South Carolina Law Review

Volume 43 | Issue 3 Article 6

Spring 1992

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UNITED STATES v. MORISON: A THREAT TO THE FIRST AMENDMENT RIGHT TO PUBLISH NATIONAL SECURITY INFORMATION

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> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."—James Madison[1]

The Supreme Court[2] and First Amendment scholars[3] frequently have articulated the importance of a well-informed public. Support for a broad First Amendment, however, begins to evaporate at the mention of the words national security. Many of the same justices and academics who support a virtually absolute right of access to, and publication of, information in most contexts are quick to point out that their reasoning should not apply to situations in which disclosure might jeopardize national survival.[4]

This Note argues that the First Amendment should be given greater weight when it is balanced against national security claims of secrecy. The status quo creates a strong presumption in favor of secrecy that should be altered to create a presumption in favor of openness. Indeed, by increasing public dissemination of national security

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* B.A. 1988, Cornell University; J.D. 1992, Yale Law School. The author wishes to thank Doug Fraleigh, Burke Marshall, and Pam Stepp for their help in developing this idea.

1. Board of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality) (quoting 9 WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910)).

2. *E.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 30 (1978) (Stevens, J., dissenting); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975); Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940).

3. *E.g.*, ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1920); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

4. James A. Goldston et al., Comment, *A Nation Less Secure: Diminished Public Access to Information*, 21 HARV. C.R.-C.L. L. REV. 409, 440-43 (1986); *see, e.g.*, Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 849 & n.* (1978) (Stewart, J., concurring); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 58-59 (1970).

information, the nation actually may be made more secure.[5]

Part I examines two of the areas in which national security secrecy clashes with the First Amendment interest in openness: The right of access to national security information[6] and the prosecution of the media for publication of classified documents. Part II analyzes this clash and concludes that the status quo tilts too far in the direction of secrecy. Part III analyzes how First Amendment theory can provide a solution to this clash. Part IV offers specific proposals for reform that are consistent with this analysis.

I. The Current System: Denying Access and Threatening Prosecution

The executive branch can attempt to prevent the disclosure of national security information in two different ways. First, it can use classification procedures to deny journalists access to specific information. If that option fails, as a result of leaks or inadequate security procedures, and information does manage to reach the media, the government can attempt to prosecute the press for violating statutes that restrict publication of national security information.[7] These two tools combine to give the executive branch enormous control over press, and consequently public, access to what our government is doing in the field of national security.

A. Using Classification to Deny Access

1. The Statutes

The current system of access and classification of national security information is governed by the Freedom of Information Act[8] (FOIA)

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5. Goldston, *supra* note 4, at 449-56.

6. For a discussion of the theory behind this implied right, see *id.* at 444-49.

7. This Note does not examine a third important area: The issue of publication by government employees. *See* Snepp v. United States, 444 U.S. 507 (1980) (per curiam); United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

The right of government employees to publish national security information partially overlaps with the issue of overclassification, which is dealt with in this Note, because broader employee rights would increase the amount of information that could reach the public domain. However, that issue also involves separate considerations, such as the validity of employment contracts that waive an individual's First Amendment rights by requiring prepublication review. Moreover, even if the status quo unduly restricts access to information, it does not follow that government employees should therefore be given unlimited rights to violate those rules.

8. 5 U.S.C. § 552 (1988).

and Executive Order 12,356[9] and strongly favors secrecy. Congress enacted FOIA in 1966[10] to increase public access to government information, and although the law provides for broad public access to a great deal of government information, it also contains nine exemptions.[11] The first of these exemptions effectively eliminates access to national security information under FOIA by providing that any information the Executive chooses to keep "secret in the interest of national defense or foreign policy" is not subject to the FOIA disclosure provisions.[12] The statute delegates to the executive branch the decision of what information should be classified and remain secret.

In 1982 President Reagan implemented Executive Order 12,356, the current executive order that applies to the exemption in the interest of national defense or foreign policy. The order creates three levels of classification: Top Secret, Secret, and Confidential,[13] and the level of classification given to a particular document depends on whether disclosure would be expected to cause "exceptionally grave damage," "serious damage," or "damage" to national security.[14]

An examination of the current use of classification procedures reveals the broad scope of the administration's authority in this area. In 1988 government agencies classified 2,508,693 documents.[15] The agencies labeled one percent "Top Secret" and thirty-one percent "Secret."[16] 6,654 individuals have authority to classify information.[17] In 1988 the Department of Defense classified 85.4% of the information, the CIA classified 3.1%, and the State Department classified 8.3%.[18]

Indeed, Executive Order 12,356 specifically authorizes overclassification: "If there is a reasonable doubt about the need to classify information, it shall be safeguarded . . . . If there is reasonable doubt about the appropriate level of classification, it shall be safeguarded at the

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9. Exec. Order No. 12,356, 3 C.F.R. 166 (1983), *reprinted in* 50 U.S.C. § 401 (1988) [hereinafter Exec. Order].

10. Act of Sept. 6, 1966, Pub. L. No. 89-554, § 552, 80 Stat. 378, 383 (current version at 5 U.S.C. § 552 (1988)).

11. *See* 5 U.S.C. § 552(b)(1)-(9) (1988).

12. *Id.* § 552(b)(1)(A). The third exemption also is relevant. It provides an exception for information "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." *Id.* § 552(b)(3).

13. Exec. Order, *supra* note 9, § 1.1.

14. *Id.* § 1.1(a)(1)-(3).

15. INFORMATION SECURITY OVERSIGHT OFFICE, 1988 ANNUAL REPORT TO THE PRESIDENT 6 (1989).

16. *Id.* at 7.

17. *Id.* at 5.

18. *Id.* at 7 exhibit 5.

higher level of classification . . . ."[19] Although the provision requires that the appropriate government agency review an overclassification decision within thirty days,[20] "[t]he message to officials will be clear: When in doubt, classify."[21]

Executive Order 12,356 also eliminates any balancing of First Amendment interests with national security interests.[22] Classifiers are not instructed to take into account whether a particular piece of information would be beneficial to the public's right to know. Instead, once the government identifies a national security justification, it may classify the information and automatically remove it from public or media access even if the risk posed by disclosure is minimal.

Consequently, "[b]ecause the executive branch both establishes the criteria for classification and performs the actual classification of such information, the FOIA national security exception is not so much an exemption as it is a license to withhold."[23] Indeed, the Executive even appoints the staff of the Information Security Oversight Office, which implements and monitors the classification procedures.[24] Congress, through FOIA's first exemption, therefore delegated all classification decisions to the executive branch[25] and created a system in which the goal of public access, which led to the creation of FOIA, does not apply in the national security context.

2. *The Role of the Courts*

Although judicial oversight would appear to offer a potential check on overclassification, the courts have refused to exercise such oversight. FOIA allows citizens to challenge a denial of a request for information in federal court, and "[i]n such a case the court shall determine the matter de novo, and may examine" the records and affidavits, in camera if necessary, to determine if the decision to withhold falls within

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19. Exec. Order, *supra* note 9, § 1.1(c).

20. *Id.*

21. *Executive Order on Security Classification: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 97th Cong., 2d Sess. 3 (1982) (statement of Mary M. Cheh, Law Professor, George Washington University) [hereinafter *Hearings*]; *accord id.* at 50 (statement of Dr. Morton H. Halperin, Center for National Security Studies); *id.* at 88 (statement of Charles S. Rowe, American Newspaper Publishers Association); *id.* at 98 (statement of Bob Schieffer, CBS News).

22. *Id.* at 50 (statement of Dr. Morton H. Halperin); *id.* at 87 (statement of Charles S. Rowe).

23. Mary M. 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, 690-91 (1984) (footnote omitted).

24. Exec. Order, *supra* note 9, § 5.2(a).

25. 5 U.S.C. § 552(b) (1988).

one of the nine exemptions of FOIA.[26] Nevertheless, courts consistently have deferred to the judgment of government agencies when the national security exemption is raised.[27]

In *EPA v. Mink*,[28] for example, members of Congress sued the Environmental Protection Agency under FOIA to obtain documents concerning underground nuclear testing. The Court held that when the Executive invokes the first exemption of FOIA, no citizen can challenge the classification decision. Rather, "the test [i]s to be simply whether the President has determined by Executive Order that particular documents are to be kept secret."[29] The court reasoned that de novo review was only for the purpose of determining whether the government actually had classified a particular piece of information pursuant to an executive order, not for determining the legitimacy of a particular classification. The Court explained that Congress could have tightened the rules if it had intended to do so,[30] but because FOIA allows an executive order to control the classification of documents, the courts should give strong deference to all executive decisions in the area.[31]

The Court adopted similar reasoning in *CIA v. Sims*,[32] which involved a private citizen's suit to compel a FOIA disclosure of the names of researchers and institutions participating in a CIA project. The CIA asserted the defense of section 102(d)(3) of the National Security Act of 1947.[33] Congress incorporated this exemption, which protects intelligence sources, into the third exemption of FOIA.[34] As in *Mink*, the Court stated that the courts should not evaluate the merits of national security classifications. "[I]t is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors" in determining what constitutes proper classification.[35] Yet as Justice Marshall's concurring opinion recognized, the decision created a "boundless" class of information that the Court would not examine to determine the appropriateness of the classification.[36]

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26. *Id.* § 552(a)(4)(B).

27. Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. PITT. L. REV. 753, 760-61 (1988).

28. 410 U.S. 73 (1973).

29. *Id.* at 82.

30. *See id.* at 83-84.

31. *Id.* at 82-84.

32. 471 U.S. 159 (1985).

33. Pub. L. No. 80-253, 61 Stat. 498.

34. *Sims*, 471 U.S. at 168-73 (construing 5 U.S.C. § 552(b)(3)).

35. *Id.* at 180.

36. *Id.* at 191 (Marshall, J., concurring).

It is apparent that Congress and the judiciary have withdrawn from the process of classifying national security information. Consequently, the executive branch has carte blanche in this area.[37] Professors Edgar and Schmidt recognized the danger of this abdication of responsibility in a 1986 article in which they noted that good reason exists "to doubt the wisdom of allowing the fox to define the parameters of—not to mention guard—the chicken coop."[38]

B. Creating the Threat of Prosecution to Deter Publication

Not surprisingly, the government cannot control all of the more than two million pieces of information that it classifies every year. Various agencies and individuals frequently leak classified information to the media both to support and to oppose administration policies.[39] In addition, sometimes the government classifies information that already exists in the public domain.[40] Nevertheless, once classified information has reached the media, the government has statutory authorization to prosecute the media for violating national security statutes. Although the government rarely uses these statutes, there is increasing interest in the possibility of such prosecutions.

1. New York Times Co. v. United States: *Opening the Door*

The 1971 case of *New York Times Co. v. United States*[41] initially seemed to vindicate the media's right to publish national security information when the Court held that the government had not met its burden of justifying the need for a prior restraint to block publication of the Pentagon Papers.[42] The decision was an immediate victory for the press because it permitted publication of classified material despite the government's claim that publication " 'could clearly result in great harm to the nation.' "[43]

Six of the nine Justices suggested, however, that the government might be able to prosecute the *New York Times* and the *Washington*

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37. *See* EPA v. Mink, 410 U.S. 73, 110 (1973) (Douglas, J., dissenting).

38. Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 354 (1986).

39. *See infra* text accompanying notes 130, 136-39.

40. *See infra* notes 111-26 and accompanying text.

41. 403 U.S. 713 (1971) (6-3 decision) (per curiam).

42. *Id.* at 714.

43. *Id.* at 762 (Blackmun, J., dissenting) (quoting United States v. Washington Post Co., 446 F.2d 1327, 1330 (D.C. Cir.) (per curiam) (Wilkey, J., dissenting), *aff'd sub nom.* New York Times Co. v. United States, 403 U.S. 713 (1971)).

Post for violating the Espionage Act,[44] even if the government could not enjoin the publication of the Pentagon Papers. Justice White, joined by Justice Stewart, said in a concurring opinion that he "would have no difficulty in sustaining convictions under [the Espionage Act] on facts that would not justify the intervention of equity and the imposition of a prior restraint."[45] Justice Marshall's concurrence noted that several statutes permit subsequent prosecution for publication, but that no congressional authorization existed for issuing a prior restraint.[46] The combination of these three opinions with the three dissenting Justices, who were willing to issue the injunction, meant that a majority of the Court had "volunteered readings of the espionage statutes in relation to hypothetical criminal proceedings against the publishers, reporters and information sources involved, even though such questions had not been briefed, were dreadfully difficult, and were quite unnecessary to a ruling about the injunction."[47]

The Court primarily based its decision in favor of the press on two factors. First, no statutory authorization empowered the government to seek a prior restraint.[48] Second, the Court created a strong presumption against prior restraints on publication and held that the government did not prove enough of a risk to national security to overcome that presumption.[49] Thus, the Court did not say that the media is free from restrictions on publishing national security information during

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44. 18 U.S.C. § 793(e) is the most applicable statute and is the one that Justice White cited. *New York Times*, 403 U.S. at 737 (White, J., concurring). The section reads:

> Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . .

18 U.S.C. § 793(e) (1988).

45. *New York Times*, 403 U.S. at 737 (White, J., concurring). Justice White also wrote that 18 U.S.C. §§ 797-798 could apply. *Id.* at 735-37.

46. *Id.* at 743-48 (Marshall, J., concurring).

47. Edgar & Schmidt, *supra* note 38, at 361 (footnote omitted).

48. *See New York Times*, 403 U.S. at 718 (Black, J., concurring); *see also*, Blasi, *supra* note 3, at 644 & n.403 (noting that no general criminal act exists that covers disclosure).

49. *New York Times*, 403 U.S. at 725-27 (Brennan, J., concurring) (stating that only proof that publication would jeopardize safety during time of war overrides the First Amendment's absolute bar of prior judicial restraints). In fact, this second rationale was the starting point of the Court's analysis. *Id.* at 714.

peace time. Instead, the Court said that in this particular case the facts did not warrant issuing an injunction. If instead the executive branch had sought criminal prosecution and had congressional authorization to do so, it probably could prosecute without violating the First Amendment.

Indeed, after losing *New York Times*, the government took the Court's advice and attempted to prosecute Daniel Ellsberg and Anthony Russo for their role in disclosing the Pentagon Papers to the *New York Times*.[50] A lower court dismissed the case, though, because of extreme governmental misconduct, "including the suppression of evidence, the invasion of the physician-patient relationship, the illegal wiretapping, the destruction of relevant documents and disobedience to judicial orders."[51] Consequently, the judge did not rule on the First Amendment issue of whether the government could prosecute the press for publishing classified materials.

Professor Nimmer contended at the time that "[t]he specter of Ellsberg hangs over government officials, newsmen, and others who may in the future wish to disclose to the public vital governmental documents."[52] At the very least, the Pentagon Papers case and subsequent prosecution of Ellsberg and Russo left two questions unanswered. First, would the Espionage Act permit the prosecution of a member of the media? Second, would a more narrowly constructed statute permit such a prosecution even if the Espionage Act did not?

2. United States v. Progressive, Inc.: *Prosecuting the Press for Violating Specific Statutes*

Pursuant to the third exemption of FOIA,[53] the government also may exempt from disclosure any information specifically exempted from disclosure by another statute. In *United States v. Progressive, Inc.*[54] the government sought a preliminary injunction against the *Progressive* to prevent the magazine from publishing the formula for building an atomic bomb.[55] The court issued the preliminary injunction because the article contained classified information[56] under sec-

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50. United States v. Russo, No. 9373-(WMB)-(1)-(filed Dec. 29, 1971), *dismissed* (C.D. Cal. May 11, 1973).

51. Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311, 311 (1974).

52. *Id.* at 312.

53. 5 U.S.C. § 552(b)(3) (1988).

54. 467 F. Supp. 990 (W.D. Wis.) (mem.), *dismissed*, 610 F.2d 819 (7th Cir. 1979).

55. *Id.* at 991.

56. *Progressive*, 467 F. Supp. at 1000.

tion 2274(b) of the Atomic Energy Act.[57]

After obtaining an injunction from a federal district court, the government was preparing to argue the appeal by the magazine when once again outside factors prevented a full resolution of the legal issues involved. Another magazine published the same information before the Seventh Circuit could hear the appeal and the issue became moot.[58]

It is unfortunate that the issue was not heard on appeal because *Progressive* presented a much better test case for evaluating prosecutions of the media than *New York Times* or the Ellsberg and Russo prosecutions. In *Progressive* a congressionally enacted statute authorized the government's request for a prior restraint.[59] Moreover, the possible danger to national security also appeared much more compelling. In *New York Times* the court dealt with the publication of materials concerning events that were at least three years old, but in *Progressive* "[a] mistake in ruling against the United States could [have] pave[d] the way for thermonuclear annihilation."[60] Thus, while in *New York Times* the government's motivation for blocking the publication of the Pentagon Papers might have been to avoid political embarrassment, in *Progressive* the government's sole purpose appeared to be to prevent the widespread availability of atomic technology.

In 1982 Congress enacted the Intelligence Identities Protection Act.[61] Like the provision of the Atomic Energy Act covering publication, Congress drafted this law much more narrowly than the Espionage Act. The Intelligence Identities Protection Act was a response to the actions of Philip Agee and Louis Wolf, who published the names of CIA agents in their magazines *CounterSpy* and *Covert Action Information Bulletin.*[62] On its surface the Act also appears much more reasonable than the government's claim in *New York Times.* Publication of CIA agents' names could put their lives as well as the United States national security in jeopardy. There certainly would seem to be a much more compelling First Amendment interest in understanding why the United States became involved in the Vietnam War than in knowing the names of our spies.[63] Nonetheless, the government has never in-

57. 42 U.S.C. § 2274(b) (1988).

58. Laura J. Holland, Note, *Private International Broadcasting from the United States: Toward an Understanding of a Content Standard*, 18 N.C. J. INT'L L. & COM. REG. 105, 129-30 (1987).

