grounds that informing select members of Congress increases the threat of a leak occurring. Developing effective methods to inhibit, deter or punish potential or actual leakers of harmful information would solve, in theory, this aspect of the oversight debate. Moreover, the threat of oversight related leaks also can be diminished through structural reoganization of oversight, as opposed to its complete abandonment. See 133 Cong. Rec. E 793 (1987) (excerpts of the Tower Report on the National Security council). See generally Kaiser, supra note 6 (discussing proposals for replacing the House and Senate Select Intelligence Committees with a Joint Committee). Also, it is generally noted that leaking is more of a problem within executive departments and agencies than within congressional committees, i.e., most leaks emanate from the executive branch and not Congress. See 133 Cong. Rec. E1474 (1987) (remarks of the Honorable Anthony Beilenson); 132 Cong. Rec. S8803 (1986) (remarks of Senator Patrick Leahy); Kaiser, supra note 6, at 133-34.

[60] Activities by the executive which do not comport with accepted public policy tend to fail and,

mocracy to government secrecy, the government should assume that eventually its covert actions will be publicized by the media. Thus, arguably,

> any covert action must be such that its revelation will not cause tremendous domestic problems for the Administration nor cause a foreign policy disaster. Of course, this depends heavily on what the publicly stated policy is regarding the area in which the covert action takes place. The covert action must be consistent with the policy.[61]

This does not imply that all leaks of covert activities are justifiable or desirable. Leaks of ongoing covert activities or plans for future covert actions can defeat the implementation of accepted policy and endanger national interests.[62] Nonetheless, the point remains valid that the threat of leaks can help check undesirable or inefficient government policy. Ostensibly, the possibility of a leak occurring increases as the propriety of a covert government act becomes more questionable. The inability to impose conditions of absolute secrecy in such situations will compel the government to be more circumspect when considering questionable actions; improper or flawed policy cannot be concealed forever from the public.

Adoption of official secrets legislation designed to stop all leaks would thus result in excessive secrecy by the executive branch and seriously impair the media's ability to promote both the informed discussion of policy and the accountability of government officials. Any proposal to curb leaks must recognize the valuable role that

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thus, generally should be avoided. See Testimony of Robert C. McFarlane, Gaston J. Sigur,Jr. and Robert W. Owen, Joint Hearings Before the House Select Comm. to Investigate Covert Arms Transactions with Iran and the Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition, 100th Cong., 1st Sess. 267 (commentary of Senator Paul Trible, Jr.: "I think there is a truism that we have heard echoed through theses hearings. . . that you cannot manage a public policy that does not have the support of Congress and the American people. You certainly can't sustain it, and you cannot succeed.")

As the Iran-Contra affair illustrates, the threat of leaks does not always ensure well designed policy (consider, e.g, the "arms for hostages" trade with Iran) or policy that comports with legislated legal restraints (consider, e.g., the support for the Contras in violation of the Boland amendments). The adverse reaction to disclosure of the covert operation, by both Congress and the public, was quite predictable.

[61] From discussion on V. Walters', The Uses of Political and Propaganda Covert Action in the 1980's, published in Intelligence Requirements for the 1980's: Covert Action, 115, 127 (R. Godson ed. 1981) (commentary of Dr. Abram Schulsky).

[62] See infra notes 87-105 and accompanying text.

leaks can play in a democracy that cherishes the freedoms embodied in the first amendment.

C. Leaks Can Contravene Democratic Norms and Endanger National Security

The fact that leaks can promote democratic interests does not defeat the contention that leaking represents a serious problem. Leaks will not always further public debate and the accountability of public officials. Indeed, many leaks directly impair the nation's interests.

First, leaks do not always further public debate of national issues because the information leaked to the public is not always accurate. The damage to public debate can occur in one of two ways: (1) a government official leaks erroneous information to the public,[63] or (2) the official's leak is truthful but incomplete, in that it only partially explains the nature of a governmental activity or interest.[64]

The leaking of erroneous or incomplete information has the potential to distort public debate because discussion becomes based on partial or misleading information.[65] The government is often unable

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[63] Leaks of erroneous information should be distinguished from situations where the government deliberately releases erroneous information in the guise of an unauthorized disclosure. An example of the latter is the disinformation campaign employed by the Reagan Administration against Libyan leader, Muammar Gadhafi.

The campaign against Gadhafi first hit the presses with an August 25, 1986 story in the Wall Street Journal. Real and Illusory Events, Time, Oct. 13, 1986, at 42. The article reported alleged mutinies in the Libyan military and the prospects of a joint U.S.-France action to drive Libyan troops out of Chad, and indicated that a contemporaneous U.S.-Egyptian military exercise in the Mediterranean was for the purpose of assembling a force capable of quickly attacking Libya. Id. at 43. White House Spokesman Larry Speakes labeled the Journal's report "unauthorized but highly authoritative". Id.; Kaddafi: A War of Leaks, Newsweek, Sept. 8, 1986, at 29. Similar reports were then published in The Washington Post and other media sources. Gadhafi Target of Secret U.S. Deception Plan, Wash. Post, Oct. 2, 1986, at A.1, col. 1; Administration Is Accused of Deceiving Press on Libya, N.Y. Times, Oct. 3, 1986, at A.1, col. 1. Most of the information, however, turned out to be false, the result of a government sponsored disinformation campaign designed to keep Gadhafi off balance. Id; infra note 66.

See also Smith, supra note 8, at 467-68, n.212 and accompanying text. See generally Editorial: The Disinformers, The Nation, Oct. 18, 1986, at 363; Preston & Ray, Disinformation and Mass Deception: Democracy as a Cover Story, in Freedom at Risk, supra note 10, at 203-23 (discussing government sponsored disinformation and mass deception).

[64] The same problem arises when the government decides to disclose some classified information to promote administration interests and the media does not have access to pertinent information which the administration has chosen not to release.

[65] From a discussion between the author of this note and John Norton Moore, Walter L. Brown

to counter the effects of such disclosures because to do so would require the release of classified information that could damage national security.[66] In a situation involving non-sensitive government information, the government can mitigate the effects of erroneous or incomplete disclosure by providing the public with complete and accurate information.[67] However, when the disclosures involve areas sensitive to national security, the government may be effectively prohibited from clarifying public discussion.[68] Public debate is potentially distorted as misleading or incomplete information remains unrebutted.

Second, unauthorized disclosures concerning lawful covert actions can also contravene democratic ideals. Theoretically, leaking information about covert programs is inimical to the ideal of democratic government because, in effect, a leaker is determining for himself, unilaterally and without authorization, whether disclosure is in the nation's best interests. When the leak concerns government activities which must remain covert to be effective,[69] the leaker may alter or even undermine policies lawfully pursued by a national government.[70]

Whether a leak actually promotes or hinders the interests of the

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Professor of Law, at the University of Virginia School of Law on February 17, 1988.

[66] Id. Ostensibly, it is difficult to cite specific examples regarding leaks of erroneous or incomplete information because the government's response to such leaks is usually to do nothing. Thus, there is no activity to flag the existence of a problem.

In contrast, government sponsored disinformation campaigns are often identified publicly. Given the strong bias in American society against government manipulation of the press, government officials may feel morally compelled to disclose the falsity of the previous disclosures. For example, the Reagan administration's campaign against Gadhafi was revealed on October 2, 1986 by Bob Woodward in The Washington Post. See Gadhafi Target of Secret U.S. Deception Plan, Wash. Post, Oct. 2, 1986, at A1, col. 1. Woodward's article was based on a "leaked" government memo, sent from National Security Advisor John Poindexter to President Ronald Reagan, which discussed a disinformation campaign against Gadhafi. Id.; Administration is Accused of Deceiving Press on Libya, N.Y. Times, Oct. 3, 1986, at A1, col. 1; Real and Illusionary Events, Time, Oct. 13, 1986, at 42; A Bodyguard of Lies, Newsweek, Oct. 13, 1986, at 43. After the disclosure of the disinformation campaign against Gadhafi, Bernard Kalb, the Assistant Secretary of State for Public Affairs, felt morally compelled to quit his government position, even though he had not been involved in the campaign. Bernald Kalb's "Modest Dissent," Time, Oct. 20, 1986, at 40.

[67] From a discussion with John Norton Moore, supra note 65.

[68] Id.

[69] E.g., the leaking of intelligence sources and methods, or special intelligence operations. See infra notes 87-102 and accompanying text.

[70] From a discussion with John Norton Moore, supra note 65. The term "lawfully" connotes that the covert program is pursued by the executive after approval by an established oversight framework for democratic control of covert operations.

nation depends on the nature of the leak. As discussed previously,[71] some leaks are in the nation's interests. Other leaks, however, endanger national security and should be prevented. On a general level, leaks of sensitive security information impair the government's ability to design and implement national security policy by destroying the requisite atmosphere of confidentiality and trust.[72] The various U.S. intelligence agencies and executive departments may fail to formulate efficient security policy if interdepartmental communication is hindered by the fear of breached confidences.[73] When internal government memoranda are written with the assumption that the content may appear in tomorrow's newspapers, valuable speech between government officials may be chilled.[74] Similarly, nations friendly to the United States may hesitate to share security information or to participate in joint intelligence ventures with the United States if the maintenance of secrecy is uncertain.[75] And effective negotiations with adversary governments may be hindered by fears that offered proposals or fallback positions will be published by the media.[76]

Such harmful effects on policy implementation, however, are the collective result of previous leaks of sensitive national security information. Accordingly, developing an effective scheme to minimize the specific occurrence of sensitive leaks would ameliorate any indirect

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[71] See supra notes 36-61 and accompanying text.

[72] In *New York Times Co.*, Justice Stewart wrote in his concurring opinion:

> [I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self evident.

403 U.S. at 728 (Stewart, J., concurring). See also *Haig*, 453 U.S. at 307; *Snepp*, 444 U.S. at 512-13 (the comments of Admiral Turner, then Director of the CIA); United States v. Curtiss Wright Export Corp., 299 U.S. 304, 320 (1936). For a broad discussion of the need for secrecy, see the transcript of a debate held December 15, 1983, published as National Security and the First Amendment 9 (1984). (the comments of Richard Willard).

[73] *New York Times Co.*, 403 U.S. at 728 (Stewart, J., concurring). See supra note 72.

[74] From a discussion between the author of this note and John Norton Moore, at the University of Virginia School of Law on April 3, 1988.

[75] *New York Times Co.*, 403 U.S. at 728 (Stewart, J., concurring). See supra note 72. See also Richardson, supra note 17, at 57 (confidentiality is needed to conduct foreign relations).

[76] From a discussion with John Norton Moore, supra note 74.

consequential harms to national security, such as general effects on security policy.

Common sense dictates that certain leaks can severely damage national security.[77] The same damaging information that is passed surreptitiously through traditional forms of espionage can be disseminated overtly to foreign countries by leaking government officials.[78] Arguably, the leaking of sensitive information is less harmful than its disclosure through espionage, because a leak puts the government on notice that a breach of confidence has occurred.[79] The government thus may be able to mitigate the extent of the damage, e.g., by changing codes or intelligence methods. Coupled with this argument is the assertion that foreign intelligence officers may not treat leaks in the press as completely credible, due to the lack of any official verification.[80]

However, disclosures through espionage also lack official verification. Moreover, leaking may actually represent a greater threat to national security because a leak provides sensitive information to all nations, instead of to one particular nation, as usually results from espionage. In addition, despite the fact that a leak puts the government on notice of the disclosure, sometimes the damage to security interests cannot be mitigated because the damage occurs immediately or soon after disclosure.[81] Regardless of the comparisons, the

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[77] Even those arguing for broad first amendment protections for media publication of leaks, acknowledge that some leaks threaten the nation's security. See, e.g., American Bar Association, Standing Committee on Law and National Security, The Media and Government Leaks 3 (1984) (Comments of Jerry Berman, Legislative Counsel, American Civil Liberties Union) (. . ."I would not question the fact that some leaks may endanger national security.". . .).

[78] See United States v. Morison, 604 F. Supp. 655, 660 (1985), aff'd, 844 F.2d 1057 (4th Cir. 1988) ("the danger to the United States is just as great when [national defense] information is released to the press as when it is released to an agent of the foreign government. The fear in releasing this type of information is that it gives other nations information concerning the intelligence gathering capabilities of the United States. That fear is realized whether the information is released to the world at large or whether it is released only to specific spies.").

[79] Edgar & Schmidt, supra note 40, at 401 ("[t]he greatest damage occurs when the government believes that 'secrets are secret' — particularly communications intelligence systems — when in fact they are not. In that situation, the government is easy prey to tactics that take advantage of its predispositions and biases"); Nimmer, Introduction - Is Freedom of the Press A Redundancy: What Does it Add To Freedom of Speech?, 26 Hastings L. Rev. 639, 656 (1975) ("disclosure of governmental 'secrets' to a foreign agent will not be known by the government, and hence corrective action by the government will not be possible. Disclosure to and publication by a newspaper will sometimes permit of such corrective action").

[80] Edgar & Schmidt, supra note 40, at 401.

[81] An example, is the disclosure of covert military operations or intelligence gathering missions. See

most important aspect to be recognized is that both leaking and espionage can be harmful to national security.

Supporters of media interests have claimed that the dangers to national security from leaking have been grossly exaggerated, because the media consistently has displayed tremendous discretion and self-restraint in deciding not to publicize information that would harm national security.[82] Indeed, history is replete with examples of where the media elected not to publish leaked sensitive national security information because of the danger posed to national interests.[83] The fact that the media has often cooperated with the government does not mean, however, that leaks have never harmed national security. Nor is it a justification for preserving the status quo with respect to secrecy measures.

First, granting the media the final say as to whether sensitive information will be published in effect removes government officials from the decision-making process. These officials are arguably in the best position to assess the potential harms to national security, because, unlike the media, they have access to all the factual information necessary to make proper disclosure determinations. In fact, on several occasions, the media has rejected government pleas for non-publication of sensitive information, resulting in publication

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infra notes 88-91 and 97-102 and accompanying text.

[82] See, e.g., Edgar & Schmidt, supra note 40, at 400; M. Halperin & D. Hoffman, supra note 16, at 37. Halperin and Hoffman argue that the media's purported freedom to publish is actually restricted by practical restraints and the threat of informal and formal sanctions. Id., supra note 16, at 37. An example of the former is the fact that newspapermen are extremely dependent on official sources for information, and publishing information which officials wish to withhold from the public may "jeopardize these symbiotic relationships." Id. Accord M. Shapiro, The Pentagon Papers and the Courts: A Study in Foreign Policy-Making and Freedom of the Press, 19 (1972). Examples of the sanctions are the "cancellation of presidential newspaper subscriptions, exclusion from Air Force One, all the way up to wiretapping civil actions or criminal prosecution." M. Halperin & D. Hoffman, supra, at 37.

