

**The Leaky Leviathan: Why the Government Condemns and Condone  
Unlawful Disclosures of Information**

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## INTRODUCTION

Ours is a polity saturated with, vexed by, and dependent upon leaks. The Bay of Pigs, the Pentagon Papers, warrantless wiretapping by the National Security Agency at home, targeted killings by the Central Intelligence Agency abroad: The contours of these and countless other government activities have emerged over the years through anonymous disclosures of confidential information to the press.<sup>1</sup> Across the ideological spectrum, many Americans believe both that leaking “is a problem of major proportions”<sup>2</sup> and that “our particular form of government wouldn’t work without it.”<sup>3</sup> Episodically, leaks generate political frenzy. The country is in such a period at this writing. Mass releases of classified defense documents and diplomatic cables through WikiLeaks, followed by a series of news stories about some of the government’s most closely held national security programs, have unleashed a torrent of legislative and media responses, of recriminations and justifications. This “latest outbreak of leak panic”<sup>4</sup> will soon fade; a new iteration will arrive in due course.

Our comprehension of leaking has not kept pace with our fascination. Even accounting for the secrecy that obscures its workings, the ratio of heat to light in commentary on the subject is extreme. Some valuable progress has been made. Journalists and ex-officials have chronicled the role of leaks in their work. Students of government and the press have limned leaks’ different forms and motivations. Legal theorists have considered their First Amendment implications. Yet for a variety of reasons, the literature reflects only a rudimentary understanding of leaks’ consequences, inside and outside government.<sup>5</sup> More surprising, because the questions are more tractable, scholars have devoted scant attention to the constitutive elements of the leak, as a legal and bureaucratic concept, or to the policies the executive branch has developed to enforce relevant prohibitions. We know something about the phenomenology and constitutionality of leaks but next to nothing about how the government deals with them.

This Article begins to reveal that world. Drawing on a range of theoretical perspectives and original sources—interviews with journalists and executive branch officials, plus records requested through the Freedom of Information Act (FOIA)—it offers the first sustained account of the regulatory regime applicable to leaking. Superficially straightforward, this regime turns out to be an intricate ecosystem. At the most general level, the Article demonstrates that the story behind the U.S. government’s longstanding failure to enforce the laws against leaking is far more complicated, and far more interesting, than has been appreciated. More specifically, the Article argues that the executive branch has never prioritized criminal, civil, or administrative enforcement against leakers; that a nuanced set of informal social controls has come to supplement, and nearly supplant, the formal disciplinary scheme; that much of what we call leaking occurs in a gray area between full authorization and no authorization, so that it is neither

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<sup>1</sup> I will refine this definition shortly. A wide range of practices are conventionally lumped together under the heading of “leaks,” as explained below. *See infra* notes 20-23, 89-101, 245-254 and accompanying text.

<sup>2</sup> President Ronald Reagan, Statement on the Issuance of a Presidential Directive, 18 WEEKLY COMP. PRES. DOC. 24, 24 (Jan. 12, 1982).

<sup>3</sup> BRUCE CATTON, *THE WAR LORDS OF WASHINGTON* 87 (1948).

<sup>4</sup> Bill Keller, *The Leak Police*, N.Y. TIMES, Aug. 6, 2012, <http://www.nytimes.com/2012/08/06/opinion/keller-the-leak-police.html?pagewanted=all>.

<sup>5</sup> *See infra* Part I.D (discussing obstacles to systematic study of these questions).

“leaks” nor “plants” but what I will term *pleaks* that dominate this discursive space; that the executive’s toleration of these disclosures is a rational, power-enhancing strategy and not simply a product of prosecutorial limitations, a feature not a bug of the system; and that to untangle these dynamics is to illuminate important facets of presidential power, bureaucratic governance, and the national security state in America today.

These claims require extensive elaboration. As a way into them, consider two features that mark the United States’ legal approach to unsanctioned disclosures of protected information. First, and most significantly, even though the Espionage Act of 1917 and other statutes broadly criminalize the gathering, receipt, and dissemination of national defense-related information and even though every modern president has decried the practice, an enormous amount of leaking to the press appears to go unpunished. The federal government has brought fewer than a dozen media leak prosecutions in the 96 years since the Espionage Act was enacted, six of them under the current administration.<sup>6</sup> Available evidence suggests that civil and administrative sanctions are only marginally more common. Let us call this the punitive/permissive divide: The statutes on the books concerning leaks, and the political rhetoric associated with them, are so harsh, and yet the government’s actual treatment of the activity seems to have been so mild. There is a dramatic disconnect between the way our laws and our leaders purport to condemn leaking and the way they condone it—a rampant, pervasive culture of it—in practice.

Second, the courts have indicated that while the government has expansive legal authority to prosecute employees who leak, it has minimal authority to stop reporters who receive leaks from broadcasting what they learn, either through ex post penalties or prior restraints.<sup>7</sup> In all cases, it seems, the government would have to prove a reporter’s actions threatened grave, immediate harm to national security interests. (It is hard to be sure because the government has never indicted one.) Let us call this the source/distributor divide: The First Amendment has been construed to provide so little protection for the leaker and yet so much protection for the journalist who knowingly publishes the fruits of the leaker’s illicit conduct and thereby enables the very harm—revelation of sensitive information to the public and to foreign adversaries—that the leak laws were designed to combat. In other areas of criminal law, downstream users of illegally obtained material are not similarly insulated from liability.<sup>8</sup>

As a descriptive or diagnostic matter, the literature has pointed to several factors to explain the existence of these features. The leak laws are so rarely enforced, it is said, because the Justice Department finds it so difficult, at the investigatory stage, to identify culprits and so difficult, at the adjudicatory stage, to bring successful cases without divulging additional sensitive information. Courts and prosecutors have privileged journalists over leakers, it is said, because of the former’s special First Amendment status and the latter’s consent to nondisclosure as a condition of employment. Throughout these discussions, the comparison is often drawn to

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<sup>6</sup> This is the standard narrative. Most observers count nine cases overall and attribute the last six to the Obama administration. Arguably, the former figure ought to be slightly higher and the latter slightly lower. *See infra* notes 102-103 and accompanying text.

<sup>7</sup> The government does have legal authority to subpoena journalists in leak cases in an effort to uncover their sources, and thereby to frustrate their reporting indirectly, though it has placed strict limits on its own ability to do so. *See infra* notes 121-127 and accompanying text.

<sup>8</sup> *See, e.g.*, 18 U.S.C. § 2315 (2006) (criminalizing the knowing sale or receipt of stolen goods).

the United Kingdom’s notorious Official Secrets Act. Whatever else might be true of our legal and political regime for regulating leaks, virtually everyone agrees the United States would never abide such a sweeping criminal prohibition.<sup>9</sup>

As a normative or justificatory matter, few have celebrated this “disorderly situation.”<sup>10</sup> Many believe it to be regrettable if not outrageous. National security hawks and opposition members of Congress routinely call for legislative strengthening of the leak laws and more vigorous executive enforcement, including against members of the media. Civil libertarians have assailed the last two administrations’ “war” on leaking and sought federal shield legislation for journalists and enhanced doctrinal protections for their sources. The most thoughtful and influential defenses of the status quo—by Alexander Bickel,<sup>11</sup> Jack Goldsmith,<sup>12</sup> and Geoffrey Stone<sup>13</sup>—are self-consciously ambivalent. They do not attempt to idealize or even rationalize the punitive/permissive and source/distributor divides, so much as to highlight the factors confounding any effort to strike an optimal balance in this area between national security needs and other democratic and constitutional goods. These analyses are also spare. They rely on discrete case studies and high-level constitutional theory to identify relevant values, precedents, and tradeoffs; they do not make any systematic inquiry into patterns and practices of leaking or enforcement or into the functional and strategic dimensions of the leak-law regime.

This Article aims to show why our “disorderly situation” cannot be understood without such inquiry and to explicate a more satisfying logic, a richer model, that better accounts for the seemingly incoherent law of leaks. The core claim is that the status quo, although ritualistically condemned by those in power, has served a wide variety of governmental ends at the same time as it has efficiently kept most disclosures within tolerable bounds. The leak laws are so rarely enforced not only because it is difficult to punish violators, but also because key institutional players share overlapping interests in vilifying leakers while maintaining a permissive culture of classified information disclosures.

The executive branch is where most of the action takes place. With respect to the punitive/permissive divide, commentators have widely assumed the executive would prefer to

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<sup>9</sup> See *infra* notes 459-488 and accompanying text (describing the Official Secrets Act and its role in U.S. legal policy debates).

<sup>10</sup> ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 80 (1975); accord Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL’Y REV. 185, 199 (2007) (characterizing First Amendment doctrine on leaking as “an awkward, even incoherent, state of affairs”). Bickel’s and Stone’s observations were directed at the source/distributor divide, but they fairly capture sentiment on the regulation of leaking more broadly. See generally GARY ROSS, *WHO WATCHES THE WATCHMEN? THE CONFLICT BETWEEN NATIONAL SECURITY AND FREEDOM OF THE PRESS* 9-20 (2011) (reviewing the “remarkable” number of articles, hearings, and reports that have critiqued U.S. leak law and policy); Stephen I. Vladeck, *Commentary*, in ROSS, *supra*, at xii, xiii (stating that “prominent scholars from across the spectrum have felled forests in the past several decades” proposing how the laws against leaking might be improved); Note, *Media Incentives and National Security Secrets*, 122 HARV. L. REV. 2228, 2232 (2009) [hereinafter Note, *Media Incentives*] (discussing “ample evidence of political dissatisfaction with the status quo” concerning classified information leaks).

<sup>11</sup> BICKEL, *supra* note 10, ch. 3.

<sup>12</sup> JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* ch. 7 (2012).

<sup>13</sup> Stone has addressed these issues in numerous important works. See, e.g., GEOFFREY R. STONE, *TOP SECRET: WHEN OUR GOVERNMENT KEEPS US IN THE DARK* chs. 1-3 (2007).

bring more cases, and then looked to constraints on realizing that preference. By concentrating on barriers to prosecution, these treatments overlook the ways in which powerful actors *benefit* from leak-law violations, as well as the ways in which leaking may be punished in the absence of a criminal proceeding, or indeed any formal sanction. The executive's "leakiness" is often taken to be a sign of institutional failure. It may be better understood as an adaptive response to key external liabilities—such as the mistrust generated by presidential secret-keeping and media manipulation—and internal pathologies—such as overclassification and fragmentation across a sprawling bureaucracy—of the modern administrative state. Once these affirmative interests in leaking are identified, the source/distributor divide also begins to look a little less puzzling. To criminalize leaking at the publication stage, as well as the transmission stage, would not only raise difficult First Amendment concerns but also risk compromising the government's instrumental use of the press.

Part I of the Article reviews the legal landscape and the available evidence on how leaks are used and punished. Part II first details the shortcomings of constraint-based rationales for the government's permissiveness, and then advances an alternative explanatory theory grounded in the executive branch interests served by leakiness. These interests include preserving ambiguity as to the origins of unattributed disclosures and therefore the communicative flexibility of top officials, signaling trustworthiness, facilitating richer internal information flows, pacifying constituencies for transparency in Congress, the media, and civil society, and mitigating the classification system's political and deliberative costs. Part III further fleshes out this account by investigating the informal enforcement model that the executive appears, behind closed doors, to have applied to leaking. Part IV returns to the source/distributor divide and to the recent uptick in prosecutions and draws out additional evaluative and descriptive implications—including the surprising insight that the U.S. and U.K. legal regimes on leaks have, at least in their observable aspects, substantially converged.

Before proceeding further, several notes are in order. Throughout the pages that follow, the focus is on the U.S. federal executive branch and its information control practices relating to national security, broadly defined to include many matters of foreign policy.<sup>14</sup> Some of the Article's arguments may well carry over to other types of leaks, to other types of institutions, to subnational levels of government, maybe also to other mature democracies. At points, I will briefly discuss possible extrapolations. But national security leaks raise a number of distinct concerns and have always driven the legal conversation.<sup>15</sup> Their treatment by the world's dominant military power will, I trust, be of sufficient interest to many.

The heart of the Article is the positive analysis in Parts II and III and the window it provides into the regulation of leaking. While I hope in Part IV to draw some fruitful linkages to broader

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<sup>14</sup> In this, the Article follows much of the existing literature on leaks. *Cf. infra* notes 249, 309 and accompanying text (noting the potential value of more congressionally oriented approaches). As compared to prior legal studies, this study pays greater attention to the production, regulation, and function of leaking and less to doctrine or the demand side. While much more could be (and has been) said about the methods and incentives of those who seek to obtain government secrets, the world explored herein is that of officialdom, of the secret-keepers and their minders.

<sup>15</sup> *Cf. ELIE ABEL, LEAKING: WHO DOES IT? WHO BENEFITS? AT WHAT COST? 4 (1987)* ("The [U.S.] government's problem with leaks and leakers tends to center on three related areas: foreign policy, defense, and . . . two intelligence organizations, the Central Intelligence Agency and the National Security Agency.").

questions in democratic, constitutional, and security theory, and while I hope more generally to facilitate normative projects of varied stripes, the Article is principally concerned with demonstrating how leaking works. The overriding aim is to provide an explanation (not a justification) for this regulatory regime in terms of the intersecting desires, beliefs, and constraints of presidents, political appointees, civil servants, legislators, journalists, and the institutions they populate. Although I cannot directly establish the intentions of many of these actors or rule out evolutionary factors—for instance, a natural tendency for the leakier components of government to gain in relative political power and thereby to propagate their disclosure norms—the Article tries to the extent possible to provide microfoundations for its theory, to specify mechanisms that reduce leakiness to the individual level.

Some pieces of the analysis were informed by roughly two-dozen interviews I conducted with current and former officials who have worked on top secret issues across the executive branch, as well as by my own experiences in government. Most of these officials served in a legal capacity. Almost all of the interviews were “on background,” which is to say the interviewees asked not to be identified and I agreed.<sup>16</sup> The unsettling brand of methodological mimesis that results—this is an Article about anonymous government sources that itself relies on anonymous government sources—is not lost on me. I would have preferred to conduct interviews on the record and yet, like so many journalists and several scholars before me, I soon learned that few were willing to discuss anything interesting under those ground rules.<sup>17</sup> Minimizing validity concerns, however, all points drawn from the interviews are consistent with the publicly available evidence, including the returns from my own FOIA requests, which I cite throughout.<sup>18</sup> The interviews proved more confirmatory than revelatory. They deepened but did not transform my understanding of this evidence.

A final caveat: While I try in this Article to shine light on an opaque corner of the law, I certainly do not mean to suggest that I have fully uncovered, much less “solved,” the inner workings of the leak regime. The phenomenon of leaking is sufficiently heterogeneous and complex as to resist monolithic characterization. Perhaps the most generalizable contribution the Article aims to make is to point the way to new conceptual, theoretical, and empirical approaches to studying the subject.

## I. WHAT WE KNOW (AND THINK WE KNOW) ABOUT LEAKS

This Part sets the stage by synthesizing relevant law, commentary, and data on leaks. Legal scholars have largely concentrated on the First Amendment questions raised by publication and prosecution of leaks and on the small set of litigated cases, in particular the Pentagon Papers case.<sup>19</sup> The literatures on media, government, and the presidency are more helpful for understanding how leaking operates.

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<sup>16</sup> [More on the interviews. Possible selection bias in who spoke with me.]

<sup>17</sup> Among the few scholarly studies of leaking and associated issues that draw on interviews with U.S. government insiders, most have similarly granted anonymity in full or in part. *See, e.g.*, GOLDSMITH, *supra* note 12, at 253; HUGH HECLLO, *A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON*, at xi-xii (1977); LEON V. SIGAL, *REPORTERS AND OFFICIALS: THE ORGANIZATION AND POLITICS OF NEWSMAKING* ch. 7 (1973).

<sup>18</sup> All records received through FOIA are on file with the author and available upon request.

<sup>19</sup> *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

There is no settled definition of a leak in the academic literature or in journalistic usage.<sup>20</sup> Most commonly, a leak is taken to be (i) a targeted disclosure (ii) by a government insider (employee, former employee, contractor) (iii) to a member of the media (iv) of confidential information the divulgence of which is proscribed by law, policy, or convention (v) outside of any formal process (vi) with an expectation of anonymity,<sup>21</sup> and this can serve as a working definition. Revelations made in a signed memoir, speech, or the like do not count, because there is no mystery as to their source. Some commentators further stipulate that the disclosure must be “unauthorized.”<sup>22</sup> The concept of authorization is crucial in this context but also, as we will see, deeply difficult; I bracket the issue for the time being and then return to it at length in Part II.<sup>23</sup> Except as otherwise specified, the Article uses the term “leaks” in the colloquial sense, encompassing both authorized and unauthorized disclosures.

As noted above, this Article primarily explores leaks to the press by executive branch sources of national security-related information, understood to include information pertaining to foreign affairs.<sup>24</sup> Given the subject matter, these disclosures will frequently, though not always, implicate or involve classified content. Routine background briefings with multiple reporters fall beyond the Article’s focus. So do the tips and nudges that officials sometimes give to outside parties about which *non*-confidential, publicly available materials deserve their attention (a significant and underappreciated practice). So do disclosures to foreign powers or their agents—espionage in the traditional sense. And so do leaks to members of Congress or to private parties not in the media, except insofar as these disclosures are anticipated to generate a news story, rendering them media leaks at one remove.

### A. *The Legal Framework*

As a number of recent works have catalogued the statutes and case law on leaking,<sup>25</sup> this overview strives for parsimony. The central statutory provision is section 793 of the Espionage

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<sup>20</sup> See MARTIN LINSKY, *IMPACT: HOW THE PRESS AFFECTS FEDERAL POLICYMAKING* 169 (1986) (“[I]n the dialogue between reporters and officials, leaks are a complex, confusing, and controversial subject. There are arguments about what is a leak . . . .”); Leslie H. Gelb, *All About Leaks*, N.Y. TIMES, May 22, 1986, at B10 (“There is not even agreement on a definition.”). Several journalists I interviewed objected to the term “leak,” on the ground that it has unwarranted pejorative connotations. I use the term here neutrally, non-judgmentally. Given the ubiquitous references to “leaks” in this area, it would be odd to use another label.

<sup>21</sup> See, e.g., LINSKY, *supra* note 20, at 169, 171, 197 (leaks involve confidential information, anonymous sources, and exclusive stories); SIGAL, *supra* note 17, at 144 (similar).

<sup>22</sup> See, e.g., William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1461 n.35 (2008) (noting the prevalence of this approach); Clifton Daniel, *Leaks: A Fact of Life*, N.Y. TIMES, June 29, 1974, at 13 (“By Washington’s definition, a leak is an unauthorized disclosure of confidential official information, usually by an unidentified ‘source.’”).

<sup>23</sup> See *infra* Part II.B.1-2.

<sup>24</sup> The classification system incorporates this understanding. See Exec. Order No. 13,526, § 6.1(cc), 75 Fed. Reg. 707, 729 (Dec. 29, 2009) (defining national security to include “foreign relations of the United States”); see also *id.* §§ 1.4(b), (d), 75 Fed. Reg. at 709 (expressly allowing for classification of information pertaining to “foreign government information” and “foreign relations or foreign activities of the United States”).

<sup>25</sup> See, e.g., JENNIFER K. ELSEA, CONG. RESEARCH SERV., R41404, *CRIMINAL PROHIBITIONS ON THE PUBLICATION OF CLASSIFIED DEFENSE INFORMATION* (2012); ROSS, *supra* note 10, at 147-68; Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 262-98 (2008); Stephen

Act of 1917.<sup>26</sup> Section 793 criminalizes a wide range of activities associated with the gathering, possession, or communication of information relating to the “national defense”—that is, a wide range of activities that may bear little resemblance to classic espionage—with intent or reason to believe the information could “be used to the injury of the United States or to the advantage of any foreign nation.”<sup>27</sup> Violators are subject to fines, forfeiture, and imprisonment for up to ten years.<sup>28</sup> Courts have construed the term “national defense” broadly, so that the statute likely embraces a great deal of sensitive information implicating foreign relations,<sup>29</sup> and they have looked to the executive’s own classification system (which conditions eligibility for classification on anticipated “damage to the national security”<sup>30</sup>) to help determine the statute’s reach.<sup>31</sup> No court has ever accepted a defense of improper classification.<sup>32</sup>

In addition to section 793, a variety of other criminal statutes might be applied to leakers, including:

- 18 U.S.C. § 371—prohibiting conspiracy to commit any offense against or defraud the United States “in any manner or for any purpose.”
- 18 U.S.C. § 641—prohibiting theft, conversion, and unauthorized disposition of “property” and “thing[s] of value of the United States or of any department or agency thereof.”
- 18 U.S.C. § 794—prohibiting gathering or delivering of defense information in aid of a foreign government.
- 18 U.S.C. § 797—prohibiting publication and sale of photographs of defense installations.

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I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL’Y REV. 219, 221-31 (2007). The laws themselves do not use the term “leaks.”

<sup>26</sup> 18 U.S.C. § 793 (2006). The Espionage Act of 1917, ch. 30, 40 Stat. 217, superseded the first federal statute directed to military information, the Defense Secrets Act of 1911, Act of Mar. 3, 1911, ch. 226, 36 Stat. 1084.

<sup>27</sup> 18 U.S.C. §§ 793(a), (d), (e). The broadest provisions of section 793 have no special intent requirement for certain categories of tangible materials relating to the national defense, just the relaxed requirement that their unlawful retention or communication have been “willful[.]” *Id.* §§ 793(d), (e).

<sup>28</sup> *Id.* §§ 793(f), (h).

<sup>29</sup> The leading opinion comes from an espionage case, *Gorin v. United States*, 312 U.S. 19, 25-32 (1941). See also REPORT OF THE INTERDEPARTMENTAL GROUP ON UNAUTHORIZED DISCLOSURES OF CLASSIFIED INFORMATION 10 (1982) [hereinafter WILLARD REPORT], available at [www.fas.org/sgp/library/willard.pdf](http://www.fas.org/sgp/library/willard.pdf) (“Because the term ‘national defense’ was so broadly defined in *Gorin*, it is likely to cover most information relating to ‘foreign relations’ that is properly classified.”). But cf. Harold Edgar & Benno Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 976-86 (1973) (noting ambiguities in *Gorin*).

<sup>30</sup> Exec. Order No. 13,526, § 1.2(a), 75 Fed. Reg. 707, 707-08 (Dec. 29, 2009).

<sup>31</sup> See, e.g., *United States v. Kiriakou*, No. 1:12cr127, 2012 WL 3263854, at \*6 (E.D. Va. Aug. 8, 2012) (explaining that “courts have relied on the classified status of information to determine whether it is closely held by the government and harmful to the United States” and adopting this approach). Tracking the language of the Espionage Act’s harm element, the nondisclosure agreements signed by millions of federal employees advise that “unauthorized disclosure . . . of classified information by [the employee] could cause irreparable injury to the United States or could be used to advantage by a foreign nation.” STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 1258-59 (5th ed. 2011).

<sup>32</sup> See Patricia L. Bellia, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 YALE L.J. 1448, 1523 (2012).

- 18 U.S.C. § 798—prohibiting disclosure of cryptographic and communication intelligence information.
- 18 U.S.C. § 952—prohibiting disclosure of diplomatic codes and correspondence.
- 18 U.S.C. § 1030(a)(1)—prohibiting disclosure of protected national defense and foreign relations information retrieved through unauthorized access of a computer.
- 18 U.S.C. § 1905—prohibiting disclosure of confidential information acquired in the course of employment “in any manner or to any extent not authorized by law.”
- 18 U.S.C. § 1924—prohibiting unauthorized removal and retention of classified documents or materials.
- 18 U.S.C. § 2071—prohibiting “willful[] and unlawful[]” concealment, removal, and destruction of government records.
- 42 U.S.C. § 2274—prohibiting communication of “Restricted Data” relating to atomic energy, with intent or reason to believe such data will be used to injure the United States.
- 42 U.S.C. § 2277—prohibiting disclosure of “Restricted Data” to unauthorized parties.
- 50 U.S.C. §§ 421-26—prohibiting disclosure of identities of covert intelligence officers, agents, informants, and sources.

The second item on this list, the general theft and conversion statute, warrants special mention on account of its potential breadth. While one circuit court has found § 641 inapplicable to “intangible goods,”<sup>33</sup> several others have upheld convictions under § 641 for disclosures of intangible confidential information.<sup>34</sup> “Why bother with an Official Secrets Act,” a former CIA analyst asked a decade ago, “with this thing on the books?”<sup>35</sup>

Judicial interpretations of these laws have narrowed their potential scope in a few respects, but not by much. Although there are many ambiguities in the Espionage Act<sup>36</sup> and the case law, it has been reasonably clear for at least the past few decades that (i) virtually any deliberate leak of classified information to an unauthorized recipient is likely to fall within the reach of one or more criminal statutes;<sup>37</sup> and (ii) the government may prosecute most if not all employees, ex-

<sup>33</sup> See *United States v. Tobias*, 836 F.2d 449, 451 (9th Cir. 1988).

<sup>34</sup> See, e.g., *United States v. Morison*, 844 F.2d 1057, 1076-77 (4th Cir. 1988); *United States v. Girard*, 601 F.2d 69, 70-72 (2d Cir. 1979). See generally Irina Dmitrieva, Note, *Stealing Information: Application of a Criminal Anti-Theft Statute to Leaks of Confidential Government Information*, 55 FLA. L. REV. 1043, 1046-52 (2003). In at least one media leak case, the government secured a guilty plea and prison sentence under § 641 without bringing any charges under the Espionage Act. See Elaine Hargrove-Simon, *Balancing National Security and Civil Rights: Analyst Sentenced for Leaking Information to London Times*, SILHA BULLETIN, Winter 2003, <http://www.silha.umn.edu/news/winter2003.php?entry=202897> (describing the case of Jonathan Randel).

<sup>35</sup> *Government Information as Property*, SECRECY NEWS, Jan. 16, 2003, <http://www.fas.org/sgp/news/secrecy/2003/01/011603.html>.

<sup>36</sup> As meticulously detailed in Edgar and Schmidt’s classic exegesis. Edgar & Schmidt, *supra* note 29, *passim*.

<sup>37</sup> See ATT’Y GEN. JOHN ASHCROFT, REPORT TO CONGRESS ON UNAUTHORIZED DISCLOSURES OF CLASSIFIED INFORMATION 3 (2002) [hereinafter ASHCROFT REPORT], available at <http://www.fas.org/sgp/othergov/dojleaks.pdf> (“I conclude that current statutes provide a legal basis to prosecute those who engage in unauthorized disclosures [of classified information], if they can be identified.”); WILLARD REPORT, *supra* note 29, at 2 (“[I]n virtually all cases the unauthorized disclosure of classified information potentially violates one or more federal criminal statutes.” (internal numbering omitted)); *Concerning Unauthorized Disclosure of Classified Information: Hearing Before the*

employees, and contractors for such leaks so long as it can prove the information was not already in the public domain<sup>38</sup> and the defendant knew or should have known her actions were unlawful.<sup>39</sup> Complementing its criminal powers, courts have also allowed the government to enforce the terms of nondisclosure agreements through injunctive and equitable relief.<sup>40</sup> The courts have further granted the executive near-total discretion to revoke security clearances of, and take other disciplinary action against, individuals suspected of leaking.<sup>41</sup>

As against the criminal vulnerability of their government sources, journalists and other private actors who publish leaked information appear to occupy a privileged legal position. In the Pentagon Papers case, the Supreme Court held the government had not met its “heavy burden” of justifying a prior restraint on the *New York Times*’s and *Washington Post*’s publication of excerpts of a classified study on Vietnam War decisionmaking leaked by defense contractor Daniel Ellsberg.<sup>42</sup> That burden, Justice Stewart famously maintained, requires the government to prove that publication “will surely result in direct, immediate, and irreparable damage to our Nation or its people.”<sup>43</sup> At least five justices suggested that ex post prosecutions might be held to a less stringent First Amendment standard than prior restraints,<sup>44</sup> and by its plain terms the Espionage Act seems to extend to journalists and publishers.<sup>45</sup> More recent Supreme Court decisions, however, give reason to believe the government’s burden would be nearly as heavy in a criminal proceeding against a member of the press, at least in the absence of a conspiracy to exfiltrate the information.<sup>46</sup> Hence the source/distributor divide.

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*S. Select Comm. on Intelligence*, 106th Cong. 10 (2000) (statement of Janet Reno, Att’y Gen.) [hereinafter Reno Testimony], available at <http://www.fas.org/sgp/othergov/renoleaks.pdf> (“[W]e believe that the criminal statutes currently on the books are adequate to allow us to prosecute almost all leak cases. We have never been forced to decline a prosecution solely because the criminal statutes were not broad enough.”).

<sup>38</sup> *But see* United States v. Squillacote, 221 F.3d 542, 575-80 (4th Cir. 2000) (holding that even publicly available classified information can qualify as national defense information under the Espionage Act).

<sup>39</sup> Scholars continue to debate the best view of the First Amendment in this context, but few dispute that the (very thin) case law permits the government at least this much. *See, e.g.*, ELSEA, *supra* note 25, at 14-15; *cf.* STONE, *supra* note 13, at 11-14 (characterizing the case law similarly, with the qualification that disclosures revealing unlawful government conduct must be seen as protected by the First Amendment). As explained above, *see supra* notes 26-35 and accompanying text, while the government would have to prove at trial the possibility of injury to the United States under some Espionage Act provisions, this harm element does not always obtain and, where it does, the fact that a disclosure involved classified information ought to be highly probative given the criteria for classification.

<sup>40</sup> *See, e.g.*, *Snepp v. United States*, 444 U.S. 507 (1980); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972).

<sup>41</sup> *See, e.g.*, *Dep’t of Navy v. Egan*, 484 U.S. 518 (1988) (establishing the nonreviewability of security clearance determinations in the absence of specific statutory warrant).