59. Stanley Godofsky & Howard M. Rogatnick, *Prior Restraints: The Pentagon Papers Case Revisited*, 18 CUMB. L. REV. 527, 541 n.63 (1988).

60. *Progressive*, 467 F. Supp. at 996.

61. Pub. L. No. 97-200, 96 Stat. 122 (codified at 50 U.S.C. §§ 421-426 (1988)).

62. Robert W. Bivens, Note, *Silencing the Name Droppers: The Intelligence Identities Protection Act of 1982*, 36 U. FLA. L. REV. 841, 843-44 (1984).

63. Later, this Note contends that this point may not always be true. *See infra*

dicted a person for a violation of the Intelligence Identities Protection Act.

3. United States v. Morison[64]: *The First Media Related Conviction for Violating the Espionage Act*

The 1988 conviction of Samuel Morison for violating sections 793(d) and (e) of the Espionage Act[65] marked the first successful prosecution for a violation of the Act that involved the media. The only other attempt by the government to prosecute members of the media under the Act was the unsuccessful prosecutions of Ellsberg and Russo for publication of the Pentagon Papers. Previously, all other prosecutions under the Act had been for providing documents or information to an agent of a foreign government.[66]

Morison was an employee at the Naval Intelligence Support Center (NISC) from 1974 to 1984. While working at NISC, Morrison did off-duty work for *Jane's Fighting Ships*, a British publication. His superiors at NISC had approved of the arrangement as long as Morison did not violate any security requirements.[67]

In 1984 Morison provided a related magazine, *Jane's Defence Weekly*, with photographs produced by a KH-11 reconnaissance satellite of a Soviet aircraft carrier under construction.[68] The government claimed that, although the Soviets already had access to some KH-11 photographs, Morison's leak confirmed the satellite's capability. When the police searched Morison's house after his arrest, they found secret NISC intelligence reports. Although he had not yet given them to anyone, Morison was not authorized to remove those documents from the agency's offices.[69] The district court convicted Morison for both the distribution of the photographs to *Jane's Defence Weekly* and for the illegal possession of the intelligence reports.[70]

Morison's conviction raises an obvious issue concerning the erosion of First Amendment rights by prosecuting individuals who leak to the

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notes 117-19 and accompanying text. Knowing if the United States has intelligence operatives in Nicaragua or Israel, for example, would have significant public policy implications and would not simply be a technical detail.

64. 844 F.2d 1057 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988).

65. 18 U.S.C. § 793(d)-(e) (1988).

66. *Morison*, 844 F.2d at 1066-67 (plurality).

67. *Id.* at 1060.

68. *Id.* at 1061.

69. *See id.* at 1061-62.

70. The Fourth Circuit upheld Morison's conviction for violating the Espionage Act, 18 U.S.C. § 793(d)-(e) (1988), and for violating 18 U.S.C. § 641 (1988), which prohibits the stealing of government documents. *Morison*, 844 F.2d at 1060 (plurality).

press. Several commentators have, in fact, analyzed the balance between the government's interest in deterring leakers and the media's interest in receiving information from leakers.[71]

Morison, however, also raises a second First Amendment issue. The government also could use the interpretation of the Espionage Act that led to Morison's conviction to prosecute members of the press for publishing classified information. Section 793(e), under which Morison was convicted, applies to anyone "having unauthorized possession of . . . information relating to the national defense [who] willfully communicates" that information.[72] Technically, whenever the media publishes classified information, it is violating this law.[73] Indeed, the court in *Morison* quoted a long passage from *Branzburg v. Hayes*[74] in which the Supreme Court had stated that the First Amendment does not permit a " 'reporter or his news sources to violate valid criminal laws.' "[75]

Morison generated a limited amount of commentary by the press about potential prosecutions.[76] A number of newspapers filed an amicus curiae brief with the Fourth Circuit and contended that the decision could "expose the press and its sources to criminal sanctions, regardless of whether any injury to the United States is intended or likely to result."[77] The approach of the *Morison* court appears to have left this possibility open.

The media is not, however, the only group to notice the possibility of prosecuting journalists under the Espionage Act. A similar finding was reached by a Presidential Commission that studied the problems of excessive government leaking and in 1982 reported their findings in *The Willard Report*.[78] The Commission analyzed laws that could be

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71. *See* Edgar & Schmidt, *supra* note 38; Goldston, *supra* note 4; Jereen Trudell, Note, *The Constitutionality of Section 793 of the Espionage Act and Its Application to Press Leaks*, 33 WAYNE L. REV. 205 (1986).

72. 18 U.S.C. § 793(e) (1988).

73. *See* Philip Weiss, *The Quiet Coup:* U.S. v. Morison: *A Victory for Secret Government*, HARPERS, Sept. 1989, at 54, 61 (arguing that members of the media have mistakenly ignored the danger of prosecution after *Morison*).

74. 408 U.S. 665 (1972).

75. United States v. Morison, 844 F.2d 1057, 1068 (4th Cir.) (quoting *Branzburg*, 408 U.S. at 691), *cert. denied*, 488 U.S. 908 (1988).

76. *See* Steven Burkholder, *The* Morison *Case: The Leaker as "Spy," in* FREEDOM AT RISK: SECRECY, CENSORSHIP, AND REPRESSION IN THE 1980'S 117, 117-19 (Richard O. Curry ed., 1988); Weiss, *supra* note 73, at 61.

77. Brief for Amici Curiae, Washington Post et. al., at 11, United States v. Morison, 844 F.2d 1057 (4th Cir.) (No. 86-5008), *cert. denied*, 488 U.S. 908 (1988).

78. *See Presidential Directive on the Use of Polygraphs and Prepublication Review: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong, 1st & 2d Sess. 166 (1985) (reprinting in appendix 2 a copy of *The Willard Report: Report of the Interdepartmental Group on Unauthorized Disclosures of Classified Information-March 31, 1982*).

used to block the dissemination of government information and concluded that the Espionage Act "could also be used to prosecute a journalist who knowingly receives and publishes classified documents or information."[79]

Of course, the probability of an administration choosing to prosecute a major newspaper or network for a violation of the Espionage Act may not be very high. As a concurring opinion in *Morison* stated: "[T]he political firestorm that would follow prosecution of one who exposed an administration's own ineptitude would make such prosecutions a rare and unrealistic prospect."[80] On the other hand, the mere threat of such a prosecution might be intimidating enough to cause a journalist not to publish information, rather than challenging the statute in court.

On at least one occasion, in fact, the threat of publication has been used to deter a major newspaper from publishing national security information. In May of 1986 Ronald W. Pelton, a former National Security Agency (NSA) employee, was tried for espionage as a result of allegations that he had provided classified information to the Soviet Union. The *Washington Post* learned that the information Pelton had sold concerned one of the NSA's top-secret projects in which American submarines were eavesdropping inside Soviet harbors. When the CIA became aware of the *Post*'s knowledge, William Casey, Director of the CIA, told two editors of the paper that he would recommend prosecution of the paper if it published the story,[81] and President Reagan called Katherine Graham, Chairwoman of the *Post*, to repeat the warning. As a result of these threats, the *Post* delayed publication of the story for over two weeks.

In the interim NBC broadcast the story and the threat against the *Post* became moot. The CIA threatened to prosecute NBC reporter James Polk, but in the end did not.[82] Nevertheless, the threat of a prosecution under the Espionage Act delayed the newspaper story for two weeks, and the story possibly would have been kept from the public indefinitely if NBC had not disclosed the information.

Ultimately, the validity of the laws that restrict publication or broadcast of national security information are uncertain and untested. The Espionage Act, as well as more specific statutes, and the government's interpretation of the Act seem to authorize prosecution of jour-

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79. *Id.* at 172.

80. *Morison*, 844 F.2d at 1084 (Wilkinson, J., concurring).

81. *See* Stephen Engleberg, *C.I.A. Director Requests Inquiry on NBC Report*, N.Y. TIMES, May 20, 1986, at A17.

82. *See* ELIE ABEL, LEAKING: WHO DOES IT? WHO BENEFITS? AT WHAT COST? 49-51 (1987).

nalists who publish national security information, but the scope of that authority remains in doubt. Anthony Lapham, general counsel of the CIA, explained the effects of this confusion in 1979 Congressional hearings.

> We have then, at least in my opinion, the worst of both worlds. On the one hand the laws stand idle and are not enforced at least in part because their meaning is so obscure, and on the other hand it is likely that the very obscurity of these laws serves to deter perfectly legitimate expression and debate by persons who must be as unsure of their liabilities as I am unsure of their obligations.[83]

II. The Need for a Better Balancing of First Amendment and National Security Interests

Part I of this Note examined the current framework of national security laws and concluded that it creates a strong presumption in favor of secrecy. This Part analyzes the effects of this presumption and concludes that the current system fails to provide enough information to the public.

A. The Need for Secrecy: Genuine Claims of National Security

The need for a certain amount of secrecy in making national security decisions is indisputable. Many military plans and intelligence operations could not be accomplished without secrecy, and it is this need for secrecy that creates the justification for First Amendment restrictions when national security interests are involved.