[83] For example, during World War II, the media's cooperation with the government was extensive. See Smith, supra note 8, at 467 ("World War II journalists, for instance, knew about but did not reveal the extent of damage at Pearl Harbor, the stories of radar and the atomic bomb, and the preparations for the Normandy invasion"). During the hostage crisis in Iran, no media source published the fact that Americans were being hidden safely in the Canadian Embassy even though the fact was widely known among the press corps. The Media and Government Leaks, supra note 77, at 6. The media also on occasion has agreed to self censorship regarding covert operations, such as the Bay of Pigs invasion. See Smith, supra note 8, at 471. Halperin and Hoffman contend that self-censorship has been extensive throughout the Cold War period and continues today. See M. Halperin & D. Hoffman, supra note 16, at 37.

that arguably damaged national security.[84] Second, government efforts to solicit media cooperation may, in fact, accomplish nothing more than to draw attention to the very activity the government wishes to shroud in secrecy.[85] Correspondingly, a confidentiality system that ultimately depends on the government's ability to solicit the media's cooperation does not provide much assurance that national security interests will be protected.[86]

In general, the dangers leaks pose to national security are similar to those posed by traditional espionage. Leaks, for example, can reveal intelligence-gathering systems, details of weapons systems and military installations, and covert intelligence plans and operations.[87] A vivid war-time example of a harmful leak was a journalist's disclosure, after the battle of Midway, that the United States' victory resulted largely from the deciphering of the Japanese code.[88] As a result, the Japanese quickly adopted a new code.[89] Another vivid example involves the disclosure of intelligence agents' identities. In 1975, the CIA station chief in Athens, Greece was assassinated soon after he was publicly identified by the magazine Counterspy.[90] Sim-

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[84] E.g., on December 19, 1984, the Washington Post published sensitive technical information regarding a military intelligence satellite to be discharged into space on an upcoming space shuttle mission. See U.S. to Orbit 'Sigint' Craft from Shuttle, Wash. Post, Dec. 19, 1984 at A1, col. 6. See also infra note 120. In compliance with the request of government officials citing national security concerns, other news mediums holding the same information, including NBC News, CBS News, Newsweek and the Associated Press, had opted for non-disclosure. Pentagon Versus Press, Newsweek, Dec. 31, 1984, at 34; Shrouding Space in Secrecy, Time, Dec. 31, 1984, at 12. The Post, however, contravened the government's request and published the information. Id. Similarly, the Los Angeles Times disclosed information regarding a deep sea salvage intelligence operation named "Project Jennifer" despite the pleas of William Colby, then Director of the CIA, that disclosure would damage national security. N.Y. Times, Mar. 19, 1975 at 52, col. 1. For further discussion of "Project Jennifer," see infra notes 100-02 and accompanying text.

[85] See A Public Call for Secrecy, N.Y. Times, Dec. 20, 1984, at A.1, col. 1; Secrets in Space, The Progressive, Feb. 1985, at 10; Pentagon Versus Press, Newsweek, Dec. 31, 1984, at 34.

[86] See The Media and Government Leaks, supra note 77, at 25 (comments of Richard Willard) ("Members of the press are not normally in a position to know what is damaging to national security and what is not. Floyd Abrams said earlier that if government officials convince reporters that the release of certain information would damage national security, they will refrain from publishing. Perhaps they would, but you can't disclose all your secrets to the press and hope they will not publish them. Some secrets are apparently innocuous, but if you know all the facts you realize what damage might result from publication.").

[87] See Note, Plugging the Leak, supra note 16, at 824.

[88] See National Security and the First Amendment, supra note 72, at 20 (comments of Admiral Mott).

[89] Id.

[90] Note, Plugging the Leak, supra note 16, at 802-03 n.10.

ilarly, shots were fired into the home of the CIA station chief in Jamaica on July 4, 1980 within hours of his being identified by the Covert Action Information Bulletin.[91]

A third example involves the disclosure of extremely sensitive weapons systems. In 1980, a series of press leaks followed by an official confirmation compromised the existence of a program to design a "ghost" aircraft that could evade existing air defense systems.[92] The aircraft, nicknamed the Stealth, represented, in the minds of some observers, "perhaps the greatest advance in aerial warfare since the development of radar."[93] Unfortunately, the disclosure of its existence provided the Soviets with years advance warning of the new technology and endangered the program's successful completion.[94] Providing notice of the Stealth to the Soviet Union created two threats to national security. The first threat was that the Soviets would initiate their own Stealth program, allowing them to evade U.S. strategic air defense systems.[95] The second was that the Soviets would design countermeasures to defeat the new technology.[96]

Hence, disclosure of sensitive information regarding intelligence gathering systems and weapons systems can have deleterious effects on national security. Systems face termination or reductions in efficiency upon disclosure. The problem is particularly acute with respect to intelligence gathering systems, because the intelligence information usually can only be gathered if the targeted nation is unaware of the system's operation.[97] Replacement of such compro-

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[91] Id. See also Berman & Halperin, The Agents Identities Protection Act: A Preliminary Analysis of the Legislative History, *in* The First Amendment and National Security, supra note 3, at 41-43.

[92] See Stealth Aircraft Hearings, supra note 6, at 1.

[93] Id.

[94] Although disclosure of a sensitive defense or weapons program does not necessarily terminate the program, the increased difficulty in protecting the program's technical features and specific operational deployment plans that comes with acknowledgement of existence threatens the program's successful completion. Id. at 134. Once such technical aspects are disclosed, the program does face termination. Id.

[95] Id. at 136.

[96] Id.

[97] See Security Classification Reform: Hearings on H.R. 12004 Before a House Subcomm. of the Comm. on Government Operations, 93d Congress, 2d Sess. 374 (1974) (such systems "frequently take advantage of some leakage which a closed society is not aware is going on whereby we get information about a country which [the closed societies] do not know is getting out. And as soon as they know it is getting out, they chop it off.") (comments of William Colby, then Director of the Central Intelligence Agency).

mised technical systems has allegedly cost the United States millions of dollars.[98]

Leaks are also extremely injurious in the area of covert intelligence plans and operations. The need for secrecy is often intrinsic to such plans and operations. "Premature disclosure might kill the idea in embryo,"[99] and disclosure of an ongoing operation might preclude successful completion and jeopardize lives. The lives of participants are frequently at stake in a covert action, such as the attempt to rescue the hostages in Iran or the attack on the Mayaguez. An example of the deleterious effects leaks can have on covert operations is provided by the disclosure of "Project Jennifer," an ongoing deep sea covert operation attempting to salvage valuable intelligence information from a Soviet submarine sunk off the Hawaiian coast.[100] As a result of the media's disclosure, Soviet vessels began patrolling the salvage area, and the operation had to be terminated before completion.[101] The inability to salvage the entire submarine with its missiles and codebooks thus prevented the achievement of what then CIA Director William Colby described as potentially the "biggest single intelligence coup in history."[102]

The above examples demonstrate the danger posed by media publication of leaked security information. It is generally recognized that in times of war special restrictions on speech are warranted in the name of national security.[103] It should be recognized, however, that speech restrictions are equally needed today, even absent the overt existence of war.

As the United States Supreme Court has recognized, "[h]istory eloquently attests that grave problems of national security and for-

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[98] Id.

[99] 133 Cong. Rec. E794 (daily ed. Mar 5, 1987) (from the Tower Report commentary on the separation of powers in security policy formulation).

[100] See N.Y. Times, Mar. 19, 1975 at 1, col. 8, cited in Note, Plugging the Leak, supra note 16, at 801-02.

[101] N.Y. Times, Jan. 14, 1976 at 8, col. 3, cited in Note, Plugging the Leak, supra note 16, at 801-02.

[102] N.Y. Times, Mar. 19, 1975, at 1, col. 8, cited in Note, Plugging the Leak, supra note 16, at 802.

[103] See Near v. Minnesota, 283 U.S. 697, 716, quoting Schenck v. United States, 249 U.S. 47, 52 (1919) ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.").

eign policy are by no means limited to times of formally declared war."[104] Furthermore, peace often stems from establishing an effective military deterrent to war, and effective deterrence cannot exist without secrecy of national security information. "No country, however extensive its weapons arsenal may be. . .can hope to mount any credible military deterrent power at all if it is unable to safeguard its most vital security plans and programs."[105]

In an age of nuclear weapons, dominated by cold war conflicts and new threats to security (like international terrorism), dangers to national security are arguably as imminent and severe in times of peace as in times of overt war.[106] Indeed, given cold war tensions and prevalent conflicts in the third world, the differences between peacetime and wartime have become somewhat indistinguishable. As one student Note concluded:

> Since World War II and the initiation of the "cold war," the two superpowers have clashed in indirect conflict through the use of proxy states. Thousands of lives were lost in the conflicts in Korea, Vietnam, Angola, and perhaps Central America. The need for secrecy during the cold war is just as compelling as it would be during overt hostilities.[107]

The dangers posed by leaking do not justify the establishment of a security state where the executive branch's propensity for executive secrecy would predominate.[108] In fact, certain types of leaks actually protect national interests and safeguard democracy.[109] On the other hand, certain types of leaks impair national security and warrant special preventive measures.[110] The goal, therefore, is to strike an effective balance between conflicting needs for free speech and restricted speech, i.e., to separate "beneficial leaks" from "harmful leaks" and effectuate remedial measures only for the latter. The

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[104] *Haig*, 453 U.S. at 303.

[105] Stealth Aircraft Hearings, supra note 6, at 1 (comment of Congressman Stratton).

[106] See *Morison*, 844 F.2d at 1081 (Wilkinson, J., concurring) ("[i]ntelligence gathering is critical to the formation of sound policy and becomes more so every year with the refinement of technology and the growing threat of terrorism. Electronic surveillance prevents surprise attacks by hostile forces and facilitates international peacekeeping and arms control efforts. . . .None of these activities can go forward without secrecy.").

[107] Note, Plugging the Leak, supra note 16, at 824. Accord, Lewis, supra note 13, at 1691.

[108] See supra notes 39-43 and accompanying text.

[109] See supra notes 50-61 and accompanying text.

[110] See supra notes 87-107 and accompanying text.

next section will attempt to develop a general approach for categorizing types of leaks.

D. Considerations, Presumptions, and Factors of Analysis for Categorizing Leaks

Inherent in the commentary of many advocates for the media is the notion that it is impossible to establish a system that will remedy leaks which harm national security, without impeding leaks which promote democratic interests.[111] In their opinion, harmful leaks must be tolerated because such leaks cannot be plugged without impairing the public's "right to know".[112] However, any approach that proffers a "right to know" as a justification for tolerating leaks which directly harm the nation's security does not reflect a true balancing of interests. Rather, it reflects an absolutist subordination of national security concerns to free speech interests. Such an approach threatens the security of the nation and has never been adopted by the Supreme Court.[113]

Competing interests in national security and free speech must be balanced throughout the classification system. Initially, the interests must be weighed in determining whether particular information should be classified or whether public access to the information should be guaranteed, under statutes like the Freedom of Informa-

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[111] This notion is reflected in the comment, "[a]lthough I would not question the fact that some leaks may endanger national security, I would argue that they are necessary in this country, because in a democratic society the national security interest must be balanced against the public's right to know." The Media and Government Leaks, supra note 77, at 3-4 (comment of Jerry Berman, Legislative Counsel to the American Civil Liberties Union). See also Freedom of the Press, 27 (1976) (proceedings of American Enterprise Institute discussions held in July 1975 on first amendment protections and regulation of the media, W. Ruckelhaus, moderator) (comment of Charles Seib of the Washington Post: "You have to assume that to have a free press - and I am convinced that our system of governance wouldn't work without it - there's a price. But that's the price we pay for a free society").

[112] See The Media and Government Leaks, supra note 77, at 3-4.

[113] See supra notes 27-31 and accompanying text. In *Morison*, Judge Wilkinson discussed the need for balancing as follows:

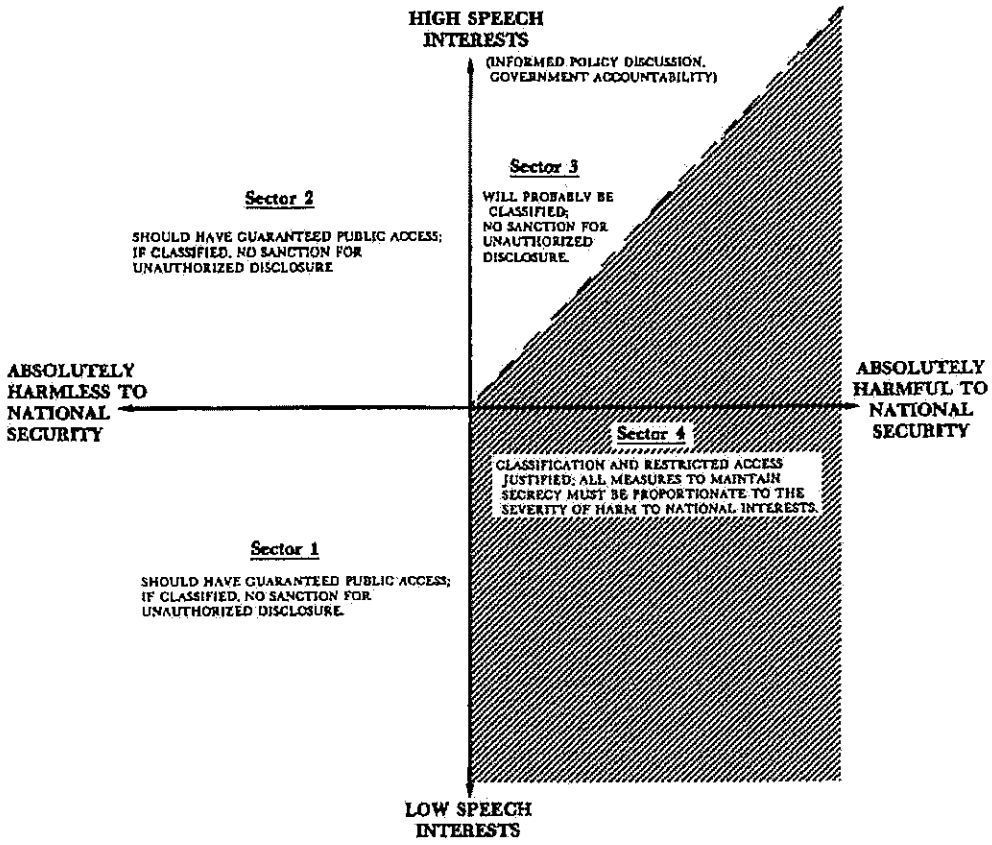
> Public security can thus be compromised in two ways: by attempts to choke off the information needed for democracy to function, and by leaks that imperil the environment of physical security which a functioning democracy requires. The tension between these two interests is not going to abate, and the question is how a responsible balance may be achieved.