<sup>42</sup> *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (internal quotation marks omitted).

<sup>43</sup> *Id.* at 730 (Stewart, J., concurring). Justice Stewart staked out the median, and thus effectively controlling, position in his concurring opinion.

<sup>44</sup> *See id.* (Stewart, J., concurring); *id.* at 733-40 (White, J., concurring); *id.* at 741-48 (Marshall, J., concurring); *id.* at 752 (Burger, C.J., dissenting); *id.* at 759 (Blackmun, J., dissenting); *cf. id.* at 757-58 (Harlan, J., dissenting) (disputing the Court’s prior restraint holding).

<sup>45</sup> *See* Papandrea, *supra* note 25, at 264; *see also* Government’s Consolidated Responses to Defendants’ Pretrial Motion at 15, *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006) (“There plainly is no exemption in [18 U.S.C. § 793] for the press . . .”).

<sup>46</sup> Particularly important statements on press immunity include *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), and *Bartnicki v. Vopper*, 532 U.S. 514 (2001). *See also* Stone, *supra* note 10, at 200 nn. 50-51 (citing additional cases). Stone concludes that “as a practical matter, the standard used in Pentagon Papers is

Of greater practical significance for national security journalists, the Supreme Court has declined to recognize a First Amendment- or common law-based reporter's privilege against compelled disclosure of confidential source information.<sup>47</sup> While some lower courts have nevertheless recognized a qualified privilege,<sup>48</sup> Judge Posner's 2003 opinion for the Seventh Circuit in *McKevitt v. Pallasch*<sup>49</sup> appears to have swung the doctrinal pendulum back toward the more restrictive view.<sup>50</sup> And while the vast majority of U.S. states have enacted statutes recognizing some form of reporter's privilege and Congress has considered many proposals,<sup>51</sup> no such "shield law" exists at the federal level. The Justice Department (DOJ) adheres to the position that the reporter's privilege does not apply in criminal cases, absent a showing that the subpoena was issued in bad faith or for the purpose of harassment.<sup>52</sup> Over the past several decades, it appears that roughly two dozen journalists have served some, usually quite brief, time in federal jail for refusing to disclose their sources.<sup>53</sup>

The federal whistleblower statutes might be expected to comprise the last major piece of the legal framework, except that in the national security context they play a marginal role. Several laws protect executive branch employees who disclose confidential information to designated agency officials or congressional committees under specified procedures.<sup>54</sup> But these laws offer significantly less succor when it comes to classified information, are widely seen as confusing and user-unfriendly, and under no circumstances permit disclosures directly to the press.<sup>55</sup> These laws also do not ensure against revocation of one's security clearance,<sup>56</sup> which in the national security and foreign policy fields generally means loss of one's job. And though the point is contestable, the laws are fairly read to provide "absolutely zero protection" for those who publicly reveal classified information, even as a last resort, and even when the information

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essentially the same as the standard the Court would use in a criminal prosecution of the press for publishing information about the activities of government." STONE, *supra* note 13, at 24.

<sup>47</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 679-708 (1972).

<sup>48</sup> See RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 587-93 (2008) (summarizing the case law). These courts creatively seized on Justice Powell's *Branzburg* concurrence as if it were the controlling opinion, when in fact Powell joined the Court's opinion in full—making five votes for the "no privilege" position. See *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

<sup>49</sup> 339 F.3d 530 (7th Cir. 2003).

<sup>50</sup> See, e.g., *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006).

<sup>51</sup> See Jones, *supra* note 48, at 594-615, 652 n.280.

<sup>52</sup> See *id.* at 597; Brief for the United States (Public Version) at 13-14, 23-37, *United States v. Sterling*, No. 11-5028 (4th Cir. Jan. 13, 2012).

<sup>53</sup> See William H. Freivogel, *Publishing National Security Secrets: The Case for Benign Indeterminacy*, 3 J. NAT'L SECURITY L. & POL'Y 95, 96-97 (2009).

<sup>54</sup> E.g., Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.).

<sup>55</sup> See generally Papandrea, *supra* note 25, at 245-48; Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM. U. L. REV. 1531 (2008). In an interview, secrecy expert Steven Aftergood stated that most classified information leakers are either uninterested in availing themselves of the prescribed whistleblower channels or do not trust that they will prove safe or effective. Interview with Steven Aftergood, Dir., Project on Gov't Secrecy, Federation of Am. Scientists, in Washington, D.C. (Apr. 10, 2012).

<sup>56</sup> See Papandrea, *supra* note 25, at 248.

reveals illegal government conduct.<sup>57</sup> The vast majority of leakers have no interest in reporting wrongdoing in any event.<sup>58</sup> Consequently, the whistleblower statutes tend to be ignored in the debate over classified information leaking, apart from occasional calls to revise them. It is telling that in Jack Goldsmith's recent book-length study of mechanisms that publicize and constrain the executive's national security activities, these laws are never once mentioned.<sup>59</sup>

### ***B. Leaking Practices***

It is a commonplace that leaks course through the nation's capital. Classified information disclosures to the media are thought to occur so regularly in Washington as to constitute "a routine method of communication about government."<sup>60</sup> According to one executive branch study, they are a "daily occurrence."<sup>61</sup> What little empirical evidence there is in the public record tends to bear out these claims.

Most arresting, in a survey of current and former senior government officials conducted by the Harvard Kennedy School's Institute of Politics in the mid-1980s, forty-two percent of respondents indicated they had, at least once, "fe[lt] it appropriate to leak information to the press."<sup>62</sup> The survey designers concluded this figure was likely understated.<sup>63</sup> "[E]verything we have found," the lead researcher reflected, "argues that leaks . . . are a routine and generally accepted part of the policymaking process."<sup>64</sup> Nonsurvey data point toward the same conclusion. Using an exceedingly restrictive definition of leaks, Leon Sigal found that between 1949 and 1969, 2.3% of the front-page stories in the *New York Times* and *Washington Post* about national or foreign news relied primarily on leaks for the information reported.<sup>65</sup> Looking at classified information disclosures specifically, a study by the Senate Select Committee on Intelligence

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<sup>57</sup> Vladeck, *supra* note 55, at 1534.

<sup>58</sup> *See infra* Part I.B.

<sup>59</sup> GOLDSMITH, *supra* note 12. The one allusion to these laws in Goldsmith's book highlights their practical irrelevance. *Id.* at 239 (observing that after 9/11, "CIA whistle-blowers leaked information to the press rather than follow internal whistle-blower procedures").

<sup>60</sup> Lee, *supra* note 22, at 1467.

<sup>61</sup> WILLARD REPORT, *supra* note 29, at 6.

<sup>62</sup> LINSKY, *supra* note 20, at 238; *see also id.* at 172 (interpreting affirmative responses to this question as confessions of leaking). This survey, which attained a response rate of 50 percent, was given to hundreds of executive officials at the level of assistant secretary and above and to a few members of Congress. *Id.* at 228-30. The survey did not ask any questions about classified information disclosures specifically. This appears to be the only study to have polled current or former U.S. officials about their views on leaking.

<sup>63</sup> *Id.* at 172, 197.

<sup>64</sup> *Id.* at 197.

<sup>65</sup> SIGAL, *supra* note 17, at 120-22. Sigal looked at two weeks' worth of stories in the *Times* and the *Post* from the years 1949, 1954, 1959, 1964, and 1969. A story was classified in the leak category only if its unattributed information appeared solely in that newspaper and "independent evidence from subsequent news articles, historical studies or memoirs, or officials' and reporters' recollections indicate[d] that it was a leak." *Id.* at 121. While Sigal's method is admirably thorough, his data cover a small and not necessarily representative sample of news items, and his strategy for identifying leaks—consulting subsequent articles, memoirs, recollections, and the like in some unspecified way—is too demanding and too arbitrary to replicate for a larger sample. In the view of the national security journalists with whom I spoke, any effort to systematically isolate "leak-based stories" through objective, observable criteria is destined to fail.

counted 147 separate instances in the nation's eight leading newspapers in the first six months of 1986.<sup>66</sup> The Weapons of Mass Destruction (WMD) Commission claimed in its 2005 public report to have identified "[h]undreds of serious press leaks" of classified information over the past decade.<sup>67</sup> Jack Goldsmith similarly appears to have tallied "hundreds of stories" in the *Times* and the *Post* following 9/11 that "self-reported disclosure of classified information," and "many more" that contained "classified tidbits" without advertising as much.<sup>68</sup>

A number of commentators have speculated that the volume of classified information leaks has been increasing in recent years,<sup>69</sup> whether because of rising levels of classification, rising levels of partisanship, diminishing trust in government, or new technologies that make it easier to produce, reproduce, store, and spread materials. I share the intuition that there has been significant growth in the raw number of leaks, although it is worth recalling that over 60 years ago President Truman asserted, based on a Yale University study commissioned by the Central Intelligence Agency (CIA), that "95 percent of our secret information ha[d] been revealed by newspapers and slick magazines."<sup>70</sup>

Journalists, researchers, and government insiders have consistently attested that leaking is far more common among those in leadership positions. The ship of state, one often hears, is the only known vessel that leaks from the top<sup>71</sup>—starting, that is, from the White House itself.<sup>72</sup> This top-down dynamic is traceable to differences in professional norms, cultures, and incentives as between political appointees and career civil servants and—perhaps an even more pronounced gulf—as between high-level and mid- to low-level employees. The latter group has limited access to reporters or to "the kind of information that makes a front-page splash."<sup>73</sup> Senior officials routinely encounter both. Civil servants generally operate in a work culture that prizes discipline and vilifies leaking as disloyalty.<sup>74</sup> For many senior officials, leaks are seen as "at worst an annoyance."<sup>75</sup> Most bureaucrats have little to gain in their careers from leaking and much to lose. Senior officials, especially those appointees who cycle in and out of government,

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<sup>66</sup> See Mark Lawrence, *Executive Branch Leads the Leakers*, WASH. POST, July 28, 1987, at A13. This study, which found that Congress was responsible for nine percent of the leaks, *id.*, remains unpublished.

<sup>67</sup> COMM'N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 381 (2005) [hereinafter WMD REPORT].

<sup>68</sup> GOLDSMITH, *supra* note 12, at 68-69.

<sup>69</sup> See, e.g., *id.* at 68-74.

<sup>70</sup> President Harry S. Truman, The President's News Conference (Oct. 4, 1951), *transcript available at* <http://trumanlibrary.org/publicpapers/viewpapers.php?pid=464>.

<sup>71</sup> See Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L. REV. 609, 624 n.47 (1991) (noting the popularity of this metaphor).

<sup>72</sup> See MORTON H. HALPERIN, *BUREAUCRATIC POLITICS AND FOREIGN POLICY* 183 (2d ed. 2006) ("Leaks come from many different sources, but it is the judgment of most reporters that the greatest single source of leaks is the White House.").

<sup>73</sup> ABEL, *supra* note 15, at 17; see also STEPHEN HESS, *THE GOVERNMENT/PRESS CONNECTION: PRESS OFFICERS AND THEIR OFFICES* 75 (1984) ("The bureaucrats' world faces inward. They know best how to maneuver within their own agencies; journalists . . . are outside their ken and represent risk beyond possible gain.").

<sup>74</sup> See LINSKY, *supra* note 20, at 171, 201.

<sup>75</sup> *Id.* at 172; see also Lee, *supra* note 22, at 1463 (quoting a sworn statement by a former *Washington Post* national security correspondent that "the vast majority of high-level government officials become confidential sources").

are better positioned to reap benefits from media relationships and from changes in administration policy or public perception. “The fine art of leaking,” accordingly, “is most often practiced at the level of the cabinet or subcabinet or among the president’s closest advisers in the White House.”<sup>76</sup> Many in the executive have plausibly claimed that members of Congress are a significant secondary source of leaks,<sup>77</sup> although reliable data on congressional leaking are even harder to come by<sup>78</sup> and such claims may warrant skepticism inasmuch as they deflect attention from the executive’s own disclosure habits.

Less senior government officials have been known to leak as well, occasionally to spectacular effect. Several observers have opined that as the Reagan and Bush II administrations wore on, their controversial, centralized approaches to policymaking inspired a growing number of mid-level employees to turn to the press.<sup>79</sup> Yet it is rare to hear of such an employee becoming any kind of repeat player in the “game of leaks,”<sup>80</sup> as so many senior officials seem to be. And one will never find such an employee publicly proclaiming, as U.S. Ambassador to Vietnam Henry Cabot Lodge, Jr. once did, that leaking is his or her professional “prerogative,” “one of my weapons for doing this job.”<sup>81</sup>

In part because of their association with opportunistic power-players rather than disempowered dissidents, leaks are sometimes thought to typify and foster the occasionally adversarial yet fundamentally symbiotic relationship between the government and the mainstream press. Max Frankel’s affidavit for the *New York Times* in the Pentagon Papers case remains the canonical statement of this view. Frankel described the “informal but customary traffic in secret information” that characterized the interactions of “a small and specialized corps of reporters and a few hundred American officials.”<sup>82</sup> Within this community, Frankel explained, high-level leaks of classified information are “the coin of [the] business.”<sup>83</sup> The media outlets that participate in these “cooperative, competitive, antagonistic and arcane”<sup>84</sup> rituals have varied over time, with the *Times* and the *Post* long occupying a central position.<sup>85</sup>

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<sup>76</sup> ABEL, *supra* note 15, at 17.

<sup>77</sup> See, e.g., HESS, *supra* note 73, at 76 (“According to a wise departmental press officer, ‘we just assume that anything given to the Hill will be leaked . . . .’”).

<sup>78</sup> The most careful (yet still anecdote-driven) study I have seen suggests that Congress has shared classified information with the media on a number of occasions, though far less often than the executive has. See Kathleen Clark, *Congress’s Right to Counsel in Intelligence Oversight*, 2011 U. ILL. L. REV. 915, 940-51. Just as politically appointed executive officials are significantly more likely to leak than lower-level civil servants, Clark finds that members of Congress are significantly more likely to reveal classified information than their staffers. *Id.* at 950-51; accord Robert Garcia, *Leak City: Washington Insiders Are Giving the Nation’s Capital a New Name*, AM. POL., Aug. 1987, at 23, 24.

<sup>79</sup> See, e.g., ABEL, *supra* note 15, at 42, 67 (Reagan); Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1037-45 (2008) (Bush II).

<sup>80</sup> Papandrea, *supra* note 25, at 248-62.

<sup>81</sup> Quoted in SIGAL, *supra* note 17, at 137.

<sup>82</sup> Affidavit of Max Frankel paras. 3, 17, Editor, N.Y. Times, N.Y. Times Co. v. United States, 403 U.S. 713 (1971), available at <http://www.pbs.org/wgbh/pages/frontline/newswar/part1/frankel.html> [hereinafter Frankel Affidavit].

<sup>83</sup> *Id.* para. 16.

<sup>84</sup> *Id.* para. 3.

<sup>85</sup> Cf. HALPERIN, *supra* note 72, at 185 (“The feeling is that ‘everyone’ in Washington reads the *New York Times* and the *Washington Post*.”). I have not seen any discussion of the changing composition of media leak recipients.

Their power to dictate outcomes is substantial. In many instances, media outlets have delayed publication or withheld certain especially sensitive details in light of the national security concerns raised by (non-leaking) officials.<sup>86</sup> These acts of restraint underwrite the industry's claim to being a careful steward of the public interest—the notion that as a counterweight to the venality and extremism of its government secret-keepers, the United States has been blessed with a responsible press. And yet it is clear that, as a group, journalists and editors do not believe that seeking, receiving, or broadcasting classified information is intrinsically harmful or unethical,<sup>87</sup> while as individuals they face potential professional harm from being “scooped” by competitors versus gain from the “exclusives” and the frisson that leak stories tend to generate.<sup>88</sup> Both their incentives and their worldview cut strongly in favor of publicizing credible disclosures.

Media leaks come in many different shapes and sizes. In his 1984 book *The Government/Press Connection*, Stephen Hess sketched a typology that has been widely followed. In motivational terms, Hess explained, the main variants include: the *ego leak*, meant to satisfy the leaker's “sense of self-importance”; the *goodwill leak*, meant to curry favor with a reporter; the *policy leak*, meant to help, hurt, or alter a plan or policy; the *animus leak*, meant to settle grudges or embarrass others; the *trial-balloon leak*, meant to test the response of key constituencies, members of Congress, or the general public; and the *whistleblower leak*, meant to reveal a perceived abuse and, unique among the list, “usually employed by career personnel.”<sup>89</sup> As Hess observed, these categories are not mutually exclusive.<sup>90</sup> A leaker may have multiple motivations or goals, some of them unconscious. Although Hess speculated that ego is the most common cause of leaking,<sup>91</sup> policy leaks—an especially capacious category he did not parse—play a larger role in the accounts of ex-officials and in the academic literature.<sup>92</sup> Significant

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Virtually all pre-WikiLeaks studies of leaks centered on print publications, though one assumes that broadcast media gained market share in the leak-revelation industry over the course of the twentieth century.

<sup>86</sup> See, e.g., SUNSHINE IN GOV'T INITIATIVE, LEAKS IN A DEMOCRATIC SOCIETY 4-8 (Apr. 2007), <http://www.sunshineingovernment.org/members/leaks/Overview.pdf> (reviewing examples).

<sup>87</sup> See LINSKY, *supra* note 20, at 171 (observing that for “nearly all journalists, most leaks do not carry . . . negative moral baggage”); Lee, *supra* note 22, at 1464 (“Journalists generally do not believe that seeking or receiving classified information is illegal or unethical.”); cf. BICKEL, *supra* note 10, at 81 (arguing that the Pentagon Papers ruling vindicated a conception of the First Amendment in which “the presumptive duty of the press is to publish, not to guard security or to be concerned with the morals of its source”).

<sup>88</sup> See DAVID WISE, *THE POLITICS OF LYING: GOVERNMENT DECEPTION, SECRECY, AND POWER* 282 (1973) (“Normally, the leaker can count on competitive pressures within the news media to insure publication of the story.”); Richard Halloran, *A Primer on the Fine Art of Leaking Information*, N.Y. TIMES, Jan. 14, 1983, at A16 (“For its part, the press rarely turns away leaks that have been checked for accuracy . . . . A published leak often leads to a counter-leak. It also makes reporters look good in the eyes of editors, competitors and customers.”). For a thorough treatment, see generally Note, *Media Incentives*, *supra* note 10.

<sup>89</sup> HESS, *supra* note 73, at 77-78. Additional typologies, largely complementary to Hess's, can be found in HALPERIN, *supra* note 72, at 184-201; Randy Borum et al., *Psychology of “Leaking” Sensitive Information: Implications for Homeland Security*, 1 HOMELAND SECURITY REV. 97, 101-07 (2006); and Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists' Confidentiality, 1795-2005*, 43 SAN DIEGO L. REV. 425, 469-76 (2006).

<sup>90</sup> HESS, *supra* note 73, at 78.

<sup>91</sup> *Id.* at 77.

<sup>92</sup> Policy leaks also play a larger role in senior officials' self-reporting. In response to a question on why it would be appropriate to leak, the most common reasons given in the Kennedy School survey were “to counter false or

subtypes of the policy leak might include the *internecine leak*, through which competing agencies or factions within the executive branch strive to strengthen their relative positions, and the *counter-leak*, intended to neutralize or dispute prior disclosures. Hess also overlooked the important, if less titillating, category of the *inadvertent or lazy leak*, effectuated through accident or ignorance with no particular instrumental aim in mind. Such leaks plainly occur.<sup>93</sup> Equally important are the many stories that look like they may contain leaks but are in fact based on public materials or sources outside the U.S. government. Angry officials not infrequently suspect a deliberate betrayal when there has been only clever journalistic sleuthing.<sup>94</sup> Sometimes referred to these days as “diffuse sourcing”<sup>95</sup> or “mosaic-making,”<sup>96</sup> it is an old insight that in some cases “there is no one leaker, and no one leak, but a composite that looks like a leak but is really just good investigative reporting.”<sup>97</sup>

Less has been written about the other dimensions on which leaks may differ. At least one Espionage Act case suggests the government may have a substantially higher burden when prosecuting leakers of intangible information as opposed to documents, disks, files, and the like.<sup>98</sup> This distinction finds some support in the statutory language, though one suspects it was bolstered, on functional or fairness grounds, by the comparatively greater “difficulty in determining orally transmitted information’s classification status.”<sup>99</sup> An additional distinction (really, a spectrum) worth noting relates to the quantum and scope of material disclosed and the difference between what we might call *specific leaks*, which convey a limited amount of content about a discrete matter, and *general leaks*, which disclose vast swaths of information more or less indiscriminately. The two most famous leaks in modern U.S. history were tangible, general leaks: Daniel Ellsberg’s disclosure to the *Times* of the 7000-page Pentagon Papers study and Bradley Manning’s disclosure to WikiLeaks of, inter alia, 250,000 diplomatic cables.<sup>100</sup>

Tangibility and generality both ought to correlate positively with the average leaker’s whistleblowing ambition and negatively with her seniority. In the absence of any tangible disclosure, journalists and their editors are much more likely to find the statements of high-level officials to be credible and newsworthy. And as the discussion here suggests, high-level officials

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misleading information,” “to gain attention for an issue of policy option,” and “to consolidate support from the public or a constituency outside government.” LINSKY, *supra* note 20, at 238-39.

<sup>93</sup> See *id.* at 170-71, 192; ROSS, *supra* note 10, at 74-75; Mark Fenster, The Improbability of Secrecy 19-21 (Feb. 2013) (unpublished manuscript), <http://ssrn.com/abstract=2220376>.

<sup>94</sup> See ABEL, *supra* note 15, at 5-6; HALPERIN, *supra* note 72, at 203; HESS, *supra* note 73, at 76-77.

<sup>95</sup> See Jack Goldsmith, *Leak Investigations in the Digital Era*, LAWFARE, June 11, 2012, <http://www.lawfareblog.com/2012/06/leak-investigations-in-the-digital-era-2/>.

<sup>96</sup> See generally David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005).

<sup>97</sup> *Leaks of Classified National Defense Information—Stealth Aircraft: Hearing Before the Investigations Subcomm. of the H. Comm. on Armed Servs.*, 96th Cong. 13 (1980) (prepared statement of Adm. Daniel J. Murphy, Deputy Under Sec’y of Defense for Pol’y Rev., Dep’t of Defense).

<sup>98</sup> *United States v. Rosen*, 445 F. Supp. 2d 602, 626 (E.D. Va. 2006) (discussing 18 U.S.C. §§ 793(d), (e)).

<sup>99</sup> *Id.* at 624.

<sup>100</sup> Ellsberg’s leak was substantially more discriminate than Manning’s. Among other reasons, Ellsberg withheld four volumes of the Pentagon Papers containing diplomatic materials out of concern that their revelation would cause significant harm. See SANFORD J. UNGAR, *THE PAPERS & THE PAPERS: AN ACCOUNT OF THE LEGAL AND POLITICAL BATTLE OVER THE PENTAGON PAPERS* 83-84 (Notable Trials Library 1996) (1972).

do not tend to see themselves as whistleblowers. I am unaware of any senior U.S. official who has ever been accused of unlawfully revealing thousands of pages or their equivalent. General leaks are the province of the radically disaffected and the subversive. Top government brass, socialized into and successful in the Washington power culture, are unlikely to be either.

One final distinction: Although legal scholars generally have not done so, some journalists have distinguished between *leaks* and *plants*.<sup>101</sup> Plants are taken to be “authorized” disclosures designed to advance administration interests and goals. Leaks are “unauthorized” disclosures. This distinction is fundamental, if elusive at the margins, and the lack of critical attention it has received represents a major hole in the legal literature. Part II will consider it in detail.

### C. Enforcement Practices

Excluding cases of true espionage, all those thousands upon thousands of leaks over the decades have yielded a total of roughly a dozen criminal indictments. The common wisdom is that there are nine leak-related prosecutions in U.S. history.<sup>102</sup> Depending on how one counts, the correct figure may be as high as thirteen.<sup>103</sup> (More on the composition of this group in Part III.) Only one Espionage Act case has been brought against someone other than the initial source,<sup>104</sup> and only a miniscule number of leak investigations appear to have yielded prosecutions for derivative offenses, such as perjury or destruction of evidence.<sup>105</sup> Although it

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<sup>101</sup> See ABEL, *supra* note 15, at 2; HESS, *supra* note 73, at 75. An exception in the legal literature is Levi, *supra* note 71, at 628-30.

<sup>102</sup> For the standard list, see Charlie Savage, *Nine Leak-Related Cases*, N.Y. TIMES, June 20, 2012, at A14.

<sup>103</sup> Arguably missing cases include the 2005-2006 aborted prosecutions of lobbyists Steven Rosen and Keith Weissman for conspiring to transmit classified foreign policy information to journalists, among others, *see* Lee, *supra* note 22, at 1512-20; the 2001-2002 prosecution of Jonathan Randel for leaking sensitive but unclassified Drug Enforcement Agency information to the *London Times*, *see supra* note 34; and the 1957 court martial of Col. John Nickerson for leaking classified information concerning an Army ballistic missile project to a syndicated columnist, among others, *see* SIGAL, *supra* note 17, at 146-47. On the other hand, if the inquiry is confined to leaks directed primarily at the media, the Defense Department official who passed information to Rosen and Weissman, Lawrence Franklin, should be dropped from the list of nine. I assume the Rosen and Weissman cases have been omitted from this list because the defendants were not government actors. The Randel case may be excluded because no charges were brought under the Espionage Act. The Nickerson case may go overlooked because of its age or because the leaked information seems never to have been published. (That the Espionage Act charges were eventually dropped and that it was a court martial should not matter; Thomas Drake’s comparable plea deal and Bradley Manning’s court martial are on everyone’s list.) It is certainly possible that the U.S. government has brought additional cases fairly classed as “leak prosecutions” beyond this group of thirteen. However, given the fervent journalistic and scholarly attention devoted to these matters, it is hard to imagine the number of missing cases is substantial.

<sup>104</sup> *See* United States v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2006) (prosecution of two lobbyists).

<sup>105</sup> The outstanding example is I. Lewis Libby’s 2007 conviction for committing perjury, obstructing justice, and making false statements in connection with special prosecutor Patrick Fitzgerald’s investigation into the disclosure of a CIA operative’s identity. *See* Lee, *supra* note 22, at 1490-1502. Fitzgerald’s actions are instructive and will be discussed further below: His brief tenure as special prosecutor gave a glimpse of what energetic enforcement would look like. *See infra* notes 124-125, 259 and accompanying text. Suspected grand jury leaks have generated some additional criminal penalties in recent years, but beyond the Libby case I have not found any criminal charges directly traceable to an investigation into a suspected disclosure of classified information to the media.

has contemplated doing so several times,<sup>106</sup> the government has never once proceeded against a member of the press.

For a crime that presidents describe as a major threat to national security and good government, the degree of “underenforcement”<sup>107</sup> is stunning. Even if we were to limit the denominator to classified information leaks that DOJ has acknowledged receiving reports on from the Intelligence Community (IC) or that government officials have otherwise documented publicly—which may be a small fraction of the universe of potentially prosecutable offenses—the indictment rate for leak-law violators would be below 0.3 percent.<sup>108</sup> The actual rate is probably far closer to zero. We have, in other words, de minimis criminal enforcement of the laws against leaking. In formal terms this legal regime looks forbidding, draconian. In practical terms, as a frustrated intelligence professional once put it, the system amounts to “permissive neglect.”<sup>109</sup> Hence the punitive/permissive divide.

The Obama administration has thus far brought six criminal cases against leakers, a significant increase over its predecessors. Emphasizing the departure from past practice, critics have decried the administration’s “war on leakers”<sup>110</sup> (or more sharply, its “war on whistleblowers,”<sup>111</sup> though none of the six defendants availed himself of the statutorily prescribed whistleblowing process). Some of the cases reportedly developed out of investigations begun in the prior administration.<sup>112</sup> Yet even if all six are fairly attributed to President Obama’s DOJ, it is important to keep *statistical* as well as historical perspective. Against a backdrop of “routine daily” classified information leaks,<sup>113</sup> six prosecutions looks more like a special operation than a war.

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<sup>106</sup> See ROSS, *supra* note 10, at 17 (stating that the government has considered prosecuting a member of the media for publishing leaked information “on at least four occasions”).

<sup>107</sup> See generally Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715 (2006). In saying that the leak laws are underenforced, I mean only to suggest that observable enforcement levels are very low in numeric terms and as compared to what the political rhetoric on leaking would suggest. I do not mean to suggest they are low relative to any congressionally intended or otherwise normatively superior standard. Many of the crimes typically identified as “underenforced” are personal or recreational in nature (e.g., drug use, gambling), linked to sex (e.g., prostitution, sodomy), or associated with traditionally disadvantaged communities, classes, or racial groups. Leaking is an outlier for having none of these attributes.

<sup>108</sup> See ROSS, *supra* note 10, at 9-10, 17.

<sup>109</sup> James B. Bruce, *The Consequences of Permissive Neglect*, 47 STUD. IN INTELLIGENCE 39 (2003); see also SUBCOMM. ON SECRECY AND DISCLOSURE, S. SELECT COMM. ON INTELLIGENCE, 95TH CONG., REPORT ON NATIONAL SECURITY SECRETS AND THE ADMINISTRATION OF JUSTICE 3 (Comm. Print 1978) [hereinafter SSCI REPORT] (“*There has been a major failure on the part of the Government to take action in leak cases.*”); *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 61 (2010) (prepared statement of Gabriel Schoenfeld, Senior Fellow, Hudson Inst.) [hereinafter Schoenfeld Testimony] (“These laws [against leaking] are on the books, and they have been upheld by the Supreme Court. But the stark fact is that they are not being enforced.”).

<sup>110</sup> See, e.g., Adam Liptak, *A High-Tech War on Leaks*, N.Y. TIMES, Feb. 12, 2012, at SR5.