The Supreme Court has recognized for many years that national security may justify restricting public access to information. In 1919, for example, the Court considered the prosecution of individuals who were trying to hinder the recruitment of troops for the war effort under the "obstructing enlistments" provision of the Espionage Act of 1915.[84] In upholding their convictions, the Court in *Schenck v. United States*[85] stated that free speech could be limited when "the words used

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83. *Espionage Laws and Leaks: Hearings Before the Subcomm. on Legislation of the Permanent House Select Comm. on Intelligence*, 96th Cong., 1st Sess. 14 (1979) (statement of Anthony A. Lapham, General Counsel, C.I.A.) [hereinafter *Laws and Leaks*]; *see also* Eric E. Ballou & Kyle E. McSlarrow, 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 (1985) (discussing the applicable statutes and their inability to effectively prevent leaks).

84. Pub. L. No. 65-24, tit. 1, § 3, 40 Stat. 217, 219.

85. 249 U.S. 47 (1919).

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."[86] Similarly, in *Near v. Minnesota ex rel. Olson*[87] the Court noted, "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[88]

These cases suggest that at times compelling reasons can justify restricting the press from disseminating national security information. If "[t]he most important service any government can provide is the protection and perpetuation of the national existence,"[89] then it is impossible to question the necessity of classifying certain types of information and restricting its access to a limited number of individuals. Prosecutions of journalists who publish nation security information can be justified for the same reason.

Publication of information about United States intelligence capabilities can compromise their effectiveness. For example, in *Morison* the government claimed that the photograph of the Soviet naval base that was leaked to *Jane's Defence Weekly* revealed the capabilities of the KH-11 satellite,[90] and therefore publication of the pictures could help the Soviets determine how effectively United States spy satellites operate.[91] Similarly, if an enemy learns that the United States has penetrated their security systems, they can take steps to counteract the penetration.[92] During World War II the United States had a great advantage against Japan because communication experts in Washington, D.C. had broken Japanese military codes and publication of the fact that the codes had been broken could have had a very damaging effect on the United States war effort.[93] Moreover, in addition to harming an ongoing project, publication "can compromise a very expensive intelli-

86. *Id.* at 52; *see also* Abrams v. United States, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting) ("A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not.").

87. 283 U.S. 697 (1931).

88. *Id.* at 716 (citing CHAFEE, *supra* note 3, at 10).

89. Ballou & McSlarrow, *supra* note 83, at 824.

90. *See* United States v. Morison, 844 F.2d 1057, 1062 (4th Cir.) (plurality), *cert. denied*, 488 U.S. 908 (1988).

91. This claim, however, is probably false. *See infra* notes 112-16 and accompanying text.

92. *See Laws and Leaks*, *supra* note 83, at 26 (statement of Daniel B. Silver, General Counsel, National Security Agency).

93. *Id.* at 134 (statement of John M. Maury, Former Legislative Counsel to the CIA).

gence system on which we have spent millions or billions of dollars, and which becomes worthless as a result of the leak."[94]

There are also other circumstances such as military operations, development of weapons, discussions with allies, and intelligence operations in which secrecy is critical. For example, in the summer of 1974 the CIA attempted to recover a Soviet submarine that had sunk off the Hawaiian coast in 1968. The salvage was one-third completed when the *Los Angeles Times* disclosed the project and permitted Soviet vessels to move into the area and make the project impractical.[95]

These examples demonstrate that at times national security claims may be quite valid when used to justify restrictions on media access to information. Although this Note contends that the current system gives excessive weight to national security claims, it nevertheless recognizes that public access to national security information must be limited at times.

B. Too Much Secrecy: Illegitimate Claims of National Security

As discussed above, there are situations in which national security concerns create a need for secrecy. At other times, however, national security claims are used to block the dissemination of information when national security is not in danger. This section examines a number of ways in which national security claims are raised in situations where the claim is unjustified.

1. The Vagueness of the Term "National Security"

One problem with permitting secrecy whenever claims of national security or national defense are raised is that those terms are inherently vague. "[N]ational security is a very ambiguous term . . . . Most people are for it, but what does it mean?"[96] Indeed, "just about everything worth knowing can be viewed in one way or another as possibly impacting adversely on national security . . . ."[97] The general goal of protecting national security is readily apparent—to ensure our nation's

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94. Floyd Abrams et al., *The First Amendment and National Security*, 43 U. MIAMI L. REV. 61, 88 (1988) (statement of Richard K. Willard).

95. Ballou & McSlarrow, *supra* note 83, at 801-02.

96. ARTHUR M. COX, THE MYTHS OF NATIONAL SECURITY 3 (1975).

97. *Civil Liberties and the National Security State, 1984: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 1st & 2d Sess. 6 (1984) (statement of Floyd Abrams) [hereinafter *Civil Liberties Hearings*]; *see also* New York Times Co. v. United States, 403 U.S. 713, 719 (1971) (per curiam) (Black, J., concurring) ("The word 'security' is a broad, vague generality . . . .").

survival, but in practice it is a much more difficult proposition to determine what information this protection should encompass.[98]

The Espionage Act[99] and the Freedom of Information Act[100] both use the term "relating to the national defense" instead of national security.[101] That phrase, however, is also imprecise. As Judge Learned Hand noted in *United States v. Heine*,[102] "every part . . . of the national economy and everything tending to disclose the national mind are important in time of war, and will then 'relate to the national defense.' "[103]

Thus, when the President is authorized to classify anything related to the national defense or to prosecute journalists for publishing information related to the national defense, the limits of this power are not clear. Statutes that are based on these terms lack clear parameters and create a danger of overclassification because "[n]ot all military information is equally sensitive and some of it is badly needed for public debate."[104]

The inherent vagueness of the terms "national security" and "national defense" ultimately makes them susceptible to being invoked in situations in which the danger is not nearly as significant as what is alleged. The debate over the publication of the Pentagon Papers in *New York Times Co. v. United States* provides a good example of how these claims can be exaggerated. The claims of national security that were raised in the case led a number of people to focus on the potential consequences that could result from publication. In his dissent Justice Blackmun said that Judge Wilkey, who had dissented in the court of appeals opinion, may have been correct when he argued that the Pentagon Papers if published " 'could clearly result in great harm to the nation.' "[105] Justice Blackmun said that by "great harm" Judge Wilkey

98. Cox, *supra* note 96, at 63; *see also* Halperin v. Kissinger, 606 F.2d 1192, 1200 (D.C. Cir. 1979) (arguing that the term "national security" is inherently vague and hampers careful analysis when constitutional rights may be invaded to protect it), *aff'd in part and dismissed in part*, 452 U.S. 713 (1981).

99. 18 U.S.C. § 793 (1988).

100. 5 U.S.C. § 552 (1988).

101. *See, e.g.*, 18 U.S.C. § 793(d)-(f) (1988); 5 U.S.C. § 552(b)(1)(A) (1988); *cf.* 18 U.S.C. § 793(a) (1988) ("respecting the national defense"); *id.* § 793(b)-(c) ("connected with the national defense").

102. 151 F.2d 813 (2d Cir. 1945), *cert. denied*, 328 U.S. 833 (1946).

103. *Id.* at 815.

104. Benjamin S. DuVal, Jr., *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579, 591 (1986).

105. New York Times Co. v. United States, 403 U.S. 713, 762 (1971) (per curiam) (Blackmun, J., dissenting) (quoting United States v. Washington Post Co., 446 F.2d 1327, 1330 (D.C. Cir.) (per curiam) (Wilkey, J., dissenting), *aff'd sub nom.* New York Times Co. v. United States, 403 U.S. 713 (1971)).

meant " 'the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate.' "[106] During the *New York Times* trial, the Secretary of the Army testified that publication of the Papers "would do grave and irreparable harm to [the] nation and its people."[107] Henry Kissinger commented that the publication of the Pentagon Papers would destroy relations with China.[108] Obviously, all of these predictions of gloom and doom did not come true; yet the predictions are understandable because it can be very difficult to accurately assess claims of national security threats.

The problem results from the danger of the concept of national security taking on mythical elements. When national security claims are raised to justify curtailing liberties, pressures generally favor the national security claims.[109] The tendency is to presume that our national survival is in serious jeopardy whenever the government invokes the term even though this is rarely the case. Yet it is very difficult to challenge these claims because the same administration that classified the information in the first place is the only party with the knowledge to evaluate the validity of the classification decision—thereby echoing Edgar and Schmidt's warning about letting the fox define the parameters of the chicken coop.[110]

2. *The Labeling of Public Information As Secret*

There are compelling reasons to keep some national security information secret. At the same time, however, it should also be recognized that "[o]nce secrets are out, they are out. You cannot rebottle old secrets . . . ."[111] The government at times treats information that already has escaped their control as secret. By doing this, the government attempts to deny United States citizens access to information that many other nations already possess. Close examination of the facts involved in many of the cases that have been used to justify restrictions on the media reveals government efforts to prohibit the dissemination of already public information.