844 F.2d at 1082 (Wilkinson, J., concurring).

tion Act.[114] Upon deciding to classify, the interests must then again be weighed in determining the appropriate level of classification. And perhaps most importantly, the interests must also be weighed in determining the propriety of applying secrecy enforcement measures, like pre-publication review or sanctions for unauthorized disclosure.

On a theoretical level, the proper balancing of interests is not difficult. Where free speech interests, such as the promotion of policy discussion and government accountability, are greater than national security interests, or a genuine threat to national security is lacking, the public should have access to the information. If the information has fallen victim to classification, sanctions should not be imposed for unauthorized disclosure. In contrast, where national security interests outweigh speech interests, classification is warranted, and enhanced secrecy measures may be justified depending on the severity of the threat to national security. Conceptually, the approach can be represented by the following graph:

[114] See 5 U.S.C. § 552 (1982).



Sectors 1 and 2 represent information which is of no genuine threat to national security, i.e., information to which the public should have unrestricted access. Any classified information falling in sectors 1 and 2 is the victim of overclassification, and sanctions should not be imposed for unauthorized disclosure. Sector 3 represents information which poses a genuine threat to national security, but which has overriding free speech values. Given the threat to national security, the government will usually classify sector 3 information. The classic example of a sector 3 "leak" is the unauthorized disclosure of illegalities or wrongdoing by government employees or agencies. In such situations, free speech interests dominate despite harms to national security. "Whistleblowing" by government leakers must not be deterred or inhibited in the name of national security, as it is necessary to ensure government accountability and honest governance, and to counter the government's proclivity for excessive secrecy.

Information falling in sector 4 is justifiably classified, because here the speech interests mandating unrestricted public access are outweighed by the threat to national security. However, severe sanctions or legal injunctions should not be invoked automatically if disclosure occurs, because interest balancing does not terminate with classification. All secrecy measures, whether in the form of pre-publication review, legal injunctions, or criminal and administrative sanctions, must be proportionate to the severity of harm to national interests that would presumptively result from disclosure of the type of information at issue.

Thus, when the threat to national security is not severe, only minor forms of sanction, such as administrative reprimand, should be imposed for unauthorized disclosure. Some national security information is of the nature that public access should not be guaranteed, but the danger resulting from disclosure is not so pressing that severe sanctions are necessary. As the perceived level of harm to national security increases, secrecy measures like administrative discharge and prepublication review become justifiable. And finally, when first amendment interests are attenuated and the threat to national security is patent, heightened secrecy measures, like criminal sanctions or legal injunctions, become defensible. Interest balancing must be incorporated within the design of secrecy enforcement systems.

On a practical level, interest balancing is difficult because it is hard to define the exact nature of a particular piece of information. No scientific formula exists for determining the exact value of the speech and security interests inherent in a particular disclosure. As a result, free speech and security interests can only be protected by relying on categorical presumptions. In situations where the threat to national security is presumptively severe, it is best to err on the side of excessive secrecy; and in situations where speech interests are presumptively paramount, it is best to err on the side of disclosure.

One factor of analysis for determining whether information should be protected from public disclosure is to distinguish leaks which involve policy discussion from those which involve the specifics of policy execution.[115] The presumption is that the former should be tolerated, while the latter should be deterred.[116] Policy discussion is often predicated on general concepts and values which pose little threat to national security. Moreover, informed policy discussion promotes democratic ideals and is of tremendous social utility. In contrast, discussion of the specifics of policy execution, i.e., specific plans, operations and systems, does not necessarily add to policy discussion and is predicated on technical and logistical information the disclosure of which can harm national security. For the purposes of policy discussion, it is possible to understand conceptually what a weapon is designed to do without knowing the technical specifics of the weaponry. Consequently, our tolerance for leaking wanes as the disclosures begin to involve harmful specifics regarding policy execution; free speech interests become more compelling as we move in the opposite direction.

It is helpful if we move from general discussion of interest balancing to specific examples. In examining the intentional disclosure of the identities of intelligence agents, it is apparent that these reve-

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[115] For example, information concerning the propriety or efficacy of deploying nuclear weapons in Europe involves policy discussion, while information concerning the technical composition, the specific location, and the logistics of nuclear weaponry actually deployed in Europe involves the specifics of policy execution.

[116] This is only a presumption. Rare situations will arise where the disclosure of policy information is more dangerous than disclosure of the specifics of policy execution. For example, assume that the American government's policy toward chemical weapons is that such weapons are stockpiled solely for deterrence purposes, and that they will never be used by the United States in actual battle. Disclosure of the government's policy would destroy the deterrence value of the stockpile, endangering national security interests much more than disclosure of the technical details of the stockpile.

lations do not promote policy discussion, provide little social utility, threaten the lives of government agents and impair the ability of the government to execute security policy.[117]

Thus, agents' identities represent an easy case for enhanced protections against disclosure.[118] Similarly, the disclosure of intricate technical defense information, such as that regarding cryptography or weapons systems, especially nuclear weapons, does not further policy discussion, and, in fact, hinders policy execution and poses a significant direct threat to national security.[119] Technical details are not usually necessary for effective policy discussion. In fact, they often serve to confuse the general public, as most members lack the

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[117] See Berman & Halperin, supra note 91, at 50-51:

> The gratuitous listing of agents' names in certain publications goes far beyond information that might contribute to informed public debate on foreign policy or foreign intelligence activities. That effort to identify U.S. intelligence officers and agents in countries throughout the world and expose their identities repeatedly, time and time again, serves no legitimate purpose. It does not alert to abuses; it does not further civil liberties; it does not enlighten public debate; and it does not contribute one iota to the goal of an educated and informed electorate. Instead, it reflects a total disregard for the consequences that may jeopardize the lives and safety of individuals and damage the ability of the United States to safeguard the national defense and conduct an effective foreign policy. The disclosure of covert agents' identities is detrimental to the successful and efficient conduct of foreign intelligence and counterintelligence activities of the United States. Whatever the motives of those engaged in such activity, the only result is the disruption of our legitimate intelligence collection programs — programs that bear the imprimatur of Congress, the President, and the American people. Such a result benefits no one but adversaries of the United States.

Id.

[118] Congress reacted to this problem by promulgating the Agents Identities Protection Act, 50 U.S.C. § 421-426 (1982). See generally Berman & Halperin, supra note 91; Note, The Constitutionality of the Intelligence Identities Protection Act, 83 Colum. L. Rev. 727 (1983); Note, The Intelligence Identities Protection Act of 1982: An Assessment of the Constitutionality of Section 601(c), 49 Brooklyn L. Rev. 479 (1983).

[119] Congress reacted to the problem of cryptography and nuclear weaponry information by promulgating 18 U.S.C. § 798 (1982) (imposing criminal sanctions for the willful disclosure of cryptographic and communication intelligence information) and 42 U.S.C. §§ 2271-2281 (1982) (authorizing criminal sanctions and injunctions for disclosure of nuclear weaponry information). 42 U.S.C. §§ 2271-2281 has only been applied once against the media. See United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), infra note 194. An injunction against publication was obtained but the injunction was lifted by the U.S. Court of Appeals for the Seventh Circuit, after other media sources published similar information. Id.; U.S. Aides Said to Have Discussed Prosecuting News Organizations, N.Y. Times, May 21, 1986, at A18, col. 1. 18 U.S.C. § 798 has never been applied against the media. Editorial: The Leak Mania, The Nation, June 7, 1986, at 780; A Crackdown on Leaks, Newsweek, May 19, 1986, at 66. The Reagan administration made repeated threats to begin prosecuting the media for disclosure of communication intelligence activities, but never followed through with the threats. Id. See also infra note 181.

technical expertise necessary to understand such information.[120] Consequently, the inclusion of such information may serve only to benefit our adversaries. If the media wishes to enhance discussion on the appropriation of weapons systems or development of Star Wars technology, disclosures should focus on general accounts and policy developments and avoid the revelation of sensitive technical and scientific details. Obviously, in certain cases it will be difficult, if not impossible, to completely extricate sensitive technical information from policy discussion. The presumption, however, is that disclosure of highly technical national security information represents a "bad leak." Such disclosure should be tolerated only when necessary to promote pragmatic policy discussion.[121]

Covert plans and operations are a more difficult area. Arguably, "[e]very time the Government of the United States undertakes covert action it has foreign policy implications."[122] Professor Emerson argues that "[the] presumption in favor of full discussion of public issues is plainly applicable to national security information. Surely preparation for an invasion of Cuba or the conduct of covert opera-

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[120] For example, the general decision of the Washington Post to publish an article on December 19, 1984, concerning a new military intelligence satellite, could have been justified on the policy grounds that the public had a need to know that the space shuttle program was being used for military purposes. See supra note 84. However, the Post's article clearly included sensitive technical information, including the satellite's type and function, and its eventual orbital position, which was not newsworthy to the average reader. See U.S. to Orbit "Sigint" Craft from Shuttle, Wash. Post, Dec. 19, 1984, at A1, col. 6. After the Post's disclosures, other media sources, including the Associated Press, ran similar stories. Shrouding Space in Secrecy, Time, Dec. 31, 1984, at 12. See Space Shuttle Flight Planned Wednesday to Test Key Rocket, N.Y. Times, Jan. 20, 1985, at A.1, col.1. Such disclosures cannot be justified by invoking amorphous concepts like the public's right or need to know. In fact, then Defense Secretary Casper Weinberger described the disclosures as those that "can only give aid and comfort to the enemy." A Public Call for Secrecy, N.Y. Times, Dec. 20, 1984, at A1, col. 1.

[121] See Sunstein, supra note 19, at 908:

> Technical data will, then, sometimes be part of political speech, and it will contribute to scientific development. Under a Jeffersonian conception of the first amendment, however, large categories of technical data are, in context, far from the center of first amendment concern. Such data may consist of algorithms, equations, charts or blueprints. Information of that sort is communicative, to be sure; it involves ideas, and it is "speech." But that speech is not necessarily of the sort to which the Jeffersonian model affords full protection.

Id. See also United States v. Progressive, Inc., 467 F. Supp. 990, 994 (W.D. Wis. 1979), appeal dismissed, 610 F.2d 819 (7th Cir. 1979) (the court could find no "plausible reason why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on this issue.").

[122] 132 Cong. Rec. H7019 (daily ed. September 17 1986) (statement of Congressman Cheney).

tions in Central America should not be concealed from the American people."[123] Unfortunately, the issue is not nearly as clear-cut as Professor Emerson implies.

The fundamental difficulty with covert actions is that frequently it is extremely difficult to distinguish public policy from its execution. Many times the two are hopelessly intertwined. A short-term narrowly tailored covert action attuned to national policy unequivocally represents an execution of policy. However, as the covert action becomes a long-term operation, it assumes policy implications in and of itself.[124]

The problem is aggravated by the fact that today few national security issues, i.e., defense and foreign policy issues, enjoy a national consensus.[125] National security risks will be assessed differently by individuals with different policy positions. Proponents of administration policy are likely to view the details of covert operations as aspects of lawful policy execution. Opponents, on the other hand, are likely to construe these same details as elements of policy which should be debated in public.

Unequivocally, opponents of administration policy should not be allowed to impair the lawful execution of policy by leaking the sensitive details of covert operations. At the same time, however, government claims that general policy decisions must remain secret, such as U.S. support for foreign insurgents, should be viewed with

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[123] Emerson, supra note 3, at 89.

[124] In a House debate regarding covert United States support for UNITA in Angola, Congressman Cheney voiced his concern that the real issue was becoming whether "the United States should become embroiled in a war between the Angolan Government, backed by the Soviets and the Cubans, and UNITA, backed by the South Africans." 132 Cong. Rec. H7020 (1986). He added that in the process of the covert operations, "the President is making a major change in United States policy toward southern Africa." Id.

[125] See Note, Access to Information, supra note 43, at 454-55:

> In recent years, the nation has witnessed a broadening political spectrum concerning fundamental questions of national security policy. As an outgrowth of domestic opposition to the Vietnam War, the Cold War foreign policy consensus that had guided American policymakers since 1945 began to crumble in the late 1960's. Although determined efforts have been made to reconstruct a semblance of national unity on questions of foreign and military policy, government officials have been unable to regain the trust of press and public that they so readily assumed during the early post-War years. As a result, fundamental disagreements persist over a range of issues, including U.S. support for Nicaraguan "contras," nuclear arms control, and the selective use of economic sanctions to induce change in South Africa.

Id.

skepticism.[126] Proponents for enhanced secrecy measures, such as criminal sanctions, should recognize that policy disclosures are presumptively less harmful than disclosures concerning the actual details of policy execution.[127] Such proponents should recognize that allowing the government to wield the threat of severe sanctions for unauthorized disclosures of general policy decisions may chill valuable speech which, in reality, poses little threat to national security.

Similarly, the government should not be allowed to cover up information that embarrasses or damages the administration, or otherwise contradicts its policy positions. In other words, whether a leak is characterized as "good" or "bad" depends on whether it harms the interests of the nation as opposed to the interests of the current administration. The two are not always congruent. One approach for distinguishing the two is to examine the chronological aspects of the disclosure. Leaks regarding past government actions are presumptively less harmful than leaks of current activities, unless the disclosures somehow reveal the details of current intelligence sources and methods.[128] The presumption is that intelligence infor-

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[126] The point is not that policy decisions must always be disclosed publicly. In certain situations, it may be appropriate to classify such policy information rather than granting statutory access to the media. For example, with respect to support for foreign insurgents, classification may provide the opportunity to prevent the escalation of indirect conflict into direct confrontation; the United States government is not forced to acknowledge the policy officially before the entire world and the adversary government is not forced into direct hostilities to save face before its people and allies. Nonetheless, the actual harm from unauthorized disclosure of such policy positions is presumptively minimal. Moreover, as Professor Cheh acknowledges, the government has previously classified such policy information in situations where the only people unaware of the policy position was the American public. See Executive Order Hearings, supra note 39, at 12 (commentary of Professor Cheh). In such situations, secrecy rationales are not very persuasive; allowing the unrestricted use of enhanced secrecy measures for such disclosures would impair valuable policy discussion.

[127] See M. Halperin & D. Hoffman, supra note 16, at 59 (arguing that the government should have to disclose publicly the fact that American armed forces, advisors or paid mercenaries are engaged in combat or "in imminent danger of coming under hostile fire", but the "details of combat plans and operations could be kept secret").