<sup>111</sup> See, e.g., Glenn Greenwald, *Secrecy Creep*, SALON, Aug. 14, 2012, [http://www.salon.com/2012/08/14/secrecy\\_creep/](http://www.salon.com/2012/08/14/secrecy_creep/) (“That the Obama administration has waged an unprecedented war on whistleblowers is by now well-known and well-documented.”).

<sup>112</sup> Scott Shane & Charlie Savage, *Administration Took Accidental Path to Setting Record for Leak Cases*, N.Y. TIMES, June 20, 2012, at A14.

<sup>113</sup> WILLARD REPORT, *supra* note 29, at 6.

I do not mean to minimize the significance of this enforcement uptick, to which Part IV will return. The uptick is of profound concern to many and threatens longstanding governmental conventions. I mean to call attention to the conventions themselves. Lost in the uproar over the recent prosecutions is just how remarkable it is for the executive branch to have a historic norm of “neglecting” major, politically resilient, judicially legitimated national security authorities.

Through occasional public statements, DOJ officials have outlined the procedures the department uses for identifying and responding to potentially unlawful leaks. Within DOJ, the Federal Bureau of Investigation (FBI) has traditionally played a lead role and continues to conduct leak investigations. The National Security Division (NSD), created by statute in 2006, now oversees these efforts and generally shares authority over cases with the FBI and the Criminal Division.<sup>114</sup> The primary mechanism for triggering legal scrutiny is the referral process. Agencies that believe they have been the “victim” of an unlawful leak may submit a crime report to DOJ, which then determines whether to open an investigation.<sup>115</sup> The “overwhelming majority” of such reports, Attorney General Janet Reno stated in 2000, are submitted by the CIA and the National Security Agency (NSA).<sup>116</sup> DOJ also has the authority, seemingly very rarely used,<sup>117</sup> to pursue leakers on its own initiative. Although the government has declined to release comprehensive data on numbers or types of leak referrals, officials have said that DOJ received “roughly 50” per year in the late 1990s<sup>118</sup> and an average of 37 per year from 2005 to 2009.<sup>119</sup> Of these referred cases, DOJ appears to open an investigation into approximately fifteen percent on average, with substantial variation year to year.<sup>120</sup>

Constraining its ability to investigate and prosecute leak cases, DOJ’s internal guidelines impose special procedures on the issuance of subpoenas to journalists. First announced in August 1970<sup>121</sup> and codified in 1973,<sup>122</sup> the guidelines prohibit use of such subpoenas except as a

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<sup>114</sup> See *Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm on the Judiciary*, 111th Cong. 45 (2009) (written response of Robert S. Mueller, III, Dir., Fed. Bureau of Investigation) [hereinafter Mueller Response]; see also Shane & Savage, *supra* note 112 (stating that among the recent leak prosecutions, “[t]wo were handled by the Justice Department’s criminal division, while two others were developed by the national security division”). For a sketch of the DOJ process prior to NSD’s creation, see Reno Testimony, *supra* note 37, at 3-10.

<sup>115</sup> For a valuable summary of reporting practices and procedures, see Steven Aftergood, “Crimes Reports” and the Leak Referral Process, *SECURITY NEWS*, Dec. 17, 2012, [http://www.fas.org/blog/secrecy/2012/12/crimes\\_reports.html](http://www.fas.org/blog/secrecy/2012/12/crimes_reports.html).

<sup>116</sup> Reno Testimony, *supra* note 37, at 4; see also Josh Gerstein, *Leak Probes Stymied, FBI Memos Show*, N.Y. SUN, Jan. 10, 2007, <http://www.nysun.com/national/leak-probes-stymied-fbi-memos-show/46407/> (reporting that, according to an unnamed former DOJ official, “the vast majority of leak probes originate at the CIA”).

<sup>117</sup> See, e.g., Reno Testimony, *supra* note 37, at 3, *passim* (describing at length “the process by which [leak] investigations are opened and pursued” before the Senate oversight body most likely to favor vigorous enforcement, without once mentioning this mechanism).

<sup>118</sup> *Id.* at 4.

<sup>119</sup> Mueller Response, *supra* note 114, at 47.

<sup>120</sup> The exact figure was 14 percent from 2005 to 2009, see *id.*, and Gary Ross appears to estimate a global average of 13 percent based on a handful of additional public statements, see ROSS, *supra* note 10, at 10, 17. In 2000, Attorney General Reno suggested that DOJ had investigated a significantly higher proportion of referrals in the immediately preceding years, although she did not provide any data. See Reno Testimony, *supra* note 37, at 4.

<sup>121</sup> Department of Justice Guidelines for Subpoenas to the News Media (Aug. 10, 1970), reprinted in Robert G. Dixon, Jr., *Newsmen’s Privilege by Federal Legislation: Within Congressional Power?*, 1 HASTINGS CONST. L.Q.

last resort and with the express authorization of the Attorney General.<sup>123</sup> All evidence suggests that this policy substantially depresses the number of subpoenas issued, and that the lack of access to journalists' records and testimony makes it substantially more difficult to identify and build cases against leakers. The significance of the policy was made vivid in the mid-2000s when special prosecutor Patrick Fitzgerald—whose writ to investigate the leak of Valerie Plame's CIA affiliation effectively loosened the guidelines by delegating him “all the authority of the Attorney General” in the matter<sup>124</sup>—subpoenaed *New York Times* reporter Judith Miller and *Time* reporter Matthew Cooper, among other journalists, leading to Miller's spending 85 days in jail.<sup>125</sup> The policy is justified as serving First Amendment values.<sup>126</sup> In light of DOJ's unflinching position that in criminal cases journalists have no constitutional or common law privilege to withhold confidential source information, the existence and durability of these guidelines might seem remarkable. For in functional terms, they amount to codification of a qualified reporter's privilege. DOJ thus adamantly opposes recognition by Congress or the courts of a doctrine it scrupulously respects by internal rule—an unusually stringent form of (and a fascinating case study in) departmentalist constitutional construction.<sup>127</sup>

Apart from criminal prosecutions, DOJ also has the option to pursue civil actions for injunctive relief or money damages against those who violate their nondisclosure agreements or profit from their disclosures of confidential information.<sup>128</sup> In theory, these suits might be brought against media leakers. In practice, however, injunctive relief is unavailable because leakers do not give advance notice of their intentions and equitable relief may be unavailable because they do not tend to benefit, in a material sense, from the media's publication of their divulgences. The government's civil authorities matter greatly in the area of post-employment, overt expression. They have directly constrained the speech of a number of former officials who

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39, 51-52 (1974); see also *Branzburg v. Hayes*, 408 U.S. 665, 707 n.41 (1972) (discussing the introduction of the 1970 guidelines).

<sup>122</sup> Policy Regarding Issuance of Subpoenas to and Interrogation, Indictment, or Arrest of Members of the News Media, 38 Fed. Reg. 29,588 (Oct. 26, 1973) (codified at 28 C.F.R. § 50.10).

<sup>123</sup> 28 C.F.R. §§ 50.10(b), (e)-(f) (2010).

<sup>124</sup> Katy J. Harriger, *Executive Power and Prosecution: Lessons from the Libby Trial and the U.S. Attorney Firings*, 38 PRESIDENTIAL STUD. Q. 491, 496 (2008).

<sup>125</sup> See *supra* note 105. See generally Don Van Natta, Jr. et al., *The Miller Case: A Notebook, a Cause, a Jail Cell and a Deal*, N.Y. TIMES, Oct. 16, 2005, at A1.

<sup>126</sup> See 28 C.F.R. § 50.10 (preamble) (emphasizing “freedom of the press,” “the news gathering function,” and “a reporter's responsibility to cover as broadly as possible controversial public issues”); Mueller Response, *supra* note 114, at 46 (defending the guidelines as “appropriately balanc[ing] the importance of First Amendment freedoms”).

<sup>127</sup> On the various models of departmentalism, see generally David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2063-64 (2010). The structure of the journalist subpoena guidelines is not unique. Whether to avert undesirable judicial rulings and congressional remedies, to preserve popular support, or to serve constitutional conviction, a number of other DOJ policies have constrained prosecutors beyond what the Constitution has been read to require: for instance, the Petite policy, which discourages federal prosecutions when a state action has already been brought, U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-2.031 (2008); the policy requiring presentation of exculpatory evidence to the grand jury, *id.* § 9-11.233; and the limitations imposed by the Levi Guidelines on the FBI's ability to monitor and infiltrate political and religious groups, OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, DOMESTIC SECURITY INVESTIGATION GUIDELINES (1976). This suite of self-binding rules awaits a synthetic scholarly treatment.

<sup>128</sup> See *Reno Testimony*, *supra* note 37, at 14.

wished to publish memoirs or exposés, and they have indirectly chilled the speech of many more. Their impact on the netherworld of anonymous leaks has been relatively negligible.

Administrative remedies offer a more robust alternative to criminal punishment. All agencies have undoubted authority to conduct their own investigations into suspected leaks and to impose a wide range of sanctions, including removal, suspension without pay, and denial of access to classified information.<sup>129</sup> In fact, the controlling executive order *requires* sanctions for every knowing, willful, or negligent disclosure of properly classified information to unauthorized persons.<sup>130</sup> These sanctions will not always be available: Former officials and those about to leave government may evade the reach of this regime. But in view of the difficulty of bringing criminal cases, many have championed administrative remedies as an efficient means to discipline and discourage leakers.<sup>131</sup>

It is very hard to know how these remedies have been utilized. So far as I am aware, the government has never released any data on them, and no one has attempted a tabulation. Anecdotal accounts indicate that a number of individuals have been reprimanded over the years for leaking to the media, and it is undoubtedly the case that additional disciplinary actions have been taken but not reported. Administrative sanctions, unlike prosecutions, do not inherently generate publicity. Still, given the deterrent value of that publicity, the media's interest in protecting its sources against reprisal, and the disciplined employee's interest in claiming whistleblower status, it is noteworthy how rarely accounts of such cases have surfaced: two General Services Administration investigators fired in 1976 but then reinstated two years later,<sup>132</sup> a State Department speechwriter and an Assistant Under Secretary for Defense removed in 1986,<sup>133</sup> a CIA intelligence officer dismissed in 2006 ostensibly for leaking but perhaps for other reasons.<sup>134</sup> Years go by without a reported incident.

A long line of government studies has noted lax enforcement in this area. Attorney General John Ashcroft acknowledged in 2002 that “[w]ith respect to administrative actions to address unauthorized disclosures of classified information, information security programs across Government are fragmentary,” and that “[i]n most of the few cases in which a person who engaged in an unauthorized disclosure of classified information has been identified, the sanctions applied have been relatively inconsequential.”<sup>135</sup> A Government Accountability Office audit found that among the 68 leak investigations conducted by the Defense Department from 1975 to 1982 that had been brought to its attention, “[i]n no case was there any indication that an individual was removed from a position of trust.”<sup>136</sup> A quarter-century earlier, a Defense

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<sup>129</sup> See Exec. Order No. 13,526, § 5.5(c), 75 Fed. Reg. 707, 726 (Dec. 29, 2009).

<sup>130</sup> *Id.* § 5.5(b)(1), 75 Fed. Reg. at 726.

<sup>131</sup> See, e.g., WILLARD REPORT, *supra* note 29, at 4-5, 11; Reno Testimony, *supra* note 37, at 14.

<sup>132</sup> CLARK R. MOLLENHOFF, THE PRESIDENT WHO FAILED: CARTER OUT OF CONTROL 141 (1980).

<sup>133</sup> ABEL, *supra* note 15, at 26, 42; James Kelly, *Shifting the Attack on Leaks*, TIME, May 19, 1986, at 91.

<sup>134</sup> R. Jeffrey Smith & Dafna Linzer, *Dismissed CIA Officer Denies Leak Role*, WASH. POST, Apr. 25, 2006, at A1.

<sup>135</sup> ASHCROFT REPORT, *supra* note 37, at 3, 4; accord SSCI REPORT, *supra* note 109, at 24 (observing that “there is no effective administrative system currently operating in the executive branch for investigating and penalizing unauthorized disclosures”).

<sup>136</sup> U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-83-15, REVIEW OF DOD INVESTIGATION OF LEAK OF CLASSIFIED INFORMATION TO *THE WASHINGTON POST* 5 (1982), available at <http://www.gao.gov/assets/210/205900.pdf>.

Department committee remarked that “disciplinary action has not been adequate in the field of security information, even after making due allowance for the difficulties generally encountered in identifying those responsible for violations.”<sup>137</sup> Although not focused on the national security field, Hugh Heclo’s 1977 study of domestic policy agencies found that senior officials seldom confronted suspected leakers.<sup>138</sup> They were much more likely to respond by exercising self-help—cultivating their own media and congressional contacts rather than trying to stanch the flow of disclosures. Less systematically, but tellingly, a recent FOIA request revealed that in the late 1990s, DOJ’s Office of Professional Responsibility determined that an assistant director at the FBI and an assistant U.S. attorney who had been detailed to a management role had committed “intentional professional misconduct” by leaking classified information to the press, assertedly to correct what they saw as misconceptions in the public record. Senior department leadership overruled that determination and declined to impose sanctions.<sup>139</sup>

The results of my own FOIA requests and interviews, discussed in Parts II and III, corroborate but also complicate the notion that administrative punishments for media leakers are rare. It appears that numerous agencies that work on national security- and foreign policy-related issues hardly ever impose such punishments, or even conduct leak investigations. Administrative discipline in these agencies is nearly as uncommon as its criminal counterpart. Informal sanctions, however, pick up some of the slack.

#### *D. Consequences*

Presidents since at least Woodrow Wilson have complained “bitterly” about the leakers within their midst.<sup>140</sup> Degrees of vehemence have varied (Reagan was on the high end, Carter on the low end), but there is no reason to doubt the sincerity of their dismay. Some leaks highlight unflattering or disturbing conduct, some prompt congressional scrutiny or media investigations, some reveal vulnerabilities or degrade a strategic advantage. And every leak not to the president’s liking has the potential to undermine his control of the political agenda. As one diligent student of the subject has noted, Theodore “Roosevelt and all subsequent Presidents discovered that leaks not authorized by the White House subverted their efforts to engineer public consent.”<sup>141</sup> This destabilizing power of leaks has significant implications for the executive branch’s internal governance, a theme this Article will return to continuously.

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<sup>137</sup> DEF. DEP’T COMM. ON CLASSIFIED INFO., REPORT TO THE SECRETARY OF DEFENSE BY THE COMMITTEE ON CLASSIFIED INFORMATION 9 (1956) [hereinafter COOLIDGE REPORT], available at [http://bkofsecrets.files.wordpress.com/2010/07/coolidge\\_committee.pdf](http://bkofsecrets.files.wordpress.com/2010/07/coolidge_committee.pdf).

<sup>138</sup> HECLO, *supra* note 17, at 227-28. Senior officials declined to confront leaking civil servants, Heclo found, out of fear of limiting access to outside channels, provoking backlash, and distracting from their policy agenda, as well as a belief that “there are few effective sanctions to prevent recurrences.” *Id.*

<sup>139</sup> Josh Gerstein, *Judge: Justice Department Can Keep Secret Names of Lawyers Warned over Leaks*, POLITICO, Jan. 20, 2011, [http://www.politico.com/blogs/joshgerstein/0111/Judge\\_Justice\\_Department\\_can\\_keep\\_secret\\_names\\_of\\_lawyers\\_targeted\\_in\\_leak\\_probe.html](http://www.politico.com/blogs/joshgerstein/0111/Judge_Justice_Department_can_keep_secret_names_of_lawyers_targeted_in_leak_probe.html).

<sup>140</sup> HESS, *supra* note 73, at 91; accord GOLDSMITH, *supra* note 12, at 83-84; Lee, *supra* note 22, at 1468-69; Halloran, *supra* note 88, at A16. For a somewhat dated compilation of colorful presidential complaints, see Joel Garreau, *Up to Their Keisters in Leaks*, WASH. POST, Jan. 16, 1983, at B5.

<sup>141</sup> Kielbowicz, *supra* note 89, at 444.

Almost all commentary on leaks, however, does not pursue the insiders' point of view but rather some form of external critique centered on national security interests or values associated with the First Amendment. National security professionals routinely claim substantial adverse consequences while minimizing democratic benefits. Journalists and civil libertarians question these claims and celebrate leaks as a source of accountability and transparency, a check on executive power, and a corrective to overclassification. For every governmental assertion of leaks "that have collectively cost the American people hundreds of millions of dollars . . . and done grave harm to national security,"<sup>142</sup> one finds the rebuttal that "there has not been a single instance in the history of the United States in which the press's publication of a 'legitimate but newsworthy' government secret has gravely harmed the national interest"<sup>143</sup>—indeed, that there have been few destructive leaks anywhere in the world.<sup>144</sup>

Government insiders occupy an epistemically privileged position in this debate. Their superior access to classified information enhances their capacity to assess harms from leaks while excusing them from offering a detailed defense of their claims.<sup>145</sup> And yet, there is the stickiness of "permissive neglect"<sup>146</sup> to contend with: Is it really plausible that the executive would adhere, across decades, to such a tragic enforcement model? There is also no shortage of former insiders who take the opposition line. In a largely ignored passage from *The Imperial Presidency*, Arthur Schlesinger, Jr. asked, "After all the years of the American obsession with secrecy, could anyone name a case where a leak did serious damage to the national security?"<sup>147</sup> "Espionage," Schlesinger granted, "was a different matter. . . . Conceivably the nation might have been better off had there been more rather than fewer leaks."<sup>148</sup>

Conceivably, but in the final analysis, it is hard to draw any strong conclusions about the balance of consequences. The problem is not just that no one has attempted to measure the costs and benefits of leaking in a systematic way. It is that any such effort would likely prove quixotic, given the great variability of the phenomenon, the many unobservables involved, the incommensurateness of the values implicated, the complicated relationships with other forms of secrecy and transparency, and the contingent nature of disclosure's effects (first-, second-, and

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<sup>142</sup> WMD REPORT, *supra* note 67, at 381. For examples of similar governmental assertions and detailed discussions of potential national security harms from leaks, see ROSS, *supra* note 10, at 79-121; GABRIEL SCHOENFELD, NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW *passim* (2010); and Bruce, *supra* note 109, at 40-43.

<sup>143</sup> Geoffrey R. Stone, *The Lessons of History*, A.B.A. NAT'L SECURITY L. REP., Sept. 2006, at 1, 3. For comparable claims, see Freivogel, *supra* note 53, at 98; Jeffrey T. Richelson, *Intelligence Secrets and Unauthorized Disclosures: Confronting Some Fundamental Issues*, 25 INT'L J. INTELLIGENCE AND COUNTERINTELLIGENCE 639 (2012).

<sup>144</sup> See, e.g., Sandra Coliver, *Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, in SECRECY AND LIBERTY: NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION 11, 66 (Sandra Coliver et al. eds., 1999) [hereinafter SECRECY AND LIBERTY] ("[T]here have been few instances anywhere in the world in recent memory where information disclosed by a government servant damaged a vital state interest.").

<sup>145</sup> Thus, immediately after asserting that leaks have "done grave harm to national security," the WMD Commission Report preterms further analysis or debate: "We cannot, however, discuss them in an unclassified format." WMD REPORT, *supra* note 67, at 381.

<sup>146</sup> See *supra* note 109 and accompanying text.

<sup>147</sup> ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 362 (1973).

<sup>148</sup> *Id.*

third-order).<sup>149</sup> The Defense Department came close to admitting as much in 1956, when a high-level panel charged with studying the issue conceded that “[t]he seriousness of unauthorized disclosures, both in number and nature, cannot be determined.”<sup>150</sup> Furthermore, even if we could reliably measure the consequences of the leaks that have occurred, it is impossible to know what outcomes would have followed from a system of slightly more, vastly more, or even paltrier enforcement. The debate over leaks’ impact on national security and democracy is destined to remain empirically impoverished to some significant degree. In many respects, it has barely advanced since 1956.

Yet, even if questions about leaking’s ultimate societal consequences have therefore proven intractable, and the associated debates become hoary, there is significant scope to advance our understanding of how permissive neglect actually works—what this regulatory regime looks like to participants, what mechanisms and customs it employs, why it takes the form it does, how it has persisted for so long. A whole suite of analytic challenges has gone all but ignored. Macro-level positive and normative evaluation may be unusually vexed in the area of leaks, but mid-level theory remains viable.

“No answer is what the wrong question begets.”<sup>151</sup>

## II. ORDER IN “DISORDER”<sup>152</sup>: THE LOGIC OF LEAKINESS

Why does the executive branch tolerate so much leaking? The dearth of punishment is striking in itself, and it seems especially curious in light of the perpetual presidential hand-wringing. A common explanation for the negligible enforcement rate—never developed at any length and never seriously scrutinized—emphasizes how difficult it is to identify and prosecute leakers. While there is surely some truth to this constraint-based account, this Part argues that it is inadequate even on its own terms. An objective observer reviewing all the evidence could only conclude, I will show, that elimination of leaks has not been a priority for many of the key actors in the U.S. government. The constraint-based view has distorted the debate on leaking, impoverished critical analysis. It fails to explain the persistent lack of formal discipline outside of the criminal realm. And it overlooks the numerous reasons why executive branch principals may prefer to avoid ramping up enforcement levels, even if they had ready means to do so.

Occasionally one finds the further claim that the “political will” to bring more cases has been lacking.<sup>153</sup> But that formulation just begs the question. Why has there been insufficient political will? And how exactly does this lack of will manifest? Neither issue has received scrutiny.

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<sup>149</sup> This contingency is the central theme of Mark Fenster, *Disclosure’s Effects: WikiLeaks and Transparency*, 97 IOWA L. REV. 753 (2012).

<sup>150</sup> COOLIDGE REPORT, *supra* note 137, at 6; *see also* LINSKY, *supra* note 20, at 187 (“Despite the prevalence of leaks, the impact on policy is hard to discern and thereby even harder to predict.”).

<sup>151</sup> ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 103 (1962).

<sup>152</sup> The allusion is to Bickel’s famous, and now conventional, observation that our legal regime for dealing with leaks is a “disorderly situation.” *See supra* note 10 and accompanying text.

<sup>153</sup> *See, e.g.*, WMD REPORT, *supra* note 67, at 382. I assume that many people who have reflected on the negligible enforcement rate have similarly concluded that lack of “political will” must play a role. I have not, however, seen any scholarly attempts to unpack this idea.

Leak prosecutions may generate political costs for an administration if they inspire media criticism. However, leaks themselves can be quite politically costly, as can the perceived failure to act against dangerous disclosures. And it is not clear that most media outlets would reflexively oppose greater enforcement against a group of actors who feed some journalists some juicy information, yet who also jeopardize the industry's legal and moral standing. The media would be on especially weak ground opposing greater *administrative* enforcement.<sup>154</sup> The puzzle of permissive neglect remains.

This Part deconstructs and then reconstructs the logic of leakiness. Section A details weaknesses in the constraint-based account. A great deal of enforcement capacity exists that is not being used; the inference arises that this equilibrium has a significant intentional component. Following this inference, Section B identifies a range of executive interests served by leaks. These interests are substantially promoted by strategic behavior. Taken together, they are critical to maintaining and making sense of the negligible enforcement rate. Their imprint does not explain everything: The goal of this Part is not so much to supplant as to supplement the familiar rationales for why leakers go unpunished. It is, moreover, impossible to estimate with any precision the frequency with which leaking has served (or disserved) relevant parties' interests. We would need to know far more than we do about the nature of their utility functions and about which sorts of secrets have been disclosed and which have not. At a minimum, however, this Part establishes the counterintuitive proposition that the optimal level of unauthorized classified information disclosures to the press, from virtually everyone in government's perspective, is substantially higher than zero.

Looking backward, this reconceptualization provides a more compelling account of the failure to enforce prohibitions against leaking. Looking forward, it generates a prediction, falsifiable in principle, that we will continue to see minimal criminal enforcement of the leak laws in this country and perhaps all other advanced democracies with institutionally "thick"<sup>155</sup> executives, notwithstanding the advent of new technologies that make it easier to smoke out perpetrators. In place of the unexamined intuitions that predominate in this area ("The leakers cannot be caught!" "The political will isn't there!"), I offer what sociologists might call a middle-range theory,<sup>156</sup> which draws on insights from a variety of literatures as well as various forms of empirical evidence. The theory provides a framework for understanding, in narrative and functional terms, both the persistence and the dynamics of permissive neglect.

How can I derive any explanatory significance from "executive" interests, when the executive branch contains many different components with interests, incentives, and cultures that

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<sup>154</sup> For decades, there has been "widespread agreement among both government officials and civil liberties advocates that government officials who publicly disclose information learned through their official duties . . . may be administratively disciplined, including being fired from their jobs, for leaking such information." Paul Hoffman & Kate Martin, *Safeguarding Liberty: National Security, Freedom of Expression and Access to Information: United States of America*, in *SECRECY AND LIBERTY*, *supra* note 144, at 477, 495.

<sup>155</sup> See generally STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE* 31, 55-56 (1993) (describing "thickening" as the proliferation of organized interests and institutional actors that surround, support, and hem in the presidency).

<sup>156</sup> See ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 39-40 (1968) (defining middle-range theories as attentive to, yet abstracted from, specific observed patterns of social behavior and noting that "[t]he seminal ideas in such theories are characteristically simple").

are not always aligned? And how can I even talk about executive “interests” in leakiness when every president condemns leaks and numerous officials are apt to resent any given disclosure?

These questions are common to many studies of executive behavior. Part of the answer is that leaking is a heterogeneous activity that occurs in a repeat-play environment. Participants in such iterated practices may deeply dislike specific instantiations and yet respect the basic structure of the practice. There is no need to posit disingenuousness or self-delusion on the part of leaks’ internal critics. Even if certain Senators may rail against any given failure to achieve cloture, Senators as a group might reap important benefits from adhering to the filibuster. Even if certain components of the government may rail against various Supreme Court decisions (*Boumediene*<sup>157</sup> springs unbidden to mind), powerful political actors, legal theorists have shown, may benefit in the aggregate from the maintenance of judicial review.<sup>158</sup> Judicial review appears to be an episodically painful, but globally beneficial, institutional design mechanism for presidents and other high-level officials. The claim here is that leakiness is like that.

Another part of the answer is that social practices, particularly diffuse ones generated by custom, may reflect or further certain values and commitments even if individuals involved never consciously determined to prioritize those values and commitments. In an institutional context as intricate as the one applicable to leaking, structural features and competing agendas greatly constrain agency. A president who set out to plug every leak would quickly find she has few decent options. To ascribe strategic logic to the “leak-law regime,” it is unnecessary either to restrict the analysis to individual ambitions or to conceptualize the executive branch as some kind of organic entity. To the contrary, to make sense of this regime it is critical to appreciate the internal conflict and complexity that mark the modern administrative state.

And part of the answer is that the president and his team are the primary architects and beneficiaries of the executive’s enforcement model, which allows us to home in on their incentives and behaviors. For analytic crispness and expository clarity, Section B concentrates initially on the White House’s interests in leaks. Building on that baseline identification of the executive branch with the White House, it then moves outward to consider other actors within and beyond the executive. Institutional players are disaggregated, and the executive’s pluralism is incorporated into the model, albeit incompletely. Any effort to account for every complication and contingency in an ecosystem this large would quickly become unwieldy. Particularly in light of the overlapping interests in leaking that unite the key actors in this story, as well as the president’s control over the classification system and the rise in presidential administration generally,<sup>159</sup> I believe that framing the analysis around the White House is not only the most fruitful but also the most methodologically sound approach.<sup>160</sup>

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<sup>157</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that the constitutional privilege of habeas corpus extends to alien detainees at Guantánamo Bay).

<sup>158</sup> See, e.g., Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 733-45 (2011); Matthew C. Stephenson, “*When the Devil Turns . . .*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003).

<sup>159</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

<sup>160</sup> Cf. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 114 (2010) (taking a president-focused approach to a rational choice analysis of constraints on executive power). Like

The focus in this Part will thus be on the factors that help account for, and render rational, the lack of visible enforcement.<sup>161</sup> The next Part will look more closely at social and ethical dimensions of this regulatory regime and at modes of enforcement outside observers do not see.

### A. *The Inadequacy of the Constraint-Based Narrative*

#### 1. *Catching Culprits*

“Turns out you never can find the leaker.”  
— President George W. Bush, 2006<sup>162</sup>

“We have already alluded to the difficulty frequently encountered in identifying the source of ‘leaks.’ We are not convinced that this difficulty is insurmountable . . . .”  
— Defense Department Committee on Classified Information, 1956<sup>163</sup>

The most common explanation given for the lack of enforcement points to the difficulty of identifying the leaker.<sup>164</sup> There is undoubtedly some force to these claims. In many cases, investigators will find it a challenge to locate the origins of a disclosure, given the secrecy that leakers may employ and the large number of individuals who may be “read in” to any given classified program. Journalists’ tendency to gather and aggregate information from multiple sources further complicates the investigative task.<sup>165</sup>

For a variety of reasons, however, this explanation is unsatisfying. First, in the mine run of leak cases, at least one person other than the source knows the source’s identity: the journalist who broke the story.<sup>166</sup> And at least as a legal matter, the government has the power to subpoena

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Posner and Vermeule’s, this analysis has a rational choice cast, although I also try to go further in providing thick description of internal executive practices and in attending to noninstrumental sources of constraint.

<sup>161</sup> I do not pay special attention in this Part to prosecutors, and it may be that no prosecutor has internalized the interests described herein. Regardless of what motivates prosecutorial behavior in this area, it is not U.S. attorneys but rather top officials at DOJ, other agencies, and the White House who have, across administrations, maintained the conditions that make it very difficult for leak cases to be brought. The point is not critical, but it also seems implausible to think that prosecutors are wholly immune, at a working level, from an administration’s basic political and policy objectives, from the habits of its highest-ranking members, or from its general stance toward leaks.