In *United States v. Morison*,[112] for example, the government claimed that the publication of the KH-11 photographs would reveal

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106. *Id.* (quoting *Washington Post*, 446 F.2d at 1330 (Wilkey, J., dissenting)).

107. Abrams, *supra* note 94, at 68 (statement of Floyd Abrams).

108. *Id.* at 88 (statement of Don Oberdorfer).

109. *See generally* Thomas I. Emerson, *National Security and Civil Liberties*, 9 YALE J. WORLD PUB. ORD. 78, 80-81 (1982).

110. Edgar & Schmidt, *supra* note 38, at 354.

111. Abrams, *supra* note 94, at 69 (statement of Floyd Abrams).

112. 844 F.2d 1057 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988).

United States satellite capabilities to the Soviet Union.[113] In reality, however, Morison may have been prosecuted for allowing the Soviets to obtain information that they already possessed. In 1978 William Kampiles sold the Russians a copy of the manual for the same satellite and was convicted of espionage.[114] In 1981 *Aviation Week and Space Technology* published a picture of a Soviet airfield and bomber that was taken by the satellite.[115] Finally, in 1980 a number of KH-11 photos were left behind after the aborted rescue attempt of the American hostages in the Iran desert, and Iran put these photos in a book and distributed them around the world.[116]

The case of Philip Agee, which led to the enactment of the Intelligence Identities Protection Act,[117] also provides an interesting example. In an effort to undermine the CIA, Philip Agee and Louis Wolf published the names of over 3000 undercover CIA agents,[118] and it is tempting to argue that Agee's publications had a devastating effect upon United States intelligence operations. Yet if Agee could easily identify so many names simply by travelling all over the world, the agents' cover could not have been very effective. It is difficult to believe that absent Agee's publications, neither the KGB nor the nation in which the operatives were based could have discovered the presence of the agents that Agee and Wolf so easily identified.[119]

The prosecution of the *Progressive*[120] for publishing the formula for building an atomic bomb raises similar questions about whether information labeled secret truly is secret. First, because the formula for the atomic bomb was available to the public, or at least easily derivable, the *Progressive* probably was not providing other nations with anything that they did not already know.[121] Further, the barrier to

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113. *See id.* at 1062.

114. United States v. Kampiles, 609 F.2d 1233, 1236 (7th Cir. 1979), *cert. denied*, 446 U.S. 954 (1980).

115. Brief for Appellant, at 8-9, United States v. Morison, 844 F.2d 1057 (4th Cir.) (No. 86-5008), *cert. denied*, 488 U.S. 908 (1988).

116. *Id.*

117. 50 U.S.C. §§ 421-426 (1988).

118. Bivens, *supra* note 62, at 845.

119. Supporters of the Intelligence Identities Protection Act blamed the 1975 death of Richard Welch, the CIA station chief in Athens, on the identification of his name in *Counterspy*. That criticism ignores, however, the fact that an East German magazine already had revealed Welch's identity and that he had ignored warnings and chosen to live in the home of the previous Athens CIA station chief. EVE PELL, THE BIG CHILL 59 (1984).

120. *See supra* text accompanying notes 54-60.

121. Mary M. Cheh, *The* Progressive *Case and the Atomic Energy Act: Waking to the Dangers of Government Information Control*, 48 GEO. WASH. L. REV. 163, 204-05 (1980).

building the bomb stemmed from the difficulty of obtaining plutonium, not from the difficulty of obtaining the formula.[122] Thus, a terrorist who learned the formula for building an atomic bomb by reading the magazine still would not be capable of building the weapon. Finally, "equally lethal chemical and biological weapons are widely known, much less expensive, and easier to obtain."[123] Indeed, no evidence indicates that the nuclear proliferation which the government was attempting to prevent resulted from the publication of the *Progressive*'s article.

Professors Edgar and Schmidt identified an additional factor concerning publication of information that is already in the public domain. The greatest damage to the United States may occur when it is acting on the mistaken belief that leaked information is still secret.[124] After an agent's cover has been blown, it may be better to have that fact definitively established rather than have the government still operating under the false assumption that the agent's identity is secret because at that point, there is a reasonable probability that the information already has reached the enemy. Nations have become so skilled at espionage that "the first persons to obtain disclosed information are likely to be precisely those from whom the government is most interested in keeping the information."[125]

A few years ago England found itself in an absurd situation after prohibiting publication of the book *Spycatcher* for national security reasons at the same time that it was on the best seller list in the United States and British citizens were regularly smuggling copies into England.[126] Although at times the government is justified in classifying information and attempting to keep it secret, once it has reached the press, it should be treated as if it is in the public domain.

3. *Using National Security to Manipulate Debate*

The greatest danger that can result from illegitimate claims of national security was noted by Professor Thomas Emerson, who wrote:

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122. *See id.* 204, 205 & nn.274-75.

123. Jeffrey A. Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV. 439, 464 (1987) (citation omitted).

124. Edgar & Schmidt, *supra* note 38, at 401.

125. Susan D. Charkes, Note, *The Constitutionality of the Intelligence Identities Protection Act*, 83 COLUM L. REV. 727, 747 (1983).

126. Abrams, *supra* note 94, at 69 (statement of Floyd Abrams); *see also History Bleached at State*, N.Y. TIMES, May 16, 1990, at A26 (editorial) (noting that the State Department and the CIA have refused to declassify information about support that the United States provided to the Shah of Iran in 1953 even though this information is 38 years old and is common knowledge).

"[W]hen 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."[127] At times information may be classified because it reveals illegal acts or because it will undermine administrative policies, and for the same reasons, leakers and reporters may be threatened with prosecution if they publish the information. "Of course, there are some real secrets, but hardly as many as the Executive Branch would have us believe."[128]

Current laws allow the executive branch to choose which documents to classify and which to make available. They also can choose which leakers to prosecute and which to leave alone.[129] In a nation in which forty percent of high level administrative officials admit to having leaked information for what they believed to be legitimate policy reasons,[130] one should skeptically view the government's choice of which leaks to tolerate. Selective classification of information and prosecution of leakers allows an administration to create a "false consensus"[131] of support for its policies, and therefore, information may be classified to prevent domestic criticism, rather than to enhance national security.[132]

As Bob Schieffer of CBS News explained to Congress, Executive Order 12,356 undermines legitimate debate because now "the official response may be to say nothing, or to revert to the old standby: 'if only you had the information I have, you would understand.' "[133] As an example, he pointed out that the second exemption covers " 'the vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security.' "[134] Thus, information concerning

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127. Emerson, *supra* note 109, at 80-81; *see also* United States v. United States District Court, 407 U.S. 297, 314 (1972) ("Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent."); *In re* Washington Post Co., 807 F.2d 383, 391 (4th Cir. 1986) ("History teaches how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions.").

128. *Civil Liberties Hearings*, *supra* note 97, at 6 (statement of Floyd Abrams).

129. *See* Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 HARV. L. REV. 906, 906 (1990).

130. Abrams, *supra* note 94, at 76 (statement of Don Oberdorfer); *see also* STANSFIELD TURNER, SECRECY AND DEMOCRACY: THE CIA IN TRANSITION 149 (1985).

131. Scot Powe, *Espionage, Leaks and the First Amendment*, BULL. ATOM. SCIENTIST, June-July 1986, at 10.

132. *See* Catholic Action of Hawaii/Peace Educ. Project v. Brown, 643 F.2d 569, 572 (9th Cir. 1980) (noting that the government could "escape the consequences of . . . an unpopular decision by concealing . . . the fact that such a decision has been or may be made"), *rev'd sub nom.* Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139 (1981).

133. *Hearings*, *supra* note 21, at 99 (statement of Bob Schieffer).

134. *Id.* at 98 (quoting Exec. Order, *supra* note 9, § 1.3[2]).

expensive flaws in the M-1 tank could be kept secret,[135] enabling the administration to continue to generate public support for a flawed project by withholding information. This is not to say that there are no important reasons for keeping the information secret, but rather to point out the existence of factors supporting disclosure.

Two recent examples illustrate this manipulation of national security laws. On April 4, 1986, Richard Burt, Ambassador to West Germany, revealed that United States intelligence had determined that Libyan agents were operating in Europe. Five days later General Bernard W. Rogers made the same revelation. These revelations were intended to build up support for President Reagan's anti-Libyan position.[136] Yet the revelations also were violations of the Espionage Act because they revealed that the United States had broken a secret Libyan code and, therefore, had given the Libyans an opportunity to change their codes.[137] There is a substantial likelihood that Burt and Rogers would have been prosecuted had their revelations hindered rather than enhanced government policies.

A 1985 column in the *New York Times* revealed similar selective use of leaks in connection with the Strategic Defense Initiative (SDI).[138] A number of scientists working on the project did not believe in its feasibility and became frustrated with the selective leaking of studies. The article quoted Ray Kidder, a physicist at Livermore Laboratory: "The public is getting swindled by one side that has access to classified information and can say whatever it wants and not go to jail, whereas we [the skeptics] can't say whatever we want. We would go to jail, that's the difference."[139] The column also noted that Energy Secretary John S. Herrington had denounced the critics of SDI for hurting the national interest,[140] illustrating that political factors may have a great deal to do with the determination of whether or not a leak is harmful to national security.

