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INCREASED PRESS ACCESS TO INFORMATION—LIMITING THE RANGE OF GOVERNMENT CLASSIFICATION

Theodore F. Kommers*

INTRODUCTION

An analysis of government secrecy in the United States shows that the present information classification process results in vast amounts of information being kept from public view without proper justification. Government secrecy is problematic in a democratic society where public policy and lawmaking decisions are made by the people through elected representatives. In such a system, the public and their elected representatives should be thoroughly informed about their government and the world to make responsible and knowledgeable decisions. Intelligent decisionmaking by the people is handicapped to the extent that the government withholds relevant information. The resolution to the precarious balance between the public's need for information and the nation's need for security through secrecy is reflected in a proposed reformation of the classification regulations, which seeks to limit the types of information which may be classified and to incorporate specific procedures for the mandatory declassification of information.

This essay first addresses a democracy's need for an unrestricted flow of information. Next, balanced against that need, the government's responsibility and desire to protect the nation are set forth. This section points out that attaining even a minimal level of national security mandates that some information (for example, information concerning nuclear weapons) not be publicly disclosed. The executive is primarily responsible for national security and foreign affairs, and consequently is

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the branch of government with the authority to classify information. There is evidence that this authority to classify has been abused. The last section offers some proposals for statutory reform of the classification process.

I. THE CONFLICT: DEMOCRACY v. SECRECY

A. Public Information Is Essential to a Democratic Institution

When the founding fathers formed the United States, they did so to rid themselves of the oppressive British monarchy and to set up a republic where they could effectively rule themselves and control their own lives. The founders structured their democratic government so that "the people" would compose and run the government. They set up an infrastructure of electoral representation where those elected would be held accountable to the voters primarily through the ballot box. The purpose of such a system was to ensure that the collective citizenry, through their elected representatives, would make the policy decisions for the country and avoid having the laws dictated to them by an unaccountable government. The people would make decisions about current issues and, ideally, have these decisions put into action by voting and otherwise petitioning the government.

For this republic to be run "by the people," citizens must be effectively included in the decisionmaking process of government. Effective inclusion mandates that the people are

1. See The Declaration of Independence para. 2 (U.S. 1776).
2. The preamble to the Constitution most clearly reflects the intentions of the framers to set up a government where "the People" would be self-governed. We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for United States of America.
U.S. Const. pmbl.
"It is ordained that all authority to exercise control, to determine common action, belongs to 'We the People.' We and we alone, are the rulers." Alexander Meiklejohn, Free Speech and Its Relation To Self-Government 15 (1948).
3. However, it should be noted that the founders considered "collective citizenry" to mean white, male landowners.
thoroughly aware of all sides of the relevant issues of the day as well as what the current government is doing about them. An informed public is unquestionably a prerequisite to the proper functioning of a government which is of and for the people. In New York Times v. United States (the Pentagon Papers case), Justice Black reaffirmed the need for an informed people. "The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government." If people are not made aware of information about the issues facing government and what the government is doing about them, one of two unattractive situations will arise. Either the uninformed public will make bad decisions or the decisions will be made by a de facto privileged oligarchy. In the absence of information about issues facing the government, the people are displaced from their role as self-governors. "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be 'uninhibited, robust, and wide-open' debate." When access to information is lost, self-government is impossible.

5. "The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about. And this, in turn, requires that . . . all facts and interests relevant to the problem shall be fully and fairly presented to the [public]." Meiklejohn, supra note 2, at 25. "Without available information, the people cannot determine which officials they should elect or judge their performance in office. 'Abuses of power, if undiscovered, can never be corrected at the ballot box.'" Frank B. Cross & Stephen M. Griffin, A Right of Press Access to United States Military Operations, 21 Suffolk U. L. Rev. 989, 1008 (1987).


7. "As increasing numbers of important decisions 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 ever larger, and our nation becomes less and less 'secure.'" James A. Goldston et al., Note, A Nation Less Secure: Diminished Public Access to Information, 21 Harv. C.R.-C.L. L. Rev. 409, 451 (1986).

B. National Security Requires Government Secrecy

As much as the free flow of information is vital to the health of a democratic republic, so too is national security vital to the very existence of those democratic institutions which give life to that republic. The executive is primarily responsible for national security. National security relies on the wise conduct of foreign affairs, the availability of intelligence information, and military preparedness—all things controlled by the executive. Secrecy in these areas is indispensable to their success. The need for secrecy in government has been recognized since the inception of the Constitution. "From our national beginnings, the Government of the United States has asserted the right to conceal and, therefore, in practical effect not to let the people know. Secrecy governed the deliberations in Philadelphia in 1787." From its inception, the United States Congress has thought it necessary for the executive to have the ability to keep information secret.

As governments have become more complex and weapons of mass destruction have become more accurate and powerful, our government's ability to keep information from potential adversaries has become more and more crucial. The importance of secrecy to national security has been recognized in the Supreme Court: "[T]he maintenance of an effective national defense require[s] both confidentiality and secrecy. . . . In the

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9. Chief Judge Haynsworth of the Fourth Circuit wrote "The Constitution in Article II Sec. 2 confers broad powers upon the President in the conduct of relations with foreign states and in the conduct of the national defense." United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir.), cert. denied, 490 U.S. 1063 (1972).