<sup>162</sup> President George W. Bush, Press Conference by the President (Dec. 20, 2006), *transcript available at* <http://www.nytimes.com/2006/12/20/washington/20text-bush.html?pagewanted=all> (discussing the “ongoing problem” of classified information leaks).

<sup>163</sup> COOLIDGE REPORT, *supra* note 137, at 15.

<sup>164</sup> *See, e.g.*, Reno Testimony, *supra* note 37, at 9-10 (“I find this dearth of prosecutions highly frustrating as well. . . . But the sad fact is that in the vast majority of leak cases . . . we simply have not been able to identify the people responsible.”); Schoenfeld Testimony, *supra* note 109, at 61 (“The prosecution of leakers is rare because they are exceptionally difficult to catch.”). *See generally* ROSS, *supra* note 10, at 21-24 (explaining the basis for and prominence of this view).

<sup>165</sup> *See supra* notes 94-97 and accompanying text (discussing “diffuse sourcing” and related practices). When the disclosures that inform a revelatory story are sufficiently diffuse, and the clues amassed by the reporter sufficiently diverse or redundant, it may be difficult to pinpoint any particular “leaker” as the key source behind the story.

<sup>166</sup> *Cf.* WMD REPORT, *supra* note 67, at 383 (“During our work, we were repeatedly told that the greatest barrier to prosecuting leaks was in identifying the ‘leaker.’ And many people with whom we spoke also said that the best (if not only) way to identify leakers was through the reporters to whom classified information was leaked.”).

journalists who will not willingly reveal their sources.<sup>167</sup> Uncooperative reporters and news outlets can be pressured in subtler ways, too, as by denying them access to senior officials. Members of the media may well fight such measures in court and in the editorial pages, but it is notable how much ground the executive cedes upfront. Notwithstanding occasional complaints about “irresponsible” stories, the reporters who publish the most leaks are not so much shunned as courted. Bob Woodward’s many revelations have hardly led to his marginalization.<sup>168</sup> And while DOJ appears to have become slightly more aggressive in recent years, it remains very unusual for prosecutors to subpoena journalists<sup>169</sup> or to request that they identify their sources.<sup>170</sup> The immediate cause of this restraint is DOJ’s policy on issuing subpoenas to members of the news media—the entire point of which is to make these subpoenas as rare as possible (and thereby, presumably, to safeguard not just First Amendment values but DOJ’s standing with the courts and the press). Leak investigations are so difficult, in part, because the government has *made* them so difficult by abjuring its most potent investigative tool.

Second, the government has refrained from using other potent investigative tools. Periodically, government task forces have recommended that the White House take concerted steps to facilitate leak investigations, such as regularizing the use of polygraphs and requiring employees who speak with the press to provide advance notice followed by summaries of what was discussed.<sup>171</sup> President Reagan went further than any other president in trying to implement these policies. No recognized constitutional obstacle stood in his way. Yet after journalists protested, senior officials rebelled from within; Secretary of State George Shultz held a press conference to announce that no one at the State Department would submit to a polygraph.<sup>172</sup> The attempted crackdown on leakers lasted all of three weeks before being summarily scrapped.<sup>173</sup> Administrations and agencies have experimented with a number of other initiatives over the years with varying degrees of vigor, but Reagan’s plan remains the closest the executive has ever

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<sup>167</sup> See *supra* notes 47-53 and accompanying text.

<sup>168</sup> See FREDERICK A.O. SCHWARZ, JR., *SECRECY AND DEMOCRACY* (forthcoming 2013) (manuscript at 252) (on file with author) (“Bob Woodward’s series of best-selling books about presidential administrations from Nixon through Obama could not have been written, and would not have sold in box-car numbers, without massive leaks from high-ranking officials.”).

<sup>169</sup> See GOLDSMITH, *supra* note 12, at 222 (“[W]hat is remarkable about the last decade is not the slight increase in attempts to use subpoenas against journalists but rather the relatively sparse use of subpoenas given the number and type of leaks.”); Gerstein, *supra* note 116 (describing FBI records released through FOIA that suggest “many investigations into leaks of top-secret data are abandoned without pursuing some obvious, if intrusive, investigative techniques, such as seeking testimony or phone records from members of the press”). For data through 2008 on federal subpoenas, including but not limited to leak cases, see Jones, *supra* note 48, at 637-42. In 2007, DOJ’s Criminal Division reported nineteen incidents in the past fifteen years in which it had sought source-related information, although Jones finds this figure may have been understated. *Id.* at 612-13, 642.

<sup>170</sup> See GOLDSMITH, *supra* note 12, at 221 (stating that this practice “has happened more than usual in the last decade, but only a bit more”).

<sup>171</sup> See, e.g., WILLARD REPORT, *supra* note 29, at 4-5, 21-23; Steven Aftergood, *In 1962, JFK Was Urged to Take “Drastic Action” Against Leakers*, *SECRECY NEWS*, Sept. 24, 2012, [http://www.fas.org/blog/secrecy/2012/09/pfiab\\_drastic.html](http://www.fas.org/blog/secrecy/2012/09/pfiab_drastic.html) (summarizing the recommendations of a 1962 study by the President’s Foreign Intelligence Advisory Board).

<sup>172</sup> See Richard J. Pierce, Jr., *Saving the Unitary Executive from Those Who Would Distort and Abuse It: A Review of The Unitary Executive*, by Steven G. Calabresi and Christopher S. Yoo, 12 U. PA. J. CONST. L. 593, 609 (2010).

<sup>173</sup> See ABEL, *supra* note 15, at 41-42; HESS, *supra* note 73, at 90-91; *Reagan Shelves Requirement for Polygraph Tests*, *WASH. POST*, Feb. 16, 1984, at A12.

come, at least in the pre-WikiLeaks era,<sup>174</sup> to establishing a comprehensive program for monitoring prospective leakers, ferreting out culprits, or constraining media contacts.

To be sure, this restraint does not necessarily reflect any conscious appreciation for leaks' upside so much as a fear of undermining morale or generating mistrust. But notice how the grounds of argument have shifted—these considerations speak less to the legal and practical barriers to identifying leakers than to the political costs of seriously trying. Forces within government sharply limit any president's ability to invigorate apprehension efforts or otherwise deviate from the norm of broad-based leakiness. The likelihood of catching culprits is endogenous to the system. To say simply “you never can find the leaker”<sup>175</sup> obscures these more fundamental drivers of nonenforcement.

Third, even with these self-imposed limitations, DOJ has had some success finding leakers. We do not have much data, but we know that from 2005 to 2009, the FBI opened investigations into twenty-six leak cases referred by the IC and identified suspects in fourteen of them.<sup>176</sup> There is presumably some selection bias here, if the FBI generally declines to open investigations it expects to be fruitless. Nonetheless, an identification rate of more than 50 percent over a five-year period suggests that many leakers can, without extraordinary measures, be discovered. Furthermore, in a significant portion of the investigations that failed to yield a suspect, other components of the executive branch appear to bear some fault. Through a FOIA request submitted in 2006, journalist Josh Gerstein obtained FBI records showing that the bureau had abandoned numerous criminal investigations into classified information leaks because the “victim agency” had failed to cooperate with its work.<sup>177</sup>

Finally, if it is true, as virtually every informed observer has indicated, that leaks are predominantly the province of top government officials with good media contacts,<sup>178</sup> then it should be all the easier to identify suspects. Those top officials might be difficult to prosecute for political or other reasons. But as a purely evidentiary or investigatory matter, their special status ought to be a boon, not a burden, to enforcers. One former Defense Department official reflected in an interview: “It's actually not so hard to catch the leaker in many cases. . . . Read a book like *Confront and Conceal*”—journalist David Sanger's classified-information-strewn account of President Obama's counterterrorism policies—“and it's often pretty damn clear what the universe of people is who might have done it.”<sup>179</sup> *Confront and Conceal* describes not only specific classified programs to which a limited number of persons had access but also specific

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<sup>174</sup> Although it is too early to draw any firm conclusions, certain developments suggest the Obama administration may be trending in the Reagan direction. See, e.g., Memorandum for the Heads of Executive Departments and Agencies (Nov. 21, 2012), available at <http://www.fas.org/sgp/obama/nitp.pdf> (describing the establishment of a National Insider Threat Policy, which will require agencies to “monitor employee use of classified networks”).

<sup>175</sup> Bush, *supra* note 162.

<sup>176</sup> Mueller Response, *supra* note 114, at 47.

<sup>177</sup> Gerstein, *supra* note 116. This failure of interagency cooperation may be compatible with the claim that nonenforcement is driven by the national security risks of bringing criminal trials, see *infra* Part II.A.2, but it undercuts the notion that leak suspects are intrinsically difficult to find.

<sup>178</sup> See *supra* notes 71-76 and accompanying text.

<sup>179</sup> Interview with former Defense Department official (Aug. 29, 2012).

meetings involving a sliver of officialdom.<sup>180</sup> “Compared to other crimes, you often have way more to go on in leak cases.”<sup>181</sup>

## 2. *Bringing Cases*

After the difficulty of identifying suspects, the next most common explanation given for the negligible enforcement rate centers on the national security concerns raised by public trials. To persuade a jury under the awkwardly worded Espionage Act, criminal prosecutions may require the government to disclose classified information. They may also provide forums for defendants to seek to do the same, as well as focal points that draw attention to the initial leak and confirm its significance.<sup>182</sup> An enforcement tool meant to vindicate national security interests, accordingly, may independently compromise them. This explanation surely has some force to it as well—indeed, more force than the identification rationale—but it is also far from satisfying.

For starters, it minimizes the Classified Information Procedures Act (CIPA).<sup>183</sup> CIPA was enacted in 1980 to facilitate the use of classified information in criminal cases. Congress was keen to address the problem of “graymail,” whereby (in simplest form) defendants pressured prosecutors to limit or abandon their case by threatening to reveal damaging material at trial.<sup>184</sup> CIPA contains numerous mechanisms to guard against such dilemmas: notification requirements prohibiting unilateral defense disclosures of classified information; protective orders prohibiting cleared counsel from sharing classified information with their clients; redactions, summaries, admissions, and substitutions; in camera and ex parte hearings.<sup>185</sup> CIPA may be cumbersome to use and suboptimal from a national security standpoint; no statute concerned to protect a defendant’s due process rights could be otherwise. In the recent high-profile case of Thomas Drake, CIPA did not prevent a discovery ruling that, according to the judge, the government deemed insufficient to avoid public references at trial to sensitive NSA activities.<sup>186</sup> Yet a number of studies have extolled the statute’s track record in national security cases.<sup>187</sup> If

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<sup>180</sup> See, e.g., DAVID E. SANGER, *CONFRONT AND CONCEAL: OBAMA’S SECRET WARS AND SURPRISING USE OF AMERICAN POWER*, at x-xiii, 190-93, 200-03 (2012) (describing meetings about the “Olympic Games” cyber-operation against Iran).

<sup>181</sup> Interview with former Defense Department official (Aug. 29, 2012).

<sup>182</sup> For a representative statement of these concerns, see WILLARD REPORT, *supra* note 29, at 11.

<sup>183</sup> 18 U.S.C. app. 3 (2006).

<sup>184</sup> See RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., *HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS* 82 (2008).

<sup>185</sup> In addition to these measures, CIPA leaves in place other tools judges might use to safeguard sensitive information. See EDWARD C. LIU & TODD GARVEY, *CONG. RESEARCH SERV., R41742, PROTECTING CLASSIFIED INFORMATION AND THE RIGHTS OF CRIMINAL DEFENDANTS: THE CLASSIFIED INFORMATION PROCEDURES ACT 10-11* (2012). A detailed analysis of CIPA’s procedures is well beyond the scope of this Article. For an overview, see 2 DAVID S. KRIS & J. DOUGLAS WILSON, *NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS* chs. 25-27 (2d ed. 2012).

<sup>186</sup> See Transcript of Sentencing Hearing at 25-26, *United States v. Drake*, No. 1:10-CR-181-RDB (D. Md. July 15, 2011) (“When we had the hearings under [CIPA], . . . and certain rulings were made, some in favor of the government, some not, the government made its determination that the disclosure of remaining classified information would harm national security and ergo the dismissal of the indictment.”).

<sup>187</sup> See, e.g., SERRIN TURNER & STEPHEN J. SCHULHOFER, *BRENNAN CTR. FOR JUSTICE, THE SECRECY PROBLEM IN TERRORISM TRIALS* 22-25 (2005); ZABEL & BENJAMIN, *supra* note 184, at 87-90.

anything, the literature on CIPA tends to underscore how harsh it has proven for defendants, who complain they are rarely given access to the government's classified evidence or permitted to submit their own classified evidence.<sup>188</sup>

Whatever CIPA's drawbacks, its history and design put the burden on those who would argue it is inadequate in leak cases, an argument that has not been elaborated. CIPA was crafted with national security leaks specifically in mind.<sup>189</sup> That its enactment did not correspond with any discernible rise in enforcement levels strongly suggests the primary causes of permissive neglect lie outside of the trial process. For over two decades, the government barely gave judges a chance to apply CIPA safely and effectively in leak cases. The first time the government did so, in 1985, it secured a jury verdict of guilty on all counts.<sup>190</sup>

Jury verdicts in CIPA cases are not the only path to punishment. Vigorous investigations of suspected leakers can generate second-order criminal offenses, like materially false statements and obstructions of justice, which may be tried without use of classified information. In some cases, these investigations may turn up evidence that the leaker profited from her unauthorized disclosure, rendering her susceptible to a civil damages action. And plea agreements offer the government a means to convict leakers without assuming the risks attendant to trial. Pleas have been used in a number of cases involving the unlawful transmission of classified information.<sup>191</sup> Even when these agreements result in punishments milder than what prosecutors might have preferred, as in the Drake case, the very act of seeking criminal penalties can still have a significant retributive and deterrent effect. Accused leakers are liable to incur a wide range of psychic and professional costs, along with steep legal fees, from their time spent under investigation and indictment. In functional terms, then, even the "failed" Drake prosecution can be seen as a successful intervention against leaking.<sup>192</sup> This is not to say that it would ever be appropriate for prosecutors to bring cases they do not believe they can win, for harassment value. It is to say that in light of CIPA, there is no a priori reason to assume prosecutors cannot win most leak cases, and that in situations where the judge's pretrial rulings raise national security concerns or otherwise augur poorly, plea agreements provide a backstop.

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<sup>188</sup> See Melanie Reid, *Secrets Behind Secrets: Disclosure of Classified Information Before and During Trial and Why CIPA Should Be Revamped*, 35 SETON HALL LEGIS. J. 272, 292-97 & n.91 (2011); Ellen Yaroshefsky, *Secret Evidence Is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, 34 HOFSTRA L. REV. 1063, 1070-76 (2006).

<sup>189</sup> See generally S. REP. NO. 96-823, at 1-2 (1980); *Espionage Laws and Leaks: Hearing Before the H. Permanent Select Comm. on Intelligence*, 96th Cong. (1979).

<sup>190</sup> See *United States v. Morison*, 844 F.2d 1057, 1062 (4th Cir. 1988); see also Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 287 (1986) (discussing the use of CIPA in Morison's trial).

<sup>191</sup> See ELSEA, *supra* note 25, at 5, 6, 13, 16, 23 n.146.

<sup>192</sup> See Dan Froomkin, *The Big Chill: How Obama Is Operating in Unprecedented Secrecy—While Attacking the Secret-Tellers*, HUFFINGTON POST, Oct. 17, 2012, [http://www.huffingtonpost.com/dan-froomkin/obama-white-house-leaks\\_b\\_1973649.html](http://www.huffingtonpost.com/dan-froomkin/obama-white-house-leaks_b_1973649.html) (crediting the view that in "every significant sense, the government won [the Drake case], because it demonstrated the price of nonconformity"); see also Scott Shane, *U.S. Pressing Its Crackdown Against Leaks*, N.Y. TIMES, June 18, 2011, at A1 (reporting that, according to leak defendant Stephen Kim's sister, the charges brought against Kim "sent [their] parents into deep sadness and anxiety, put more strains on Stephen's marriage than a couple can bear, and ruined all he has worked for over his life").

Many of these concerns, moreover, relate to prosecutions brought under the Espionage Act. There are a number of other criminal laws potentially applicable to leak cases, as outlined in Part I.<sup>193</sup> Some of these statutes—notably including the general theft and conversion statute, 18 U.S.C. § 641—do not have a comparable scienter requirement. Nor do they have the same moral valence. The title of the Espionage Act, one former DOJ official who worked on leak cases suggested, can be a disadvantage for the prosecution inasmuch as it primes the jury to expect a traitorous offense.<sup>194</sup> While the government has enlisted several of these other statutes on occasion, it has declined to use them as aggressively as it might and continues to lead with the Espionage Act. Drake, for example, was never charged under § 641.<sup>195</sup>

### 3. *Dogs That Did Not Bark*

In case the preceding discussion still leaves room to wonder whether investigative and prosecutorial constraints are sufficient to explain decades of minimal enforcement, additional evidence of the comparative and negative variety—relating to practices the executive has used in analogous areas but not the leak area and to potential remedial steps it has forgone—should erase any doubt.

First, as a Senate study once observed, the executive branch takes classic spy situations “much more seriously than leaks.”<sup>196</sup> The majority of Espionage Act prosecutions have involved, well, espionage, incidents in which an official passed confidential information to a foreign power.<sup>197</sup> Like media leaking, espionage typically presents significant investigative challenges—perhaps greater challenges, given that news stories tend to reveal on their face the existence of a government source. While the practice of prioritizing espionage cases may be explicable on numerous grounds,<sup>198</sup> it undercuts the notion that the leak laws cannot accommodate aggressive enforcement within standard resource constraints.

Second, the executive also appears to take violations of the anti-graft laws much more seriously than it takes leaks. “Public corruption,” DOJ announced recently, “is among the FBI’s top priorities and is the number one priority of the Criminal Investigative Division.”<sup>199</sup> In fiscal year 2009 alone, the department’s Public Corruption Unit managed approximately 2500 corruption investigations involving public officials, coordinated more than 1000 additional investigations, and helped obtain over 850 convictions of federal officials.<sup>200</sup> Intrusive techniques, such as undercover operations and electronic surveillance, are a staple of the unit’s

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<sup>193</sup> See *supra* notes 32-35 and accompanying text.

<sup>194</sup> Interview with former DOJ official (Aug. 28, 2012).

<sup>195</sup> See Indictment, *United States v. Drake*, No. RDB 10-181 (D. Md. Apr. 14, 2010); see also *supra* note 34 and accompanying text (explaining that the Fourth Circuit, in which Drake’s case was brought, construes § 641 as covering disclosures of intangible as well as tangible classified information).

<sup>196</sup> SSCI REPORT, *supra* note 109, at 8.

<sup>197</sup> See Papandrea, *supra* note 25, at 296.

<sup>198</sup> Espionage cases may, for example, be easier to prosecute if they are more conducive to being charged as conspiracies or if they are less likely to elicit a skeptical reaction from juries.

<sup>199</sup> FED. BUREAU OF INVESTIGATION, TODAY’S FBI: FACTS AND FIGURES, 2010-2011, at 28 (2012), available at <http://www.fbi.gov/stats-services/publications/facts-and-figures-2010-2011/facts-and-figures-2010-2011-pdf>.

<sup>200</sup> *Id.*

investigative work.<sup>201</sup> These raw data tell us nothing about the prevalence of the underlying criminal conduct, of course, or about the relative difficulty of identifying and prosecuting corrupt individuals versus leakers. But they are illustrative nonetheless of what a vigorous criminal enforcement regime against federal officials is capable of. Corruption, like espionage, has comparatively little upside for modern administrations, agencies, or the general U.S. public. And so the government polices it more zealously.

Third, the majority of classified information leaks are not referred for possible criminal action. DOJ officials have indicated that the department receives roughly 40 referrals per year, mainly from the CIA and NSA.<sup>202</sup> Taken together with the facts that (i) virtually all classified information leaks (as well as many leaks of unclassified information) potentially fall within the terms of one or more criminal statutes, and that (ii) several studies have suggested such leaks occur almost daily, this figure implies that agencies have been reporting only a small fraction of leak-law violations. The only study ever to consider this ratio found similarly.<sup>203</sup> The referral process, in other words, exercises major drag on the system. It filters out most leak cases before they ever reach a prosecutor.<sup>204</sup>

My FOIA requests and interviews flesh out this observation. [They reveal that over the past several decades, agencies that generate veritable mountains of information relating to the national defense—including cabinet-level departments like Energy, State, Treasury, and Homeland Security as well as independent agencies like the Nuclear Regulatory Commission—have collectively referred a handful of leak cases to DOJ.<sup>205</sup>] The only meaningful users of the referral process are certain elements of the IC, the heads of which are required by executive order to report possible violations of federal law to the Attorney General.<sup>206</sup> Even though its text speaks of the “national defense,” the Espionage Act has been reduced by executive branch practice to an intelligence statute.

This point bears emphasis. *The vast majority of entities within the U.S. government that work on national security-related issues have effectively opted out of the criminal enforcement regime for leaks.* Such widespread disregard of the referral process is all the more striking when one considers that individuals and agencies can refer cases to DOJ with no desire that they be pursued, simply to demonstrate concern or to gain bureaucratic cover. Perhaps some busy officials worry that referrals will only create more work for them, without in all likelihood

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<sup>201</sup> *Id.*

<sup>202</sup> See *supra* notes 115-119 and accompanying text.

<sup>203</sup> See SSCI REPORT, *supra* note 109, at 7 (stating that of the thirty recent classified information leaks brought to the committee’s attention, only three were referred to DOJ).

<sup>204</sup> See *infra* notes 330-338 and accompanying text (situating the referral process within a “vetogates” model). DOJ does have the authority to investigate possible leak-law violations in the absence of a referral but, as noted above, such sua sponte investigations appear to be extremely rare. See *supra* note 117 and accompanying text. The failure of the victim agency to refer the matter presumably sends a strong signal to prosecutors that the agency would not welcome their intervention.

<sup>205</sup> [Details and confirmation; several FOIA requests, including DOD and FBI, still outstanding]

<sup>206</sup> Exec. Order No. 12,333, § 1.7(a), 46 Fed. Reg. 59,941, 59,945 (Dec. 4, 1981), *amended by* Exec. Order No. 13,470, § 1.6(b), 73 Fed. Reg. 45,325, 45,332 (July 30, 2008); see also *supra* note 177 and accompanying text (noting evidence of IC elements submitting crime reports and then declining to facilitate DOJ’s investigations).

yielding a conviction. Yet, while this pattern is not strictly irreconcilable with the notion that the difficulties of investigating and prosecuting leaks have driven the lack of enforcement, it strongly suggests a more profound dynamic at work.

Fourth, to the extent that any perceived flaws in the Espionage Act or CIPA are seen to constrain prosecutions, no administration has made a concerted effort to address them. Specific executive branch components have episodically supported or advanced proposals to strengthen the Espionage Act, as by removing the scienter requirement.<sup>207</sup> But the White House has never made such reforms a legislative priority. To the contrary, President Clinton, immediately before leaving office, vetoed a bill that would have criminalized the knowing and willful disclosure of “any classified information,” without regard to the leaker’s intent or the subject matter of the information.<sup>208</sup> Clinton’s veto message explained that the legislation “might discourage Government officials from engaging even in appropriate public discussion, press briefings, or other legitimate official activities” and “create an undue chilling effect.”<sup>209</sup> The following year, Congress directed the Attorney General to conduct a study of the leak laws and issue a report containing recommendations for legislative and administrative reforms.<sup>210</sup> Attorney General Ashcroft’s 2002 report recommended a slew of administrative measures but notably declined to discuss possible legislative revisions, stating that the benefit from any such reform “is unclear.”<sup>211</sup> FBI Director Robert Mueller took a similar position in a 2010 written response to a Senator’s question.<sup>212</sup> Most recently, the Obama administration opposed certain Senators’ efforts to insert broad anti-leak provisions into the 2013 Intelligence Authorization Act.<sup>213</sup>

Fifth, consecutive administrations have likewise declined to reconsider DOJ’s stringent policy on the issuance of subpoenas to journalists. As explained above, this policy is not statutorily grounded (though it may correspond with congressional preferences) or constitutionally mandated under existing doctrine (though it may promote constitutional values), and it poses a significant obstacle to bringing leak cases.<sup>214</sup> Although the White House generally refrains from interfering with DOJ’s specific prosecution decisions, it regularly seeks changes to high-level, self-imposed rules such as these. There is no evidence, however, that any president or Attorney General has considered relaxing the journalist subpoena policy. I expected that the prosecutors and White House officials I interviewed would express some frustration or at least ambivalence on this score. None did. The policy is “respected more than resented,” one former prosecutor said.<sup>215</sup>

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<sup>207</sup> See ROSS, *supra* note 10, at 154-58; SSCI REPORT, *supra* note 109, at 17-22; WISE, *supra* note 88, at 153-56.

<sup>208</sup> Intelligence Authorization Act for Fiscal Year 2001, H.R. 4392, 106th Cong. § 304 (2000).

<sup>209</sup> President’s Message on Returning Without Approval to the House of Representatives the “Intelligence Authorization Act for Fiscal Year 2001,” 36 WEEKLY COMP. PRES. DOC. 2784, 2785 (Nov. 13, 2000). For more on this episode, see Dmitrieva, *supra* note 34, at 1060-63.

<sup>210</sup> Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, § 310, 115 Stat. 1394, 1400-01 (2001).

<sup>211</sup> ASHCROFT REPORT, *supra* note 37, at 3.

<sup>212</sup> Mueller Response, *supra* note 114, at 47.

<sup>213</sup> See *Administration Opposes Leaks Provisions of Intelligence Bill*, CQ NEWS, Nov. 29, 2012, available at 2012 WLNR 27128218.

<sup>214</sup> See *supra* notes 121-127 and accompanying text.

<sup>215</sup> Interview with former DOJ official (Aug. 28, 2012).

Finally, and critically, all of the points made in this section have focused on criminal enforcement, and yet my research confirms and extends prior findings that administrative enforcement is also extremely rare.<sup>216</sup> (Civil remedies are even rarer, although in many instances they may be poorly suited to media leaks.<sup>217</sup>) Just as most agencies outside the IC decline to use the criminal referral process, the returns from my FOIA requests suggest that most decline to invest any significant energy into internal investigations or penalties for suspected leakers. [Highlights – Energy, State, Treasury, et al. have nearly zero recorded sanctions among them.] This passivity is particularly notable because administrative remedies not only are easier to obtain than criminal convictions but also typically generate far less publicity and criticism.<sup>218</sup> To the extent that concerns about negative media coverage or the security risks associated with jury trials have been driving down prosecution rates, one might expect policymakers to shift enforcement into the lower-cost, lower-salience administrative realm. No evidence suggests they have taken anything other than occasional, ad hoc steps to do so.

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In sum, on a range of levels, the executive’s actions are hard to square with the commonly voiced notion that investigative and adjudicative difficulties are the critical barriers to cracking down on leaks. At a minimum, the idea that the leak laws are inherently or peculiarly incapable of application is untenable. Energetic enforcement just comes at a cost—political, practical, personal—that relevant decisionmakers have been unwilling to accept. But how can that be so, if leakers are catchable and leaks are “a problem of major proportions”<sup>219</sup>? To understand why, it is necessary to turn to the other side of the ledger and consider the potential benefits that a strategy of minimal legal enforcement can yield for executive branch principals and the executive as an institution.

## ***B. Leaking’s Systemic Rewards***

### ***1. Plants Need to Be Watered—with Leaks***

Perhaps the most basic benefit of a permissive approach to leaks is that it helps preserve a robust ability to use the media to convey anonymous statements that serve administration ends—that is, to plant.<sup>220</sup> The efficacy of these “authorized” unofficial disclosures is linked to the frequency of “unauthorized” disclosures. (Although both types of disclosure involve leaking as colloquially understood, this section and the next follow those who have written about plants in associating leaks with lack of approval.) In a few pages, I will return to the authorized/unauthorized divide and show why a binary formulation is too simple. But for the

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<sup>216</sup> See *supra* notes 129-139 and accompanying text (reviewing evidence of lax administrative enforcement).

<sup>217</sup> See *supra* notes 128-129 and accompanying text.

<sup>218</sup> See *supra* note 154 and accompanying text (noting widespread acceptance of administrative penalties for leakers). Relative to criminal prosecutions, administrative penalties are therefore also much less likely to generate perverse consequences from the government’s perspective, such as the so-called “Streisand Effect” whereby an attempt to suppress a disclosed item of information only draws more attention to it. See *Streisand Effect*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Streisand\\_effect](http://en.wikipedia.org/wiki/Streisand_effect) (last visited Nov. 3, 2012).

<sup>219</sup> Reagan, *supra* note 1.