[128] Directive 84 Hearings, supra note 6, at 18-19 (comments of Senator Mathias and Richard Willard). While acknowledging that intelligence information becomes stale, Richard Willard adds that in some cases the revelation of past events can impair national security:

> It is true that intelligence does become stale. But intelligence sources and methods do not. The fact that we knew a particular piece of information 5 or 10 years ago may not be all that topical or harmful today, except that it may disclose something about the way we find it out. This could include the human agent that may have been involved in obtaining the information, or technical collection systems that still may be in use in providing information to us. That is the kind of damage we are concerned about.

Id. at 19.

mation becomes stale fast.[129] Ostensibly, the potential for serious harm to national security decreases as the delay between the occurrence of the disclosed event and the time of disclosure increases.

Consequently, any classification system should attempt to limit appropriately the duration of classified status.[130] In addition, any attempt to impose sanctions for leaks which concern past events and do not reveal current intelligence sources and methods should be evaluated with especial skepticism. Proponents of leak-plugging proposals must recognize that disclosures of past government decisions can promote policy discussion and preserve the accountability of government officials. In this light, the release of the Pentagon Papers can be characterized justifiably as a "good leak" because the 1971 disclosures elucidated the U.S. government's previous handling of the Vietnam conflict, especially the activities of the Johnson administration.[131] The Supreme Court correctly refused the Nixon administration's injunction request; the information at issue was historical in nature and was not likely to reveal details of current covert intelligence plans, operations, sources or methods.[132]

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[129] In assessing Reagan's Directive 84, which applied in parts to speech by former government officials, Senator Mathias commented that "[n]othing really gets stale quicker than intelligence. The chance of damage to the national interest of the United States from some disclosure by a former official is there, of course, but it is a much less active risk than that of an incumbent who leaks current information, intelligence that is not stale." Id. at 18.

[130] See M. Halperin & D. Hoffman, supra note 16, at 75 (proposing that information more than three years old should be released automatically to the public, unless the classifying agency is able to convince an independent review board of the need to extend the period of classification).

[131] The material sought to be enjoined was all historical in nature, recounting events at least three years old. See *New York Times Co.* 403 U.S. at 722 n.3 (Douglas, J., concurring); *The Progressive*, 467 F. Supp. at 995 (distinguishing *The Progressive* case from *New York Times Co.*, the court noted that the latter involved historical data concerning events that occurred three to twenty years previously).

[132] See supra note 131. Discussing the Pentagon Papers, Halperin and Hoffman concluded that "[t]here was nothing in the nature of weapons or electronic design information, identities of secret agents still in the field, or other material of the sort that could be of great value to foreign governments while of little relevance to public concerns." See supra note 16, at 10. This argument is attenuated somewhat by Justice Blackmun's conclusion in *New York Times Co.* that the disclosure of some of the documents in possession of the Washington Post could result in "great harm to the nation" and hinder efforts to end the Vietnam war and ensure a speedy return of POWs. 403 U.S. at 762 (Blackmun, J., dissenting) (quoting United States. v. Washington Post Co., 446 F.2d 1327, 1330 (1971) (Wilkey, J. dissenting in part)). He was referring, however, to only a miniscule portion of the documents. Id. at 759. There is no indication that any such information was indeed published. Presumptively, the media disclosures focused on previous activities by the Johnson administration, and were harmless to national security. Clearly, if the war had ended by the time of disclosure the release would have been entirely historical in nature, and the likelihood of harm to national security interests even less.

In situations where the administration's interests contravene the nation's need for informed debate and government accountability, the conflict should always be resolved in favor of disclosure.[133] The government should not be allowed to manipulate public discussion of policy by controlling the flow of information to the public. However, it is a misjudgment to state that the need for informed policy debate requires the disclosure of plans to invade Cuba or the conduct of covert intelligence operations in Central America.[134] Most policy issues should be debated in a public forum, but many executions of policy can only occur in an atmosphere of confidentiality. The argument that prior disclosure of plans to engineer coups in Guatemala or to invade Cuba would have resulted in more efficient policy decisions misses the point.[135] Hindsight is always twenty-twenty. It is easy to criticize the government for failing to adequately disclose information regarding plans for security operations when the operations seemingly result in failure. However, prior disclosure of covert intelligence plans and operations can preclude or hinder successful completion of any objective.[136] Surely fewer critics would clamor about the Kennedy administration's lack of prior disclosure if the Bay of Pigs invasion had succeeded.

The real point is that an administration should not be allowed to establish an absolute veil of secrecy around short-term covert actions after their completion. Leaks subsequent to the completion of covert operations can ensure the accountability of government officials. Sensitive leaks prior to the inception of covert action or during its

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[133] Another example concerns cable traffic during the Reagan administration between the U.S. Embassy in El Salvador and the State Department, explaining the tabulation of the number of people killed in El Salvador each month. The dispatches indicated that the Embassy lacked confidence in the accuracy of its tabulation, and, in fact, knew that the actual number killed was much higher than officially indicated. Since public disclosure of this information would have hurt the Reagan administration's position on El Salvador, authorized release to the public was doubtful. Executive Order Hearing, supra note 39, at 52-53 (commentary of Dr. Halperin).

[134] See Emerson's comments, supra note 3 and accompanying text.

[135] See Note, Access to Information, supra note 43, at 450-51, n.204 and accompanying text. The authors assert that the 1954 CIA engineered coup in Guatemala impaired, in the long run, U.S. interests in Latin America. Id. They also cite President Kennedy's famous remark to the managing editor of the New York Times subsequent to the failure of the Bay of Pig's invasion: "Maybe if you had printed more about the operation, you would have saved us from a colossal mistake." Id. The obvious implication is that prior disclosure would have prevented the occurrence of flawed intelligence operations.

[136] See supra notes 99-102 and accompanying text.

execution, however, can impede the government's ability to conduct effective defense and foreign policy. It is safe to say, given the current lack of consensus in America with respect to national security policy, that every planned covert operation will have its detractors.[137] Accordingly, allowing critics to disclose at will details of covert intelligence plans or ongoing operations would reduce national security policy to a state of disorder. Put simply, sensitive technical and logistical details concerning sophisticated weaponry and current intelligence plans, operations, sources and methods warrant enhanced protection against unauthorized disclosure, including the use of criminal sanctions. Enhanced protection is not warranted, however, when information concerns past government activities or general statements of policy, such as the acknowledgement and discussion of support for foreign insurgents.

Such a categorization based classification system will not effectively balance security and speech interests, however, unless government officials entrusted with classification determinations and the application of sanctions are subject to some form of independent review. Without independent review, interest balancing will remain skewed by the propensity of government officials to overclassify and exaggerate security interests and to cover up illegal or embarrassing government activities.[138]

Independent review could be conducted by either the judiciary or by an independent commission established by Congress. Judicial review is of restricted utility, given the limited expertise of the judiciary in security matters and the prodigious amount of time and effort necessary to effectuate a broad system of review.[139] Consequently,

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[137] Leaks are less of a problem during a time when there is a national consensus regarding national security policy. Given the consensus of opinion in favor of the war effort against the Nazis in World War II, the chances of a government official leaking the plans for the D-Day invasion, or of the media deciding to publish such information, were slim. Today, however, the country lacks such a consensus and the threat of leaks is more prominent. See supra note 43. For example, given the conflicting opinions on American policy toward Nicaragua, plans for a surprise invasion of Nicaragua would not be construed in the same light as the D-Day invasion. Consequently, there would be a serious likelihood of an advance leak occurring to the detriment of the covert plans.

[138] See supra notes 39-43 and accompanying text.

[139] A review of all secrecy related decisions would place a severe administrative burden on the judicial system. In addition, the judiciary has traditionally felt compelled to be deferential to the government's secrecy decisions due to the political nature of the decisions and the lack of judicial expertise in security matters. See infra notes 202-04, 232-33 and accompanying text. Thus, an independent review board, established outside the court system, would likely promote a more effective

judicial review should be supplemented with review by an independent commission with the full-time task of reviewing government secrecy decisions.[140] Ideally, careful review should be conducted of all initial classification decisions to ensure that harmless speech is not chilled by improper classification.[141] At the very least, independent review should be conducted of all censorship decisions made pursuant to pre-publication review agreements and all attempts to impose severe sanctions for unauthorized disclosures, such as administrative discharge or criminal prosecution.

Obviously, secrecy decisions should be overturned when national security interests are not legitimately threatened. Indeed, the mere fact that independent review will be conducted will likely deter the

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balancing of speech and security interests. The board's final decisions could also be subjected to judicial review if deemed necessary.

[140] Halperin and Hoffman propose the creation of a Classification Review Board, established by Congress with the purpose of "overseeing the administration of a legislated classification system." M. Halperin & D. Hoffman, supra note 16, at 75. The Board would be informed of all classification decisions and could review a classifier's decision "whether acting on [the Board's] own initiative, on the request of a member of Congress, or on the appeal of a citizen pursuant to the Freedom of Information Act." Id. at 76. The Board would also be entrusted with preparing government documents for public release by overseeing the deletion of properly classified information. Id.

Similarly, the student authors of *Note: Plugging the Leak* advocate the creation by Congress of a Classification Screening Agency, which would determine which classified information deserves the added protection of criminal sanctions for unauthorized disclosure. See Note: Plugging the Leak, supra note 16, at 859-60. The Agency, after review by its Classification Screening Board, would grant the government's request for enhanced protection only if "the information falls within congressionally created categories of information that require secrecy" and the Board finds that disclosure would "likely result in serious damage to national security." Id. at 862 After a request is granted, the classified information is to be marked with a warning that it is especially protected, and that unauthorized disclosure or publication will warrant criminal prosecution. Id. at 861. Criminal sanctions would then be legally applied for the knowing and unauthorized disclosure or publication of such information, unless it is shown that the disclosure was made only to a member of Congress or that it concerned information already in the public domain. Id at 684-85.

[141] See Halperin and Hoffman's proposal, supra note 16. However, review of all classification decisions might prove administratively difficult, unless the classification system can be significantly streamlined to restrict the overall amount of classification. This would require expanding statutory access to government information. The threat that a broad system of review could prove administratively burdensome poses two dangers. The first is that the review board will end up rubberstamping information without adequate review of speech interests, assuming the role of a censorship board. The second is that the board will fail to adequately assess security interests, allowing some harmful information to be disclosed publicly.

The proposal offered in *Note: Plugging the Leak* avoids many of these administrative burdens by using a review board only for evaluating government requests to protect certain information with criminal sanctions. See supra note 140. This proposal, however, does not provide efficient independent review of other classification decisions and, thus, it does not adequately counter overclassification. Most importantly, under the proposal, government agencies could still engage in the excessive use of administrative and civil remedies, without being subject to the board's review.

government from pursuing censorship or sanctions in situations where the government's real interest is to prevent the disclosure of illegal, improper or embarrassing activities. Furthermore, Congress should provide expressly that the fact that a leak reveals violations of the law is an affirmative defense against the application of sanctions. Independent review coupled with such a national security "whistleblowing" provision would help curb abuses in the classification system and promote the proper categorization of leaks.

II. Leaker Versus Publisher: Leak Curbing Measures Should Target Leakers; Media Restrictions are Justifiable Only in Narrow Circumstances

In addition to the problem of identifying which information warrants special leak-plugging measures is the question of whether to treat alike the leaker of sensitive information and the publisher of such information. The question reflects the reality that leaking is a two-part process: a government official's release of sensitive national security information poses little threat without a medium for public disclosure. Consequently, there are two potential focal points for targeting leak curbing measures. This section will discuss the prospects of targeting each and conclude that the brunt of leak-plugging reform should target the leaker, and not the publisher. For legal, normative and administrative reasons, restrictions against media disclosure are justifiable only in limited circumstances.

In determining the scope of free expression rights possessed by government employees, the Supreme Court has applied a balancing test which weighs the need for commentary on matters of public concern with the government's interests as employer in "promoting the efficiency of the public services it performs through its employees."[142] Although government employees do not forfeit all rights of free expression because of the nature of their employment, speech restrictions are constitutionally permissible when the government

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[142] Pickering v. Board of Education, 391 U.S. 563, 568 (1968). See Rankin v. McPherson, 107 S. Ct. 2891 (1987); Connick v. Myers, 461 U.S. 138 (1983); Broadrick v. Oklahoma, 413 U.S. 601 (1973). The Supreme Court has recognized that the government's power to regulate the expression of government employees is broader than its right to regulate expression by the public. See *Pickering*, 391 U.S. at 568.

can assert a substantial government interest and the restrictions are narrowly drawn to protect that interest.[143] The Court has recognized that preventing serious harm to national security represents a compelling interest, justifying broad speech restrictions on current and former government employees who have or had access to classified information.[144] Accordingly, leak-plugging measures aimed at present or former government employees are constitutionally permissible when the measures are appropriately designed to effectuate their purpose.

Moreover, imposing anti-leak restrictions on government employees with access to sensitive national security information is morally justifiable in light of the special nature of their positions. Assessing the normative rationales for speech restrictions on government employees who have access to classified information, Richard Willard asserts:

> [I]t is [the government's] belief that. . . all government officials in the area of national security have a particular trust placed in them by the American people. We have access to information that very few other people in the world know about. We have that access as a result of our jobs, as a result of the special trust and confidence that the American people place in us. And we believe that it is only appropriate to be held to a higher standard as a result of that knowledge and that trust and confidence. We may sometimes experience inconveniences and limitations that the public generally, or for that matter government employees generally, are not subject to. But that, we believe is appropriate as a part of the very special

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[143] See supra note 142. See also Nat'l Fed'n of Fed. Employees v. United States, 695 F. Supp. 1196, 1199-1200 (D.D.C. 1988); United States v. Marchetti, 466 F.2d 1309, 1317 (1972).

[144] See supra note 30-31 and accompanying text. When faced with national security claims, the judiciary has been deferential in its interest balancing to executive and congressional decisions. See *Morison*, 844 F.2d at 1082. The courts have realized that employee restrictions which "would otherwise be impermissible may be sustained where national security and foreign policy are implicated." Id. Accord *Snepp*, 444 U.S. at 509 n.3 ("the C.I.A. could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment.") See McGehee v. Casey, 718 F.2d 1137, 1141-43 (1983).