10. Id. at 1316 (quoting Louis Henkin, The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers, 120 U. PA. L. REV. 271, 273-74 (1971)). "'The Federalist' vindicated the right of the executive branch to conduct negotiations and, by inference, intelligence operations, without any immediate obligation to supply Congress or the people the detail of what it was doing." Arthur Schlesinger, The Secrecy Dilemma, N.Y. TIMES, Feb. 6, 1972 (Magazine), at 12.

11. See June D. W. Kalijarvi & Don Wallace, Jr., Executive Authority to Impose Prior Restraint upon Publication of Information Concerning National Security Affairs: A Constitutional Power, 9 CAL. W. L. REV. 468, 481 (1973). "It also should be noted that in 1789, the Executive by statute was empowered to classify government documents and conceal them from the public." Id. at 481-82 n.59.

area of basic national defense the frequent need for absolute secrecy is, of course, self-evident."\footnote{13}

\section{Exclusive Executive Control over the Classification Process}

The need for secrecy in government affairs is most important in the areas of national defense and foreign affairs. Pursuant to this need, the executive's role as Commander-in-Chief\footnote{14} and as the country's principal agent in foreign relations\footnote{15} has given him the authority to determine what information shall be classified.


\footnote{14} "The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into actual Service of the United States..." U.S. Const. art. II, § 2, cl. 1. In The Prize Cases, 67 U.S. (2 Black) 635 (1862), the Supreme Court analyzed the President's powers as commander-in-chief and gave that role substantial deference in light of the blockade of the Southern states ordered by President Lincoln without Congress' approval.

Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to afford to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands."

\emph{Id.} at 670 (emphasis in original) (citation omitted).

\footnote{15} The Supreme Court most strongly reaffirmed the President's role as the leader in foreign affairs in an opinion written by Justice Sutherland in United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936), Writing for the majority, Justice Sutherland said:

It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

\emph{Id.} at 320-21.
Today, although various intelligence oversight committees exist, the executive has virtually complete and unreviewable discretion as to what information is classified and kept from the public. The origin of the executive's daunting power to classify information stems simply from legislative inaction rather than from any affirmative specific statutory or Constitutional authority. Executive Order No. 10,290, signed by President Truman in 1951, was the first executive order dealing with classification of information which stated outright that the power to classify was not based upon legislation. Regarding President Eisenhower's subsequent order on classification, Executive Order No. 10,501, the Commission on Government Security stated: "In the absence of any law to the contrary, there is an adequate constitutional and statutory basis upon which to predicate the Presidential authority to issue Executive Order 10,501." Executive Order No. 12,356, issued by President Reagan in 1982, is the order under which information is classified today. Generally, the Order outlines the classification categories, and defines which government officials have

16. The Information Security Oversight Office, created by Executive Order No. 12,356, mainly collects statistical data rather than reviews the propriety or legality of executive classification processes. The other oversight mechanisms, in addition to the congressional committees, include:

(i) the Offices of General Counsel and Inspector General within the intelligence agencies; (ii) the system of internal regulations established under the President's Executive Order on Intelligence and administered through implementing regulations of the intelligence agencies; (iii) the Office of Intelligence Policy within the Department of Justice; (iv) the Foreign Intelligence Surveillance Act and the court established thereunder . . . and (vi) the National Security Council or its staff and other nonintelligence departments and agencies [which review certain intelligence activities] . . .


18. Executive Order No. 10,290 [ ] was the first to indicate that the President was relying not upon any specific statutory provision, but rather upon "authority vested in me by the Constitution and statutes, and as President of the United States." Such reliance upon implied constitutional powers seemed to strengthen the President's discretion to make official secrecy policy by intertwining his responsibility as Commander in Chief with the obligation to "take Care that the Laws by faithfully executed."


original classification authority and on what levels.\textsuperscript{21} Essentially, the authority to classify information is delegated throughout the executive branch to the heads of the executive agencies and to top military officials.

Today, it is generally accepted that although widespread knowledge of government and its activities is essential to a democracy's legitimacy, a certain amount of secrecy is unavoidable.

\textsuperscript{21} Executive Order No. 12,356 first lays out classification levels and then lists those individuals who may exercise classification authority.

\textbf{SECTION 1.1. CLASSIFICATION LEVELS.}

(a) National security information (hereinafter "classified information") shall be classified at one of the following three levels.

(1) "Top Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

(2) "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

(3) "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security.

(b) Except as otherwise provided by statute, no other terms shall be used to identify classified information.

\textbf{SEC. 1.2. CLASSIFICATION AUTHORITY.}

(A) \textbf{Top Secret.} The authority to classify information originally as Top Secret may be exercised only by:

(1) the President;

(2) agency heads and officials designated by the President in the Federal Register; and

(3) officials delegated this authority pursuant to Section 1.2(d).

(B) \textbf{Secret.} The authority to classify information originally as Secret may be exercised only by:

(1) agency heads and officials designated by the President in the Federal Register;

(2) officials with original Top Secret classification authority; and

(3) officials delegated such authority pursuant to Section 1.2(d).