Indeed, although excessive restrictions on public access to information are a threat to the First Amendment, selective restrictions may be even worse. When no public access is permitted in a particular area, the public is uninformed, but when selective classification occurs, the public may mistakenly believe that they are making fully informed decisions. Justice Douglas recognized this point when he wrote that "the government usually suppresses damaging news but highlights favorable

135. *Id.*
136. ABEL, *supra* note 82, at 48-49.
137. *Id.*
138. Flora Lewis, *A "Star Wars" Cover-Up*, N.Y. TIMES, Dec. 3, 1985, at A31.
139. *Id.* (brackets in original)
140. *Id.*

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."[141]

C. *Recognizing the First Amendment Value of National Security Information*

Part II(B) of this Note demonstrated that national security may be used as a justification for secrecy in situations in which national security is not really jeopardized. In those situations it might be possible to argue that secrecy is still warranted because it is important to err on the side of protecting our national survival even if that presumption results in excessive secrecy.[142] Certainly if there were no benefits to public disclosure of government information, this point would be valid; however, this section argues that excessive secrecy creates harms of its own.

1. *General First Amendment Interests*

"The preservation of a full and free flow of information to the general public [is] a core objective of the First Amendment"[143] because, as the Court recognized in *Cox Broadcasting Corp. v. Cohn*,[144] "[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally."[145] Thus, when information is classified or when criminal sanctions are used to block the publication of information, those steps conflict with the First Amendment goal of ensuring the public has access to information.

In order for access to be meaningful, the information provided must be relevant and significant. As the Court explained in *NAACP v. Button*[146] when it considered a NAACP challenge to a statute that limited its right to recruit new members, "abstract discussion is not the only species of communication which the Constitution protects."[147] Likewise, in the context of national security, it is meaningless to have abstract debate about policies without the availability of relevant facts.

When national security statutes are used to deny information to

141. Gravel v. United States, 408 U.S. 606, 641-42 (1972) (Douglas, J., dissenting).
142. *See* Emerson, *supra* note 109, at 80.
143. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 30 (1978) (Stevens, J., dissenting).
144. 420 U.S. 469 (1975).
145. *Id.* at 492.
146. 371 U.S. 415 (1963).
147. *Id.* at 429.

the press, significant harm to the First Amendment's role in informing the public results. As the Court noted in *Smith v. Daily Mail Publishing Co.*,[148] "[a] free press cannot be made to rely solely upon the sufferance of government to supply it with information."[149] The First Amendment "has a structural role to play"[150] in our governmental system "[f]or speech concerning public affairs is more than self-expression; it is the essence of self-government."[151] Our leaders and the policies they implement are determined by the citizens. To make those choices in an effective and responsible manner, citizens need to be aware of the information that is the basis for their decisions. Although there is some need for secrecy, any law that unduly limits the availability of information to the public runs counter to Professor Emerson's statement that "government's business is, generally speaking, the public's business."[152]

In addition to its role in self-government, access to information serves an important checking function. "The purpose of the First Amendment and the Bill of Rights is to protect citizens against government."[153] By providing accurate information to the public, the press makes criticism of the government more persuasive. As noted earlier, administrations may use the label "national security" to close off access because it sheds a poor light on them. Consequently, there is a strong public interest in placing information that an administration has classified for reasons of self-interest back into the public domain.

At a general level, the First Amendment therefore protects a right to information that promotes effective self-government and provides opportunity for the public to check governmental abuses. But the right to information is not valuable only because it is encompassed within

148. 443 U.S. 97 (1979).

149. *Id.* at 104 (citing Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (plurality); Brazburg v. Hayes, 408 U.S. 665, 681 (1972)).

150. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (emphasis and citations omitted).

151. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964); *see also* Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (asserting that the First Amendment "is concerned, not with private right, but with a public power, a governmental responsibility").

152. *Laws and Leaks*, *supra* note 83, at 164.

153. *Id.*; *see also* Roth v. United States, 354 U.S. 476, 488 (1957) (noting that the First Amendment is based in part on " 'efforts to secure freedom from oppressive administration . . . to supply the public need for *information*' ") (quoting Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940)); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) ("[I]nformed public opinion is the most potent of all restraints upon misgovernment . . . ."); Blasi, *supra* note 3.

First Amendment theory. In the context of national security decision-making, wide dissemination of information generally results in better decisions and, consequently, enhanced national security.

2. *The Importance of Access to National Security Information*

Supporters of restrictions on the publication of national security information often argue that the need for secrecy is justified because the classified decisions are critical to our national survival. Although the supporters are certainly correct in pointing out the importance of such decisions, the importance of the issues at stake actually justifies more openness. As the Court noted in *De Jonge v. Oregon*:[154] "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights"[155] of the First Amendment. Justice Black adopted this same reasoning in his concurring opinion in *New York Times Co. v. United States*.[156] He opposed any restrictions on press publication of national security information because a free press is critical "to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell."[157] Similarly, Alexander Meiklejohn wrote that the Framers specifically intended that the First Amendment operate absolutely during time of war.[158]

Although there may be strategic advantages to waging military campaigns in total secrecy, that notion runs counter to the First Amendment goals of self-government and checking governmental abuses. The public's interest in access to information when difficult political decisions are being made is greater than when routine issues, in which there is a broad national consensus, are being resolved. Presently, the United States faces critical decisions on how to adapt to changing conditions in the former Soviet Union, Eastern Europe, and the Middle East (as well as many other areas in the world). It is essential that those decisions not be made in secret or in a setting that effectively silences the opposition.[159]

Critics of openness admit that there are legitimate interests in having open debate, but they claim that certain details must be kept

154. 299 U.S. 353 (1937).
155. *Id.* at 365.
156. 403 U.S. 713, 717 (1971) (Black, J., concurring).
157. *Id.*
158. MEIKLEJOHN, *supra* note 3, at 20.
159. *See* Goldston, *supra* note 4, at 450-51.

secret. The problem with the critics' position is that frequently the details are the most important part of the debate. For example, evaluations of policies concerning nuclear weapons and arms control necessarily depend on knowledge of the details. Governmental authorities regularly decide whether or not the United States should spend billions of dollars on weapons programs such as the Strategic Defense Initiative (SDI) and the Stealth Bomber.[160] A decision about whether or not to support a weapons program cannot be made effectively without knowing the answers to important questions, such as: Will it work? If it works, will it stop all or most missiles? Finally, what will be the likely reaction by other nations with nuclear capability?

Although it is reasonable to keep some of the details secret to protect a defense system, it is unreasonable to expect meaningful debate on the subject if the only information provided to the public is a vague promise that the system will work perfectly and enhance national security.[161] Obviously, if a proposition is put forth in that manner, without any of the facts from the other side, the chances of a program receiving support are enhanced.

Similar issues arise in evaluating arms control proposals and efforts to stop third world nations from developing new weapons systems. For example, an important element of arms control negotiations is the details of verification; consequently, "[y]ou cannot talk about [the steps in the verification process] without talking about them technically."[162] Yet in theory the Atomic Energy Act should block the discussion of such details. Although, with the exception of the suit against the *Progressive*,[163] the Act has never been used against the press, the possibility of such use exists. On its face, the Act authorizes injunctions "prohibiting the publication of articles about the Salt II treaty, speculation that the United States is developing new or different nuclear weapons, evidence that nuclear reactors are unsafe, [or] a new discovery that would make the production of nuclear power safer."[164]

There are also situations in which violation of the Intelligence Identities Protection Act would be necessary to further legitimate debate. For example, "investigative journalists seeking to ascertain the role of the CIA in the overthrow of the Allende government in Chile, its part in the attempted assassination of Fidel Castro, or even its recruitment efforts on college campuses" would violate the Act.[165] The

160. *See* Powe, *supra* note 131, at 10.
161. *See* Lewis, *supra* note 138, at A31 (discussing these claims about SOI).
162. Abrams, *supra* note 94, at 83 (statement of Floyd Abrams).
163. *See supra* notes 54-60 and accompanying text.
164. Cheh, *supra* note 121, at 197-98.
165. Emerson, *supra* note 109, at 94.

recent events of the Iran-Contra debacle further demonstrate how damaging it can be to implement public policy in secret.

In her article on the Atomic Energy Act, Mary Cheh points out the difficulty that advocates of a broad First Amendment have in the national security context. "When the question is, 'in light of the possible harm, do we need to know that *particular information, that specific data?*,' the answer will invariably be 'no.' "[166] In most cases restricting publication of one particular fact to preserve its secrecy will not seriously impair public debate. The problem is that the same argument can be made for virtually any fact or document, and at some point restriction of information can render public discussion worthless or, worse yet, create a false perception of meaningful debate.