Thus, the courts have upheld secrecy agreements that restrict employee disclosure of classified information, see Knopf v. Colby, 509 F.2d 1362 (4th Cir. 1975), cert. denied, 421 U.S. 992 (1975); *Marchetti*, 466 F.2d at 1316; *Nat'l Fed'n of Fed. Employees*, 695 F. Supp. at 1199-1201;, and the use of pre-publication review procedures, see *Snepp*, 444 U.S. at 510; *McGehee*, 718 F.2d at 1143; *Marchetti*, 466 F.2d at 1316-17; *Nat'l Fed'n of Fed. Employees*, 695 F. Supp. at 1201-02. Such restrictions are even constitutionally applied to former employees. See *Snepp*, 444 U.S. at 513-15; *McGehee*, 718 F.2d at 1143; *Marchetti*, 466 F.2d at 1317.

responsibility we have.[145]

When one accepts a position with access to sensitive security information, he assumes special responsibilities and obligations not to misuse the access. When he intentionally leaks sensitive information that his superiors have classified out of genuine concern for national security, he is culpable.[146] This argument is strengthened by evidence suggesting that many harmful leaks result from careless or inattentive employees who "gossip to show their power."[147]

Directing leak-plugging reform at the media is a far more contentious issue, legally and morally. Supreme Court rulings and congressional legislation have established that the media does not have an absolute right of access to information possessed by the government.[148] In effect, this reflects the recognition that government em-

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[145] National Security and the First Amendment, supra note 72, at 17: The courts have recognized that employees of the intelligence agencies occupy "a position of 'special trust' reached by few in government." *McGehee*, 718 F.2d at 1142-43 n.11. Accord *Snepp*, 444 U.S. at 511 & n.6.

[146] The leaker is culpably responsible in this sense only if his superiors appear motivated by a genuine concern for national security, and not by bureaucratic or individual self-interest. Thus, an official is not culpable when revealing illegalities or improprieties by government agencies or employees. Also, an official does not necessarily deserve punishment for leaking information that is classified but actually harmless to national security, i.e., in a classic case of overclassification.

[147] 133 Cong. Rec. E4273 (daily ed. Oct. 31, 1987) (statement by Rep. Bereuter).

[148] See supra note 27-35 and accompanying text. The Supreme Court has held that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." Houchins v. KQED, Inc., 438 U.S. 1, 15 (1977). Accord *McGehee*, 718 F.2d at 1147. In addition, the Supreme Court has recognized that the first amendment does not accord the media a special right of access that is greater than that afforded the public. See Pell v. Procunier, 417 U.S. 817, 834 (1974); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974); *Houchins*, 438 U.S. at 14-5. In *Pell*, *Saxbe*, and *Houchins*, the Court upheld restrictions on media access to prisoners, finding that the state had a legitimate interest in protecting the public, confining and rehabilitating prisoners, and maintaining security. See, e.g., *Pell*, 417 U.S. at 822-23.

In contrast, the Court has recognized rights of access to information which traditionally has been available to the public. See, e.g., Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982) (access to criminal trials gets special protection because trials have "historically been open to press and public"); Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 578 (1980) (the right to attend criminal trials is implicit as the courtroom is a place where people generally have a right to be present). However, even in the special access cases, access rights are not viewed as absolute. See *Globe Newspaper Co.*, 457 U.S. at 606-7. In *Globe Newspaper Co.*, the court concluded that access to criminal trials can be denied if the state can prove "the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest." Id. Accord *Richmond Newspapers*, 448 U.S. at 581 n.18.

Thus, the denial of media access to classified information is justified on the dual grounds that the information is traditionally non-public and the government can assert compelling national security interests.

ployees do not enjoy unlimited rights of free speech.[149] From the perspective of the media, however, leaking represents a different issue. The issue is not whether the media has an unrestricted right of access, but whether the media has an unrestricted right to publish once access has been gained. Advocates for the media earnestly reply in the affirmative.[150] The basic assumption is that leak-plugging reforms should target leakers and not the media because the responsibility for leaking rests with the government:

> The answer to the question of whether the press is responsible for leaks is, nonsense! The question assumes that the obligation of the press is to protect government information. It is quite the opposite: the obligation of the press is to seek out and publish the news, not to make a judgment about what is and what is not a government secret. Many of the most famous news leaks, including the Pentagon Papers case, were not based on diligent investigative reporting, but were the result of government officials, for one reason or another, giving information to the press. I think the responsibility lies with the government.[151]

In the opinion of Professor John Norton Moore, such assumptions that the media is not subject to the principled rule of law amount to a "game theory," under which the government's perceived role is to maintain secrecy, and the media's role is to ferret

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[149] See supra notes 142-44 and accompanying text.

[150] For example, in answering a hypothetical question about deployment dates of cruise missiles, Floyd Abrams replied:

> I don't know if anybody would argue that the press has the right to that information, but once that information comes into its hand, the government does not have the right to prevent its publication or to punish the press for having published it.

The Media and Government Leaks, supra note 77, at 8. See also Smith, supra note 8, at 471:

> A government that fails to keep its secrets should not force the press to do so, either by prior restraint or subsequent punishment. Journalists have agreed to self-censorship even in doubtful instances such as the Bay of Pigs invasion, but their role under the Constitution is to publish what they see fit. Officials have the authority to keep some necessary secrets, but they have no legitimate power to prevent the press from telling what it already knows. Such freedom to publish obviously involves some risks, but no democratic system can ever be entirely safe. The stark choice is between living with occasionally irresponsible journalism and continually onerous state control of the news media.

Id; Freedom of the Press, supra note 111, at 21 (Charles Seib of the Washington Post, commenting that the press has an absolute privilege to publish). See also infra notes 158-60 and accompanying text.

[151] The Media and Government Leaks, supra note 77, at 3 (comments of J. Berman, legislative counsel for the American Civil Liberties Union).

out and publish government information.[152] In fact, Max Frankel, former Editor of the New York Times, admitted that important national security issues were resolved spontaneously on an ad hoc basis by a process resembling a game of hide and seek between the government and the press.[153]

This process has been referred to as the equilibrium theory model of disclosure, under which:

> the absence of a right of access to information held by government is balanced by the power to publish almost all information that has been lawfully obtained. The self-interested behavior of countervailing forces, it is thought, will produce an equilibrium that benefits the citizenry as a whole.[154]

Professor BeVier asserts that the equilibrium model of disclosure is a form of political compromise, resulting from the absence in the Constitution of a "normative standard by which the claims of access to governmental information can be evaluated."[155] In her opinion, a disclosure system which leaves such questions of access to the political arena and allows the media to publish whatever information it obtains, is consistent with the Constitution's scheme of checks and balances and its designation of political decisionmaking to the democratic processes.[156]

It is not immediately apparent, however, why the media should

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[152] Interview with John Norton Moore, Walter L. Brown Professor of Law, at the University of Virginia School of Law (Feb. 17, 1988).

[153] Catledge, supra note 40, at 9.

[154] Sunstein, supra note 19, at 890. See BeVier, supra note 21, at 510-16. Professor Sunstein notes that the equilibrium model is beneficial in that it establishes well defined parameters of appropriate behavior for both the government and the media. Sunstein, supra, at 900. However, he criticizes the approach because it undervalues interests in both secrecy and free speech. Id. at 903. In effect, the government is allowed to suppress information that should be disclosed, and the media is allowed to disclose information that should be suppressed.

[155] BeVier, supra note 21, at 516. See infra note 156.

[156] See BeVier, supra note 21, at 514-15. BeVier states that:

> [a] system that resolves questions of public access to government information by turning to the political marketplace, while at the same time leaving the press free to publish whatever information it can obtain by one means or another, is consistent not only with the aspect of our constitutional scheme that assigns power to decide all but questions of constitutional principle to the democratic processes but also with the aspect that checks governmental power by dividing and diffusing it among various institutions.

Id. See also Stewart, Or the Press, 26 Hastings L.J. 631 (1975). Potter Stewart argues that the press was guaranteed an absolute right to publish under the Constitution in order to establish a "fourth institution" outside government to serve in the constitutional scheme of checks and balances. Stewart, supra, at 634.

enjoy a right to publish with absolute impunity. Granted, the promotion of public debate and the accountability of public officials are noble and important democratic functions, but not all publications further public debate and some may limit the ability of the government to protect the nation's interests.[157]

Those who insist that the media has an absolute constitutional right to publish information it possesses argue, either expressly or implicitly, that the "press clause" must be construed independently of the "speech clause."[158] Otherwise, the freedom of the press would be subject to the same balancing of interests analysis generally recognized as applicable to the freedom of speech.[159] Their argument is based partially on the conclusion that the speech and debate clauses must be treated differently because construing them as having the same import would result in a "constitutional redundancy."[160]

This, however, does not explain why the freedom of the press must be afforded separate constitutional status. As Professor Lange states, "the goal of first amendment theory should be to equate and reconcile the interests of speech and press, rather than to separate them."[161] It is plausible that the framers referred to two freedoms

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[157] See supra notes 63-102 and accompanying text.

[158] See BeVier, supra note 21, at 482-83; Nimmer, supra note 79, at 639-41; Smith, supra note 8, at 451-58; Stewart, supra note 156, at 633-37. See also Anderson, The Origins of the Press Clause, 30 UCLA L. Rev 455, 533 (1983) ("[t]hough scholars may debate whether the press clause has any significance independent of the speech clause, historically there is no doubt that it did. Freedom of the press . . . was the primary concern of the generation that wrote the Declaration of Independence, the Constitution, and the Bill of Rights.").

[159] See supra notes 24-35, 142-44 and accompanying text.

[160] See Lange, The Speech and Press Clauses, 23 UCLA L. Rev. 77, 78 (1975); Nimmer, supra note 79, at 640; Stewart, supra note 156, at 633. Stewart argues that:

> [t]his basic understanding is essential. . . to avoid an elementary error of constitutional law. It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They are guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would result be a constitutional redundancy.

Stewart, supra note 156, at 633.

[161] Lange, supra note 160, at 118. Lange notes that the terms " 'freedom of speech' and 'freedom of the press' were used quite interchangeably in the eighteenth century, particularly among persons who were interested in the terms at a conceptual level." Lange, supra note 160, at 88 (relying on L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (1963)). Moreover, Lange concludes that "one cannot accept the distinctions between speech and the press which Professor Nimmer offers. It is not at all evident that speech contributes less to the democratic dialogue than does the press. It is no more evident that the functions of the press can be considered adequately apart from the personal interests of the individuals who compose it." Id. at 104. In fact, Lange argues that

in recognition that different considerations are raised by each. Given the media's roles as an institutional watchdog over government conduct and a disseminator of information to the public, the government ostensibly should bear a higher burden in justifying suppression of media publication. Nevertheless, this does not mean that the media should be immune from a balancing of interests analysis. Rather, it means that the speech interests implicated in publication suppression cases should be afforded greater weight than in cases of individual speech suppression.[162] Thus, the government should be required to demonstrate more compelling security concerns when attempting to restrain publication. There is no reason, however, why the media should be allowed to publish with absolute impunity in situations where the government appears genuinely motivated by a serious threat to national security, and the speech interests are minimal.

The Supreme Court's views on the matter need clarification. The Court has not recognized an absolute right of publication,[163] but the scope of acceptable restrictions is not clear. What is clear is that media restrictions are viewed with particular disdain and will be upheld only in the narrowest of circumstances.

In a 1930 decision, *Near v. Minnesota*,[164] Chief Justice Hughes asserted:

> no one would question but that a government might prevent actual

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recognizing the two freedoms as having separate constitutional status would ultimately impair both the interests of individuals and the press. Id. at 107-19.

[162] See *New York Times Co.*, 403 U.S. at 761 (Blackmun, J., dissenting) ("[w]hat is needed here is a weighing upon properly developed standards of the broad right of the press to print and of the very narrow right of the Government to prevent.").

[163] Justice Black's concurrence in the Pentagon Papers case exemplifies the view that the media deserves special protections from government imposed restrictions:

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.

New York Times, 403 U.S. at 717. (J. Black, concurring). See also supra notes 23, 27-31 and accompanying text. An absolute right of publication has never been recognized by a majority of Supreme Court justices. See *Nebraska Press Assn.*, 427 U.S. at 564; *New York Times Co.*, 403 U.S. at 761 (Blackmun, J., dissenting); Near v. Minnesota, 283 U.S. 697, 708 (1930); Smith, supra note 8, at 448-49.

[164] 283 U.S. 697 (1930).

> obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. . . .The constitutional guaranty of free speech does not 'protect a man from an injunction against uttering words that may have all the effect of force.'[165]

The *Near* national security exception has been criticized as antiquated and too limited for use in the modern nuclear era.[166] Indeed, in *New York Times Co.*, Justice Brennan attempted by analogy to modernize the import of the *Near* exception, concluding that the "publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea."[167] In the same case, Justice Stewart, without reference to *Near*, concluded that publication could not be enjoined unless disclosure would "surely result in direct, immediate, and irreparable damage to our Nation or its people."[168] The absence of any reference to *Near* suggests that Justice Stewart's standard is broader and more flexible than Justice Brennan's.[169] Neither standard, however, has been accepted conclusively by the Court as the guiding formulation for issuing national security injunctions.[170] In

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[165] Id. at 716, qouting Schenck v. United States, 249 U.S. 47, 52 (1919). The *Near* national security exception can be viewed as a contextual elaboration of the "clear and present danger" standard announced in *Schenck*. Justice Holmes concluded in *Schenck* that:

> [t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . .The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

249 U.S. at 52.

[166] See, e.g., Pincus, Press Access to Military Operations: Grenada and the Need for a New Analytical Framework, 135 U. Pa. L. Rev. 813 (1987):

> The *Near* standard is obsolete and potentially dangerous in today's world. Because the test was announced during a simple era in United States foreign and defense policy, *Near*'s hypothesized threat to national security was tidy and of limited scope. In contrast, the contemporary national security environment is characterized by global American commitments and the constant possibility of nuclear war.

Id. at 816.

[167] 403 U.S. at 726-27 (Brennan, J., concurring).

[168] Id. at 730 (Stewart, J., concurring).

[169] Pincus, supra note 166, at 825 ("[a] threat to 'our nation or its people' is likely to apply to a large variety and number of menaces, not simply to events that could be considered 'kindred to imperiling the safety of a transport at sea.' ").