<sup>220</sup> See *supra* note 101 and accompanying text (summarizing the leak/plant distinction).

moment, it will suffice to think of plants as unattributed disclosures made or directed by the president and his immediate advisers.<sup>221</sup>

Planting is a critical policymaking and communications tool for this group. In pioneering the bully pulpit presidency, Theodore Roosevelt is believed to be the first occupant of the White House to develop a systematic practice of revealing confidential material, “on background,” to select journalists.<sup>222</sup> This practice is now one of the White House’s most important means of disseminating information, framing its activities, gauging popular and congressional reactions, and controlling the political agenda—perhaps *the* most important means when it comes to sensitive national security and foreign policy subjects. Plants are valuable for many reasons. Depending on the context, they may allow the White House to circumvent or cajole the career bureaucracy, to communicate more efficiently with foreign governments, to send signals and warnings to adversaries without formally engaging them, to float trial balloons, to respond rapidly to breaking developments, to preserve plausible deniability if an initiative is poorly received or an assertion turns out to be false, and generally to impart information about executive branch policies without officially acknowledging those policies and thereby inviting unwanted forms of accountability or constraint.<sup>223</sup>

Consider the recent news stories about the CIA’s drone program targeting suspected al Qaeda militants in Yemen.<sup>224</sup> The very existence of this program is classified. Relying on information provided by unnamed U.S. officials, the stories explain the basic purpose and nature of the program, and several report that all operations have been conducted with the consent of the Yemeni government. Let us assume that the president or his delegees authorized these communications with the press, whether unilaterally or in response to prior disclosures or discoveries by others. By revealing this information, the administration keeps the American people minimally informed of its pursuits, characterizes them in a manner designed to build support, and signals its respect for international law and sovereignty (the detail about the host state’s consent). At the same time, by revealing this information through a plant, the administration manages to avoid engaging in any unstructured public conversation about issues that might implicate intelligence sources and methods, or violating any pledges it might have made to Yemeni leaders not to officially reveal their role in the drone strikes, lest this cause them political trouble at home.<sup>225</sup> The lack of official acknowledgement also limits the ability of domestic watchdog groups to leverage the disclosure for additional details about internal procedures, legal standards, collateral damage estimates, and the like: The program is, after all, still classified. Recognizing that “[a]s a practical matter, foreign governments can often ignore

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<sup>221</sup> This group might be broken out further. The president’s national security operational team, for example, may tend to treat classified information more circumspectly than his political aides. The White House, too, is a “they” and not an “it,” though the degree of polycentrism is limited.

<sup>222</sup> See Kielbowicz, *supra* note 89, at 444-46; Papandrea, *supra* note 25, at 249-55.

<sup>223</sup> For a somewhat more cynical catalogue of the purposes of planting, see Levi, *supra* note 71, at 629 (including “lying to the press or the public” as among plants’ ends).

<sup>224</sup> See, e.g., Adam Entous et al., *U.S. Relaxes Drone Rules*, WALL ST. J., Apr. 26, 2012, at A1; Greg Miller, *U.S. Drone Campaign in Yemen Expanded*, WASH. POST, Apr. 26, 2012, at A8.

<sup>225</sup> Cf. Declaration of John Bennett, Dir., Nat’l Clandestine Serv., CIA, *passim* & para. 45, N.Y. Times v. DOJ, No. 12-cv-00794-CM (S.D.N.Y. June 20, 2012) (explaining the CIA’s concern not to reveal such sources and methods and asserting that “in many foreign countries, cooperation with the CIA is not a popular concept”).

unofficial disclosures” whereas they cannot “so easily cast a blind eye on official disclosures,” FOIA doctrine enables this strategy by providing that only the latter forfeit the government’s option to refuse to confirm or deny the existence of records pertaining to a policy.<sup>226</sup>

There are countless variations on the Yemen story, but the basic insights generalize. Plants enhance the administration’s capacity to play “two-level games”<sup>227</sup>: sending interconnected messages about its national security and foreign policies to various domestic and international audiences without incurring the full diplomatic, legal, or political risks that official acknowledgement may entail.<sup>228</sup> Every policy area generates some materials that are confidential and others that are public. In national security and foreign affairs, however, the classification system leaves the public side of this balance grossly underdeveloped—not simply from the perspective of popular accountability but from the perspective of a White House that wants to explain, justify, spin, and claim credit for its activities. As Max Frankel observed four decades ago, “practically everything that our Government does, plans, thinks, hears and contemplates in the realms of foreign policy is stamped and treated as secret.”<sup>229</sup> The regular declassification process is relatively cumbersome, contentious, and irreversible. Planting offers a low-cost workaround.<sup>230</sup> It is easy to be cynical about the practice. From a transparency standpoint, planting is highly problematic.<sup>231</sup> But as a device for communicating about strategically and politically fraught matters, planting has clear instrumental value. Democratic value too; without it, public knowledge about these subjects might be even more impoverished.

The merits of planting aside, the key descriptive insight for present purposes is that it is a cherished presidential prerogative. When President Obama’s former chief of staff William Daley raised hackles for acknowledging, “I’m all for leaking when it’s organized,”<sup>232</sup> he was

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<sup>226</sup> *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009). A deeply pragmatic concern for the nuances of foreign affairs thus drives FOIA doctrine to be highly formalistic. The reported CIA drone program in Yemen also implicates the covert action statute, which provides that for such actions “it is intended that the role of the United States Government will not be apparent or acknowledged publicly.” 50 U.S.C. § 413b(e) (2006). Plants may preserve legal wiggle room to claim the government’s role has not reached this threshold.

<sup>227</sup> For the classic account of two-level games from the international relations literature, see Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988). For a helpful summary of reasons why the government may prefer to communicate with foreign actors by relaying messages anonymously through the media, see Kielbowicz, *supra* note 89, at 482-83.

<sup>228</sup> *Cf. HALPERIN*, *supra* note 72, at 184 (stating that concerns about “multiple audiences” may generate “leaking,” as the speaker may, inter alia, “desire to make clear to a domestic American audience or to the bureaucracy what the position is without making a formal statement to a foreign government”).

<sup>229</sup> Frankel Affidavit, *supra* note 82, para. 5.

<sup>230</sup> *Cf. infra* notes 247-248 and accompanying text (discussing the use of ad hoc, or “instant,” declassification in connection with planting and pleaking); see also MARC AMBINDER & D.B. GRADY, *DEEP STATE: INSIDE THE GOVERNMENT SECRECY INDUSTRY* 60 (2013) (“Because so many matters of the state have been stamped Secret, the practice of illegally leaking to the press is not only considered acceptable, but oftentimes *necessary* for governance.”); Steven Aftergood, *Some Unauthorized Disclosures of Classified Info Are Routine*, *SECRECY NEWS*, June 11, 2012, [http://www.fas.org/blog/secrecy/2012/06/routine\\_leaks.html](http://www.fas.org/blog/secrecy/2012/06/routine_leaks.html) (stating that certain officials routinely disclose classified information “not to subvert policy but to explain it, to defend it and to execute it”).

<sup>231</sup> And it will only become more problematic if executive branch components like the CIA that refuse to officially acknowledge their activities, as a categorical matter, continue to assume greater paramilitary obligations.

<sup>232</sup> Roger Simon, *Exclusive: Bill Daley, Unplugged*, *POLITICO*, Oct. 28, 2011, <http://www.politico.com/news/stories/1011/67043.html>.

simply giving candid expression to a deeply rooted belief. Daley evoked a long line of predecessors, such as the top aide to President Carter who remarked on his affection for the “conscious planned leak,”<sup>233</sup> or the aide to President Johnson who observed that, “[o]f course, the people at 1600 Pennsylvania Avenue are not really worried about all leaks—only those that originate outside the White House.”<sup>234</sup> Planting is not an incidental practice of a few craven officials. It is programmatic, a mode of governance. “With every rollout of everything significant we do” in the national security field, one White House official remarked in an interview, “there is a structured layout of how we will do the leaking” (*i.e.*, the planting).<sup>235</sup> All recent administrations have done the same.<sup>236</sup> In the jaundiced but not unfounded view of some veteran reporters, “the guiding principle, then and now, is that when it suits an administration’s purpose to leak secret information to the press, it simply ignores or temporarily overrides a document’s classification.”<sup>237</sup>

There is a catch, however: Vigorous enforcement of the leak laws would cripple the administration’s ability to plant on national security and foreign policy subjects. For a strategy of planting to work, it is critical that relevant audiences not immediately assume that every unattributed disclosure they encounter reflects a concerted White House effort to manipulate the information environment. The practice of planting requires some amount of *constructive ambiguity* as to its prevalence and operation.

Imagine a world in which the laws against leaking were vigorously enforced—yielding, say, a dozen criminal cases each year rather than a dozen throughout U.S. history. Presidentially approved sources would remain untouched. Prosecutors would never charge them, if such a prosecution would even be constitutional.<sup>238</sup> Yet others who secretly divulge classified information would become much more vulnerable. Fewer officials would run the risk. Those who keep tabs on the U.S. government would become conditioned to expect that less-than-fully authorized disclosures are the exception, not the rule, and that when such disclosures do occur they are reasonably likely to generate an observable sanction, such as a prosecution, or at least the opening of an investigation. They would come to assume that most if not all of the unattributed items they read about in the newspaper are really plants.

No special insight is needed to draw the connection between evidence of a crackdown on leaks and the likely pedigree of the classified information that filters out. A government that aspires be leakproof, commentators have long claimed, is a government that aspires “to control

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<sup>233</sup> ABEL, *supra* note 15, at 62 (quoting Stuart Eizenstat).

<sup>234</sup> SIGAL, *supra* note 17, at 145.

<sup>235</sup> Interview with White House official (Aug. 20, 2012). “The people in this building want to leak when they want to leak—when it helps the president.” *Id.*

<sup>236</sup> See, e.g., *Leaks of Classified National Defense Information—Stealth Aircraft: Hearing Before the Investigations Subcomm. of the H. Comm. on Armed Servs.*, 96th Cong. 146-47 (1980) (testimony of Adm. Elmo Zumwalt) (explaining that during the 1970s, while the speaker was a member of the Joint Chiefs of Staff, highly classified intelligence information was “very frequently” disclosed to the press through “authorized leak[s] from the White House, designed to have some policy impact or political impact”).

<sup>237</sup> ABEL, *supra* note 15, at 34.

<sup>238</sup> See generally ASHCROFT REPORT, *supra* note 37, at 2 (discussing the president’s constitutional authority to control the protection and dissemination of national security secrets).

its preferred [disclosures] and thus the press and other outside critics.”<sup>239</sup> “[A]llowing the Executive Branch to leak at will information that glorifies the President and his policies, while aggressively suppressing all information that does the opposite, is the classic recipe for propagandizing without limit.”<sup>240</sup> For any president, to be seen as implementing an effective program against leaking is to invite charges of hypocrisy and abuse, and to lose some of the protections that anonymous sourcing provides.

Members of the media, for their part, would become more vulnerable to the critique that they are the pawn of the president, if he were thought to exercise greater control over the composition of unattributed governmental disclosures. To protect themselves against that critique, national security journalists would have to take steps to distance themselves from the White House, as by challenging more of its claims, highlighting more dissenting views, or insisting on identifying anonymous Oval Office sources as “White House officials” (much less common these days than hazier formulations such as “administration officials”). A preview of this dynamic was evident when President Reagan attempted to limit agency contacts with the press—a clear sign, reporters complained, that Reagan was trying “to make sure that whatever information gets out makes the administration look good.”<sup>241</sup> In our current system, authorized disclosures often serve reporters’ ends as much as unauthorized disclosures do. But that mutuality of interests is fragile. Journalists who are seen to traffic too frequently or credulously in White House plants face reputational harm, the charge that they are administration shells.<sup>242</sup> Leakiness insulates most journalists from such accusations by disaggregating the government and disassociating the use of anonymous sources from the president’s agenda.

This analysis solves a puzzle presented by the CIA example above. Recall that the lack of official acknowledgement is considered a key foreign policy advantage of planting information about the drone program. Yet, if everyone knows these news stories are the product of White House plants, aren’t they the equivalent of an official acknowledgement? Why does it matter that the disclosures were made “on background” as opposed to in a press release, speech, or the like? Are Yemenis really that dense? Part of the answer is that everyone does *not* know these disclosures came from the White House. This Article just stipulated that. The hypothesis is believable, but given the leakiness of the U.S. system, we have no solid basis for prediction. Leakiness preserves the president’s plausible deniability as to his role in the disclosure, if not in the underlying policy as well.

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<sup>239</sup> HECLO, *supra* note 17, at 231; *see also* Daniel, *supra* note 22, at 13 (noting the popular view that without leaks, “the country would get only Government-controlled news”).

<sup>240</sup> Greenwald, *supra* note 111.

<sup>241</sup> HESS, *supra* note 73, at 90 (quoting the executive director of the Reporters’ Committee for Freedom of the Press); *see supra* notes 171-173 and accompanying text (discussing this episode).

<sup>242</sup> Last decade’s contretemps over Judith Miller is a case in point. *See* Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531, 1561 n.169 (2012) (explaining that “Miller, a Pulitzer-winning former *New York Times* reporter, was subject to extensive criticism for articles uncritically reporting her White House sources’ false claims about weapons of mass destruction in Iraq”). Although none of the journalists I interviewed suggested as much, I imagine that some reporters develop elaborate informal barter systems with their government sources, procuring a few real leaks from time to time in exchange for passing off other pieces of spin as if they were leaks.

Through several mechanisms, then, invigorating enforcement of the leak laws threatens to reduce the acoustic separation between perceived “official” and “unofficial” disclosures and thereby to degrade the president’s ability to enlist the media in any number of complex policy games. There are differing degrees of vigor, of course, and the causal pathways are complicated and messy at the margins. Some jaded audiences may already assume (incorrectly) that the White House dictates all national security- and foreign policy-related disclosures. Some may pay no attention. A major crackdown on leakers would be more avulsive than a minor crackdown. But the existence of a basic positive relationship between the government’s perceived leakiness and the president’s communicative flexibility seems clear enough.

President Obama is currently learning this lesson—and validating the theory. By increasing criminal enforcement against suspected leakers, his DOJ has “exposed the White House to accusations . . . that it clamps down on whistleblowing when the disclosures undermine its agenda but eagerly volunteers anonymous ‘senior administration officials’ for interviews when politically expedient.”<sup>243</sup> Critics in the media, civil society, and Congress now scrutinize every such unattributed disclosure for signs of hypocrisy, national security harm, or other grounds for delegitimation. It took only a handful of prosecutions to erode the administration’s credibility in the eyes of important constituencies and, with it, the capacity to shape the policy narrative.

In sum, the relationship between permissive neglect and presidential information management is much more complicated, and more interesting, than standard critiques of the former suggest. Leaking seems on the surface like the enemy of planting: Almost by definition, disclosures unapproved by the president threaten to jeopardize his control over what information emerges and how. And without doubt, certain specific leaks can work at cross-purposes with certain other plants. Yet for the reasons just provided, it is a fallacy of composition to conclude that leakiness, as an aggregate phenomenon, therefore undermines planting. If there is tension at the retail level, at the wholesale level planting depends upon leaking to give it political and epistemological breathing room; leaking, in turn, depends upon planting to give it legal breathing room. The two are fundamentally symbiotic. Plants need to be watered with leaks.

## 2. *Plants, Leaks, and Pleaks*

“Someone at my level never leaks.”

—President Carter’s national security adviser Zbigniew Brzezinski<sup>244</sup>

An appreciation for presidential planting thus helps us start to sort through the puzzle of permissive neglect. However, notwithstanding the binary way in which some thoughtful journalists have parsed unattributed disclosures into leaks and plants (most journalists and almost all legal scholars have not done this much),<sup>245</sup> the distinction is far from clean.

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<sup>243</sup> Uri Friedman, *Good Leak, Bad Leak*, FOREIGN POL’Y, June 8, 2012, [http://www.foreignpolicy.com/articles/2012/06/07/good\\_leak\\_bad\\_leak](http://www.foreignpolicy.com/articles/2012/06/07/good_leak_bad_leak).

<sup>244</sup> Quoted in LINSKY, *supra* note 20, at 201.

<sup>245</sup> It is notable that journalists today seem even less likely to promote the leak/plant distinction than their predecessors a generation ago. Several journalists I interviewed seemed to take offense at the mere mention of the term “plant.” One hypothesis is that, in media circles, accusations of doing the government’s bidding have grown

Intragovernmental divisions, deficits in hierarchical supervision, and other complicating factors need to be brought into the analysis. This complexity further illuminates the rationality of minimal enforcement.

In distinguishing leaks from plants, the key concept is authorization. But what does it mean for a disclosure of classified information, or merely confidential information for that matter, to be authorized?<sup>246</sup> The Espionage Act is silent on the question. In legal terms, there is only one administrative process in place to regulate the disclosure of classified information, and that is the declassification regime set forth in executive order. Although the order does not explicitly prohibit declassifying information immediately in advance or by means of unattributed disclosures to the press, it does not clearly countenance such an ad hoc approach either.<sup>247</sup> Nor does it clarify the White House's role. The practice of publicizing information while maintaining its classification is disfavored but is not ruled out.<sup>248</sup> The executive order resolves very little, in fact, about how specific declassification decisions are to be made or disputes concerning them resolved. At the highest levels of government, disclosure authority is barely specified. The practices of top officials do not track these or any other codified rules.

In terms of presidential management of the secrecy system, the critical variable is presumably whether the president or his delegees approved the release of information to the media. And yet there are no general procedures in place to govern or convey such approval, or to define relevant delegees and their authority relations vis-à-vis each other. In many cases, the president's wishes may be ambiguous even to those in the White House, whether because of silence, mixed signals, mixed precedent, or disagreement among top aides. In some cases, senior agency officials may disclose classified information in a manner permitted by the terms of the executive order but against the wishes of other agencies or White House overseers. For fear of

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increasingly damaging relative to accusations of jeopardizing important policy interests, and reporters have consequently sought to disassociate their work from labels like planting that highlight its benefits for officialdom.

<sup>246</sup> Two prior commentators have perceptively identified some of the complexity in this question, though neither engages it in any depth. See Fenster, *supra* note 93, at 15-16 (noting that “[u]nauthorized” in this context can mean quite different things, depending on the leaker’s identity and purpose”); Levi, *supra* note 71, at 630-31 (stating that “in view of the complexity of government today, leaks may be authorized at many different levels, leading to major definitional problems” regarding what constitutes a leak or a plant).

<sup>247</sup> The executive order provides that “[i]nformation shall be declassified as soon as it no longer meets the standards for classification” and that in “some exceptional cases,” “the need to protect such information may be outweighed by the public interest in disclosure.” Exec. Order No. 13,526, §§ 3.1(a), (d), 75 Fed. Reg. 707, 713 (Dec. 29, 2009). However, in restricting declassification authority to a small set of officials responsible for the original classification and in referring exceptional cases to “the agency head or the senior agency official,” *id.* §§ 3.1(b), (d), 75 Fed. Reg. at 713, the order appears to assume that declassification will be handled primarily if not entirely by individual agencies, rather than by the White House or an interagency collective. The order sets forth hardly any procedures for discrete disclosure determinations, in contrast to its lengthy protocols on “automatic declassification,” “systematic declassification review,” and “mandatory declassification review.” *Id.* §§ 3.3-5, 75 Fed. Reg. at 714-18. As far as I can tell, no scholarship has considered the law governing ad hoc declassifications—a strange lacuna in the secrecy literature. Cf. JENNIFER K. ELSEA, CONG. RESEARCH SERV., RS21900, THE PROTECTION OF CLASSIFIED INFORMATION: THE LEGAL FRAMEWORK 11-14 (2013) (noting the executive order’s ambiguity on “instant declassification” and stating that as “a practical matter,” “there is little to stop agency heads and other high-ranking officials from releasing classified information . . . when it is seen as suiting government needs”).

<sup>248</sup> Exec. Order No. 13,526, §§ 1.7(c)-(d), 75 Fed. Reg. at 710-11.

dirty hands, some officials may enable disclosures by their subordinates without giving any instructions whatever.

It is, in short, no simple task to apply the concept of authorization to this domain. As a matter of presidential control, if not formal law, we can begin to make headway by envisioning a spectrum reflecting the degree to which the president has expressly or impliedly blessed a disclosure. This spectrum runs from the quintessential plant (the president himself strategically sharing a secret or instructing an aide to do so) to the quintessential leak (a low-level employee stealing highly classified documents he was never meant to see and passing them to a journalist). Most unattributed disclosures to the press reside somewhere well in between these poles. A senior official is authorized by the leadership of her agency to speak with a reporter about a certain subject, or her habit of doing so is tolerated, though her specific comments are not vetted with interagency counterparts or otherwise preapproved. A White House aide reveals something he has been working on in the course of a conversation with a journalist, without having cleared his remarks with colleagues or superiors. Let us call these disclosures *pleaks* to capture their quasi-authorized character.

We can go a little further in elaborating this conception of authority. Still on a presidentialist model,<sup>249</sup> the authority to reveal confidential information might be assessed on several dimensions: (1) the speaker's positional distance from the president, as determined by hierarchical rank and practical proximity; (2) the speaker's substantive distance from the president, as determined by the expected correspondence between her disclosure decision and the president's desires (from "the president is dying to have this fact aired" to "the president sees the disclosure as grievously undermining his agenda"); and (3) the speaker's situational claim to communicative license, or the expected probability that the president would approve of the information being divulged in such a manner by such an official. Although it is impossible to draw clean cutoffs between plants and pleaks or between pleaks and leaks, these criteria provide some additional conceptual guidance and a basis for comparison. Bradley Manning's traffic with WikiLeaks is near zero on all dimensions—a clear leak.<sup>250</sup> Everything the president intentionally discloses is necessarily a plant. In between is a vast, liminal space in which authorization may be contested and pleaking may occur. Agencies' communications with the media frequently inhabit this space. Many of the internecine disclosures through which senior agency officials pursue policy goals, for instance, are deficient on one or more axes but nonetheless tolerated and even relied upon by the White House.<sup>251</sup>

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<sup>249</sup> It would be conceptually coherent to speak of congressional planting and pleaking, too. My focus on presidential authorization in defining these terms follows from my descriptive interest in leaks' treatment by the executive branch. I do not mean to imply that national security secrets are a sole presidential prerogative, that congressional disclosures come with a comparative legitimacy deficit, or that presidential authorization provides an appropriate normative standard for assessing all disclosures.

<sup>250</sup> General leaks almost always will be. *See supra* note 100 and accompanying text (defining general leaks).

<sup>251</sup> The ubiquity of such disclosures is taken for granted by Washington observers. *See, e.g.*, STANSFIELD TURNER, *SECRECY AND DEMOCRACY* 149 (1985) ("The Pentagon leaks, primarily to sell its programs to Congress and the public. The State Department leaks when it's being forced into a policy move that its people dislike. The CIA leaks when some of its people want to influence policy but know that's a role they're not allowed to play openly.").

Take the Secretary of State. She may not have express or implied approval from anyone in the White House to reveal certain things, and may well have interests and incentives that are misaligned with those of the president and other cabinet secretaries. Nevertheless, she is a leading administration policymaker in her own right, with strong ties to the president, original classification authority, a highly developed understanding of which information is more or less sensitive in which contexts, and a plausible warrant to control many disclosure decisions in the area of foreign policy. She also has formal declassification authority for information originally classified by the State Department.<sup>252</sup> A significant percentage of the Secretary's statements to the media will hew closely to or at least support the White House line. Even the most provocative, legally problematic disclosures she might make are typically a long way from the pure leak end of the spectrum(s). The same goes for the disclosures of her top aides and former aides. The heads of executive agencies and their immediate advisers and assistant secretaries are widely thought to be inveterate leakers. They may be better understood as a community of pleakers.

Top White House aides, in contrast, are more likely to be planters. No independent bureaucracy claims their duty or allegiance. Their job descriptions demand a higher degree of loyalty to the president, their political fates are tied more closely to his, and their perch near the Oval Office generates richer information about his views and more robust feedback mechanisms to clarify which sorts of disclosures he favors and disfavors.

Consider in this light Zbigniew Brzezinski's remark, "Someone at my level never leaks"<sup>253</sup> (or the analogous saying among top British officials, "I brief, you leak"<sup>254</sup>). Brzezinski's meaning was ambiguous. He might have been making an implausible statement about the conceptual impossibility of top White House officials' acting without legal authority or about the superior ethics of these individuals. Or he might have been making a cynical statement about the prospects for legal enforcement, implying that someone of his rank faces no realistic risk of being disciplined for speaking out of turn. The analysis here offers a more defensible, and I suspect more faithful, interpretation: Brzezinski was suggesting that the secretive press dealings of someone who works as closely with the president as he did are vastly more likely than those of a lower-level employee to rate high on axes (1), (2), and (3) and therefore to merit recognition as plants. Brzezinski's disclosures were the functional equivalent of presidential disclosures.

The likelihood that many classified information disclosures are part-plant, part-leak, made by senior officials, provides additional grounds to favor a strategy of lenient criminal and administrative enforcement. The reason is not just that these are powerful people, and powerful people are difficult to punish. If that (conclusory) claim were dispositive, then in investigating the sanction rate we might simply note that high-level individuals appear to spill secrets more often than those below them;<sup>255</sup> any inquiry into how they do this would be explanatorily otiose. Yet the ambiguous bureaucratic character of their disclosures matters greatly too. Pleakers like

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<sup>252</sup> Exec. Order No. 13,526, § 3.1(b), 75 Fed. Reg. at 713.

<sup>253</sup> ABEL, *supra* note 15, at 62.

<sup>254</sup> See HOUSE OF COMMONS PUB. ADMIN. SELECT COMM., LEAKS AND WHISTLEBLOWING IN WHITEHALL 13 (2009) [hereinafter LEAKS IN WHITEHALL], available at <http://www.fas.org/irp/world/uk/leaks.pdf>.

<sup>255</sup> See *supra* notes 71-76 and accompanying text.

the Secretary of State's top aides are not rogue actors out to cause mischief or expose wrongdoing. To the contrary, they are institutional insiders with thick connections to executive branch leadership, a well-developed sense of lines that can and cannot be crossed, and, in many cases, a complex mix of motives, including the best interests of their agency and the nation, if not also a plausible grant of actual or apparent authority to divulge the information. They are not the president's proxies but they are not entirely unfaithful agents either.

We can now refine one of the claims advanced above. The previous section argued that notwithstanding the harms from specific leaks, a general practice of leakiness benefits the White House by facilitating plants. This tradeoff starts to look less stark when we realize that what we were calling "leaks" are not randomly distributed across the bureaucracy or unmoored from presidential will—that pleaks predominate over true leaks. Whatever the precise allocation of plants, pleaks, and leaks (and however one defines these categories), the outsized role played by the government's upper echelons helps explain why most reporters believe there are substantially more unattributed disclosures "for" the president than "against" him.<sup>256</sup> Journalists, too, may benefit from a pleak-heavy system, if the resulting diversity of sources insulates them from charges of excessive attachment to the White House, while the seniority of sources insulates them from charges of recklessness in their research methods and publication decisions.

An energetic program of enforcement threatens to deny these benefits and cause significant independent harms. Many unlawful disclosures of information plainly do occur.<sup>257</sup> But among the unattributed disclosures that look illegal on their face, some significant fraction may turn out be lawful, or at least effectively insulated from legal penalty, because traceable to the president or consistent with the executive order on classification.<sup>258</sup> Empower investigators to look too hard into too many of these cases, and any number of uncomfortable results may follow: The special prosecutor probe that brought down Vice President Cheney's Chief of Staff is the natural experiment that shows why aggressive enforcement is so unpalatable, the exception that proves the rule.<sup>259</sup> Formal leak investigations risk exposing top officials' efforts to manipulate the secrecy rules and marginalize opponents, among other machinations. Criminal cases against quasi-authorized sources risk provoking unfavorable judicial rulings. And all public sanctions risk exacerbating internal conflict as well as underscoring it. Prosecuting or firing an assistant secretary who discloses information with the acquiescence of her agency head may be seen as tantamount to challenging that agency head, and indeed the agency itself.

Investigators, furthermore, will rarely be able to tell upfront the extent to which any given disclosure was authorized. As a matter of strategy, plants and pleaks may be camouflaged as

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<sup>256</sup> HESS, *supra* note 73, at 94.

<sup>257</sup> See, e.g., Mueller Response, *supra* note 114, at 47 (explaining that the "majority of the [leak cases referred to DOJ] are meritorious in the sense that they are based on an unauthorized dissemination of classified information").

<sup>258</sup> Cf. WILLARD REPORT, *supra* note 29, at 4 ("Sometimes a time-consuming investigation is undertaken, only to reveal that the source of the leak was a White House or Cabinet official who was authorized to disclose the information."). If the president or the executive order permitted a certain disclosure, one assumes that the disclosure would never be prosecuted under the Espionage Act and that, if it were, the judge would find § 793's scienter requirement or distributional element (that the information was passed to a "person not entitled to receive it," 18 U.S.C. §§ 793(d), (e)) not to have been met.

<sup>259</sup> See *supra* notes 105, 124-125 and accompanying text (discussing this investigation).

leaks. Journalists at the top of their profession say they generally do not know, and could not realistically ascertain, the precise level or type of authorization their sources have received.<sup>260</sup> The distinctions among leaks, pleaks, and plants become messier still in cases that involve multiple disclosures. News stories not infrequently combine elements of leak and plant. Journalists may acquire some initial piece of classified information through a leak or pleak or an off-the-record hint, supplement it with information from public and foreign sources (or vice versa), and then tell the White House that a story will be forthcoming, at which point the administration decides to cooperate in a bid to contextualize the initial disclosure and minimize its damage.<sup>261</sup> It appears that something along these lines happened with David Sanger's stunning story in the *New York Times* in June 2012 about the U.S. government's partial responsibility for the Stuxnet virus that attacked Iranian nuclear enrichment facilities.<sup>262</sup>

The inverse can happen, too. Top White House aides may plant information on the hope of generating a particular sort of story, only to have the recipient leverage that disclosure to ferret out other information the White House does not want to see revealed. Journalists are hardly passive conduits; to say they receive plants is not to suggest they themselves are potted plants. These hybrid cases complicate prosecution as well as investigation. Any decent defense lawyer would emphasize the appearance of additional classified information disclosures in the same news story, which threatens to invite critical scrutiny of the administration's tactics and bring high-ranking officials into the case.

All this conceptual, legal, and observational uncertainty regarding authorization thus deepens the explanation of why strict enforcement would be so problematic for presidents and agency leadership alike.<sup>263</sup> The rare undeniable leak like Bradley Manning's can be investigated and punished with modest externalities for the executive's broader functioning. Any thoroughgoing effort to separate out the unauthorized from authorized disclosures, however, would run up

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<sup>260</sup> Interview with Charlie Savage, Reporter, N.Y. Times (Aug. 3, 2012); Interview with Scott Shane, Reporter, N.Y. Times (Aug. 8, 2012); see also Levi, *supra* note 71, at 630 (“[I]n many instances . . . neither the press recipient of the information, nor the reading public, will know whether or not the disclosure is authorized.”).