(C) \textbf{Confidential.} The authority to classify information originally as Confidential may be exercised only by:

(1) agency heads and officials designated by the President in the Federal Register;

(2) officials with original Top Secret or Secret classification authority; and

(3) officials delegated such authority pursuant to Section 1.2(d).

able in order for the government to operate effectively. A problem arises with the classification system, though, because the authority to keep information confidential has been abused. The Congressional Committee on Government Operations analyzed President Reagan's Executive Order and found the following:

The Committee finds that abuse of classification authority and overclassification of government information continues to be a serious problem. Overclassification results in unnecessary restrictions on the public availability of information, a reduction in public confidence in the classification system, a weakening of the protection for information that is truly sensitive, and an increase in the cost of government.

The Committee finds that Executive Order 12356 offers nothing that will address the problems of overclassification. Unless new action is taken to control overclassification, the new order is likely to make matters worse because it gives classifiers vaguer guidelines, fewer restrictions, and unnecessary additional classification authority.

The abuses in government secrecy result from the classification process itself in which decisions concerning what information should be classified are left entirely up to the executive and its agencies. Due to the tremendous power and influence the government has in nearly every facet of life, the potential for abuse through withholding information is unparalleled. This potential is compounded by the fact that the agencies and individuals making the classification decisions have an enormous self-serving interest in classifying as much information as possible. As more information is classified, the executive's

22. The introductory paragraph of Executive Order No. 12,356 puts it best: "[This Order] recognizes that it is essential that the public be informed concerning the activities of its Government, but that the interests of the United States and its citizens require that certain information concerning the national defense and foreign relations be protected against unauthorized disclosure." Id.


24. "Numerous independent studies of the classification system have concluded that far more information is classified than is necessary or constitutionally permissible." James A. Goldston et al., Note, A Nation Less Secure: Diminished Public Access to Information, 21 HARV. C.R.-C.L. L. REV. 409, 483-84 n.376 (1986).

25. "Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and their intentions
power increases\textsuperscript{26} while its accountability to those it was created to serve decreases.\textsuperscript{27}

The lowest classification level under the current executive order mandates that "[i]nformation may not be classified under this Order unless its disclosure reasonably could be expected to cause damage to the national security."\textsuperscript{28} However, this standard is not followed. Indications that the classification system is, in fact, abused are widespread.

In 1972, \textit{The New York Times} reported that William G. Florence, a retired Pentagon security officer, testified that he "estimated that the Pentagon files contained about 20 million classified documents and that 'the disclosure of information in at least 99.5 per cent of those classified documents could not be prejudicial to the defense interests of the nation.'"\textsuperscript{29} Regarding the Vietnam War, it is now known that "[e]xtensive secret military operations were carried on in Laos for over five years before Congress or the public were able to obtain any information about them at all."\textsuperscript{30} The executive agencies not only withhold information but they also give out misinformation. Regarding the Vietnam War, "[w]e know that there were

\textsuperscript{26} The increase in power results from diminished accountability. For example:

That important secrets exist is carefully broadcast; only the substance is obscure. Secrecy is a particularly effective device for manipulating public opinion because it intimidates the uninitiated and elicits feelings of awe and guilt. "If you only had access to the cables, you wouldn't say the things you do," is the standard ploy. . . . For the public the mystique of secrecy is powerful. . . . The managers of the Vietnam War continually pleaded with critics not to come to the conclusions about the conflict to which ordinary common sense was leading them because the real situation was much more complicated. "You don't know the whole story," they would say. Of course, that was true, as the Pentagon papers have shown, but the vital pieces of information that were missing would have confirmed the doubts, not allayed them.


\textsuperscript{27} [T]he executive branch has had a free hand in dealing with classified information. Naturally this has made it vulnerable to its own worst instincts. . . . If secrecy in some cases remains a necessity, it also can easily become the means by which the Government dissembles its purposes, buries its mistakes, safeguards its reputation, manipulates its citizens, maximizes its power and corrupts itself.

\textit{Id.} at 13.


\textsuperscript{29} Schlesinger, \textit{supra} note 11, at 12.

\textsuperscript{30} \textit{Barnet, supra} note 27, at 268.
huge discrepancies between what the managers of the war learned about the basic nature of the conflict and what they taught the public, including Congress.”

In describing President Reagan’s approach to information, a long-time executive branch aid said: “There was a convergence of belief of the bad effects of too much disclosure...[and a fear that] by providing information about what they were doing, they would provide critics with an opportunity to shoot at them.”

During the passage of the Freedom of Information Act, the House Committee on Government Operations expressed concern about the public’s need for access to government information:

A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. . . . [T]he ideals of our democratic society have outpaced the machinery which makes that society work. The needs of the electorate have outpaced the laws which guarantee public access to the facts in government.

III. CURRENT METHODS OF PUBLIC ACCESS TO GOVERNMENT INFORMATION

Today, there are two main ways for the American public to get officially nondisclosed information about its government: the Freedom of Information Act and government leaks.

A. The Freedom of Information Act

The origin of the Freedom of Information Act dates back to the administration of Franklin Delano Roosevelt. As a result of Roosevelt’s New Deal legislation, the United States government created and greatly expanded many administrative func-

31. Id. at 275. Barnet also thoroughly discusses government deception surrounding the Vietnam War. For example:

The covert actions against Laos and North Vietnam which were stepped up in 1963 were ostensibly for the purpose of stopping infiltration into South Vietnam. From 1964 on the United States publicly charged that the war was instigated and promoted by Hanoi. . . . [Yet] the Special Group for Counter-Insurgency set up by President Kennedy concluded on April 5, 1963, that “we are unable to document and develop any hard evidence of infiltration after October 1, 1962.”


tions and agencies to handle the economic disaster facing the nation in the 1930s. As a result, administrative regulation of private enterprise as well as most other aspects of American life intensified. Consequently, in 1946 the Presidential Committee on Administrative Management recognized the potential for abuse inherent in the newly created executive agencies. As a result, the 79th Congress passed the Administrative Procedure Act. The Act provided in pertinent part that "[s]ave as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except for good cause." The underlying motivation behind the Act was that public disclosure would serve as a check on the broad powers of the new agencies.