3. Access As a Means to Better Decisionmaking

Early in 1961, shortly before the Bay of Pigs fiasco, the *New Republic* and the *New York Times* became aware of many of the plan's details. Both publications were concerned about the damage that could result if they published all the available information, and they voluntarily checked their stories with the Kennedy Administration to prevent the revelation of critical national security details. After the invasion President Kennedy told Turner Catledge of the *New York Times*: " 'If you had printed more about the operation you would have saved us from a colossal mistake.' "[167]

Although public discussion may eliminate the possibility of an operation that depends on secrecy,[168] it also may avert tragic mistakes by exposing flawed planning.[169] Some have argued, for example, that the Vietnam War serves as an example of the potential consequences of developing operations and strategies while keeping large amounts of information out of the public domain.[170] Justice Douglas explained this functional element of the First Amendment in his concurring opinion in *New York Times Co. v. United States*.[171] "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health."[172]

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166. Cheh, *supra* note 121, at 200.

167. Cox, *supra* note 96, at 121.

168. *See, e.g.*, Ballou & McSlarrow, *supra* note 83, at 801-03 ("Project Jennifer").

169. *See, e.g.*, Cox, *supra* note 96, at 121 (discussing the Bay of Pigs).

170. *See, e.g.*, MORTON H. HALPERIN & DANIEL N. HOFFMAN, TOP SECRET: NATIONAL SECURITY AND THE RIGHT TO KNOW (1977); Goldston, *supra* note 4, at 451-52.

171. 403 U.S. 713 (1971) (per curiam) (Douglas, J., concurring).

172. *Id.* at 724.

Secrecy often can be counterproductive[173] because public debate encourages criticism that can reveal flaws in plans or policies.[174] When a group of individuals from the same political party who share the same views decide policies in secret, they may fail to properly consider alternative viewpoints and options, which results in increased chances for error.[175] This link between secrecy and poor decisions was noted by former Congressman McCloskey, who stated that "[t]he failures of our system—of our government—have been paralleled by failures of the press."[176] He pointed out that there was no press coverage of school segregation before 1954 or discrimination before the civil rights movement. Similarly, there was silence on the subject of Japanese internments during World War II and minimal coverage of the possible risks of stock market investment before 1929. He contended that poor, or nonexistent, press coverage contributed to these national failures.[177]

In contrast, there are numerous examples in which the press contributed to national security by disclosing classified information.[178] A December 22, 1974 story in the *New York Times* revealed that the CIA was running domestic operations against antiwar demonstrators. The story led to a reorganization of the CIA and an increase in congressional oversight.[179] An April 26, 1981 article in the *Chicago Sun-Times* revealed a number of flaws in plans for the M-1 tank and led to questioning of defense procurement policies.[180] A story in the *Washington Post* on October 2, 1986, revealed that the administration had launched a campaign of "disinformation" against Moammar Gadhafi. This article demonstrated how the Reagan Administration deceived both the American public and our allies regarding United States policy toward Libya.[181]

When evaluating any statute designed to restrict the media's right to publish national security information, it is important to recognize that the information being restricted can have a very positive impact on the decisionmaking process. It is possible to advocate an active press without being against national security. A 1986 note in the

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173. *See* Ben H. Bagdikian, *Foreword* to DONNA A. DEMAC, KEEPING AMERICA UNINFORMED: GOVERNMENT SECRECY IN THE 1980'S at xi-xii (1984); *Laws and Leaks*, *supra* note 83, at 44-45 (statement of Thomas I. Emerson).

174. *See* Goldston, *supra* note 4, at 450-51.

175. *See id.* at 451.

176. PAUL N. MCCLOSKEY, JR., TRUTH AND UNTRUTH: POLITICAL DECEIT IN AMERICA 209 (1972).

177. *Id.*

178. Brief for Amici Curiae, Washington Post et. al., at 29-32, United States v. Morison, 844 F.2d 1057 (4th Cir.) (No. 86-5008), *cert. denied*, 488 U.S. 908 (1988).

179. *Id.* at 29-30.

180. *Id.* at 30.

181. *Id.* at 32.

Harvard Civil Rights-Civil Liberties Law Review explained this point very effectively when it stated: "As increasing numbers of important decision are made on the basis of information to which the public is denied access, the accountability of elected officials declines, the distance between the governed and their servants grows even larger, and our nation becomes less and less 'secure.' "[182]

III. USING THE FIRST AMENDMENT TO BALANCE THE BENEFITS OF OPENNESS AND THE NEED FOR SECRECY

Part II of this Note argued that the status quo places too much emphasis on the use of secrecy to promote national security and as a result undermines the public's participation in the decisionmaking process. Yet that part also noted that in certain situations the need for secrecy is critical to effective government. Consequently, at some point an inevitable clash must occur between the need for secrecy and the benefits of disclosure. Two First Amendment questions arise from this clash. First, if openness is an essential element of the First Amendment, why should our society ever permit secrecy in government? Second, under what circumstances should our society permit secrecy?

A. Secrecy Within the First Amendment

In the United States it is the people, not elected officials, who govern,[183] and therefore "that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system."[184] The First Amendment plays a vital role in this system by facilitating public access to information. Only by being adequately informed can citizens determine if their government is responsive to their wishes and meaningfully participate in the political process.[185] The more the government operates in secrecy, the less ability the people have to exercise control over their officials.[186]

In order to be truly responsive to the people in certain areas, however, the government also must be able to operate in secrecy because certain programs that the public may support can be implemented

182. Goldston, *supra* note 4, at 451.

183. *See, e.g.*, MEIKLEJOHN, *supra* note 3, at 107-24 (testimony on the meaning of the First Amendment).

184. Stromberg v. California, 283 U.S. 359, 369 (1931).

185. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982) (holding that press access to a criminal rape trial is mandated by the First Amendment).

186. Professor Greenawalt identified this approach as the "liberal democracy" justification for free speech that is based on the consequences of utilizing the First Amendment. Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 145 (1989).

only in secrecy.[187] For example, the people may want the government to establish good diplomatic relations with other nations, and that task would be impossible without some amount of secrecy. Likewise, a military invasion that the public supports would be seriously jeopardized if every detail were disseminated to the public for their approval.

Consequently, in same situations secret national security decision-making is consistent with the First Amendment. In those situations, however, secrecy is justified because the citizens choose to permit it, not because the citizens are incapable of making intelligent decisions. The value of disclosing important information is still fundamental to our democracy.

This theory of the First Amendment could be labeled functional[188] or consequential.[189] According to this theory the First Amendment is valuable because of its role in keeping government responsive to the people. But at the point the First Amendment becomes a barrier to government responsiveness, the people may choose to give up some First Amendment openness in order to achieve their goals.

Zechariah Chafee explained that the First Amendment protects "a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way."[190] The current system of classification is harming this social interest by making it impossible for the public to become involved in many national security decisions that do not require secrecy.[191] Secrecy should be permitted only in situations in which openness would block the achievement of the wisest course of action.

B. Where to Draw the Line

If we accept the notion of allowing some secrecy within the confines of the First Amendment, the next step is to determine how much should be permitted. The goal is to allow enough secrecy to enable government to be effective without reducing its responsiveness to the people. A useful analogy for drawing this line can be derived from Supreme Court decisions over the past twenty years that involve press access to prisons[192] and press access to criminal trials.[193] In those opin-

187. *See supra* notes 84-95 and accompanying text.

188. *See* CHAFEE, *supra* note 3, at 31.

189. *See* Greenawalt, *supra* note 186, at 127-30.

190. CHAFEE, *supra* note 3, at 33.

191. *See supra* part II(B).

192. *E.g.*, Houchins v. KQED, Inc., 438 U.S. 1 (1978); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

193. *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia,

ions members of the Court stressed the value of public dissemination of information. For example, in *Richmond Newspapers, Inc. v. Virginia*[194] the Court held that generally the press could not be excluded from attending criminal trials because absent a compelling reason, the First Amendment " 'prohibit[s] government from limiting the stock of information from which members of the public may draw.' "[195] Similarly, in *Houchins v. KQED, Inc.*[196] Justice Stevens wrote that "[i]t is not sufficient, therefore, that the channels of communication be free of governmental restraints;"[197] rather, the government must "insure that the citizens are fully informed regarding matters of public interest and importance."[198]

Having recognized the value of an informed public, those cases set forth a balancing test that took into account the government's obligation "to ensure that this constitutionally protected 'discussion of government affairs' is an informed one."[199] The Court balanced two considerations: "[W]hether public access plays a significant positive role in the functioning of the particular process"[200] and whether "denial is necessitated by a compelling government interest."[201] These same two interests also should be weighed in the national security context.

The problem with the current system of handling national security information is not that it permits secrecy; rather, the problem lies in the fact that the system fails to balance the secrecy with the benefits of openness. The important role that an active press plays in formulating national security policy is frequently ignored.[202] Consequently, the ex-

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448 U.S. 555 (1980).

194. 448 U.S. 555 (1980).

195. *Id.* at 576 (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978)).

196. 438 U.S. 1 (1978).

197. *Id.* at 32 (Stevens, J., dissenting).

198. *Id.*; *see also Richmond Newspapers*, 448 U.S. at 582 (Stevens, J., concurring) ("This is a watershed case. . . . [N]ever before has [the Court] squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever.").

199. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982).

200. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986) (citing *Globe Newspaper*, 457 U.S. at 606).