<sup>261</sup> See David Ignatius, *What's Behind a Leak*, WASH. POST, June 24, 2012, at A23 (“[G]ood reporters start by assembling stories in bits and pieces. When they have enough, they go to high-level sources in the White House or elsewhere and say: I’ve got the story and I’m planning to run it, whether you cooperate or not.”).

<sup>262</sup> David E. Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES, June 1, 2012, at A1; cf. Scott Shane, *Inquiry of Leaks Is Casting Chill over Coverage*, N.Y. TIMES, Aug. 2, 2012, at A1 (“The Stuxnet computer worm that destroyed some Iranian nuclear centrifuges . . . first came to light not from press leaks but from computer security companies that saw its consequences in several countries.”). Sanger’s account of how he elicited information from top National Security Council sources for a prior story on the Iranian nuclear program is telling: “The issue was too classified to discuss, I was told. Well, I said, it wouldn’t be in a few hours, after we wrote a story describing the Iranian letter and the secret facility.” SANGER, *supra* note 180, at 181.

<sup>263</sup> The complexity of the concept of authorization, as it pertains to disclosures of protected government information, also helps explain the stickiness of the awkward, overinclusive wording of the Espionage Act—wording that invites noncompliance. Most everyone agrees that “authorized” leaks do not merit criminal punishment. And yet for all of the reasons just given, it would be exceedingly difficult to spell out, in statute or regulation, exactly who has the power to authorize which disclosures in which ways. The resulting system would be cumbersome and inflexible, and it would force executive branch principals to manage and take responsibility for the processes of planting and pleaking to a degree many of them would not want. While the Espionage Act’s breadth might seem on its face like the enemy of government-media intercourse, in practice it generates an open-ended delegation to the executive to develop its own standards for acceptable conduct.

against an elaborate web of bureaucratic customs and conventions on which the executive has come to rely—the government by plant, pleak, and leak<sup>264</sup> bequeathed by the New Deal. Because “leaking” is such an ambiguous practice and leak investigations are so difficult to cabin once set in motion, all components of the executive branch that strategically reveal protected information through the press have a shared interest in keeping enforcement levels low.<sup>265</sup>

The individual incentives of top officials reinforce these structural dynamics. Because pleaking is so common across this group, a large number of policymakers will, at any given time, have reason to worry that vigorous enforcement would ultimately redound to their detriment by exposing their prior actions or limiting their future capacity to use the media. Those who participate in the game of leaks do not want judgmental, non-game-playing prosecutors figuratively patrolling their hallways. As long as these pleakers continue to engage the press in a zone of ambiguous bureaucratic and legal authorization, they will remain the natural allies of leakers in their unwillingness to tolerate highly constrictive institutional responses.

### 3. *External Signaling and Executive Self-Binding*

How does the executive gain and retain power over time? As it increasingly comes to be seen as the most dangerous branch, how does it convince Congress and the electorate to keep delegating authority, notwithstanding the deep antimonarchical strain in American thought?

Executive power scholars Jack Goldsmith, Trevor Morrison, Richard Pildes, Eric Posner, and Adrian Vermeule have recently drawn attention to one key instrument. With different accents, their work has stressed the paradoxical utility of mechanisms that are seen to reduce presidential discretion: for instance, arrangements that cede authorities to relatively independent actors, such as inspectors general or DOJ’s Office of Legal Counsel (OLC).<sup>266</sup> Posner and Vermeule refer to this strategy, whereby presidents adopt ongoing limits on their power and “commit themselves to a course of action that would impose higher costs on ill-motivated actors,” as “executive self-binding.”<sup>267</sup>

Although these self-binding mechanisms may deplete presidential power in the short term, they ultimately serve to enhance it by sustaining the institution’s credibility and legitimacy and

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<sup>264</sup> Cf. Levi, *supra* note 71, at 622 (describing Washington insiders as “participating in a ‘government by leak’”).

<sup>265</sup> If certain specific factions or components of the executive branch were systematically more likely to lose out from leakiness, a natural coalition for invigorating enforcement might develop. It is unclear a priori what that coalition would look like, however. The evidence marshaled in this Article suggests that most cabinet departments and national security agencies prefer to maintain the status quo.

<sup>266</sup> See, e.g., GOLDSMITH, *supra* note 12, at 99-108 (arguing that “the institution of inspector general has empowered the presidency by constraining it”); POSNER & VERMEULE, *supra* note 160, at 137-50 (theorizing “executive self-binding” and listing mechanisms such as independent commissions, bipartisan appointments, and commitments to multilateralism); Trevor W. Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 63-64 (2011) (discussing OLC); Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1387-88, 1407-08 (2012) (book review) (crediting Posner and Vermeule’s general theory of executive self-binding though critiquing their application of it). As Pildes notes, this line of argument reinforces a broader body of work on the significance of presidential credibility. Pildes, *supra*, at 1387 & n.21 (citing RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* (1990)).

<sup>267</sup> POSNER & VERMEULE, *supra* note 160, at 137.

thereby securing popular approval of further grants of discretionary authority. Or so the theory goes. Credibility and legitimacy on this account are social facts, not abstract ideals. They involve generalized judgments about trustworthiness, akin to the “diffuse support” the Supreme Court enjoys from the American public above and beyond the popularity of any particular ruling.<sup>268</sup> Presidents must demonstrate that they are acting in rational, restrained, law-respecting ways if they wish to win such support. This is nowhere truer than in the secretive realms of national security and foreign policy, where congressional and judicial checks are least robust and the executive’s activities least visible to the average citizen.<sup>269</sup> In these areas especially, credibility and legitimacy need to be signaled as much as earned.

Leakiness offers a signaling mechanism of just this sort.<sup>270</sup> Political scientists have argued that by lowering monitoring costs, the provision of transparency by government agents can promote broader delegations of authority and resources.<sup>271</sup> If members of the public believe leaking is pervasive, then they should expect to learn about most of the nefarious or unlawful things the executive branch might be doing, along with any associated internal disagreements, whether or not the president wants them to. Perhaps there will be a time lag, but even the executive’s deepest secrets will tend to come to light. Members of the public should further expect that officials will internalize this prospect and therefore be reticent to do such troubling things in the first place. Indeed, compared to the other self-binding mechanisms that scholars have highlighted, leakiness may be especially efficacious precisely because it is not seen as strategic, or even consciously intended. Leaks are often taken to be unique sources of insight into the inner workings of power.

This special authenticity that many assign to leaks, and the special credulity that attaches, can be seen in historian Bruce Catton’s early treatment of the subject:

[I]t is through the leak that the people are kept in touch with their government. . . . It is the leak which enables them to know whether the fine boasts and pretensions of an appointed person are really justified. It is the leak—telling them what may happen, what is being planned, what the carefully hidden facts actually are—which makes it possible for them to react while there is still time . . . .<sup>272</sup>

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<sup>268</sup> See Pildes, *supra* note 266, at 1387-88.

<sup>269</sup> See POSNER & VERMEULE, *supra* note 160, at 146 (“Because the information gap between voters and legislators, on the one hand, and the executive, on the other, is especially wide in foreign affairs, there is . . . wide scope for suspicion and conspiracy theories.”).

<sup>270</sup> Some social scientists reserve the term signaling for “*purposive* communication” or define it with reference to unintuitive formal criteria. Diego Gambetta, *Signaling*, in THE OXFORD HANDBOOK OF ANALYTICAL SOCIOLOGY 168, 170 (Peter Hedström & Peter Bearman eds., 2009). This Article uses the term more loosely, to refer to situations where the display of otherwise unobservable attributes of an institution “rais[es] the probability the receiver assigns to a certain state of affairs” (e.g., that the executive is acting responsibly), *id.*, whether or not various actors within the institution intended that result.

<sup>271</sup> See, e.g., John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131 (Adam Przeworski et al. eds., 1999) (advancing this claim in the context of a formal model); James E. Alt & Robert C. Lowry, *Transparency and Accountability: Empirical Results for U.S. States*, 22 J. THEORETICAL POL. 379 (2010) (finding empirical evidence that increased transparency dampens the negative effect of tax increases on retention of governors and leads to greater fiscal scale).

<sup>272</sup> CATTON, *supra* note 3, at 87.

The bloated official secrecy system sends an opposite signal: that the government has something to hide. When the American people learn the executive branch classified more than 92 million items last year,<sup>273</sup> without learning anything about the content of those items, it does not inspire trust. It inspires, instead, the belief that national security policy is a realm of nonaccountability. Leaks are the holes in the wall that encircles this realm, rays of sunlight from a shadow world, “the authentic voice of the government.”<sup>274</sup> Permissive neglect is the means to generalize that perception and counter the credibility gap that 92 million secret documents threaten to open up. A leaky government is, over time, a trustworthy government.

Theories of self-binding thus reinforce the importance of minimizing public sanctions for leaking and maintaining a substantial ratio of perceived unauthorized to authorized disclosures. They align the executive’s crude institutional interest in maintaining power with the more elevated normative ideal no doubt held by some officials that “press coverage of secret executive branch action serves a vital function in American democracy.”<sup>275</sup> If their sociological premises are correct, these theories suggest that any enforcement regime that is seen as harsh on leakers—whistleblowers, they will be called—or that has the effect of exposing the administration’s media machinations, represents a profound threat to executive power.

The main difficulty here is that leakiness might also be taken as a sign of administrative fecklessness, and some leaks do in fact reveal abuse, illegality, or internal dissent—think of the Taguba Report on detainee torture in George W. Bush’s second term—and thereby hurt the executive’s credibility in quite a direct sense.<sup>276</sup> However, even these revelations may reassure various constituencies that their views are being represented by some in government. And no effective self-binding strategy is without such costs. A mechanism that never made the president look bad would quickly lose its capacity to signal credibility; the whole point is that the power-enhancing second- and third-order effects of these arrangements ultimately come to swamp the power-reducing first-order effects. No pain, no gain. From a presidential power perspective, the question is how the immediate adverse consequences of certain specific leaks compare to the

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<sup>273</sup> INFO. SEC. OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 2011, at 1 (2012), *available at* <http://www.archives.gov/isoo/reports/2011-annual-report.pdf>. The vast majority of these classification decisions are “derivative” rather than “original” in nature, *id.*, but this is small comfort to anyone concerned about overclassification. *Cf.* Peter Galison, *Removing Knowledge*, 31 CRITICAL INQUIRY 229, 230 (2004) (stating that “[s]ome suspect as many as a trillion pages are classified” in the United States, the equivalent of “200 Libraries of Congress”).

<sup>274</sup> ALEXANDER M. HAIG, JR., CAVEAT: REALISM, REAGAN, AND FOREIGN POLICY 17 (1984).

<sup>275</sup> GOLDSMITH, *supra* note 12, at 222.

<sup>276</sup> *See* Vladeck, *supra* note 10, at xiv (suggesting that “the upsurge in unauthorized disclosures in the latter years of the Bush administration” damaged the president’s credibility). Another difficulty concerns intentionality. As compared to some of the other self-binding mechanisms identified in the literature, it is less clear whether leakiness was intentionally adopted by policymakers for this strategic end. One possibility is that leakiness-as-self-binding is an emergent phenomenon, in the sense that it arises from interactions among the executive’s components even though none of these components may have sought it as such. *See generally* Timothy O’Connor & Hong Yu Wong, *Emergent Properties*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (last revised Feb. 28, 2012), <http://plato.stanford.edu/entries/properties-emergent/> (discussing theories of emergence). Leakiness’s credibility-enhancing effects, on this account, would be a feature of the administrative state supervenient on, and irreducible to, the individuals and entities that comprise the system. It seems just as plausible, however, that numerous presidents and top officials have come to appreciate the link between leaks and credibility and have consciously incorporated this insight into their permissive institutional designs, even if they have not expressly acknowledged as much.

subtler, longer-term benefits of leakiness. It is hard to see how this comparison could be made with any precision.<sup>277</sup> But in light of the immense credibility costs that official secrecy imposes and the immense political costs that leakiness would impose on a mendacious chief executive (costs that explain why policies seen as targeting leakers spawn such distrust), there is a solid theoretical basis to believe the benefits win out.

There is an additional, more speculative sense in which leakiness may preserve the credibility of government, as well as the professional integrity of its employees: if it reduces the incidence of official lying. A leaky government keeps fewer programmatic secrets. Although Americans still do not know the specifics of the CIA's drone operations in places like Yemen, thanks to anonymous U.S. sources they know quite a lot about the Yemen program's basic structure and orientation. Government officials may refuse to confirm or deny this information in official settings. But because of all the disclosures that have occurred, it would be pointless to dissemble about the program's existence, and no one feels pressure to do so. Leakiness, in this context, not only pushes out specific revelations to the media but also creates an environment in which official lying becomes an untenable and unnecessary strategy.<sup>278</sup> A pervasive culture of leaking may substitute, to some extent, for a pervasive culture of lying. The executive benefits from this tradeoff both because it likely better supports public trust in government and because it prevents most officials from feeling pressure to violate an injunction ("thou shall not lie") that, unlike the leak laws, continues to exert a strong moral pull on public servants.<sup>279</sup>

#### ***4. Manufactured Scarcity and Intragovernmental Communication***

Even if it manages to secure the public trust, how does the executive manage to secure effective communication across hundreds of offices and hundreds of thousands of employees? Leakiness plays a relatively straightforward role in advancing this interest. Leaks, pleaks, and plants (henceforth as in Part I "leaks" for simplicity's sake) facilitate richer information flows throughout the bureaucracy and constitute an important means by which the executive branch speaks to itself. In a phrase, they are discursive as much as subversive disclosures.

The general point is not new. Colloquially, it is reflected in statements such as Secretary of State Alexander Haig's quip that the Reagan administration had converted the *Times* and the *Post* into "White House bulletin boards."<sup>280</sup> In the academic literature, the idea of leaks as tools

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<sup>277</sup> Perhaps tests could be run for correlations between the incidence of leaks and public perceptions of government. The threshold constraint on this sort of empirical work is the tremendous difficulty of specifying and identifying the "leaks" that have occurred, not to mention the tremendous complexity of the factors that influence perceptions of government over time.

<sup>278</sup> The dissonance between the unofficial publicity and the official posture of nonacknowledgement may raise distinct credibility concerns, though it is also unstable over time. See generally Kreimer, *supra* note 79, at 1027-61 (explaining social, political, and legal dynamics that work to unravel government secrets once they have been publicly identified).

<sup>279</sup> See, e.g., HESS, *supra* note 73, at 24 (stating that "[f]or all press secretaries" in the executive branch, "the crux of ethical conduct is lying").

<sup>280</sup> HAIG, *supra* note 274, at 18.

for internal communication is touched upon in numerous works<sup>281</sup> and was developed thoroughly in an article by Richard Kielbowicz.<sup>282</sup> The best-known variant involves the use of the press to gain the attention of an otherwise inaccessible White House. A *New York Times* essay from the 1980s conveys a sense of the timeless drama associated with these rituals:

A White House assistant, frustrated because he can't get his views before the President, judiciously plants a story likely to catch the President's eye. A Presidential aide, afraid to confront the President directly with bad news, gets his message across through the press. A Cabinet officer, unable to get past the White House palace guard, leaks a memo that will land on the President's desk in the morning newspaper. In recent weeks, top officials have engaged in that form of communication in a vivid, classic campaign to persuade President Reagan to adopt drastic revisions in the 1984 budget.<sup>283</sup>

As Kielbowicz explains at length, leaks are used to push information not only upward to agency heads and the White House but also downward to those who are meant to implement a policy and horizontally across agencies and branches.<sup>284</sup> Presidents use leaks (again, defined to include plants and pleaks) to signal disapproval, promote a new policy direction, and strengthen the position of a particular interagency faction. Agencies use leaks to highlight helpful facts, undercut rivals, and build support for their initiatives. Just as they give confidential material to their media contacts, government sources often receive valuable information in turn; “[i]t is shocking,” a former DOJ official reflected, “how much reporters will say about what others have told them.”<sup>285</sup> Underneath the surface of the stories we read in the newspapers citing anonymous U.S. officials, lies an elaborate intragovernmental communicative economy.<sup>286</sup>

What is less appreciated is the role played by lax enforcement of the leak laws. Most obviously, lax enforcement allows leaks to be used more freely. A larger volume of administrative samizdat circulates. Less obviously, the backdrop of formal illegality remains relevant, because in depressing the overall amount of leaking it enhances the significance of the disclosures that occur. The Espionage Act casts a shadow even if it is rarely enforced. The government official who reveals classified information is still assuming some modest amount of legal and professional risk for her actions. That she is willing to do so communicates to her listeners that she or her agency feels she has something notable to say.<sup>287</sup> Even if the leak laws generally go unenforced, the paradox here is that leaking must remain illicit or else the speakers' statements would not necessarily reach their intended audience or convey the intensity of their

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<sup>281</sup> See, e.g., 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, 400 (1986) (“[L]eak and counterleak by government employees have become an integral part of the way people with power talk to one another.”).

<sup>282</sup> Kielbowicz, *supra* note 89.

<sup>283</sup> Halloran, *supra* note 88, at A16; see also HALPERIN, *supra* note 72, at 184 (“Leaking is a time-honored means of getting information to the president outside formal channels.”).

<sup>284</sup> Kielbowicz, *supra* note 89, at 476-83.

<sup>285</sup> Email from former DOJ official to author (Feb. 2, 2013) (on file with author).

<sup>286</sup> To “newspapers” in this sentence we might now add online outfits such as Politico. Television, however, still lags behind as a vehicle for intragovernmental communication. The relative permanence of the written word, as much as the authoritativeness of the *Times* and the *Post*, makes print media a better “bulletin board.”

<sup>287</sup> At least, it communicates as much in cases where there is no suspected speaker who is widely known to have an exceptionally high risk tolerance or discount rate.

preferences, and so would fail to deliver the communicative benefits the executive branch has come to expect from them. On this account, the laws against leaking can be seen as a form of *manufactured scarcity* which, by raising the cost of leaks, also raises their salience and signaling power when they occur. The illegality of leaking enhances its functionality.<sup>288</sup>

In this way, a policy of permissive neglect toward leaking may be efficiency-enhancing relative to the baseline of colossal official secrecy.<sup>289</sup> Overclassification threatens to stifle important decisional inputs and cause policy sclerosis. Permissive neglect enables and refines a deliberative workaround for the increasingly plural executive and its many principals. These discursive disclosures have the added effect of informing the American people about the activities of government, yielding external democratic rewards as well as internal instrumental ones.

It might nevertheless be argued that, on balance, any deliberative benefits that executive principals realize from leaks are wiped out by their deliberative costs, as when they transmit distorted information<sup>290</sup> or bias public opinion in ways that constrain options. I believe this is a very difficult case to make, given the importance of good information to central administrators and the educative value that even hostile leaks may have.<sup>291</sup> It is unclear what turns on the argument in any event. Regardless of whether leaks deserve to be seen as a desirable tool of intragovernmental communication from a god's-eye view, they have clearly become a significant tool in practice. For the many actors within the executive branch who are accustomed to utilizing them as such, this tradition furnishes additional grounds to resist any crackdown.

### 5. *Pacifying and Coopting Powerful Groups*

We are not quite done with the political economy of leakiness. For leaking does more than enhance secret-keepers' ability to send messages and signals throughout the bureaucracy and to outside audiences. It also mediates the executive's relationships with a host of powerful groups in ways that further entrench the low enforcement rate.

***The media elite.*** First, and most directly, leakiness has served the individual and institutional interests of select members of the mainstream media. *New York Times* editor Max Frankel spoke truer than he may have intended when he characterized classified information leaks as "the coin of our business."<sup>292</sup> A regime with fewer leaks and greater frontal openness might support the

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<sup>288</sup> Leaks are like street drugs to this extent. Harsh statutory prohibitions increase their cost, even in zones of underenforcement. Risk-taking personalities are least deterred. Whatever deleterious side effects they might have, the prohibitions depress supply and so inflate the market value of the trafficking that occurs.

<sup>289</sup> To be clear, this is a second-best claim. Whether leakiness would be similarly efficiency-enhancing in a world without overclassification is much harder to say. See ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 34, 68, 83-84 (2011).

<sup>290</sup> See HESS, *supra* note 73, at 93 (questioning leaks' deliberative utility because of the potential for messages to "get garbled in transmission").

<sup>291</sup> Cf. HECLO, *supra* note 17, at 231 (discussing the benefits that oppositional leaks by civil servants can generate for agency management). As we have already seen, moreover, many so-called "leaks" are not at all hostile to the president's agenda. See *supra* Part II.B.1-.2.

<sup>292</sup> Frankel Affidavit, *supra* note 82, para. 16.

*Times*'s watchdog function as well, if not better. But it would not give *Times* reporters the same privileged role as information brokers or sell as many papers.

The laws against leaking prop up this dynamic. Notwithstanding their complaints about overclassification, FOIA stonewalling, and the like, those media outlets that tend to receive significant leaks have a strong incentive to maintain broad official secrecy. Publicizing leaks is how they scoop their competitors. If the cost of leaking were lowered through decriminalization, the incidence of leaking would rise and the value of the information would fall. Manufactured scarcity increases the returns to leaking for publishers just as it does for government actors. These returns are not evenly distributed across the media industry. The special access that major outlets have to senior officials, together with speakers' desire to be heard, has historically led to a concentration of leaks in papers like the *Times* and the *Post*<sup>293</sup> and thus to a reproduction of media hierarchy. Indeed, it is not a stretch to think that leaks have helped consolidate the very notion of a mainstream press. To traffic in confidential government information is to be a Washington player; the flow of that information influences not only the substantive content but also the institutional structure of the public sphere.

At the same time, by channeling so many leaks (defined, again, to include pleaks and plants) to the media elite, executive sources have generally enhanced the administration's ability to influence the coverage that ensues. While the *Times*, the *Post*, and their ilk amass soft power, their commitment to responsible journalism, their interest in avoiding onerous regulation, and their repeat interactions with top officials combine to give those officials leverage and moderate the reporting. The natural tendency of leaks to cluster in a few major outlets has in turn helped to keep most news coverage within bounds the executive's leadership finds acceptable. This mutually beneficial arrangement is now under threat from changes to the media marketplace and the development of technologies that lower the cost of copying, disseminating, and mining information.<sup>294</sup> It is an open question whether leaking will continue to provide similar benefits for the executive's leadership and the establishment press in the years ahead, whether the portrait sketched by Max Frankel will continue to retain its descriptive power.<sup>295</sup> Recent efforts by "old media" luminaries to impugn the motives of WikiLeaks and distance themselves from its model<sup>296</sup> reflect, among other things, how much they stand to lose from any significant reconfiguration of traditional disclosure and enforcement practices.

***Classification's critics.*** Second, leakiness staves off avulsive reform by pacifying key constituencies for transparency. On account of leaks, neither Congress nor the executive has been compelled to tackle the problems posed by official secrecy in a meaningful, forward-looking way, as by invigorating moribund judicial review of national security secrets or streamlining a classification system that everyone agrees is obscenely bloated. Legislators,

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<sup>293</sup> See *supra* notes 82-85, 280 and accompanying text.

<sup>294</sup> For a lucid account of these developments, see GOLDSMITH, *supra* note 12, at 73-82.

<sup>295</sup> It is similarly an open question whether, in light of upheavals in journalism and technology, the government's enforcement model will remain so permissive for long. See *infra* notes 489-504 and accompanying text (considering this question and noting reasons to expect more continuity than discontinuity in the foreseeable future).

<sup>296</sup> See Yochai Benkler, *A Free Irresponsible Press: WikiLeaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 333-36, 356-57, 370-93 (2011) (describing the old media's vilification of WikiLeaks and linking this response to anxiety about economic and technological change).

judges, journalists, and watchdog groups feel sufficiently served by the amount of information that percolates out.

Generally speaking, there are two stable equilibria in the U.S. market for transparency: broad formal classification with broad informal disclosure, or narrow formal classification with narrow informal disclosure. Whether or not leakiness is desirable for all concerned in an ideal world (a deeply contestable proposition), it is an appealing second-best solution for many given the fact of overclassification. Leakiness protects the classification system at a political level even as it undermines the system at a practical level.

Although this particular dynamic may go overlooked, commentators have long appreciated that “leaking has a symbiotic relationship with secrecy.”<sup>297</sup> Surely we would have less leaking of classified information if we had less classified information. Not only would there be fewer documents to pilfer, but people might treat the secrecy rules with more respect. As Morton Halperin has observed, “[w]hen there is vast overclassification it is . . . difficult to persuade government officials that they are doing harm by providing information which is classified to the press and the public.”<sup>298</sup>

Unwinding overclassification is exceedingly difficult to do, however. Years of reform efforts have barely made a dent,<sup>299</sup> and it is not clear they ever will. Large numbers of concerned citizens face a collective action problem in organizing effectively against the concentrated interests of those individuals and institutions within government for whom classified information is a valuable source of professional benefits. Furthermore, the marginal transaction costs of running a more selective classification system may be extremely high, while the policy costs of erroneous declassifications may be greater than those incurred under existing levels of leaking. For reasons both public-oriented and self-interested, the prospect of seriously addressing overclassification is a most unwelcome one for powerful actors within the executive branch. Leakiness may hurt them on occasion, but it spares them this potentially greater pain.<sup>300</sup>

**Congressional overseers.** Third, leakiness allows congressional committees to economize on oversight as well as transparency-seeking legislation. The political rewards of national security policies that are seen as successful accrue disproportionately to the executive.<sup>301</sup> As compared to

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<sup>297</sup> SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 217 (1983).

<sup>298</sup> MORTON H. HALPERIN, *CRIMINAL PENALTIES FOR DISCLOSING CLASSIFIED INFORMATION TO THE PRESS IN THE UNITED STATES* 1 (2012), available at <http://www.right2info.org/exceptions-to-access/national-security>.

<sup>299</sup> See Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 *YALE L. & POL’Y REV.* 399, 400-01 (2009) (discussing “[t]he persistent failure to achieve significant reforms over half a century” in which “[e]ntire shelves of commission reports, congressional hearings, and independent critiques” have targeted overclassification).

<sup>300</sup> The leak laws could pose a limited threat to the classification system if alleged violators were allowed to raise a defense of improper classification, bringing judges into the business of evaluating classification determinations. However, no court has recognized such a defense. See *supra* note 32 and accompanying text. This outcome is unsurprising. Even after Congress amended FOIA’s national security exemption in 1974 to require de novo review of disclosure denials and to cover only those records that “are in fact properly classified,” 5 U.S.C. §§ 552(a)(4)(B), (b)(1)(B) (2006), courts persisted in declining to consider the substantive propriety of classification decisions. See Pozen, *supra* note 96, at 635-38.

<sup>301</sup> See, e.g., AMY B. ZEGART, *EYES ON SPIES: CONGRESS AND THE UNITED STATES INTELLIGENCE COMMUNITY* ch. 4 (2011) (discussing this asymmetry of payoffs and incentives in the context of intelligence oversight).

a more proactive, “police patrol” model of oversight—much of the content of which would be nonpublic and virtually all the good results from which would be imputed to the president—a more reactive, “fire alarm” model that relies on leaks has many benefits for members of Congress.<sup>302</sup> Without lifting a finger, they receive a steady stream of reports about the executive’s activities and the public’s response to those activities, as mediated through the press. Through their own overt and covert uses of the media, they may additionally influence the coverage of those activities. So long as the ratio of agency leaks and pleaks to White House plants is not too small—which motivated partisans can help ensure by drawing attention to the latter, as they are energetically doing at this writing<sup>303</sup>—leakiness allows Congress to exploit the diversity of viewpoints within the executive to acquire better, broader, cheaper information.

Congress’s longstanding failure to confront the executive secrecy system must be understood in light of these institutional and member-level interests in leakiness. With some notable exceptions such as the bill vetoed by President Clinton that would have strengthened the Espionage Act,<sup>304</sup> Congress has done little to address national security leaks or the classification system that underlies them. A variety of committees have held hearings on high-profile incidents, and the intelligence committees have recently mooted measures to curb certain forms of planting and pleaking. But in general legislative action has been minimal for decades. Of particular note, members have declined to make use of the protection afforded by the Constitution’s Speech or Debate Clause<sup>305</sup> to reveal, or threaten to reveal, executive branch information without fear of criminal or civil liability.<sup>306</sup> One might expect that a responsible legislature would try to steer classified information leaks its way, so as to preserve legitimate secrecy while providing an outside check on the executive.<sup>307</sup> Congress has largely bypassed this approach, which would force it to take greater responsibility over the revelations that emerge, and has instead countenanced minimal enforcement against media leakers while directing all prospective whistleblowers to their agency inspector general in the first instance.<sup>308</sup> Many members of Congress seem quite content to be regular readers (and perhaps occasional purveyors) rather than recipients of leaks. Systematic recourse to leaking emerges, once again, as the more efficient and politically palatable alternative to systematic legal reform.

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<sup>302</sup> See generally Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984) (distinguishing these two models of oversight).

<sup>303</sup> See Charlie Savage, *2 Inquiries Set to Track Down Paths of Leaks*, N.Y. TIMES, June 9, 2012, at A1 (describing accusations by congressional Republicans that “the White House [has] risk[ed] national security for political gain by deliberately disclosing secret information that makes Mr. Obama look tough”).

<sup>304</sup> See *supra* notes 208-209 and accompanying text.

<sup>305</sup> U.S. CONST. art. I, § 6, cl. 1 (“[F]or any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place.”).