Under the Johnson administration in 1966, Section 3(c) of the Administrative Procedure Act was expanded and codified, into what is now known as the Freedom of Information Act (FOIA), to "protect the right of the public to information." The legislative history of the FOIA reveals Congress' acknowledgement of the public's need for information concerning its government:

Congress passed the Freedom of Information Act in response to a persistent problem of legislators and citi-

35. The Committee stated:
There is a conflict of principle involved in their make-up and functions. . . . They are vested with duties of administration . . . and at the same time they are given important judicial work. . . . The evils resulting from this confusion of principles are insidious and far reaching. . . . Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible. Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the Commission, in the role of prosecutor, presented to itself.

Id.
zens, the problem of obtaining adequate information to evaluate federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives. The touchstone of any proceedings under the Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests. The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly.\textsuperscript{39}

To effectuate this goal of governmental disclosure, the FOIA requires that each agency shall make information available to the public through the Federal Register, shall make information available for public inspection and copying, and shall make information promptly available to any person upon any request for records where the proper procedures have been followed.\textsuperscript{40}

The admirable objectives of the FOIA are simultaneously undercut in the text of the Act itself in its list of exempted materials. This list includes “matters that are . . . specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order.”\textsuperscript{41} The current executive order\textsuperscript{42} allows top executive officials to exercise unreviewable discretion in declaring information secret. Consequently, all information which is properly classified pursuant to the executive order is beyond the scope of the FOIA. Furthermore, the Executive order provides that if an agency receives a FOIA request regarding information which is not classified at the time of the request, the agency may, at that time, classify the information and legally withhold it from the requesting party.\textsuperscript{43} Consequently, Executive order 12,356 effectively guts the FOIA of all usefulness in the national security/foreign affairs arena.

\textsuperscript{39} Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971).
\textsuperscript{40} 5 U.S.C. § 552(a)(1)-(3) (1988).
\textsuperscript{43} “Information may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act.” Exec. Ord. No. 12,356 § 1.6(d), 47 Fed. Reg. 14,874 § 1.6(d) (1982).
B. Government Information Leaks

The other primary method through which the public receives officially nondisclosed information about the government is through news leaks by government employees. The government may leak information for any number of reasons: to test public response to contemplated policy decisions, to reinforce public confidence in action already taken, or even to oppose official policy in interbranch/agency conflicts.44

Leaks are often the press' main source of information. "The testimony of numerous members of the press, former government officials, and others demonstrates how pervasive is the practice of leaking."45 According to Max Frankel, then Editor of The New York Times:

[A] small and specialized corps of reporters and a few hundred American officials regularly make use of so-called classified, secret, and top secret information and documentation. It is a cooperative, competitive, antagonistic and arcane relationship. . . . Without the use of "secrets" . . . there could be no adequate diplomatic, military and political reporting of the kind our people take for granted, either abroad or in Washington and there could be no mature system of communication between the Government and the people.46

1. Problems with Government-Leaked Information

The problem with relying on government leaks for information is that the public is told only that which the government

44. In an affidavit presented in connection with its court battle to publish the Pentagon papers, the Washington Post alleged that its reporters had been shown classified documents on numerous occasions. This is, of course, standard procedure. The obvious purpose is to lend credibility to a news angle which the government is eager to promote. A reporter able to hint at "authoritative sources" is much more likely to print the story as the government would like to see it. However, many leaks come from sources trying to counteract official policy rather than promote it. The military services make liberal use of the "leak." These usually involve "secret intelligence" about new Soviet weapons. Sometimes, they are designed to whip up a little war fever. . . . But most leaks are for the purpose of explaining or defending official policy, not undermining it.

BARNET, supra note 27, at 290.


46. Id. (quoting the affidavit of Max Frankel, Editor, The New York Times, filed in New York Times v. United States, 403 U.S. 713 (1971) (per curiam)).
wants it to hear. Leaks are result-driven. Bits of information are leaked for the purpose of furthering government goals and not for the purpose of broadening the public's knowledge about its government. A main purpose of leaking information is the manipulation of public opinion. This will rarely result in details about government decisionmaking, mismanagement, or corruption being revealed to the public. Leaks are clearly not a reliable method for disseminating information about the workings of the government to the public—a matter of the utmost importance to the operation of a legitimate democracy.

2. Government Prosecution of Leakers

In addition to “leaking” only result-driven information, the government actively prosecutes those employees who, without proper authorization, leak negative information about the government to the public. The government has prosecuted its employees for revealing information under breach of contract theory, espionage statutes, and statutes covering theft from the federal government. Suits against government-employed leakers are brought selectively. The government chooses which individuals to prosecute or sue based on the content of the information revealed.