[170] The justices failed to reach consensus in *New York Times Co.* about a national security exception, and a coherent standard has not been subsequently formulated. Id. at 826; Nagel, How Useful is Judicial Review in Free Speech Cases?, 69 Cornell L. Rev. 302, 328-29 (1984). In *Agee*, the Supreme Court referred back to the *Near* standard in upholding the government's restriction of Agee's foreign

the absence of consensus for a particular standard, the only certainty is that the barriers to an injunction are formidable, but not absolute.[171]

Although Supreme Court decisions have outlined a narrow range of permissible national security injunctions, they shed little light on the extent of media protection from criminal sanctions. Some judicial opinions suggest that the scope of permissible criminal sanctions is broader than the national security exception to the general presumption against prior restraints.[172] However, as Professor Jeffries recognizes, the doctrine of prior restraint is "fundamentally unintelligible. It purports to assess the constitutionality of government action by distinguishing prior restraint from subsequent punishment, but provides no coherent basis for making that categorization."[173] Jeffries notes that a special hostility is justified toward administrative pre-clearance programs, which require government authoriza-

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travel. See 453 U.S. at 308-09. The Court concluded that "Agee's disclosures [of the locations of CIA agents], among other things, have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personel. They are clearly not protected by the Constitution." Id. In his dissent, Justice Brennan argued that *Near* was not "relevant or convincing precedent" for supporting Agee's restriction. Id. at 321 n.10. Instead, Brennan asserted his *New York Times Co.* standard as the appropriate principle. Id.

The United States District Court for the Western District of Wisconsin was forced in *United States v. The Progressive Inc.* case to grapple with the muddled national security exception. See 467 F. Supp. 990. The court began by noting that times have changed significantly since the days of *Near*. Id. at 996. "Now war by foot soldiers has been replaced in large part by machines and bombs. No longer need there be any advance warning or any preparation time before a nuclear war could be commenced." Id. The court thus concluded that disclosing technical information on the hydrogen bomb "is analogous to publication of troop movements or locations in time of war." Id. The court's conclusion that the Progressive's publication fit within the national security exception was never reached on appeal, as similar disclosures by other magazines mooted the issue. See infra note 194.

[171] See *Nebraska Press Assn.*, 427 U.S. at 570 ("we reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact."); *New York Times*, 403 U.S. at 714 (per curiam) (" '[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' ", quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)); *Near*, 283 U.S. at 716 (protection against prior restraint "is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.").

[172] See, e.g., *New York Times*, 403 U.S. at 733 (White, J., concurring) ("[p]rior restraints require an unusually heavy justification under the First Amendment; but failure by the government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication"); Southeastern Promotion's Ltd. v. Conrad, 420 U.S. 546, 559 (1975) (there is less constitutional protection against criminal penalties than against prior restraints); *Near*, 283 U.S. at 720 (subsequent punishment is the appropriate remedy for "malicious, scandalous and defamatory" publication, not prior restraint).

[173] Jeffries, supra note 18, at 21.

tion before publication.[174] Administrative pre-clearance leaves the control of speech content to bureaucratic discretion, subjecting speech to the excessive tendencies of government censors.[175]

This same hostility is not applicable, however, to speech control systems which are based on injunctions or criminal sanctions. Under either system, the government does not pre-screen speech, and judicial officers who "have no vested interest in the suppression of speech" are in charge of the proceedings.[176] Jeffries also correctly attacks the contention that injunctions prevent speech more effectively and are thus more deleterious than criminal prosecutions.[177] An injunction may indeed allow the government to define harmful speech in advance and preclude its disclosure. In the case of a criminal prosecution, this speech will already have been disclosed. However, the threat of criminal sanctions is not as narrowly confined as an injunction and may chill speech which should not be suppressed.[178] There is no judicial intervention prior to disclosure to ascertain whether the speech at issue meets the pertinent standard for suppression. Moreover, the imposition of criminal sanctions involves personal risks of imprisonment and/or pecuniary loss to reporters and their mediums which are absent when injunctions are issued (assuming the injunction orders would be obeyed). In this light, the argument that injunctions threaten free speech interests more than criminal sanctions is clearly unfounded.[179] Both forms of speech control have the same purpose, to prevent media publication of information that seriously harms national security.

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[174] Id. at 22-25. See *Near*, 283 U.S. at 735-38 (Butler, J., dissenting) (Justice Butler comments that the prior restraint doctrine should focus on authorizations of advance administrative control, such as by censors or licensors, rather than suits in equity).

[175] Jeffries, supra note 18, at 22-25.

[176] Id. at 26.

[177] Id. at 26-29.

[178] Jeffries notes that "while an injunction may delay publication for several days, the prospect of penal sanctions may delay publication forever." Id. at 27. Thus, if the government seeks to enjoin speech that is constitutionally protected, judicial intervention in the injunction proceedings will allow the speech to be heard eventually, after a delay in publication. The nebulous threat of criminal sanctions, however, may deter forever the publication of speech that is actually protected.

[179] Jeffries concludes that there is only one situation where injunctions have an actual impact on free speech which is greater than the threat of criminal sanctions, when a jurisdiction holds that the unconstitutionality of an injunction is no defense in circumstances where injunction terms are violated by publication. Id. at 27. In these jurisdictions, a potential publisher would have to endure a temporary delay in publication, in order to preserve his constitutional claim, that the threat of criminal sanctions would not impose. Id. at 28.

The proper focus, therefore, is not the form of judicial proceeding but the propriety of the formulated standard of speech suppression.[180] If the first amendment prohibits issuance of an injunction unless the government proves disclosure will result in "direct, immediate and irreparable damage" to national security, then the media should be afforded analogous protections from subsequent punishment. The Reagan administration's threats to prosecute the press for harmful disclosures has made the scope of media protection from subsequent punishment a timely issue.[181] In fact, the absence of a clear standard may have already induced media sources to refrain from publishing information of no real threat to national security.[182]

Arguably, the standards formulated by Justices Brennan and Stewart in *New York Times Co.* may prove too inflexible and too inexact in meaning to promote a proper balancing of free speech and national security interests. Nevertheless, in general the Supreme Court's holdings correctly recognize that media controls should be upheld only in the rare circumstances where the danger to national security is patently severe. Irrespective of legal prece-

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[180] Discussing *New York Times Co.*, Jeffries stated, "it is my view that the outcome of such a case should not turn on the form of the relief requested. The same result should obtain whether the government seeks to enjoin the New York Times from publishing information or to prosecute it for having done so." Id. at 31.

[181] During his term as CIA Director for the Reagan administration, William Casey made repeated threats to begin prosecuting the press for the publication of sensitive national security information. In May and June of 1986, Casey recommended that the Justice Department commence prosecution of The National Broadcasting System, The Washington Post, Newsweek, The New York Times, The Washington Times, and Time Magazine, for reports about U.S. intelligence gathering operations. See A Crackdown On Leaks, Newsweek, May 19, 1986, at 66; Shifting the Attack on Leaks, Time, May 19, 1986, at 91; Casey Said to Consider Prosecuting Publications, N.Y. Times, May 7, 1986, at D31, col. 2; U.S. Aides Said to Have Discussed Prosecuting News Organizations, N.Y. Times, May 21, 1986, at A18, col. 1; Questions of National Security: The CIA Tangles with the Washington Post and NBC, Time, June 2, 1986, at 67; Leaks v. Public Service Announcements, N.Y. Times, May 11, 1986, at D1, col. 1. At one point, Casey commented that the media would not be prosecuted for past reports, but only for future reports. See Papers Won't Face Charges on Past Articles, Casey Says, N.Y. Times, May 16, 1986, at A15, col. 1. The White House supported Casey's calls for media prosecution. See White House Backing C.I.A. on Prosecuting Publications, N.Y. Times, May 9, 1986, at A14, col. 3.

[182] For example, in May 1986, the Washington Post abandoned its plans to publish an article concerning the "secrets of underwater eavesdropping." The Administration's Unofficial Secrets Act, N.Y. Times, Aug. 3, 1986, at A23, col. 2. The "main substance" of the story was not printed, after the Post had received phone calls and warnings form William Casey and President Reagan, and after government officials had rejected various versions of the story submitted by the Post for review. Id. The Post finally elected to suppress the story, despite the fact that the Post editors "were convinced that national security was not involved." Id.

dent, the use of media controls should be restricted for both normative and administrative reasons.

First of all, with respect to culpability, unauthorized disclosure by a public official cannot be equated with publication by the media. The relationship between the media and the government is not hierarchical. In the words of Justice Black, the media's function is to "serve the governed, not the governors."[183] Correspondingly, the media has no duty to heed government calls for non-publication. Instead, "[i]ts role is to find out news and present it to the public."[184] Prohibiting the press from publishing classified information would destroy the media's ability to promote critical policy discussion and government accountablity; the media would become a government mouthpiece, rather than the public's watchdog.[185]

Also, "members of the press are not normally in a position to know what is damaging to national security and what is not."[186] They may not comprehend fully the implications to national security posed by disclosure because they may lack knowledge of other relevant facts that are often classified.[187] In addition, much of the sensitive information that reaches the media does not arrive in a form clearly identifying its highly sensitive nature.[188] Classification labels have often been removed or the information is disclosed in

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[183] *New York Times Co.*, 403 US. at 713 (J. Black, concurring).

[184] National Security and the First Amendment, supra note 72, at 11 (comment of R. Willard).

[185] See *Gravel*, 92 S. Ct. at 2633-34 (Douglas, J., dissenting) ("[t]o refuse to publish 'classified' reports would at times relegate a publisher to distributing only the press releases of Government or remaining silent: if he printed only the press releases or 'leaks' he would become an arm of officialdom, not its critic"). Obviously, the government would only seek to enjoin or prosecute the media when the story at issue contained leaked information which did not support administration policy or position. Government officials would not protest when the disclosures furthered administration policy. Thus, the media would become a propaganda appendage of the government. See Leaks vs. Public Service Announcements, N.Y. Times, May 11, 1986, at D14, col. 1.

[186] The Media and Government Leaks, supra note 77 at 25 (comment of R. Willard).

[187] Id.

[188] In contrast to the government official in possession of classified material, the media is often unaware of the classification status of the material it receives. A notable example is the publication by Jane's Defence Weekly of a photograph furnished by a government official, Morison. The incident resulted in successful government prosecution of Morison, the court concluding that Morison "clearly knew by virtue of his security clearance and his signing of an agreement that classified information and documents were not to be transmitted to outsiders." *Morison*, 604 F. Supp. 655, 661 (D. Md. 1985), aff'd, 844 F.2d 1057 (4th Cir. 1988).

Jane's Defence Weekly, however, was not in the same position as Morison. In fact, Morison had clipped off all classification labels on the photograph before its dispatch to the magazine. *Morison*, 844 F.2d at 1061.

such a manner, as over the telephone, where labels go unseen.[189] The problem is complicated further by pervasive overclassification, which renders it difficult for the media to determine the actual level of harm posed by disclosure.[190] Consequently, members of the media who publish sensitive information ordinarily lack the same culpability of the leaking government official, who is more aware of the information's true nature.[191]

Scienter concerns aside, allowing government interference in media processes endangers democratic ideals because of the difficulty in limiting the restrictive effects of government controls. Accordingly, even though some publication restraints would benefit national security, the use of media controls is generally precluded by the administrative difficulties of preventing unjustified intrusion by the government. In discussing its reluctance to allow government controls of the media, the Supreme Court has said:

> We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficient-sounding the purposes of controlling the press might be, we. . .remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.[192]

Unquestionably, government controls can threaten the ability of the media to execute its democratic functions. The dangers of abuse are imminent given the government's proclivity for excessive secrecy and the inevitable desire to manipulate public disclosure to gain political advantage.[193] Consequently, media controls should be utilized only in narrow circumstances, where the dangers to national security are

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[189] See Id. Granted, the media is not always naive about the nature of the documents it receives. For example, the editors of the New York Times were well aware that the Pentagon Papers were undoubtedly classified, even though Daniel Ellsberg had covered the "top secret" markings when copying the originals. M. Halperin & D. Hoffman, supra note 16, at 11-12. Nonetheless, the media is less culpable than leaking government employees, as the latter are in a better position to know whether the information is truly harmful to national security. See supra notes 84, 145-46, 186-91 and accompanying text.

[190] See supra notes 36-38 and accompanying notes.

[191] See supra note 189.

[192] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring) quoted in Nebraska Press Assn. v. Stuart, 427 U.S. 539, 560-61 (1975).

[193] See supra notes 39-43 and accompanying text.

especially severe, the speech interests are not pressing, and the likelihood of government abuse is attenuated.

An additional reason for limiting media controls is the difficulty in promulgating restrictions that actually will have the intended remedial or deterrent effects. Injunctions are not often effective because the information the government wants suppressed often gets disclosed by media sources other than the one involved in the litigation.[194] Frequently, the government's pursuit of an injunction will serve only to confirm or advertise the content of the article at issue.[195] Criminal sanctions against the media are also of limited utility because attempted prosecutions are likely to provoke public outcry and are unlikely to result in media compliance.[196] As one scholar noted,

> Journalistic self-restraint will not be encouraged in the long run by the threat of jail. There is nothing that can advance a person's career in the media more quickly than being threatened with imprisonment over a free press issue. Why should he or she seek to avoid the kind of attention and support that would come from his or her colleagues in such a situation?[197]

Thus, even if we were able to define when disclosure would result in "direct, immediate and irreparable damage", directing controls at the media may accomplish little. Given the dangers for abuse discussed previously and the inherent inefficacy of restrictions, it is arguable that the best course may be to avoid media controls altogether. However, if media restraints are to be promulgated, they must apply only to narrow, specifically defined circumstances, where speech interests are extremely low and the threat to national security particularly egregious. Restrictions should concentrate on these most serious cases, such as disclosures of cryptographic or nuclear weaponry information, or disclosures of pending intelligence

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[194] See *New York Times Co.*, 403 U.S. at 733 (White, J., concurring). United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), appeal dismissed, 610 F.2d 819 (7th Cir. 1979), provides a vivid example of the limited effectiveness of injunctions. In this case, the government sought a preliminary injunction against publication of an article detailing the physics of a hydrogen bomb. The whole issue became moot when various newspapers and magazines published pieces similar to the Progressive article at issue. See Smith, supra note 8, at 463-64.

[195] Smith, supra note 8, at 464.

[196] The Media and Government Leaks, supra note 77, at 31.

[197] Id. (comments of A. Weinstein)

activities (e.g., disclosure of agents' identities) or future short-term covert operations (e.g., military operations) which may jeopardize the lives of agents or servicemen. Leak-plugging reforms should focus primarily on leaking government employees.[198]

III. Separation of Powers' Concerns: The Need for the Legislature to Promulgate Leak-Plugging Reforms

The final piece to the puzzle regarding leak-plugging measures is the appropriate role of each government branch in the promulgation of such reforms. With respect to national security concerns, the appropriate division of governmental powers has always been a contentious issue.[199] In short, there is no "clear and simple separation of powers model," "in precedent or in practice,"[200] with respect to solving the problems presented by leaks. In the absence of clear-cut divisions of power and control, congressional legislation will best reflect a proper balancing of national security and free speech interests. Excessive deference to executive enactments results in excessive secrecy and the suppression of speech genuinely deserving of protection.