<sup>306</sup> See Josh Chafetz, *Congress’s Constitution*, 160 U. PA. L. REV. 715, 742-53 (2012). Senator Mike Gravel is an outlier for the way he placed much of the Pentagon Papers in the Congressional Record on the eve of the Supreme Court’s ruling. See *id.* at 745-48. No comparable breach of executive secrecy rules has occurred on the House or Senate floor in all the years since.

<sup>307</sup> Cf. David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 329-33 (2010) (discussing this general strategy).

<sup>308</sup> See *supra* notes 54-57 and accompanying text. In several famous cases, executive branch leakers reached out to the press only after failing to receive what they felt was an adequate response from Congress. See, e.g., DANIEL ELLSBERG, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* 365 (2002) (describing Ellsberg’s turn to the *New York Times* after “striking out” with two senators); Jane Mayer, *The Secret Sharer*, NEW YORKER, May 23, 2011, at 46, 52-55 (describing Thomas Drake’s turn to the *Baltimore Sun*).

Congress's role in the ecosystem of national security leaks is a large and complex subject. Certain congressional entities receive a steady flow of classified information through official channels, supplemented by a side traffic in direct and indirect unofficial disclosures. Agencies typically incur political risk if they try to limit this traffic by clamping down on staffers' communications with their oversight committees. Partisan motivations and sincere good-governance sentiments sustain a perpetual interest on the Hill in leaks, along with a ready-made rhetoric of crisis about their prevalence. The recent rise of a "commuter Congress," in which many members spend as little time as possible in Washington, may have helped strengthen relationships between elite reporters and less peripatetic executive officials, shifting power to the latter in the intragovernmental game of leaks. While a full account of Congress's use of leaks is well beyond the scope of this Article,<sup>309</sup> the key point here is simply that they offer Congress a low-cost mechanism for monitoring and disciplining the executive and providing transparency, and that these benefits powerfully if imperfectly reinforce the executive's own interests in leakiness. Congress, too, stands to lose a great deal from the demise of permissive neglect.

*Civil servants and game players.* Fourth, leakiness moderates certain structural tensions within the executive branch. It is widely believed that career bureaucrats are on average more change-resistant, expertise-driven, and risk-averse than the presidential appointees who cycle in and out around them.<sup>310</sup> When new administrations consider bold plans that roil staff who were installed by their predecessors or who feel invested in the prior program, anonymous disclosures to the media provide a means to fight back. Presidential plants can be used to advance radical agendas: The Bush II administration's campaign to build the case for the Iraq invasion is, for some, an insidious case in point. Inasmuch as leaks and pleaks tend to be a conservative force in policymaking—debilitating to sudden shifts and extreme proposals on either end of the ideological spectrum—they may help keep the bureaucracy reasonably satisfied with the policies that are pursued and with their level of knowledge thereof. Leaks and pleaks, more broadly, help keep the National Security Council (NSC) reasonably well aligned with agencies even as the former continues to consolidate power in the postwar era.<sup>311</sup> While specific disclosures by senior civil servants and military brass may serve to constrain the president, their general availability is critical to maintaining his own disclosure discretion and sociological legitimacy, not just with the general public but with the vast workforce he needs to carry out his policies.

Leakiness also offers cultural and psychological benefits for those involved. Leaks, we have seen, are a medium through which political appointees challenge civil servants and vice versa, ideological factions challenge other ideological factions, agencies challenge other agencies, individuals challenge other individuals, and the "multivocality" of the executive branch passes

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<sup>309</sup> The subject merits greater attention. So far as I am aware, the most significant treatment remains a 1977 study by Hugh Heclo that focused primarily on the executive branch. HECLO, *supra* note 17.

<sup>310</sup> See generally RONALD N. JOHNSON & GARY D. LIBECAP, *THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY* ch. 7 (1994) (discussing the political autonomy and professional orientation of career bureaucrats). In numerical terms, the civil service dwarfs the "politically" selected portion of the executive workforce. See DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 56 (2008).

<sup>311</sup> On the postwar rise of the NSC to predominance in national security and foreign affairs policymaking, see generally AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC* ch. 3 (1999); Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1677-87, 1693, 1699-1703, 1746 (2011).

from metaphor to reality. Whether leaking ultimately does more to inflame or improve relations across bureaucratic components, its very existence as a forum for disputation enhances all components' ability to exercise voice and exit<sup>312</sup> on sensitive matters. To shut down this forum through vigorous enforcement would impoverish not only executive branch deliberations but also the *experience*—the degrees of freedom, the opportunities for strategic behavior, the sense of self-importance, the intrigue, the thrill—of being an executive branch insider.

Common references to “the game of leaks”<sup>313</sup> capture something important about the competitive, pleasurable outlet leaking can provide for some. A policy of lax enforcement avoids darkening the clouds with widespread investigations, prosecutions, and the like and so preserves these experiential rewards. Participants in the game of leaks are hedonically, not just instrumentally, invested in keeping enforcers at bay.

### III. “ORDER” IN DISORDER: DISCIPLINING LEAKERS WITH AND WITHOUT LAW

To submit that the laws on the books have been underenforced is not to suggest that anything goes in the realm of leaking. To the contrary, in the absence of more supple formal proscriptions, a set of customary norms appears to have arisen that conditions disclosure and enforcement behavior alike, imposing some amount of order in the absence of regularly applied law. Leakers do get disciplined. It is just that the system of social control is partially nonhierarchical, largely informal, and almost completely invisible to the outside observer.

This Part sketches that system. The sketch is necessarily tentative and incomplete. Interviews, FOIA requests, personal observations, and a small number of generally available sources provide a sufficient empirical basis to construct a preliminary account of the values, conventions, and sanctions that “regulate” national security-related leaking, separate and apart from the laws on the books. I believe that this account has substantial descriptive power—indeed, that without a grasp of its basic contours, one cannot begin to understand or evaluate the law and policy of leaks. Many of the points made in this Part likely obtain outside the national security field as well. But it must be stressed that the regulation of leaking is a diffuse practice, my visibility into which is limited. To refine the inductive story I tell here, much more work would need to be done to identify relevant norms, trace their development, formalize a behavioral model, consider case studies, and so on. The overriding goal of this Part is to lay the foundation for that work, to set a new research agenda for scholarship in the area as much as to convince on any particulars.<sup>314</sup>

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<sup>312</sup> See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970) (comparing “exit” and “voice” strategies). By exit, I mean that in publicizing their positions, leakers may depart, legally and metaphorically, from the executive branch’s internal deliberative process and the rules governing disclosure.

<sup>313</sup> E.g., Papandrea, *supra* note 25, *passim*; Howard Kurtz, *How Sources and Reporters Play the Game of Leaks*, WASH. POST NAT’L WEEKLY ED., Mar. 15-21, 1993, at 25.

<sup>314</sup> Existing scholarship has valuably explored issues such as the journalistic norms that influence newspapers’ decisions whether to publish secret information, see, e.g., Note, *Media Incentives*, *supra* note 10, and the ethical considerations specific to whistleblowers, see, e.g., C. FRED ALFORD, *WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER* (2001), but it has not considered the institutional norms that structure leak regulation.

For all the reasons detailed in Part II, it is not in the interest of executive branch principals to throw the book at a great number of leakers. And yet neither is it in their interest to allow prohibitions on leaking to fall into desuetude and invite informational anarchy. A strategic administration, rather, will seek to maintain a steady stream of disclosures that are understood by the public to be leaks, while minimizing these disclosures' policy costs. In the sketch offered below, I suggest that a pragmatic code has developed within the executive to help mediate this tension. This code has come to gloss, and nearly displace, the inert and overbroad Espionage Act,<sup>315</sup> functioning as a parallel law of leaking. Critics like James Bruce miss these dynamics entirely when they assert that on account of the "glaring absence of criminal penalties," the message sent to executive employees is, "Leak all you want, and no matter how much, or how serious, nothing will happen to you."<sup>316</sup> Permissive neglect is not nearly that permissive.

### A. *Internal Signaling and Informal Sanctions*

Stated most generally, instead of linear, legalistic supervision of the release of confidential information to the media, the executive exercises supervision to a large degree through suasion and the threat of informal sanctions if an employee goes too far. Top White House officials' complaints about specific instances provide a signal as to which disclosures cross the line. These complaints are sometimes aired publicly, as when President Reagan's spokesperson called a press briefing to vent the President's anger over the leak of a scuttled fighter-jet sale to Taiwan.<sup>317</sup> More often, they are communicated privately, as when President Obama phoned the Administrator of the Environmental Protection Agency to express dissatisfaction with the leak of a finding on greenhouse gases.<sup>318</sup>

A variety of potential sanctions back up these threats. The key mechanisms, interviews and anecdotal accounts suggest, involve *shaming*, *shunning*, and *exiling*.<sup>319</sup> Through shaming, suspected leakers may be targeted with damaging rumor campaigns, given the cold shoulder, or berated by agency bosses and White House overseers. President Obama's Chief of Staff Rahm Emanuel is said to have been "a big screamer" who relished "hauling in" suspected offenders, including the occasional cabinet secretary.<sup>320</sup> Through shunning, suspected leakers may be cut out of certain types of meetings, working groups, or email chains or brought in on plans only at

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<sup>315</sup> On its face, as suggested above, the Espionage Act fails to distinguish among different types of leakers or even different parties to the leak transaction: It crudely lumps together classic saboteurs with ill-motivated leakers, well-intentioned whistleblowers, journalists, and publishers. See *supra* note 45 and accompanying text; see also Edgar & Schmidt, *supra* note 29, at 1083-84 (calling the Act "fatally defective" for failing to distinguish among spies, government employees, and members of the media).

<sup>316</sup> Bruce, *supra* note 109, at 43. In Bruce's telling, the "enforcement climate" is one of "utter indifference." *Id.*

<sup>317</sup> HESS, *supra* note 73, at 89-90.

<sup>318</sup> JONATHAN ALTER, *THE PROMISE: PRESIDENT OBAMA, YEAR ONE* 155 (2010).

<sup>319</sup> In this, there is nothing exceptional about the leak regime. In general form, these sanctions—which are not mutually exclusive and may overlap in any given case—are ubiquitous in bureaucratic settings. See HERBERT KAUFMAN, *THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR* 220-21 (1960) (noting the importance of shaming); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 154-78 (1989) (discussing shunning and exiling strategies); Aimee L. Franklin & Javier F. Pagan, *Organization Culture as an Explanation for Employee Discipline Practices*, 26 REV. PUB. PERSONNEL ADMIN. 52, 56 (2006) (reviewing research finding that informal disciplinary methods "are widely employed" in public organizations).

<sup>320</sup> Interview with former White House official (Aug. 20, 2012).

the last minute. A former top aide at the State Department recalled that after an NSC official accused him of divulging sensitive information on Africa policy, he was told he was no longer welcome at White House strategy sessions.<sup>321</sup> Through exiling, suspected leakers may be denied promotions, denied face time with key policymakers, moved to obscure posts, or pressured to resign. Morton Halperin, cited throughout this Article as a leading chronicler of the role of leaks in the policy process, was forced out of the Nixon administration's NSC when his colleagues suspected he had passed information on the secret U.S. bombing of Cambodia to the *Times*.<sup>322</sup>

Exclusion from meetings and projects appears to be an especially common remedy.<sup>323</sup> Among senior government officials, loss of such access means loss of status, influence, power. One White House interviewee asserted that those leakers who are seen as undermining "message discipline" are "going to quickly be rendered irrelevant. . . . I think that really shuts some people up."<sup>324</sup> If no suspect has been identified, key authority figures like the president's national security adviser or chief of staff may issue warnings to a larger audience of potentially guilty employees, threatening to initiate an investigation and expose offenders if similar leaks recur; unlike with formal disciplinary methods, these enforcers need not build a case against any particular individual. The White House, as the executive's main architect of communications strategy, coordinator of the interagency process, and ultimate policy authority, is the primary issuer of these informal sanctions. It is not the only issuer. Agency leadership may supplement or assist, and occasionally resist, its efforts. IC elements like the CIA may at times try to punish leaky agencies, and even the White House itself, by limiting access to highly classified "compartments." But by and large, consistent with the insight that top White House aides have the strongest claim to communicative license as presidential planters,<sup>325</sup> we find that they are more likely to be dispensers than to be recipients of disclosure discipline.

The executive takes efforts to prevent leaking as well as to punish it. All components that handle classified material, for instance, employ a wide range of information security technologies and protocols.<sup>326</sup> The president's main practical tool of prevention is limiting the circle of secret-keepers. As one White House official explained, "when there's been a ton of leaking on an issue, senior folks in this building change the process in a way that reduces the number of people who have access to the information."<sup>327</sup> These programs become, in the

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<sup>321</sup> Interview with former State Department official (July 28, 2012).

<sup>322</sup> *Halperin v. Kissinger*, 606 F.2d 1192, 1196-97 (D.C. Cir. 1979). In Halperin's case, as in many others, it is difficult to disentangle whether he was marginalized because he leaked about a certain subject or because the content of the leak indicated he did not share key administration goals.

<sup>323</sup> Cf. Oona A. Hathaway & Scott Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L.J.* 252 (2011) (arguing that the threat of exclusion by decentralized regime participants is a pervasive mode of enforcement in public law).

<sup>324</sup> Interview with former White House official (Aug. 20, 2012); see also Daniel Ellsberg, *Secrecy and National Security Whistleblowing*, 77 *SOC. RES.* 773, 778-81 (2010) (asserting that, within the U.S. national security bureaucracy, "what is most feared by most prospective secret-tellers . . . is social isolation, ostracism, exile," and that "[b]reaking the pledge of secrecy in a way that is not tacitly tolerated or authorized by group leaders or practices is generally the surest and fastest way . . . to be expelled").

<sup>325</sup> See *supra* Part II.B.2.

<sup>326</sup> See, e.g., Exec. Order No. 13,587, § 1, 76 *Fed. Reg.* 63,811, 63,811 (Oct. 7, 2011) (directing "structural reforms to ensure responsible sharing and safeguarding of classified information on computer networks").

<sup>327</sup> Interview with White House official (Aug. 20, 2012).

jargon, a closer hold. Yet while the expected odds of leaking may thereafter decline, the risks of decisionmaking defects associated with insularity and compartmentalization rise<sup>328</sup>—as does the risk of triggering a vicious cycle whereby excluded officials come to feel aggrieved and so speak increasingly freely to the press, which only reinforces the secret-keepers’ perceived need to close ranks, further fueling bureaucratic alienation, and on and on. Such vicious cycles appear to have developed in the Nixon and Bush II administrations.<sup>329</sup> These predictable pathologies, along with the simple need to disclose information broadly enough to effectuate any given policy, inherently constrain the ability to pursue leak deterrence through precautionary strategies.

For senior officials (the sorts of people who regularly or semi-regularly attend meetings at the White House, roughly at the level of deputy assistant secretary and above<sup>330</sup>), the informal enforcement regime is easily the most important source of discipline for leaking. A crude set of vetogates<sup>331</sup> all but ensures these officials are never prosecuted. As explained above, a referral by the victim agency to DOJ is typically a precondition to criminal action, and referrals are seldom submitted by agencies other than the CIA and NSA.<sup>332</sup> There is no prescribed process to govern the production or transmission of these crime reports. Former DOJ officials with whom I spoke knew almost nothing about how agencies determine whether to submit them. As a matter of practice, it appears that in most agencies, politically connected appointees exercise substantial control. Rather than encourage individual employees to contact DOJ or coordinate referrals through a relatively independent inspector general, agencies tend to route all concerns through their general counsel’s office.<sup>333</sup> Referrals, consequently, are unlikely to be made over the opposition (tacit or overt) of the general counsel’s superiors.<sup>334</sup> On top of the effective veto held by the career prosecutors who decide whether to move forward with a case, the referral process gives an effective veto to the leadership of critical agencies.

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<sup>328</sup> On these risks, see generally Pozen, *supra* note 307, at 278-80.

<sup>329</sup> See HALPERIN, *supra* note 72, at 256-57.

<sup>330</sup> Recall that in the Kennedy School’s survey of officials at the level of assistant secretary and above, nearly half of the respondents acknowledged having found it appropriate to leak. See *supra* note 62 and accompanying text.

<sup>331</sup> Vetogates are “the choke points” in a legal process, key preliminary phases in which discrete groups can block final action. See generally WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 66-68 (4th ed. 2007).

<sup>332</sup> See *supra* notes 115-119 and accompanying text. To this list of significant users of the referral system, we may now need to add the Office of the Director of National Intelligence, which has overseen the CIA, the NSA, and the rest of the IC since its creation in 2004.

<sup>333</sup> A former prosecutor who worked on leak cases stated that referrals “always” seemed to come from general counsel’s offices, Interview with former DOJ official (Aug. 28, 2012), and high-level lawyers from the Departments of Defense, Homeland Security, and State assumed this is how leak referrals would be handled in their agencies, in the unlikely event such a referral were made. Throughout the executive, most agencies have presidentially appointed, Senate-confirmed general counsels. See HENRY B. HOGUE ET AL., *CONG. RESEARCH SERV., RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS passim* (2008).

<sup>334</sup> Notably, the primary users of the referral system, the CIA and NSA, often suspect that someone employed by another agency leaked “their” information. Referrals of such leaks do not implicate the CIA’s or NSA’s own high-level officials. Unlike their counterparts in non-IC agencies, the heads of the CIA and NSA are also required by executive order to report possible violations of federal law. See *supra* note 206 and accompanying text.

There may be yet a third veto, held by the president and his appointees at DOJ. Notwithstanding the norm of declining to interfere with specific prosecution decisions, Oval Office executives have been known to encourage their DOJ counterparts to prioritize or deprioritize certain categories of cases,<sup>335</sup> and some interviewees suggested that media leaks have historically been an area on which the White House has counseled caution.<sup>336</sup> Even if line-level prosecutors typically have no special compunctions about pursuing leakers—and I am not aware of any evidence that they do—it is plausible that their FBI and NSD bosses would curtail their discretion upon receiving a negative signal from president, the Attorney General, or their top aides. DOJ’s tradition of running leak cases out of Main Justice, instead of individual U.S. Attorneys’ Offices, strengthens these sources of “political” influence. Beyond the criminal process, agency heads may hold additional vetoes over administrative penalties for senior staff who disclose information with their assent or acquiescence. Agencies have broad discretion to withhold most punishments in most cases. Their disciplinarians cannot easily ruin someone’s career against the wishes of agency leadership,<sup>337</sup> in the vast majority of cases, one assumes, they would not even contemplate trying to do so.

The existence of multiple, institutionally diverse vetogates predictably biases the formal enforcement system against action. For all the reasons given in Part II about why a strategic executive should disfavor public sanctions, this bias is perfectly rational. Informal sanctions are not only easier to calibrate and administer but are also comparatively obscure. They can preserve a veneer of bureaucratic harmony at the same time that they minimize backlash. The problem of leaking may be seen as a “management problem,” one White House official noted, and Oval Office brass (“chief of staff-level people”) generally do not wish to highlight their managerial failures.<sup>338</sup>

### ***B. Senior Officials, Junior Officials, and Mixed Deterrence***

Lower-level officials are subject to some of the same informal sanctions as their superiors, which may be replicated in miniature within an agency. And they may be exposed, secondhand, to some of the same internal White House signals regarding the boundaries of acceptable leaking. But for them, the possibility of career-jeopardizing investigation and formal sanction—while still statistically remote—is more realistic.<sup>339</sup> Although civil service rules raise the cost of

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<sup>335</sup> See Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. \_\_ (2013) (explaining that “the White House has long been involved in directing enforcement efforts within and across executive branch agencies”).

<sup>336</sup> One interviewee, for instance, stressed that before the Obama administration, no recent White House had given DOJ “carte blanche” to pursue leak cases. Interview with DHS official (Sept. 10, 2012).

<sup>337</sup> See generally 5 U.S.C. § 7532 (2006) (placing decisions regarding national-security-related suspensions and removals within the sole discretion of agency heads); PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 203-04 (2d ed. 2002) (explaining that agency heads retain discretion to review internal adjudicatory decisions); cf. LEAKS IN WHITEHALL, *supra* note 254, at 13-14 (observing that in the United Kingdom, while “[s]pecial advisers are, in theory, subject to the same rules regarding the disclosure of information as other civil servants,” in practice the minister responsible for their discipline is unlikely to take any action “where the adviser has been acting in what they [sic] believe to be the minister’s interests”).

<sup>338</sup> Interview with White House official (Aug. 20, 2012).

<sup>339</sup> For a recent example of administrative punishment, see *Navy SEALs Said to Be Punished for Breach*, N.Y. TIMES, Nov. 8, 2012, <http://www.nytimes.com/aponline/2012/11/08/us/politics/ap-us-seals-punished.html?hp>

pursuing administrative remedies, they allow agencies to punish employees for misconduct.<sup>340</sup> The returns from my FOIA requests indicate that in responding to leaks, certain executive branch components are substantially more active than others in their use of these remedies. [It appears, for example, that over the past two decades, the Departments of State and the Treasury have never once imposed an administrative sanction for an unauthorized disclosure to the media (or at least, none that was identifiable as such by their Offices of Inspector General), whereas the CIA is known to have used investigative tools such as polygraphs and .... fill in – CIA sanction comparison will almost certainly have to be anecdotal]. Particularly in the IC, if not elsewhere, leakers cannot take administrative apathy for granted.

The value of informal sanctions generally declines as one moves down the bureaucratic hierarchy. For employees as low on the totem pole as Bradley Manning, a private first class soldier stationed abroad when he transferred materials to WikiLeaks, many informal sanctions would not even be possible. Manning was never part of any inner circle from which he could have been marginalized. Shaming, shunning, and exiling work best when the professional community is close-knit and the personal costs associated with loss of access are high.<sup>341</sup>

Once we attend to its extralegal dimensions, we thus find that the executive's regime for regulating leaks is in significant respects more pluralistic than unitary. Even though the classification rules and the laws against leaking are written in generally applicable terms, in practice the regime privileges White House officials over agency officials, political appointees over civil servants, senior staff over junior staff, and non-IC employees over IC employees, both in terms of the type of sanctions utilized and the amount of disclosure discretion given. The first three discrepancies are ingrained in the way the executive organizes its work. High-level officials—above all, top White House officials—are expected to speak with the press as part of their job, to explain and defend administration policies. There is widespread recognition that this may entail, as one former White House official put it, some “informal trimming” of the boundaries of confidentiality and classification.<sup>342</sup> Lower-level employees have no comparable discretion, no reliable safe harbor. For many in the White House, leaks by low-level career employees are seen as “totally unacceptable from the standpoint of running the government.”<sup>343</sup>

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(reporting that seven members of Navy SEAL Team 6 received letters of reprimand and a partial forfeiture of pay for two months for divulging classified information to a video game maker).

<sup>340</sup> See Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1375 (2012) (“[F]ederal law uniformly provides that insubordination is a suitable ground for good-cause removal.”).

<sup>341</sup> I offer no direct evidence for this claim as regards leakers, but it is consistent with the literature on relational contracting and private ordering in homogeneous communities. See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (exploring diamond dealers' use of informal governance mechanisms).

<sup>342</sup> Interview with former White House official (Aug. 20, 2012).

<sup>343</sup> Interview with White House official (Aug. 20, 2012). Across a range of fields, many have noted that American legal practice appears more pluralistic than positivistic in “its implicit acceptance of customs founded on multiple sources of legal authority.” Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 935. It is nonetheless striking to find such pronounced pluralism *within* the executive branch, in a core national security area. These fissures reflect leaking's role as a means by which different normative communities within the executive coordinate and compete with one another, as well as leaking's relevance to a diverse set of governmental ends, from retaining power to shaping public opinion to securing the nation.

In effect, senior officials are given a standard: “Don’t disclose confidential information in a manner that causes serious harm to U.S. interests or the president’s agenda.” The difficulty of delineating a comprehensive policy *ex ante* is too great for this group, so the details are largely left to be worked out through *ex post*, informal enforcement. Junior officials are given a rule: “Don’t disclose confidential information, period.” Violations of this rule are largely tolerated by those who run the executive branch, as Parts I and II explained, and in the abstract their utility may even be appreciated. But these disclosures are not similarly approved, much less cultivated.

From the executive’s perspective—that is, taking the institution’s objective interests and not social welfare as the maximand—this mix of threats, rhetoric, occasional informal sanctions, and very occasional formal sanctions may generate something approximating privately optimal deterrence. Given the benefits of leakiness and the high costs of enforcement, stiff penalties imposed rarely may be an efficient approach.<sup>344</sup> Prosecutions invite backlash. They can also overdeter. The executive’s relatively invisible, asymmetric regulatory model conserves political capital and curtails litigation risk, even as it skews the balance of leaks, pleaks, and plants toward the latter two.<sup>345</sup> If one assumes some normal distribution of risk preferences among those junior officials with access to classified information, the government need create only a modest sense of danger to discourage all but the most risk-loving tail. And so much of that tail may be sufficiently reckless that invigorating criminal enforcement would have little effect beyond a small number of individuals at the margins. By allowing junior officials to challenge the secrecy rules through leaking, but only at significant personal peril, the executive likely weeds out many trivial appeals while preserving some of the most important communications.<sup>346</sup>

The system for senior officials, moreover, is designed to facilitate learning. Statements and sanctions issued by the president and his top aides establish the disclosure standard applicable to this group; discrete leaks, pleaks, and plants progressively test that standard and stimulate refinements. Generalized grievances about unauthorized disclosures (“too much is being shared with the media about China policy”) yield over time to more particularized enforcement cues (“the next leak about our negotiations with the Taiwanese military will not be tolerated”). Agency participants and White House overseers continually learn from each other and iteratively codetermine the limits of legitimate disclosure behavior, in an active feedback loop. Even if certain components of the executive have more or less tolerant cultures with regard to leaking, this dynamic process, together with the vetogates that minimize formal sanctions, helps ensure that those overlapping normative orders substantially converge on an authoritative system for disciplining senior officials.<sup>347</sup>

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<sup>344</sup> Cf. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 183-84 (1968) (arguing that harsh penalties, rarely imposed, may be a socially optimal strategy when enforcement is costly).

<sup>345</sup> On this skew, see Part II.B.2 *supra*.

<sup>346</sup> Cf. *supra* Part II.B.4 (discussing the intragovernmental communicative economy of leaks).

<sup>347</sup> An analogy might be drawn to the way in which OLC opinions on questionable practices generate effective immunity for those who follow them. See *Developments in the Law—Presidential Authority*, 125 HARV. L. REV. 2090, 2092 (2012) (“[OLC] opinions are not only followed by the entire executive branch, but arguably also confer nearly complete civil and criminal immunity for officials that act in accordance with OLC’s view of the law.”). A reasonable expectation attaches that those high-level sources who stay within the bounds of acceptable disclosure, as signaled by the White House and agency heads, will escape formal punishment.

It is misguided, consequently, to envision leak regulation as a field in which top-down efforts by the White House to control the executive have lost out to balkanized assertions of power by lower-level players across the various agencies. The reality puts pressure on that very distinction. Leakers operate with a high degree of impunity from criminal, civil, and administrative discipline. Decentralization seems to run riot. Yet through the design of the criminal referral process and DOJ's journalist subpoena policy, the failure to seek legislative revisions or invest significant resources in apprehension, and the informal signaling and sanctioning mechanisms just described, the diffuseness of the system is constructed to a significant extent by the president and his appointees. The White House plays a key role both in establishing the boundaries of acceptable leaking and in enforcing them through periodic interventions—sometimes through the very practice (anonymous disclosures to the press) the White House means to discipline.

Put another way, in lieu of the command-and-control regulation of national security information that the classification rules and traditional separation of powers theory would seem to envision, the White House gives agency leadership a kind of informational block grant.<sup>348</sup> What presidents lose in control over specific disclosures, they gain in deniability and other rewards from leakiness. Part II demonstrated that switching to a more formal, centralized model of disclosure would impose enormous costs on the executive, not only in terms of transactional efficiency but also in terms of legal accountability, popular credibility, policy development, bureaucratic harmony, and media, congressional, and civil society slack. There is no need to make this switch, however, unless the misallocations and missteps inevitable in an informal system are perceived to outweigh these costs. That the existing model has persisted for so long suggests they do not. To the contrary, the analysis here lends more support to the notion—roughly in line with Robert Ellickson's famous hypothesis about close-knit groups—that the president's national security team has developed informal norms on disclosure that tend to maximize their aggregate welfare.<sup>349</sup>

### C. *Substantive Norms*

Ideally, an account of the executive's informal code of leaking would elaborate, not just the procedural and remedial conventions sketched above, but also the content of the primary extralegal norms that tell government actors what they may say and do. Leaking is such a broad, varied, and clandestine phenomenon that it is impossible to specify this content with precision. No doubt certain norms have evolved over time. Nevertheless, from the opinions shared by insiders and the enforcement known to have occurred, it is possible to piece together some basic elements. U.S. officials routinely vilify "leakers," as a class, and deny the existence of any First Amendment protections beyond whatever might be afforded to members of the media.<sup>350</sup> It is

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<sup>348</sup> I thank David Super for suggesting this metaphor.

<sup>349</sup> See ROBERT C. ELICKSON, *ORDER WITHOUT LAW* ch. 10 (1991). As Ellickson acknowledges, welfare assessments in most such contexts will be "impossible to quantify with precision" and must rely on "largely intuitive assessments of the utilitarian potential" of the social norms that are employed versus alternative norms that are not. *Id.* at 183.

<sup>350</sup> The government's longstanding official position is that to the extent conveying classified information to unauthorized parties even "constitutes speech, that speech is wholly unprotected by the First Amendment." Consolidated Response of the United States to the Defendant's Pretrial Motions 30, *United States v. Kim*, 1:10-cr-00225-CKK (D.D.C. Mar. 2, 2011).

therefore striking to find that the substantive norms on leaking appear to incorporate a fairly nuanced set of ethical and constitutional distinctions. If Jack Goldsmith is right that the government's failure to crack down reflects "a recognition . . . that press coverage of secret executive branch action serves a vital function in American democracy,"<sup>351</sup> these norms help to operationalize that sentiment and reconcile it with the equally widespread recognition that certain leaks can do great damage.