47. During my years in the White House it was not unusual for me or other government officials to have photocopied or otherwise reproduced classified documents or excerpts therefrom; to take such documents home for review; or to quote from them, summarize them, or otherwise utilize them in “off-the-record,” “background,” or other kinds of sessions with one or more representatives of the news media and occasionally in speeches. No formal authority was sought or obtained for such use, and no investigation or prosecution ensued. On the contrary, the President, Secretary of State, Secretary of Defense, Attorney General, Special Assistant for National Security Affairs, Director of Central Intelligence and other members of the NSC knowingly and deliberately disseminated such information from time to time in order to advance the interests of a particular person, policy, political party, or Department of the Administration itself, or, in their opinion, the national interest. Lesser officials often did the same for these reasons and others.

Id. (quoting the affidavit of Theodore C. Sorenson, filed in New York Times v. United States, 403 U.S. 713 (1971) (per curiam)).


50. Id.
United States v. Morison marked the first time the government successfully prosecuted a person not accused of being a spy under the Espionage Act. Samuel L. Morison worked at a Naval Intelligence Support Center as a security-cleared analyst. He leaked classified satellite photographs of a Soviet nuclear-powered carrier under construction to a British publication. The United States District Court found Morison guilty of violating the Espionage Act (18 U.S.C. § 793(d)) by willfully transmitting photographs, allegedly related to the national defense, to a person not entitled to receive them. The court also found him guilty of "theft or conversion of those same ... photographs, in violation of [the theft statute] 18 U.S.C. § 641."

In his defense, Morison argued that the Espionage Act was intended by its drafters to cover what most people would consider classic espionage cases "where the disclosure is to an agent of a foreign government" and that the statute was therefore "not properly applied to a 'leak' case." However, the court concentrated on a literal interpretation of the statute. The Espionage Act provides that:

Whoever, lawfully having possession of, access to, control over, or being entrusted with any ... photograph ... relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States ... willfully ... transmits ... the same to any person not entitled to receive it ... Shall be [fined or imprisoned or both].

54. Id.
55. The name of the publication was Jane's Defense Weekly.
57. Id.
58. Id. at 660.
59. Id. at 658.
60. Id. at 660.
61. 18 U.S.C. § 793(d) (1988). The full text of this section is as follows: Whoever, lawfully having possession of, access to, control over, or being entrusted with 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
The court stated that "to read into the statute the requirement that it apply only in 'classic espionage' cases where the disclosure is to an agent of a foreign government would be to ignore the plain language of the law as presently written."62

With respect to the count regarding theft, Morison argued that 18 U.S.C. § 64163 was not meant to apply to unauthorized disclosures of classified information.64 He asserted that "no definitive court test of the applicability of 18 U.S.C. § 641 to unauthorized disclosures of classified information"65 has yet been made. The court conceded this point but noted that "other district courts have allowed prosecution under § 641 for similar conduct"66 and permitted it to be applied in his case.

Since Morison opened the door to the application of § 641 to unauthorized disclosures of government information, the issue now is not "may these statutes be used by the government against leakers?" but "in what manner is the government exercising its discretion to prosecute such leakers?" Morison contended

that using § 641 to regulate the disclosure of government information gives executive branch officials unbridled

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62. Morison, 604 F. Supp. at 660. Morison also claimed that Section 793(d) was unconstitutionally vague and overbroad. Both allegations were rejected by the Court. Id. at 659, 662.

63. 18 U.S.C. § 641 (1988) states:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department of agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

64. Morison, 604 F. Supp. at 660.

65. Id.

66. Id. at 664.
discretion to enforce the statute and thereby control the flow of government information to the public. Thus, government officials would be free to enforce the statute and thereby control the flow of government information to the public. Thus, government officials would be free to enforce their own information control policy, and liability may turn on nothing more than the fact that the disclosure embarrasses [sic] them or subjects them to public criticism.  

To this the court briefly replied: "These arguments have little to do with this case." In reality, these arguments are central to the larger issue: government abuse of the classification process which undermines the public's knowledge about government information. By allowing the government to enforce selectively these statutes, Morison's point was exactly on target.

In addition to prosecuting cases based on the espionage and federal theft statutes, the government also employs contractual restraints against its employees to deal with what it considers to be unfavorable information leaks. Like the federal theft and espionage statutes, suits brought against employees under a contract theory of law are also pursued with a great deal of discretion based upon the content of the information. *United States v. Marchetti* and *Snepp v. United States* are the two landmark cases which illustrate this contract approach.

Government employees whose positions provide access to privileged or classified information are required to enter into a secrecy agreement upon the commencement and termination of their employment. This agreement generally states that they will not divulge information to which they were exposed as a result of their secured status without first seeking and receiving prepublication approval from the proper officials.

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67. Id.
68. Id.
70. 444 U.S. 507 (1980).
71. An example of part of one such secrecy agreement is the oath Victor L. Marchetti took upon the termination of his employment with the Central Intelligence Agency.