For national security policy purposes, the fundamental separation of powers conflict is whether Congress or the executive branch should be the controlling institution.[201] The role of the judiciary in such matters is less contentious. The Supreme Court has recognized expressly that "[m]atters related to foreign policy and national security are rarely proper subjects for judicial intervention."[202] In the

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[198] Some government officials have acknowledged that this is the correct approach. See, e.g., id. at 25 (comments of R. Willard):

> I recognize that very few journalists traffic in top secret documents. Most are not that irresponsible; they report what they believe the public should know: I have concluded that the press is not to blame for leaks of classified information, and that both the solution and the blame lie with government employees who violate the law by disclosing classified information without proper authority.

Id. See also National Security and the First Amendment, supra note 72, at 11 (comments of R. Willard).

[199] For discussion of the problems inherent in defining separation of powers in the area of national security and secrecy, see Edgar & Schmidt, supra note 40; Koh, supra note 58; Shapiro, supra note 82, at 20-28, 45-46.

[200] Edgar & Schmidt, supra note 40, at 351.

[201] See infra notes 207-10 and accompanying text.

[202] *Haig*, 453 U.S. at 292. See *New York Times*, 403 U.S. at 756-58 (Harlan, J., dissenting); BeVier, supra note 21, at 508-12.

Court's opinion,

> [s]uch decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[203]

Consequently, in reviewing legislative or executive enactments designed to plug sensitive leaks, the judiciary must be deferential to political institutions and avoid interference into substantive political decisions.

This does not suggest that the judiciary abdicate its responsibility to prevent political encroachments upon constitutionally protected rights of speech. Judicial review, however, should focus primarily on the constitutional propriety of the leak-plugging system and procedural applications thereof; the judiciary should be deferential to the substantive security decisions of Congress or the executive.[204]

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[203] Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948) (Jackson, J.), quoted in *New York Times*, 403 U.S. at 757-58 (Harlan, J., dissenting).

[204] See Cheh, supra note 51, at 730-31; Richardson, supra note 17, at 59. In *Morison*, Judge Wilkinson explained in the following manner the need for judicial deference in the area of national security:

> The aggressive balancing that courts have undertaken in other contexts is different from what would be required here. The government's interest in the security of judicial proceedings, searches by law enforcement officers, and grand jury operations presented in *Richmond Newspapers*, *Zurcher*, and *Branzburg* are readily scrutinized by the courts. Indeed, they pertain to the judiciary's own system of evidence. Evaluation of the government's interest here, on the other hand, would require the judiciary to draw conclusions about the most sophisticated electronic systems and the potential effects of their disclosure. An intelligent inquiry of this sort would require access to the most sensitive technical information, and background knowledge of the range of intelligence operations that cannot easily be presented in the single "case or controversy" to which courts are confined. Even with sufficient information, courts obviously lack the expertise needed for its evaluation. Judges can understand the operation of a subpoena more readily than that of a satellite.

844 F.2d at 1082-83.

Examples of judicial deference in the area of national security include the standards for reviewing the government's denial of a Freedom of Information request and the CIA's censorship of a document pursuant to a pre-publication review agreement. The former is more deferential than the latter, but both defer to agency expertise. See *McGehee*, 718 F.2d at 1148-49. The F.O.I.A. standard provides de novo review of agency classification, but the court must give substantial weight to agency affidavits.

Thus, the judiciary plays an important but limited role with respect to leak-plugging measures. The judiciary must apply traditional principles of strict constitutional analysis to ensure that any proposed measures actually are justified by compelling national security concerns. In addition, the measures must be designed narrowly to prevent disclosure of sensitive information, without inhibiting speech that promotes democratic ideals.[205] And finally, the courts must ensure that measures are not applied arbitrarily, capriciously or under pretext.[206]

See 5 U.S.C. § 552(a)(4)(B). Courts should not examine agency expertise further once satisfied that the classification procedures have been properly followed and the information is covered by the F.O.I.A. exemption. *McGehee*, 718 F.2d at 1148. A "presumption of regularity" for classification decisions has also been recognized under the F.O.I.A. standard. Id. In contrast, the *McGehee* court concluded that, in reviewing CIA censorship decisions, the judiciary should still defer to CIA judgment, but should "nevertheless satisfy themselves from the record, in camera or otherwise, that the C.I.A. in fact had good reason to classify, and therefore censor, the materials at issue." Id.

[205] See *Nat'l Fed'n of Fed. Employees*, 695 F. Supp. at 1205 (finding that the usage of the undefined term "classifiable" in a nondisclosure agreement was unconstitutional because less restrictive definitions were available to protect the government's interest). An example of a Supreme Court failure to conduct proper judicial review in a national security case is provided by Snepp v. United States, 444 U.S. 507 (1980) (per curiam). The Snepp case involved a CIA employee's breach of an agreement to submit all future writings related to his CIA employment to CIA officials for review before publication. Pre-publication review was designed to prevent the inadvertent disclosure of classified information. Snepp failed to submit for pre-publication review a book he had written. The Supreme Court upheld the pre-publication review agreement and imposed a constructive trust on all of Snepp's profits resulting from the sale of his book.

Arguably, the Supreme Court could have justified its holding on a detailed finding that protection of national security information was a compelling governmental interest and that requiring CIA employees to submit to pre-publication review was a narrowly tailored method of preventing dangerous disclosures. After all, CIA employees have access to the most sensitive security information. The Court even indicated the use of such an approach in a footnote. See *Snepp*, 444 U.S. at 509 n.3. A balancing of interests analysis, however, is conspicuously absent from the text of the opinion. Ostensibly, the Court was satisfied to dismiss any first amendment claims summarily with a footnote. The body of the opinion apparently relied on a "blend of the law of trusts and the law of contracts." Id. at 518 (Stevens, J., dissenting). Though use of an elaborate balancing test might have reached the same result, the Court's reliance on trust and contract theory and the absence of serious deliberations about first amendment issues represents a dangerous precedent. See Emerson, supra note 3, at 97:

> [The] cavalier treatment of constitutional liberty by the Supreme Court in the *Snepp* case violated most of the principles essential to assure that the safeguarding of national security is accomplished within the limits of our constitutional system. Far from giving presumptive weight to constitutional values, the Court accepted the so-called contract as binding without even considering its impact upon the former employee's right to expression or upon the public's right to know, approved almost casually the imposition of a prior restraint, and sanctioned a major restriction upon First Amendment rights subject only to the limitation that it be "reasonable."

Id. See also Cheh, supra note 51, at 713-19; Lewis, supra note 13, at 1695-96; Note, Access to Information, supra note 43, at 441-42.

[206] See Cheh, supra note 51, at 733:

Judicial review to ensure that legislative or executive enactments remain within the parameters of the Constitution is indispensable in the search for leak-plugging reforms. The enactments themselves, however, are political decisions to be made by the political branches of government. Whether the executive or the legislature should be the controlling institution in matters involving national security is a complicated question that unfortunately pervades the issue of leak-plugging.[207]

> [T]he courts have a significant role to play in keeping governmental secrecy within bounds. . . [W]ith respect to the keeping of particular secrets, the courts should review the system of guidelines under which secrecy decisions are made in order to ensure that they do not arbitrarily and unnecessarily deny information to the public or operate to cover up violations of law.

Id; Emerson, supra note 3, at 104:

> [T]he role of the courts is crucial. They start from the traditional position that measures to assure national security must conform to our system of constitutional rights, yet national security factors inevitably affect the way constitutional limitations are applied and hence the issues come before them in a fluid state. Because of the pressures exerted by appeals to national security, the tendency of the government to overstate the dangers, and the likelihood of invoking national security for improper purposes, the courts must be constantly alert to avoid being stampeded. To perform an effective role they must approach claims of the executive and legislative branches with skepticism and firmness and must insist upon principles which force the government to meet exacting standards.

Id. See also Tulsky, supra note 19, at 454-55; Note: The Boland Amendments and Foreign Affairs Deference, 88 Columbia L. Rev. 1534, 1563 (1988) ("[j]udicial scrutiny of executive claims of national security interests is also required to check potential executive aggrandizement in the growth of the national security state.").

For discussion arguing that the judiciary currently is not fulfilling its role with respect to the review of secrecy measures see Edgar & Schmidt, supra note 40, at 353-60; Cheh, supra note 51, at 709. See also infra note 233.

[207] See supra note 199 and accompanying text. For differing views regarding the division of powers in cases involving national security, compare United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) with Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

In *Curtiss-Wright* the Court comments that in the area of foreign affairs "with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . [and] as the sole organ of the federal government in the field of international relations —a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. . . [C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." 299 U.S. at 319-20.

In contrast, the Court states in *Youngstown Sheet & Tube* that, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." 343 U.S. at 587. "A determination that sanctions should be applied, that the hand of the law shall be placed upon the parties, and that the force of the courts should be directed against them is an exercise of legislative

As with most national security matters, the Constitution sheds little light on the allocation of authority issue.[208] The Constitution indicates that national security and foreign affairs matters are within the purview of both political institutions,[209] but the breadth and hierarchy of the respective powers are left unclarified. Correspondingly, the courts have long recognized foreign affairs and national security powers as falling "within a 'zone of twilight' in which the President and Congress share authority or in which its distribution is uncertain."[210]

With respect to the classification of national security information, the Supreme Court recently recognized that the President's "authority to classify and control access to information bearing on national security. . . flows primarily from [the] constitutional investment of power in the President [as Commander in Chief of the Army and Navy] and exists quite apart from any explicit congressional grant."[211] Thus, the executive's authority to make individual secrecy decisions is not grounded on congressional authorization. A fundamental issue remains, however: the extent to which the executive's authority to establish and enforce secrecy can be contained by congressional initiative.

Recent judicial decisions suggest that Congress may have only a limited right to restrict the executive's power to protect national security information. In *Department of the Navy v. Egan*,[212] the Supreme Court stated that the power to protect national security information "falls on the President as head of the Executive Branch

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power. . . We chose to place the legislative power of the Federal Government in the Congress." Id. at 630 (Douglas, J., concurring). See generally, M. Shapiro, supra note 82, at 20-28.

[208] See National Federation of Federal Employees v. United States, 688 F. Supp 671, 685 (D.D.C. 1988)(citing Henkin, Foreign Affairs and the Constitution 16-17 (1972)) ("[n]either political branch is expressly charged by the Constitution with regulating accumulation of or access to national security information.").

[209] See United States v. American Tel. & Tel. Co., 567 F.2d 121 (D.C. Cir. 1977):

> While the Constitution assigns to the President a number of powers relating to national security, including the function of commander in chief and the power to make treaties and appoint Ambassadors, it confers upon Congress other powers equally inseparable from the national security, such as the powers to declare war, raise and support armed forces and, in the case of the Senate, consent to treaties and the appointment of ambassadors.

Id. at 128.

[210] Id.

[211] Department of the Navy v. Egan, 108 S. Ct. 818, 824 (1988).

[212] Id.

and as Commander in Chief."[213] In *National Federation of Federal Employees v. United States*,[214] the United States District Court for the District of Columbia relied on *Egan* in striking down as unconstitutional a congressional resolution which restricted the executive's ability to implement nondisclosure and pre-publication review agreements.[215]

The court noted that, historically, Congress' authority to protect national security information has been limited to enforcing secrecy through the promulgation of civil and criminal sanctions.[216] The court was apparently persuaded by Justice White's commentary in *New York Times Co.* concerning the scope of the executive's secrecy power.[217] In evaluating the government's request for an injunction against publication of the Pentagon Papers, Justice White stated:

> [W]ithout an informed and free press there cannot be an enlightened people. . . . [Yet] [i]n the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.
>
> I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. . . But be that as it may, it is clear to me that it is the constitutional

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[213] Id. at 824.

[214] 688 F. Supp. 671 (D.D.C. 1988).

[215] Id. at 683-85. Section 630 of the Omnibus Continuing Resolution for Fiscal Year 1988, Pub. L. No. 100-202 (Dec. 22, 1987), provided that no funds appropriated for the fiscal year 1988 could be "used to implement or enforce" any nondisclosure agreement which:

> (1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination;
>
> (2) contains the term "classifiable";
>
> (3) directly or indirectly obstructs, by requirement of prior written authorization, limitation of unauthorized disclosure, or otherwise, the rights of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;
>
> (4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress;
>
> (5) imposes any obligations or invokes any remedies inconsistent with statutory law.

688 F. Supp. at 676. See also Treasury Postal Service and General Government Appropriations Act of 1988 Pub. L. No. 100-202, § 630.

[216] 688 F. Supp. at 685.

[217] The court cited White's opinion without elaboration. See 688 F. Supp. at 685.

> duty of the Executive — as a matter of sovereign prerogative and not as a matter of law as the Courts know law — through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.
>
> This is not to say that Congress ha[s] no role to play. Undoubtedly, Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets.[218]

White's analysis suggests that the executive has the sovereign prerogative to enforce confidentiality through executive orders and that Congress' role is limited to the promulgation of civil and criminal laws to enforce secrecy.

This approach, however, seriously undermines congressional authority in national security matters and vitiates Congress' ability to restrain the executive's proclivity for excessive secrecy. It is indeed true that the classification system has been established historically by executive order, and that Congress has expressly recognized the executive's authority to do so.[219] Congressional acquiescence in the area of systemic design, however, does not provide the executive with exclusive authority in such matters. Since 1968, Congress has re-established its substantive authority over many national security decisions which previously had been entrusted completely to executive discretion.[220] Prominent examples of such legislation include the Arms Export Control Act,[221] which requires congressional approval for particular arms sales by the executive, the War Powers Resolution,[222] which requires congressional notification when the executive engages the United States military in hostilities, and congressional approval of the engagement after 60 days, and the Intelligence Oversight Act of 1980,[223] which requires the intelligence agencies to keep congressional oversight committees informed of covert activities. The fact that Congress has historically permitted the executive to establish classification systems and pre-publication re-

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[218] *New York Times*, 403 U.S. at 729-30 (White, J., concurring).

[219] See supra note 39.

[220] See Koh, supra note 58, 1258-73, 1263 n.32; Note: The Boland Amendments and Foreign Affairs Deference, supra note 206, at 1535 n.10.

[221] Pub. L. No. 90-629, 82 Stat. 1320 (1968), codified in 22 U.S.C. 2751 (1981).

[222] Pub. L. No. 93-148, 87 Stat. 555 (1973), codified in 50 U.S.C. §§ 1541-48 (1982).

[223] Pub. L. No. 96-450, § 407, 94 Stat. 1981-82 (1975), codified at 50 U.S.C.§ 413 (1982).

view systems by executive order should not preclude Congress from recovering the authority to promulgate systemic design.