201. *Globe Newspaper*, 457 U.S. at 607 (citations omitted). The Court also has considered whether "the place and process have historically been open to the press and general public." *Press-Enterprise*, 478 U.S. at 8.

This factor seems irrelevant in the national security context because if access is determined to have a significant First Amendment function that outweighs the government's interest in secrecy, tradition becomes a poor reason to continue the practice. Circumstances have changed a great deal during the two hundred years since the tradition developed. Moreover, it is not clear that the denial of a right of access was ever a good policy.

202. *See supra* part II(C).

ecutive branch uses secrecy in many situations in which it is not supported by a compelling state interest.[203]

There are times when secrecy "must . . . be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale."[204] Unfortunately, when national security is at stake in our current system, the balancing tends to weigh very heavily in favor of secrecy.[205] Executive Order 12,356 favors secrecy by encouraging officials to classify information when in doubt.[206] Similarly, the government has made threats of prosecution to deter publication of classified information.[207]

These approaches create a presumption in favor of secrecy that should be replaced by a presumption in favor of openness. The goal should be to maximize the amount of information in the public domain while permitting the government to utilize secrecy only when it is necessary to effectively respond to the wishes of the people.

IV. Creating a Better Framework

New legislation is needed to regulate the conflict between press publication and national security secrecy. Such legislation should accomplish at least two goals. First, Congress should attempt to decrease executive branch discretion[208] by enacting more comprehensive statutes that take greater account of the fundamental conflict between the need for secrecy and the value of openness. Although the Espionage Act's prosecution provisions are elaborate, they attempt to cover too many issues at once by simultaneously applying to spies, journalists, and leakers.[209] The issues at stake are important enough for Congress to draft statutes that are clearly worded and separate from the Espionage Act.[210]

Second, Congress should increase its involvement and the involvement of the courts in the process. In the status quo the executive branch has almost exclusive control over classification decisions[211] and

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203. *See supra* part II(B).

204. Chafee, *supra* note 3, at 31.

205. Emerson, *supra* note 109, at 85 ("The heaviest pressures are usually found on the side of national security and the rights of the individual are balanced away.").

206. *See supra* part I(A)(1).

207. *See supra* part I(B).

208. *See supra* part I(A).

209. Edgar & Schmidt, *supra* note 38, at 407.

210. *Id.*; *see also* United States v. Morison, 844 F.2d 1057, 1085 (4th Cir. 1988) (Phillips, J., concurring) ("[T]he Espionage Act statutes as now broadly drawn are unwieldy and imprecise instruments . . . ."), *cert. denied*, 488 U.S. 908 (1988).

211. Cheh, *supra* note 23, at 690; *see supra* notes 9-38 and accompanying text.

is free to classify based on its own criteria without judicial review.[212] Similarly, the executive branch makes decisions about whether to threaten prosecution of the media on the basis of imprecise statutes.[213]

In an ideal world the executive branch would independently realize the value of public debate and permit as much disclosure as possible. Since that realization is unlikely, however, Congress and the courts must become more involved in determining the rules of the game. Congress can become much more active in the process by drafting more precise legislation. Although the executive branch may ultimately have to decide what to classify and when to prosecute, Congress can reduce the element of discretion by implementing clearer standards.[214]

Courts could become much more involved by recognizing that they have a "clear responsibility to inquire into whether national security claims override traditional constitutional rights or liberties."[215] A new approach to national security secrecy must provide for judicial review of the conflict between protection and disclosure, and judges must be willing to accept that role.

A. Increasing Access

Instead of relying on executive orders, Congress should draft comprehensive legislation to deal with national security classification that takes account of the executive branch's tendency to overclassify. That legislation should also factor in the benefits of public disclosure. Rather than enacting an open-ended provision, Congress should draft a national security exemption to FOIA that provides explicit guidance for resolving the essential issues: What areas are covered? Who in the executive branch has the authority to decide? How significant should the risks to national security be to justify classifying a particular piece of information?

This new framework also must include a balancing element that takes into account the value of the particular piece of information to public discourse. When "information . . . bear[s] on the citizenry's ability to make informed political decisions, then a strong governmental interest is needed to offset the right of access."[216] Legislation should contain a provision stipulating that classifiers must consider the First

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212. *See supra* part I(A)(2).

213. *See supra* part I(B).

214. *See* Ballou & McSlarrow, *supra* note 83, at 859-67 (detailing a proposal for a comprehensive legislative scheme).

215. Wald, *supra* note 27, at 764.

216. Michael J. Hayes, Note, *What Ever Happened to "The Right to Know"?: Access to Government-Controlled Information Since* Richmond Newspapers, 73 VA. L. REV. 1111, 1137 (1987).

Amendment value of the document before making their decision.

In addition, application of the legislation must be consistent to avoid the hypocrisy of selective leaking.[217] Congress should require the executive branch to apply the rules in an even-handed manner so that if no technical information that is critical of a weapons program is being leaked, then no technical information in support of the program should be leaked. The same approach should apply to the initial classification of information. In this way, classification would be a tool for national security, not political security.

Congress also should establish a better system of oversight. Currently, the executive branch appoints all the members of the Classification Oversight Board,[218] but the flaw in this approach is that if the executive branch is deliberately abusing the system, that abuse will remain unchecked. Congress should preserve its checking function by retaining control of the Board which could include members appointed by Congress as well as the executive branch—and hopefully individuals from outside government such as journalists—so that oversight would no longer be monopolized by the executive branch.

Indeed, a presumption against secrecy could also result in more effective promotion of secrecy in situations in which secrecy is genuinely necessary. By classifying less information and acknowledging the need for open debate, the executive branch can more effectively protect its interests in secrecy because of the increase in the credibility of the classification system. "[W]hen 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."[219]

Finally, the courts should become more involved in the process. Although the current framework assigns them the role of de novo review of classification decisions,[220] they have refused to take on this function.[221] A new statute should assign the courts a meaningful role in reviewing challenges to classification decisions,[222] and courts should willingly accept that role.

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217. *Cf.* Frederick M. Lawrence, Note, *The First Amendment Right to Gather State-Held Information*, 89 YALE L.J. 923, 926-27 (1980) (discussing the theory of equal access to both the media and the public); *see supra* notes 127-38 and accompanying text.

218. *See supra* note 24 and accompanying text.

219. New York Times Co. v. United States, 403 U.S. 713, 729 (1971) (per curiam) (Stewart, J., concurring).

220. *See supra* part I(A)(2).

221. *See* Wald, *supra* note 27, at 760.

222. *But cf.* Ballou & McSlarrow, *supra* note 83, at 859-67 (detailing a proposal for legislation that would empower a congressionally appointed agency with the authority to validate the classification of information by the executive).

B. *Eliminating the Threat of Prosecution*

At times the government must classify information and keep it secret, but once secrecy breaks down and the press obtains information, it should be free to publish without a threat of prosecution. Although such a policy would carry some risk that critical information might be published, that risk would be outweighed by the First Amendment benefits of freeing the media from the threat of prosecution. Indeed, this approach could create incentives for the government to limit classification to situations in which it is most needed.

A prohibition on prosecuting journalists will create an additional check on the government's tendency to overclassify by eliminating the danger of selective prosecution. The executive branch will not have the option of using threats to deter the press from publishing criticism. Moreover, if the information has reached the press, it is likely to be public information. Therefore, the compelling interest in support of secrecy has diminished.[223]

Justice Potter Stewart endorsed this approach in a 1974 speech at Yale Law School.[224] He advocated a system based on a battle between the press and the government in which the press should be given autonomy to publish whatever it can to "battle against secrecy and deception in government."[225] That system would still permit the government to keep information secret, but when they failed, journalists could not be threatened. In this way, "[t]he Constitution . . . establishes the contest, not its resolution."[226]

Alexander Bickel advocated this same solution in his 1975 book, *The Morality of Consent*.[227] He paralleled the resolution of the First Amendment versus national security conflict with the criminal process in which the prosecuting and defense attorneys work in an adversarial relationship to achieve justice. He reasoned that since society has a vested interest in both good government and an active press, an active conflict between the two is the optimal solution. Bickel acknowledged that, as most would agree, this resolution is disorderly, but he concluded: "The best resolution of this contest lies in an untidy accommodation; like democracy, in Churchill's aphorism, it is the worst possible solution, except for all the other ones."[228]

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223. *See supra* part II(B)(2).
224. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).
225. *Id.* at 636.
226. *Id.*
227. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 87 (1975).
228. *Id.* at 87.

V. CONCLUSION

The First Amendment and national security are not part of a "zero-sum game."[229] Enhancing one value does not necessarily hinder the other. In our democracy the goal should be to place as much information as possible in the public domain, and secrecy should be utilized only when it facilitates government responsiveness to the people. Unfortunately, the current system assumes that increasing the media's right to publish national security information puts our national survival in jeopardy. By increasing media access to information and eliminating the possibility of prosecuting journalists, the advantages of public debate can be maximized and ultimately better decisionmaking and better national security will result.

229. Emerson, *supra* note 109, at 111.