I SOLEMNLY SWEAR, WITHOUT MENTAL RESERVATION OR PURPOSE OF EVASION, AND IN THE ABSENCE OF DURESS, AS FOLLOWS: 1. I will never divulge, publish, or reveal by writing, word, conduct, or otherwise, any information relating to the national defense and security and particularly information of this nature relating to intelligence sources, methods and operations, and specifically Central
The first of the two cases, *United States v. Marchetti*, addresses the constitutionality, as well as the propriety, of the secrecy agreement itself. Victor L. Marchetti, a former employee of the Central Intelligence Agency (CIA), attempted to publish a manuscript in violation of the secrecy oath he took as a condition of his employment with the CIA. The Central Intelligence Agency sought to enjoin him from publishing this information on the ground that such publication would be in violation of the secrecy agreement which existed between Marchetti and the CIA. The Fourth Circuit granted the injunction and ruled that the secrecy oath was contractual, "constitutional and otherwise reasonable and lawful." The court based its decision on the government's right to and need for secrecy and the practical utility of the contractual arrangement to assure that secrecy.

Although courts have traditionally applied a very high level of judicial scrutiny to laws which adversely affect First Amendment rights, the *Marchetti* court avoided applying such scrutiny by focusing instead on the executive origin of the secrecy agreement. The court made the initial observation that the First Amendment was directed solely at Congress: "Congress shall make no law . . . abridging the freedom of speech, or of the press." By concentrating on the amendment's specific mention of Congress, the court reasoned that such exacting scrutiny need only be used in analyzing Congressional action impinging upon freedom of speech or the press.

"Intelligence Agency operations, sources, methods, personnel, fiscal data, or security measures to anyone, including but not limited to, any future governmental or private employer, private citizen, or other Government employee or official without the express written consent of the Director of Central Intelligence or his authorized representative."

*Marchetti*, 466 F.2d at 1312.

72. Id. at 1311.

73. Id.

74. Citizens have the right to criticize the conduct of our foreign affairs, but the Government also has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonable be thought to be inconsistent with the national interest. . . . Moreover, the Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment.

*Id.* at 1315-17.

75. *Id.* at 1313 (quoting U.S. Const. amend. I).
The court's analysis did go a step further, however, and recognized that "[i]n order to protect freedom of speech and of the press, the First Amendment has been applied beyond its express terms" by the Supreme Court to apply to the executive and judicial branches of government as well. "In applying the First Amendment to actions taken by the judicial and executive branches, the Supreme Court has followed a flexible approach." Marchetti then used this "flexible" approach and concluded that the overwhelming importance of national security and effective government operation justified the secrecy agreement's infringement upon a federal employee's freedom of speech. "This flexible approach toward the executive and judicial branch is warranted not only because they are omitted from the express language of the First Amendment, but also because they lack legislative capacity to establish a pervasive system of censorship." Marchetti did not recognize that this particular method of censorship may be equally, if not more, pervasive than a law passed by Congress because the oaths restrict the flow of information at its source—since the persons being censored are government insiders, the public's access to government information is cut off. Censorship of government officials without an alternative system of information dissemination restricts the public's access to essential facts about the operation and processes of government.

Marchetti restricted its holding to secret information touching upon the national defense and the conduct of foreign affairs. The court stated:

We readily agree with Marchetti that the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship. It precludes such restraints with respect to information which is unclassified or officially disclosed, but we are here concerned with secret information touching upon the national defense and the conduct of foreign affairs. . . .

In Snepp v. United States, the Supreme Court took a step beyond Marchetti and held that secrecy agreements apply to the disclosure of both classified and unclassified information
Snepp, a former CIA agent, also entered a secrecy agreement as an express condition of his employment with the Agency. After his career with the CIA, he published a book based on his exposure to CIA activities in South Vietnam. The Agency sued Snepp for not submitting this book to the Agency for prepublication review, as required by his secrecy agreement—even though the CIA conceded that Snepp’s book disclosed no classified information.

The Court primarily concentrated on the relationship Snepp established with the Central Intelligence Agency by taking the secrecy oath. The Court referred to this arrangement as a “trust agreement.” Through its emphasis on the nature of the agreement, the substance of the information sought to be published became immaterial.

Snepp’s employment with the CIA involved an extremely high degree of trust. In the opening sentence of the agreement that he signed, Snepp explicitly recognized that he was entering a trust relationship. The trust agreement specifically imposed the obligation not to publish any information relating to the Agency without submitting the information for clearance. . . . Whether Snepp violated his trust does not depend upon whether his book actually contained classified information. . . . The Government simply claims that, in light of the special trust reposed in him and the agreement that he signed, Snepp should have given the CIA an opportunity to determine whether the material he proposed to publish would compromise classified information or sources.

The Court stated: “[u]ndisputed evidence in this case shows that a CIA agent’s violation of his obligation to submit writings about the Agency for prepublication review impairs the CIA’s ability to perform its statutory duties.” This statement is undeniably true. If each agent made independent decisions as

81. Id. at 511.
82. FRANK SNEPP, DECENT INTERVAL: AN INSIDER’S ACCOUNT OF SAIGON’S INDECENT END (1977).
84. Id. at 510.
85. Id. at 510-11. The Court also pointed out that the character of his position with the CIA could of itself establish a trust relationship. “Quite apart from the plain language of the agreement, the nature of Snepp’s duties and his conceded access to confidential sources and materials could establish a trust relationship. . . . Few types of governmental employment involve a higher degree of trust than that reposed in a CIA employee with Snepp’s duties.” Id. at 511 n.6.
86. Id. at 512.
to what secret information the public should know, national security would, in fact, be severely threatened.\textsuperscript{87} However, in the absence of any other vehicle to disseminate information, such "unauthorized" disclosures will undoubtedly continue in the future.