Systemic design is a legislative function, which should not be usurped by executive order. In construing the government's request for an injunction in *New York Times Co.*, Justice Marshall noted that "the Constitution provides that Congress shall make laws, the President execute the laws, and courts interpret laws. . . It did not provide for government by injunction in which the Courts and the Executive Branch can 'make law' without regard to the action of Congress."[224] The same holds true with respect to the executive's ability to design classification and non-disclosure systems through executive order. Executive secrecy orders are tantamount to executive legislation, and the results are clearly injurious to legitimate speech interests.

In establishing secrecy systems by executive order, the executive's proclivity for excessive secrecy is left unchecked at both the point of systemic design and the point of implementation. As long as Congress does not abrogate the executive's right to make the individual secrecy decisions pursuant to a legislated secrecy system, i.e., interfere with the executive's right to implement the law as he or she sees fit, Congress should be allowed to define the systemic parameters within which the executive must operate in making secrecy decisions.[225]

The effective solution to national security leaks lies with congressional legislation and not executive orders or directives. The funda-

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[224] 403 U.S. at 742 (Marshall, J., concurring), citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Thus, in examining the government's promotion of secrecy measures, Justice Marshall espoused the *Youngstown* view of the scope of executive authority. See supra note 207.

[225] Cf. Koh, supra note 58:

> the time is now ripe for a systematic legislative reconsideration of the proper relationship among the President, Congress and the courts in foreign affairs. . . . Congress should make a comprehensive effort to enact a new national security charter. . . . [N]ational security reform efforts should focus not only on restraining executive adventurism, but also on attacking the institutional sources of congressional acquiescence and judicial tolerance that have contributed equally to recent executive excesses.

Id. at 1258. See M. Halperin & D. Hoffman, supra note 16, at 55-57 (Congress should legislate the classification system).

A call for legislative reform does not mean the executive is precluded from acting to promote secrecy absent express congressional authorization. Rather, it means Congress should not be precluded from reasonably restricting executive authority in situations where there is a danger of excessive secrecy. Thus, the executive can engage in systemic design in the face of congressional acquiescence. But executive design can be restricted by congressional involvement.

mental arguments for congressional legislation are twofold. Ironically, the two reflect concerns at opposite ends of the national security/free speech conflict. In one case, national security is endangered by a lack of deference to executive measures. In the other case, legitimate speech interests are threatened by excessive deference to executive measures.

First, congressional legislation is needed to protect national security in light of judicial reluctance to permit certain security measures without prior congressional approval. For example, in the Pentagon Papers case, several justices suggested that the executive's injunction request may have been granted if Congress had expressly authorized prior restraints in the circumstances as presented.[226] Such reluctance to accede to or uphold executive endorsed secrecy measures without prior congressional approval could conceivably result in disclosure of sensitive information that could be prevented otherwise. Second, and more importantly, legislation is the appropriate cure to the leaking problem because Congress is in a better position to weigh reasonably considerations of national security and free speech. Legislation is necessary to prevent executive encroachments on legitimate speech.

The proclivity of the executive branch toward excessive secrecy[227] would suggest that executive measures generally would be overbroad in scope. There is also the inevitable danger that executive measures will be designed to further the interests of the administration, rather than the interests of the nation.[228] In contrast, congressional deliberation would more likely focus solely on the best interests of the nation and would unequivocally produce measures that would prohibit the excessive use of secrecy by the executive.[229] In other words, Congress is in a better position to balance effectively the interests of free speech and national security. The issue is one where earnest open debate and lengthy deliberation will result in efficient resolution. Once Congress has promulgated a leak-plugging

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[226] 403 U.S. at 731-32 (White, J., Stewart, J., concurring), 742-43 (Marshall, J., concurring).

[227] See supra notes 39-43 and accompanying text.

[228] See supra notes 43-48 and accompanying text.

[229] See Tulsky, supra note 19, at 454 (congressional action is "more consistent with the notion of representative democracy" than presidential action alone, because the "varying interests of the people are more likely to have an audible voice in Congress").

system, execution thereof, i.e., the enforcement of sanctions or application of restraints, will be the responsibility of the executive branch, with all actions subject to judicial or independent review as discussed previously.[230] Systemic design, however, is best addressed by Congress.

Some have argued that these considerations should compel the judiciary to abrogate any executive secrecy measures lacking congressional approval.[231] Though the underlying preference for legislated measures is sound, it is not immediately obvious that all executive measures should fail unless sanctioned by Congress. The problem is not necessarily the absence of on-point congressional legislation itself, but rather the danger that the judiciary will defer without question to executive judgment absent a cognizable congressional position. Arguably, free speech interests would be protected from executive encroachment if the judiciary applied traditional strict constitutional review of proposed measures. Ostensibly, such review would abrogate any executive measures that threaten speech deserving protection.

In reality, however, the judiciary may feel compelled to be excessively deferential to the executive, absent direct congressional action, because of the political nature of the decisions.[232] Indeed, scholars have argued that, since the Vietnam era, the judiciary has been excessively deferential to executive leak-plugging proposals and has abdicated its duty of strict review.[233] Moreover, ad hoc decisions by

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[230] See supra notes 138-41, 205-06 and accompanying text. Congressional promulgation of comprehensive systemic reform in the area of government secrecy may in fact allow the judiciary to be less deferential to executive secrecy claims, as the proper scope of executive discretion would be more clearly defined for the courts. Cf. Koh, supra note 58, at 1337 ("legislative clarification of the substantive rules of foreign affairs law would encourage courts to speak more frequently to the merits of foreign affairs claims" since "[t]hose rules would serve as lines against which both congressional and executive actors could evaluate the legality of proposed presidential conduct.").

[231] See, e.g., Cheh, supra note 51, at 733 ("[t]he courts must insist that Congress specifically approve all executive secrecy actions, such as prepublication review, that significantly diminish individual rights of free expression or seriously curtail public access to governmental information."); Edgar & Schmidt, supra note 40, at 354-55 ("the fact that first amendment concerns permeate the area of national security secrecy should cause the Supreme Court to insist on a clear statutory statement as the predicate for any exercise of executive power that trenches on constitutionally protected liberties.").

[232] See supra notes 202-04 and accompanying text. See also *Egan*, 108 S. Ct. at 825 ("unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.").

[233] See, e.g., Edgar & Schmidt, supra note 40, at 353. ("[s]ince *Pentagon Papers*, the Supreme

the judiciary rendered pursuant to executive secrecy claims are not an efficient means for establishing a broad and coherent system for maintaining the secrecy of classified information. A judicial holding is extremely fact specific and will frequently fail to provide individuals or the media with an adequate basis for evaluating a priori the consequences of an unauthorized disclosure or publication.[234]

The solution, of course, is for Congress to promulgate comprehensive leak-plugging reform which would define the parameters of acceptable executive action. Congress has been reluctant to do so, however, and has approached the issue in piecemeal fashion, often reacting to specific executive proposals rather than initiating its own.[235] Unequivocally, leaking is a serious problem implicating fundamental national security and first amendment interests. Congress should deliberate on the appropriate balancing of interests and enact comprehensive reform that reaches all aspects of the issue. "Protection of defense secrets is too complex to be handled by ad hoc amendment of executive branch proposals."[236]

Court has consistently upheld executive power as a matter of result, even as it adheres to congressional dominance as a matter of rhetoric."); Cheh, supra note 51, at 717 ("[i]f congressional silence or the most general grant of power, such as the CIA charter or statutes establishing standards of employee conduct, delegates such power to the Executive, then nothing short of actual [congressional] disapproval will negate it."); Sofaer, supra note 24, at 53 ("[t]he federal courts have been too prepared to accept executive claims based on national security needs."); Koh, supra note 58, at 1306 ("[t]hrough both action and inaction, the federal courts have consistently upheld the President's authority to dominate the foreign affairs arena. . . . [T]he net effect of the federal courts' actions has been to all but dismantle the *Youngstown* vision of the National Security Constitution. . . . In its place the courts have begun to impress upon the foreign policy process a *Curtiss-Wright* vision that tips the scales dramatically in favor of executive power."); Lewis, supra note 13, at 1695-1701 (criticizing the *Snepp* and *Morison* decisions). See also *Haig*, 453 U.S. at 319 (Brennan, J., dissenting) ("[t]he Constitution allocates the lawmaking function to Congress, and I fear that today's decision has handed over too much of that function to the Executive.").

[234] The *Morison* decision exemplifies the problems inherent in allowing the judiciary to evaluate executive secrecy claims which are not based on clear congressional authorization. First, it is doubtful that Morison realized the ultimate consequences of his disclosure as the Espionage Act had never been successfully used before against a leaker. See Lewis, supra note 13, at 1701. Second, the exact scope of the Espionage Act with respect to leaks remains extremely unclear even after *Morison*. See supra note 13. Recognizing that "jury instructions on a case-by-case basis are a slender reed upon which to rely for constitutional application", Judge Philips observed that "carefully drawn legislation" undoubtedly would "provide the better long term resolution." *Morison*, 844 F.2d at 1086 (Philips, J., concurring).

[235] See Edgar & Schmidt, supra note 40, at 406 ("Congress has. . . simply modified certain executive proposals and enacted others almost unaltered; in some cases Congress has approved only part of an integrated package of legislation which is virtually meaningless when severed from the whole.").

[236] Id. Professor Koh argues similarly that a comprehensive legislative solution, in the form of a national security charter, is needed to define in general the proper scope of executive discretion in national security and foreign affairs matters. See Koh, supra note 58, at 1318-43. He asserts that

Ostensibly, such legislation would include the use of some administrative pre-clearance programs (such as the CIA's pre-publication review scheme), some narrowly tailored legal injunctions, administrative sanctions, and some forms of criminal sanctions. The current pervasiveness of leaking indicates that the threat of administrative sanctions alone does not provide sufficient deterrence. Such sanctions are also of no utility against former government employees who leak sensitive information.

A four-tiered leak-plugging system reflecting the aims and principles detailed in this note would effectively diminish the occurrence of harmful leaks. The use of administrative sanctions would be supplemented by the limited application of pre-publication review, legal injunctions, and criminal sanctions. Pre-publication review programs would target inadvertent leaks of sensitive information. Legal injunctions would enjoin potential publishers of sensitive information in the infrequent situations where the government has advance notice of imminent and exceedingly dangerous intentional disclosure. Finally, criminal sanctions would provide deterrence against intentional leaks of extremely sensitive information, including those by former employees. The balancing of interest decisions and line-drawing problems inherent in the enactment of such a comprehensive system are best addressed, however, by Congress, not the Executive.

IV. Conclusion: Putting the Pieces Together

The leaking of classified national security information is an intractable problem with no easy solution. Any proposal to increase national security secrecy implicates fundamental first amendment interests and may contravene the mores of democracy. Leaks are not harmful per se due to the pervasive overclassification of information. And some leaks actually enhance public debate of national issues and preserve the accountability of government officials.

Notwithstanding these considerations, leaking in general is a serious problem in need of remedial attention. Though some leaks fur-

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"[w]ithout such a regulatory strategy, interstitial efforts to amend particular foreign affairs law will inevitably fail, serving only to push executive conduct toward new statutory lacunae and pockets of unregulated activity." Id. at 1321.

ther democratic interests, others seriously threaten the nation's interests by impeding or prohibiting the planning or execution of national security policy. Accordingly, leak-curbing reforms must reflect a proper balancing of free speech and national security interests. Any system designed to prevent unauthorized disclosure of classified information should attempt to erradicate harmful leaks without seriously curtailing leaks beneficial to democracy.

The current absence of a coherent and satisfactory national approach to sensitive security leaks attests to the difficulty of resolving the problem. Nevertheless, steps can be taken toward a leak-plugging system that effectively balances the nation's conflicting interests. Unequivocally, official secrets legislation would be incompatible with the first amendment and would deter legitimate and valuable speech. Classification reform, however, would be an important first step toward resolving the problem. Popular perception that the classification system is overused and a worthless indicator of the harm posed by disclosure generates an atmosphere conducive to leaking. Congress should enact measures designed to add certainty and reliability to the classification system.

Classification reform, however, would not enable the government to use the classification system as a basis for imposing prior restraints or criminal sanctions on leakers and publishers. Reform would not defeat the objections to adoption of official secrets legislation or a variation thereof. The ultimate decision to classify a specific piece of information is the prerogative of the executive. Given the executive's proclivity for secrecy, there is an inherent tendency for overbroad application of any classification system. Moreover, the confidentiality of particular information will often facilitate efficient policy deliberation between executive departments, although the disclosure of such information may not seriously threaten national security. In other words, much national security information is of the nature that public access should not be guaranteed; however, the danger resulting from disclosure is not so serious that special measures like legal injunctions or criminal sanctions are warranted. Allowing the broad application of draconian secrecy measures will chill beneficial disclosures.

The key to devising a satisfactory leak-plugging system is comprehensive congressional legislation. Ideally, Congress should deliberate on the appropriate balancing of security and speech interests

and promulgate legislation encompassing all facets of speech control. The scope of each leak-plugging measure will vary depending on the first amendment implications of each.

Though systemic design is the legislative domain of Congress, the judiciary must strictly review design and procedure to ensure that all measures and the applications thereof are legitimate under the Constitution. For example, heightened secrecy measures, like prepublication review or criminal sanctions, should be abrogated in circumstances where the threat to speech interests is clearly greater than the threat to national security. Also, Congress should establish an independent commission to supplement judicial review of actual secrecy decisions by executive officials.

Furthermore, leak-plugging measures should focus primarily on the leaker, in light of the moral considerations and administrative difficulties of imposing restrictions or sanctions against the media. Sanctions against the media are often ineffective and are harder to justify since the media is often unaware of the true danger posed by disclosure. In addition, the difficulty of preventing overexpansive interference by the government generally precludes the use of media controls. Leak-plugging measures should target the party in the best position to know that disclosure is harmful and culpable, i.e., the leaker. Leakers of sensitive information should not be permitted to act with impunity.

In sum, the plugging of national security leaks is a complex and difficult issue. Any leak-plugging system, whether comprehensive in scope or not, must distinguish between leaks that promote national interests and leaks that harm national interests. Only the latter should be deterred. Granted, the task of categorizing leaks is onerous, but it is not insurmountable. By relying on a system of presumptions as discussed in this note, legislation can reflect a meritorious balancing of the nation's conflicting needs for security and free speech. The most important step toward effective resolution is immediate action by Congress. The current confidentiality system is plagued by an atmosphere of confusion and uncertainty; and anarchy fuels the occurrence of leaks. Congress should act soon in the nation's best interests by promulgating comprehensive legislation with respect to national security leaks.

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