IV. THE NEED FOR CHANGE

The possibility that the government will use the espionage and theft statutes and contract law to censor the dissemination of what it considers to be "unfavorable" information has been recognized by the Supreme Court.

This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor. . . . It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad statute.\textsuperscript{88}

The larger problem lies in the classification system itself. If "the system" incorporated methods and procedures for systematic review and declassification of information with the specific purpose of broadening public knowledge, then government employees, in their individual capacities, would probably be less inclined to break their secrecy agreements and disseminate information they believe is vital to public discussion. Government employees who leak information without

\textsuperscript{87} When a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA—with its broader understanding of what may expose classified information and confidential sources—could have identified as harmful. In addition to receiving intelligence from domestically based or controlled sources, the CIA obtains information from the intelligence services of friendly nations and from agents operating in foreign countries. The continued availability of these foreign sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents.

authorization should be prosecuted—there must be a way to enforce the agreements. However, this should be true only where other outlets for declassifying information exist.

The District of Columbia Circuit Court of Appeals has addressed this crisis regarding classified information.\(^8\) In denying a claim by a former CIA agent who sought a declaratory judgment that CIA classification and censorship violated the first amendment, the court stated:

It would of course be extremely difficult for judges to "balance" the public's right to know against an acknowledged national security risk, and I do not believe we are currently authorized to do so. However, it seems important in view of recent revelations about past indiscretions in the name of national security, for some governmental institution, if not the classification system itself, to conduct such a balance. . . . Economic and criminal sanctions against agents who violate the preclearance and agency classification scheme are justifiable. But with no mechanism in the system for balancing the public's right to know with possible risks to security, those sanctions can also result in the permanent loss of information critical to public debate.\(^9\)

The classification system is clearly in need of reform. A delicate balance must be struck to maintain these two vital functions of the nation: keeping the democratic process viable through meaningful public debate, and maintaining the safety of the very institutions which give life to that democracy.

To reform the present classification system, change must be initiated by one of the three branches of government. It is highly doubtful that reform of the classification system will come from within the executive. As mentioned earlier, the executive bureaucracy will not voluntarily elect to lessen its own power and influence through large-scale declassification of information.\(^9\)

Neither is the judiciary a likely place to look for aid to the problems with the classification system. The courts, having no training in, experience with, or inside knowledge of national security issues, have exercised prudent self-restraint in this area. In examining denied FOIA requests and prosecutions against those who leak "unfavorable" information, courts have

\(^8\) McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983).
\(^9\) Id. at 1150.
\(^9\) See supra notes 26 and 28.
consistently deferred to the executive on national security issues.

For example, in *McGehee v. Casey* the appellant sought a declaratory judgment that the CIA classification and censorship scheme violated the First Amendment and that an article he desired to have published contained no properly classified material. The court stated:

>Courts are to “accord substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record” because “the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse [e]ffects might occur as a result of a particular classified record.”

Additionally, in *Epstein v. Resor*, the Ninth Circuit addressed the issue of judicial participation in national security matters.

>This court] recognizes the proposition that the question of what is desirable in the interest of national defense and foreign policy is not the sort of question that courts are designed to deal with. As has been stated, the judiciary has neither the ‘aptitude, facilities, nor responsibility’ to review these essentially political decisions.

In *United States v. Marchetti*, Chief Judge Haynsworth wrote that the operations of the CIA are generally “an executive func-
tion beyond the control of the judicial power [and if] in the conduct of its operations the need for secrecy requires a system of classification of documents and information, the process of classification is part of the executive function beyond the scope of judicial review." 97

Due to the executive's reluctance and the judiciary's self-proclaimed inability to reform or review the classification process, change must come from the legislature. Congressional action is needed to reform the present classification system and to install mechanisms which systematically declassify massive amounts of information—while remaining sensitive to national security and foreign affairs interests. The Supreme Court has declared that Congress may legislate in the area of national security affairs, with the only restriction being that it not prevent the President "from accomplishing [his] constitutionally assigned functions." 98

Under the present executive order, items of information are reviewed for declassification by the Archivist of the United States after being submitted into the National Archives, 99 or upon the election of agency heads—a highly unlikely event. In addition to these two instances, classified information is subject to mandatory review for declassification upon the government's receipt of a procedurally correct request to do so from a United States citizen or permanent resident alien, federal agency, or State or local government. 101

97. Id. at 1317.

In some of our more recent cases involving the powers and prerogatives of the President, we have employed something of a balancing approach, asking whether the statute at issue prevents the President "from accomplishing [his] constitutionally assigned functions," and whether the extent of intrusion on the President's powers "is justified by an overriding need to promote objectives within the constitutional authority of Congress." In each of these cases, the power at issue was not to be within the sole province of the President, but rather was thought to be encompassed within the general grant to the president of the "executive Power."

Id. (citations omitted).
100. Id. at § 3.3(b)–(c).
(a) Except as provided in Section 3.4(b), all information classified
These methods are wholly inadequate. Due to the sheer mass of information involved, only a very small fraction of classified information is subject to declassification requests each year. For example, in 1984 alone the government made more than 19.6 million decisions to classify information.102

A. Proposals for Reform

While recognizing that some information simply must be kept confidential by the government, both the beginning and ending of the classification process should be modified to cut back on the potential for abusing the system. The types of information which may be classified should be reduced, and a systematic procedure for declassifying information should be instituted—thereby minimizing the amount of information initially classified, and speeding along the release of that information.

Presently, there are three levels at which information may be classified: confidential, secret, and top secret.103 One way to minimize the amount of information being classified is to limit the possible categories. The “confidential” category of classified information could be dropped altogether. Information is classified as confidential when its unauthorized disclosure reasonably could be expected to cause damage to the national security.104 The potential for damage to national security is low for this category. The imperative for informed public debate is so crucial to democracy that it outweighs the potential harm the information’s unauthorized disclosure may have on the national security. On balance, the possibility that information reasonably could be expected to cause damage to the national security does not justify the extent to which public debate would be stifled by its nondisclosure. While not classifying such information may sometimes lead to mere “damage”

under this Order or predecessor orders shall be subject to a review for declassification by the originating agency, if:
(1) the request is made by a United States citizen or permanent resident alien, a federal agency, or a State or local government; and
(2) the request describes the document or material containing the information with sufficient specificity to enable the agency to locate it with a reasonable amount of effort.

104. Id.
to the national security (as opposed to "serious damage" or "exceptionally grave damage" as is the case for "secret" or "top secret" information, respectively), the public loss of faith in government (due to its perception of the government's unaccountability) and the harm to the democratic process is conceivably worse. In the *Pentagon Papers* case Justice Black stated that "[t]he guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic." Justice Stewart elaborated:

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.\(^{106}\)

In addition to limiting the types of information which may be initially classified, the other side of the spectrum—declassification—should be loosened to open more information up to public scrutiny. Mandatory, specified declassification time periods should be established. All classified materials should be automatically declassified in either three or five years after the date of their original classification. The government, however, may extend the classified status of a piece of information for another classification period. To do so, upon the declassification date, the government would have the burden of showing to the Oversight Committee, by a preponderance of the evidence, that the information still meets one of the requisite levels of sensitivity to be classified.

Under this scheme, inertia would be on the side of declassification instead of the other way around. If no action is taken by an agency, the information is declassified—unlike today's system which requires that affirmative steps be taken by the government to declassify. Since finite resources would be available for this purpose, considering time and money constraints, the government would be forced to choose to classify only that information it deems most sensitive—thereby allowing vast amounts of classified information to be available to the public.

Also in this proposed scheme, classified information may be subject to release prior to its declassification date if it is the

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106. *Id.* at 728 (Stewart, J., concurring).
subject of a FOIA request. When access to information is sought through the FOIA, the government must offer a written justification for withholding the document from the requesting party. In this justification, the reasons for the document's original classification should be restated; and the information may only be withheld to the extent that those reasons are still viable. If the requesting party contests the justification, the dispute shall be presented to the Oversight Committee.

The Oversight Committee would be composed of individuals chosen from outside the government "who are qualified on the basis of achievement, experience and independence." To keep this system itself from being a source of government leaks, the committee members should be required to "execute an agreement never to reveal any classified information obtained by virtue of his or her service with the committee except to the President, . . . such persons as the President may designate," or to a person statutorily designated to receive information within the parameters of carrying out the committee's proper functions. The use of secrecy agreements throughout the executive branch and intelligence agencies would now be justified since other outlets would exist within the system for declassifying information.

The members of the Oversight Committee should be chosen by the President and ratified by Congress. The Committee's duties would include overseeing and monitoring the classification and declassification procedures of the various executive agencies. Upon discovery of potential classification illegalities, the Committee should submit such information to the President and the Attorney General for review and ruling. If within a reasonable amount of time (perhaps sixty days) the Committee finds that the problem has not been seriously addressed and no ruling has been issued with regard to the alleged illegalities, the Committee shall then be permitted to submit this information to the appropriate Congressional committee for review: for example, the Senate Select Committee on Intelligence or the House Permanent Select Committee on Intelligence. This threat of having information revealed to Congress would, hopefully, motivate the President and Attorney General to take quick action on the classification dispute in

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108. Id. at § 5.
109. These committees are described in 50 U.S.C. § 413 (1988).
order to keep the information away from the congressional committees.

B. Legislative Proposal

National security information properly classified as "Secret" and "Top Secret" shall be subject to mandatory declassification in three (3) and five (5) years, respectively, after the date of original classification, subject to the following exceptions:

(a) the declassification period for national security information may be extended beyond the prescribed three or five year period if, upon the declassification date, the original classifying entity makes a showing that such disclosure reasonably could be expected to cause serious damage to the national security; or

(b) the declassification period may be shortened when classified information is the subject of a Freedom of Information Act (5 U.S.C. § 552) request within its prescribed three or five year classification period. Upon such a request, the classifying entity must show that the facts which justified the original classification are still viable. Otherwise, the information shall be made available to the requesting party and the public.

CONCLUSION

By raising the hurdle over which information must pass to be classified, less information will be classified. Only information, the unauthorized disclosure of which reasonably poses a threat of serious damage to the national security, should be kept from the public. Additionally, subject to the government's option to attempt to renew the classification period, information which is properly kept from the public should be declassified automatically upon the expiration of its predetermined declassification date. If the declassification scheme works properly, information will be made available to the public more efficiently and on a much larger scale, without compromising the secrecy of information which is legitimately sensitive.