A limited amount of evidence on disclosure norms can be gleaned from the criminal cases that have been brought against suspected media leakers.<sup>352</sup> The leading Espionage Act case, *United States v. Morison*,<sup>353</sup> is particularly instructive. As recounted by the appellate court, Samuel Morison was a disaffected Naval intelligence analyst who sought to gain full-time employment with the British circular *Jane's Defence Weekly*. Seemingly to impress the *Jane's* editor-in-chief, Morison purloined reconnaissance satellite photographs of a Soviet military site, cut off the Top Secret markings on their border, and mailed them, with an expectation of payment, to the editor-in-chief.<sup>354</sup> The *Morison* court squarely rejected the alternative narrative advanced by the defendant: that he had leaked the photographs, not for pecuniary or professional reasons, but in a patriotic bid to alert the American public that the Soviet Union was preparing to expand its naval reach.<sup>355</sup> The Fourth Circuit upheld Morison's conviction on all counts.<sup>356</sup>

Morison not only violated several laws against leaking, like so many before and after him, but also transgressed several ethical lines. In the court's telling, he (i) sold protected information, (ii) in a manner not designed or intended to advance U.S. policy or broader First Amendment values, (iii) to a foreign publication. Morison's activities were, in these respects, closer to espionage than to whistleblowing.<sup>357</sup> These ethical lines remain significant. Another

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<sup>351</sup> GOLDSMITH, *supra* note 12, at 222.

<sup>352</sup> Cf. ELLICKSON, *supra* note 349, at 182 ("Norms are also identifiable. They are evidenced by patterns of sanctions, patterns of primary behavior, and aspirational statements."). Too little is known about the details of administrative sanctions to mine them similarly for insights.

<sup>353</sup> 844 F.2d 1057 (4th Cir. 1988).

<sup>354</sup> *Id.* at 1060-62.

<sup>355</sup> *Id.* at 1062, 1079-80.

<sup>356</sup> *Id.* at 1060, 1080. Morison was convicted on two counts of violating the Espionage Act, 18 U.S.C. §§ 793(d), (e), and two counts of violating 18 U.S.C. § 641, and sentenced to two years' imprisonment.

<sup>357</sup> It is something of a puzzle, then, why President Clinton pardoned Morison on his last day in office. The U.S. attorney who handled the case on appeal spoke for many in government when he complained that the pardon was "inexplicable," as Morison had acted "with the basest of motives." Breckinridge L. Willcox, *Speaking of Pardons* . . ., WASH. POST, Feb. 24, 2001, at A23; see also Vernon Loeb, *Clinton Ignored CIA in Pardoning Intelligence Analyst*, WASH. POST, Feb. 17, 2001, at A6. A FOIA request I submitted to the William J. Clinton Presidential Library sheds a bit of new light on this episode.

It appears that several letters sent to Clinton late in his presidency may have influenced his decision. In 1998, Senator Daniel Patrick Moynihan began to press the case for a pardon. Moynihan asserted, without explanation, that Morison had been seeking "to bring pressure to bear on a policy question"; repeatedly equated Morison's conviction with "press censorship"; and suggested that Morison's rank—"not too high, not too low"—influenced the Reagan administration's decision to prosecute. Letter from Sen. Daniel Patrick Moynihan to President William J. Clinton (Sept. 29, 1998), available at <http://www.fas.org/sgp/news/2001/04/moynihan.html>. Moynihan further emphasized the potential for leak-law enforcement to jeopardize presidential interests: "An evenhanded prosecution of leakers," he noted, "could imperil an entire administration." *Id.* Two years later, the famed historian Arthur Schlesinger, Jr. and journalist Anthony Lewis followed with their own missives. Schlesinger and Lewis (who attached several

convicted media leaker, Jonathan Randel, sold tangible documents to a British publication.<sup>358</sup> (For their part, the British authorities also seem more inclined to prosecute leaks involving the sale of information.<sup>359</sup>) And virtually every U.S. official with whom I spoke affirmed that they would judge a leak more critically if it possessed the above-described attributes. The *Morison* episode is best known for the Fourth Circuit’s legal analysis. Given how rarely the laws against leaking are enforced, the most notable aspect of the case is simply that it was brought. *Morison* stands, not just for the legal proposition that the Espionage Act and 18 U.S.C. § 641 may be applied to media leaks, but for the broader proposition that leaks made without any apparent patriotic or policy justification are the most deserving of punishment.

Post-*Morison* cases elaborate on this theme. It is a staple of leak litigation that the prosecution portrays the defendant’s actions as lacking in public-regarding motive and personal virtue. In several cases, the prosecution has alleged that the defendant turned to the press in retaliation for a perceived slight by his employers, such as the CIA’s denial of Jeffrey Sterling’s racial discrimination claims;<sup>360</sup> or that he<sup>361</sup> employed spy-like tactics to communicate with journalists, such as Stephen Kim’s use of an online pseudonym or Thomas Drake’s use of encrypted email accounts and his efforts to gather information from unwitting NSA colleagues.<sup>362</sup> Most defendants have been accused of leaking tangible items. Tangibility not only eases the government’s evidentiary and Espionage Act burden, but also limits its ability to downplay or deny a security breach. All of the prosecuted individuals have been low- to mid-level civil servants or contractors, except for Bradley Manning, who was a soldier, and Drake,

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columns he had written about *Morison* in the 1980s) characterized *Morison* as a patriotic policy leaker, and criticized the application of the Espionage Act to media leaks as a Reagan administration gambit to create a de facto Official Secrets Act. Letter from Anthony Lewis to President William J. Clinton (Dec. 28, 2000) (on file with author); Letter from Arthur Schlesinger, Jr. to President William J. Clinton (Dec. 7, 2000) (on file with author). Schlesinger further noted that *Morison*’s grandfather was his “teacher and friend, the great historian Samuel Eliot *Morison*.” *Id.* None of these letters mentioned the Constitution, though their arguments were pregnant with First Amendment implications. The journalist Bob Scheer evidently wrote Clinton to similar effect. On the internal cover letter for the Lewis and Scheer letters, Clinton scrawled a handwritten note to his advisers: “looks like something we probably should do.”

What ultimately drove President Clinton’s decision to pardon *Morison* (among many others) remains largely unknowable, as do the thought processes of Moynihan, Schlesinger, Lewis, and Scheer. On their face, these documents suggest that Clinton may have been moved by a sincere concern for press freedom—or perhaps a concern to be seen by history as concerned for press freedom—as well as by a pragmatic interest in maintaining the viability of pleaks and plants. One wonders whether Clinton would have made the same decision had he read the Fourth Circuit’s discussion of the facts, if indeed he did not do so. Inasmuch as the *Morison* pardon holds any generalizable, substantive lessons on leaks, it might be taken as evidence that behind all the tough rhetoric, at least some presidents consciously appreciate their democratic, political, and policy value.

<sup>358</sup> See *supra* notes 34, 103.

<sup>359</sup> See LEAKS IN WHITEHALL, *supra* note 254, at 17 (stating that the police’s decision not investigate a recent leak on the expenses of Members of Parliament would have been “surprising” if the information had been sold for personal gain); *UK Anthrax Officer Jailed for a Year*, BBC NEWS, Oct. 23, 1998, [http://news.bbc.co.uk/2/hi/uk\\_news/199796.stm](http://news.bbc.co.uk/2/hi/uk_news/199796.stm) (describing the conviction of a British naval officer for disclosing information about an alleged anthrax plot to the *Sun* in exchange for £10,000).

<sup>360</sup> See Indictment at 7-8, *United States v. Sterling*, No. 1:10CR485 (LMB) (E.D. Va. Dec. 22, 2010) (asserting that Sterling leaked classified information “[i]n retaliation for the CIA’s refusal to settle on terms favorable to [him]”).

<sup>361</sup> The defendants have all been men.

<sup>362</sup> See *Shane*, *supra* note 192 (describing the case against Kim); Indictment at 5-7, *United States v. Drake*, No. 10-CR-00181-RDB) (D. Md. Apr. 14, 2010) (describing Drake’s alleged conduct).

who was more senior in rank though not a bureau chief or presidential appointee. Critically, all reached out to reporters in some proactive fashion, without any implicit or explicit backing from agency leadership. These individuals were not legitimate participants in the game of leaks, as conceived by the upper echelons of the executive branch. Defense counsel in these cases, meanwhile, almost invariably seek to portray their clients as whistleblowers, notwithstanding the failure to follow whistleblowing protocols. Both sides recognize the value of pitching their arguments in an ethical register against the backdrop of an overbroad law.

Because there are so few leak prosecutions, those that are brought can send powerful signals throughout government about the parameters of permissible leaking. The sample size is too small, and the recent cases (several of which are ongoing) too fresh, to distill neat lessons. But the general pattern suggests that the most vulnerable officials are those lone wolves who speak with reporters outside the context of any ongoing interagency process—true leakers, not pleakers or planters, in this Article’s typology—and whose claim to a whistleblowing purpose is complicated by evidence of dubious tactics or dishonorable aims. The ongoing case of Bradley Manning has highlighted and reinforced an additional normative line, in Manning’s almost total failure to discriminate among the hundreds of thousands of documents he passed to WikiLeaks.<sup>363</sup> A strategic administration can tolerate some significant amount of discrete revelations about perceived errors or abuses. It cannot tolerate internal dissenters who seek to destroy the entire secrecy and national security system.

In the leak context as in others, the jury serves as an important mechanism for bringing these sorts of moral and practical sentiments into the prosecutorial calculus. One former DOJ official who worked on leak cases opined that his former colleagues “by and large use good judgment” in assessing whether a leak “was wrong” before deciding whether to move forward.<sup>364</sup> Informing these assessments, he further suggested, are their expectations of how ordinary citizens would think about criminal desert: Cases are shelved if they lack “jury appeal.”<sup>365</sup> The referral process ensures that prosecutors never encounter most potentially unlawful leaks. Within the set they do encounter, the prospect of skeptical jurors raises the cost of pursuing disclosures that appear to be consistent with ubiquitous practices or otherwise justified. It is notable in this regard that the government never indicted Thomas Tamm, the DOJ employee who revealed the NSA’s highly classified warrantless wiretapping program to the *New York Times*, even though his identity quickly emerged.<sup>366</sup> Tamm’s civil disobedience was vindicated in the court of public opinion. The failure to bring charges against him sent a message that disclosures of government conduct widely believed to be illegal will prove immune from criminal punishment, even if they may not escape its administrative counterpart.

A focus on relatively unsympathetic, bureaucratically isolated defendants is a rational prosecutorial strategy of course. It economizes on resources and political capital, enhances odds

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<sup>363</sup> See Benkler, *supra* note 296, at 321-30 (summarizing the contents of the materials allegedly leaked by Manning in 2010); see also *supra* note 100 and accompanying text (discussing general leaks).

<sup>364</sup> Interview with former DOJ official (Aug. 28, 2012).

<sup>365</sup> *Id.*; see also Reno Testimony, *supra* note 37, at 10 (stating that in some cases, DOJ has identified the leaker but “decided not to prosecute because we concluded that . . . a jury would likely refuse to convict notwithstanding the evidence”).

<sup>366</sup> See Charlie Savage, *No Prosecution Seen for Official in N.S.A. Leak*, N.Y. TIMES, Apr. 27, 2011, at A17.

of securing convictions and averting unfavorable judicial rulings, and refines the laws' deterrent effect. It also complicates the charge of selective prosecution. That DOJ has chosen to indict only a small subset of leakers is not necessarily a mark of politicization or double standards, so much as fidelity to the disclosure norms executive officials abide by—norms that themselves sharply (and problematically) distinguish among different types of speakers and speech acts.

Interviews and apparent leaking patterns suggest several more specific norms governing media disclosure. These norms correlate with but by no means mirror the formal classification hierarchy. The revelation of “intelligence sources and methods,”<sup>367</sup> many interviewees indicated, is generally considered an egregious offense, a line that even habitual leakers and pleakers will not cross. Intelligence sources are considered especially off limits; revealing the identity of an undercover U.S. agent is the paradigmatic example of an improper disclosure. Such episodes have occurred in recent decades, but seemingly rarely. Only two individuals have ever been charged under the Intelligence Identities Protection Act of 1982 (IIPA).<sup>368</sup> While some of the same forces that depress the overall enforcement rate may help explain this miniscule figure, I expect that the primary driver is the degree to which government officials have internalized the underlying norm. The IIPA is largely superfluous for them. The potency of this norm could be seen in the widespread outrage—and special prosecutor appointment—that followed the outing of Valerie Plame as a CIA operative.<sup>369</sup> Importantly, in this disapprobation of revealing intelligence sources and methods, national security interests and First Amendment principles converge.<sup>370</sup> Public awareness of the name of a CIA agent typically creates an immediate risk to that individual, without contributing anything meaningful to the project of self-government.

Beyond intelligence sources and methods, some interviewees suggested that disclosures of “operational details” are likewise seen as beyond the pale.<sup>371</sup> The key word in this phrase is not “operational,” as one might expect, but “details.” Leaks about the general contours of a military initiative or diplomatic negotiation do not necessarily arouse special outrage. In this case, too, it is the especially particularized nature of the leak that minimizes the possibility of justification

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<sup>367</sup> Cf. *CIA v. Sims*, 471 U.S. 159, 167 (1985) (describing sources and methods as “the heart of all intelligence operations”); Vicki Divoll, *The “Full Access Doctrine”: Congress’s Constitutional Entitlement to National Security Information from the Executive*, 34 HARV. J.L. & PUB. POL’Y 493, 522 n.104 (2011) (noting that the term “sources and methods,” though lacking in clear definition, “has become somewhat of a talisman in intelligence circles”).

<sup>368</sup> 50 U.S.C. §§ 421-426 (2006). Both individuals served in the CIA. See Indictment at 8-10, *United States v. Kiriakou*, 1:12CR127 (E.D. Va. Apr. 5, 2012); Andrew M. Szilagyi, Note, *Blowing Its Cover: How the Intelligence Identities Protection Act Has Masqueraded as an Effective Law and Why It Must Be Amended*, 51 WM. & MARY L. REV. 2269, 2282 (2010); see also Scott Shane, *From Spy to Source to Convict*, N.Y. TIMES, Jan. 6, 2013, at A1 (quoting John Kiriakou, recently convicted under the IIPA for leading a reporter to a covert CIA interrogator, as stating, “I should never have provided the name,” and quoting a former senior CIA lawyer as stating that while Kiriakou is not “evil,” “it’s not a trivial thing to reveal a name”).

<sup>369</sup> See *supra* notes 124-125 and accompanying text.

<sup>370</sup> Geoffrey Stone has insightfully observed that all of the traditional examples of information the publication of which may be criminally punished, including the sailing dates of military transports and the identities of CIA operatives, share the feature of threatening significant harm while adding little to public debate. STONE, *supra* note 13, at 24-25. My research suggests that internal executive branch norms incorporate this perspective. These exceptionally high-risk, low-return disclosures are least respected and least tolerated.

<sup>371</sup> E.g., Interview with former Defense Department official (Aug. 28, 2012).

and motivates the prohibitive norm.<sup>372</sup> Also verboten, it seems, are threats to leak information about other executive branch components.<sup>373</sup> Such behavior not only flaunts one's disrespect for background norms of legality and collegiality, but makes identification of the source too easy: Enforcers cannot so easily ignore a complaint that tells them exactly who did it. An additional norm may forbid direct criticism of the president. For all the difficulties that anonymous U.S. government sources may cause for the White House, it is exceedingly rare to find a news story in which one has impugned the president in any overt manner. The commander in chief may be challenged in some of his policy goals, but he is not mocked.

Although it may seem counterintuitive, there is nothing inherently odd about the observation that those who flout the rules on disclosing classified information would nonetheless abide certain other norms on leaking. Recent work in social psychology demonstrates that all but the most sociopathic rule violators want to believe they are acting ethically, and so maintain certain boundaries they will not cross even as they blow past the generally applicable proscriptions.<sup>374</sup> It seems likely that psychological mechanisms such as the urge to avoid cognitive dissonance<sup>375</sup> help explain how even hardened national security types can rationalize violating the laws against leaking, as most naturally construed. There may be other “reconciliation strategies” at work here, too.<sup>376</sup> For instance, those officials who discuss classified items with select journalists may tend to hold some sort of Dworkinian or natural law-based understanding about the relationship between law and justice, whereby their belief in law's ultimate reasonableness leads them to resist the very notion of a “law” that could prohibit what they see as valuable, accountability- and security-promoting activities. Or perhaps certain officials come to believe that the classified materials their agency generates are their property, in some legally significant sense, and that this property relationship gives them a right of disposition that trumps otherwise applicable disclosure restrictions. This hypothesis is speculative but not far-fetched. We know from research in behavioral economics that people pervasively use various sorts of mental accounting to place information into coherent normative frames and to rationalize their conduct,<sup>377</sup> and “property talk” about classified information is ubiquitous in U.S. government circles.<sup>378</sup>

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<sup>372</sup> Cf. Pozen, *supra* note 307, at 275-323 (arguing that there are diminishing marginal returns, for values such as public debate and democratic accountability, to increasingly specific disclosures about government policies).

<sup>373</sup> See HALPERIN, *supra* note 72, at 202 (noting that while bureaucrats may strategically raise the concern that information “will be leaked,” they do not threaten “that they themselves would ever do it”).

<sup>374</sup> This is a central theme of DAN ARIELY, *THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES* (2012). Daniel Ellsberg has recently contended that bureaucratic “habits” in the U.S. government “allow a good deal of leeway and discretion in disregarding formal rules of the classification system” but demand fidelity to “the [real] rules,” which forbid “revelations to potential adversaries or rivals of the policies or agency or bosses one serves.” Ellsberg, *supra* note 324, at 774-75.

<sup>375</sup> Cognitive dissonance is the psychological discomfort that results from holding conflicting knowledge, opinions, or beliefs. See generally LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957).

<sup>376</sup> See Frederick Schauer, *Official Obedience and the Politics of Defining “Law”* (Dec. 2012) (unpublished manuscript) (cataloguing “reconciliation strategies” officials may use to avoid acknowledgment of lawbreaking).

<sup>377</sup> See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 342-46 (2011) (reviewing some of the literature).

<sup>378</sup> See MARK J. ROZELL, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY* 9 (2d ed., rev. 2002) (noting “the belief of many in the government that each branch *owns* the information it develops” (internal quotation marks omitted)). Based on experience, I would refine the observation just quoted to reflect that many in government believe each *agency* or *component* of the executive branch owns the information it develops.

Let us close with one more speculative, but particularly important, hypothesis. If the analysis above is sound, then paradoxically it may be the case that more vigorous enforcement of the laws against leaking would lead to a *greater* amount of unlawful disclosures, or at least a greater amount of destructive disclosures. It is well established in the social-psychological literature that enhanced external prohibitions may correspond with reduced internalization of the underlying norm:<sup>379</sup> A classic finding shows that harsh, punitive parenting is associated with decreased inhibitory control and increased antisocial behavior in adolescence and young adulthood.<sup>380</sup> One possible causal mechanism for the efficacy of a softer touch is what is known as “insufficient deterrence.”<sup>381</sup> When parents punish rule violations only lightly, it arouses cognitive dissonance in children who comply without strong external justification for doing so; to dissolve this dissonance, the children come to internalize the rule. There is no reason to expect this dynamic would be confined to juveniles or to rules that lack the force of law. It is an old concern of tax policy, for instance, that aggressive enforcement may backfire in revenue terms, by attenuating the sociocultural link between taxpaying and civic virtue and decreasing citizens’ intrinsic motivation to comply with the laws.<sup>382</sup>

Low levels of official enforcement help preserve the primacy of the unofficial code on acceptable leaking. Unpatriotic disclosures, disclosures made for money, disclosures with a high ratio of expected national security harm to democratic benefit—all are kept in check by a broadly held set of norms condemning such conduct. To be sure, these norms can be vague as guides to decision and are highly imperfect as social controls. In certain cases, they may be distorted or disregarded. Yet, given the difficulty of detecting and punishing leakers, any system that relied solely on external enforcement to suppress unwanted disclosures would be either exceedingly ruthless or exceedingly ineffective. An escalation in formal enforcement risks alienating those many officials who take the informal prohibitions on leaking seriously, corroding their feeling of stewardship over the secrecy system and unraveling associated cultural and psychological constraints (even if it is impossible to estimate the causes and effects of such alienation with any precision). Permissive neglect maintains loyalty to the social norms against improper disclosures even as it destroys loyalty to the legal norms against unauthorized disclosures.

The policy implications of this tradeoff are potentially profound. And perverse. By making government employees feel like they are not trusted to look after the nation’s important secrets, a stern, suspicious administration may foster the very sort of leaking behavior it most fears.

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<sup>379</sup> See, e.g., Joan E. Grusec & Jacqueline J. Goodnow, *Impact of Parental Discipline Methods on the Child’s Internalization of Values: A Reconceptualization of Current Points of View*, 30 DEV. PSYCHOL. 4 (1994); Mark R. Lepper, *Social Control Processes, Attributions of Motivation, and the Internalization of Social Values*, in SOCIAL COGNITION AND SOCIAL DEVELOPMENT: A SOCIOCULTURAL PERSPECTIVE 294 (E. Tory Higgins et al. eds., 1983).

<sup>380</sup> See Diana Baumrind, *Effects of Authoritative Control on Child Behavior*, 37 CHILD DEV. 887 (1966); R. Loeber & T. Dishion, *Early Predictors of Male Delinquency: A Review*, 94 PSYCHOL. BULL. 68 (1983); Kristin L. Moilanen et al., *Predictors of Longitudinal Growth in Inhibitory Control in Early Childhood*, 19 SOC. DEV. 326 (2010); Gerald R. Patterson, *Performance Models for Antisocial Boys*, 41 AM. PSYCHOL. 432 (1986).

<sup>381</sup> See generally Elliot Aronson & J. Merrill Carlsmith, *The Effect of the Severity of Threat on the Devaluation of Forbidden Behavior*, 66 J. ABNORMAL & SOC. PSYCHOL. 584 (1963); Jonathan L. Freedman, *Long-Term Behavioral Effects of Cognitive Dissonance*, 1 J. EXPERIMENTAL SOC. PSYCHOL. 145 (1965).

<sup>382</sup> See Lawrence Zelenak, *The Great American Tax Novel*, 110 MICH. L. REV. 969, 973 (2012) (book review). See generally Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1482-1527 (2005) (reviewing theory and evidence on the idea that law undermines various forms of trust).

#### IV. SOME NOTES ON LEAKINESS AND EXECUTIVE POWER

To offer a new theory of how the legal regime on leaking works is to invite questions about how it should work. For reasons already suggested, I am skeptical of global assessments and optimizing proposals in this area. The secrecy that surrounds disclosure and classification practices necessarily limits our understanding of leaks' incidence, impacts, causes, and relationships to other forms of transparency.<sup>383</sup> Leaking implicates so many governmental interests and social goods that prescription necessarily entails significant value choices. And regardless of one's empirical assumptions or normative priors, a thicket of practical and political factors stands in the reformer's path. President Reagan learned this lesson the hard way.<sup>384</sup> While it is undoubtedly true, as Louis Henkin and Cass Sunstein insisted in well-known works,<sup>385</sup> that the United States' mixture of broad official secrecy with broad leaking fails to ensure that improperly concealed information will be revealed or that properly concealed information will remain under wraps, the observation is unhelpful. No system this large could ever ensure against failure. The pertinent question is how our system compares to viable alternatives in facilitating ends such as national security, government accountability, and informed public debate. That question cannot be answered satisfactorily in the abstract.<sup>386</sup>

These caveats notwithstanding, the positive theory advanced in this Article clearly carries a wide range of potential implications, not just for how we conceptualize and study leaks but for how we understand the executive branch and judge its policies. Parts II and III interspersed a number of evaluative and predictive observations—for instance, the point made just above about social-psychological factors that may lead any crackdown on leakers to generate perverse consequences.<sup>387</sup> This Part considers some additional implications of broader scope. The issues addressed are large, and my arguments are offered in a preliminary, provisional spirit. Far from seeking the last word on the subjects covered, I seek principally to suggest productive new lines of inquiry.

##### A. *Revisiting the Source/Distributor Divide*

The question whether journalists and publishers deserve greater First Amendment protection from criminal penalties than do their government sources has been a central concern of the literature on leaks. In theory, scholars have defended the source/distributor divide as facilitative of the special social role of the press, the special professional responsibilities of executive employees, and the need for a judicially administrable rule.<sup>388</sup> In practice, the government has

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<sup>383</sup> See *supra* Part I.D.

<sup>384</sup> See *supra* notes 171-173 and accompanying text (discussing Reagan's failed attempt to minimize leaking).

<sup>385</sup> Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 278 (1971); Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 901-04 (1986).

<sup>386</sup> In eschewing ideal theory and optimistic prescription on the balance to be struck between government openness and other public values, I join company with Jack Goldsmith, Seth Kreimer, and Geoffrey Stone. See GOLDSMITH, *supra* note 12, at 210-11, 218, 228; STONE, *supra* note 13, at 2-3; Kreimer, *supra* note 79, at 1074-79.

<sup>387</sup> See *supra* notes 379-382 and accompanying text.

<sup>388</sup> For a representative statement of this position, see STONE, *supra* note 13, at 7-13, 21-22. See also *supra* notes 42-46 and accompanying text (describing the source/distributor divide); Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protection for Leakers of Classified Information*, 6 J. NAT'L SEC.

established the media's privileged legal position largely through inaction.<sup>389</sup> The source/distributor divide is under threat, however. Scholars, pundits, and lawmakers continue to contest the media's criminal immunity,<sup>390</sup> and the courts have never squarely ratified it. Although a rigorous exploration of this issue is well beyond the scope of this Article (which has endeavored to move the legal conversation *away* from the standard set of doctrinal questions), the analysis above prompts two brief remarks regarding the divide's continuing vitality.

First, the divide makes good sense for a government concerned to prevent certain especially harmful leaks while preserving a larger pool of strategically valuable disclosures. The obvious point is that focusing enforcement on employees, rather than journalists and publishers, reduces short-term backlash. Although members of the media may feel threatened by cases brought against their sources and by the subpoenas these cases can entail, the government avoids picking a direct fight with those who buy ink by the barrel. The deeper point is that, over the long term, protecting the media helps protect the system of pleaking and planting upon which, this Article has shown, executive branch principals have come to rely. Journalists, recall, often cannot be certain about the extent to which their sources are authorized to speak with them. They find this issue difficult because the government makes it difficult, by declining to clarify the law governing ad hoc declassification, by condoning vast amounts of pleaking, and by attempting to camouflage certain plants as leaks.<sup>391</sup> Only very rarely do journalists receive a major scoop from a low-level employee through no effort of their own;<sup>392</sup> far more frequently, they acquire confidential information through their ongoing relationships with high-level contacts. The legal and bureaucratic fog that enshrouds these exchanges, we saw in Part II, preserves the president's plausible deniability and communicative flexibility as well as his enforcement discretion. It is not a design defect but a critical feature of the executive's information control regime.

Media prosecutions could jeopardize this constructive ambiguity. Even under the broadest provisions of the Espionage Act, the dissemination and retention of national defense information from authorized sources does not generally give rise to liability.<sup>393</sup> If faced with a realistic threat of prosecution, journalists and publishers who cover national security topics would need to spend

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L. & POL'Y \_\_ (2013) (challenging the "common view . . . that publishers must be strongly protected under the First Amendment, while leakers can be punished with little or no constitutional difficulty").

<sup>389</sup> See *supra* note 106 and accompanying text (explaining that no member of the media has ever been prosecuted for leak-related activity). Whether the government's longstanding failure to use its criminal authorities against the media gives rise to a kind of negative constitutional custom, with independent normative significance, is an interesting theoretical question that has received little attention.

<sup>390</sup> For a prominent recent example, see SCHOENFELD, *supra* note 142, at 265-68. See also Walter Pincus, *Prosecution of Journalists Possible in NSA Leaks*, WASH. POST, May 22, 2006, at A4 (discussing Attorney General Alberto Gonzales's televised statement that *New York Times* reporters could be prosecuted for publishing classified information regarding the NSA's warrantless wiretapping program).

<sup>391</sup> See *supra* Part II.B.1-2.

<sup>392</sup> Top national security reporters confirm this hardly ever occurs. *E.g.*, Interview with Charlie Savage, Reporter, N.Y. Times (Aug. 3, 2012); Interview with Scott Shane, Reporter, N.Y. Times (Aug. 8, 2012).

<sup>393</sup> See 18 U.S.C. § 793(e) (2006) (conditioning liability on "unauthorized" possession, access, or control). While section 793(d) lacks the "unauthorized" qualifier, the requirement that the national defense information have been passed to or retained by a "person not entitled to receive it," *id.* §§ 793(d), (e), similarly invites defenses based on the source's actual or apparent authority to share the information under the terms of the classification executive order, established bureaucratic conventions, or theories of presidential prerogative.

substantially more time and effort investigating their sources' legal credentials. The government, in turn, would need to clarify lines of disclosure authority and render more transparent—to the press, the public, and itself—the pedigree of specific revelations and the processes by which it publicizes secret information. Cases brought against sources can be confined to bureaucratically isolated, low- and mid-level officials who have clearly violated the classification rules and have no colorable defense of apparent authority.<sup>394</sup> Cases brought against distributors would invite a more searching inquiry into the government's disclosure practices, highlighting the plasticity of the rules themselves. They would be a far cruder instrument of deterrence, with costs and benefits much closer to one another. Whether or not it is constitutionally rooted, the source/distributor divide has proven so resilient in part because it allows the government to target certain especially worrisome incidents (through noncriminal as well as criminal actions) without compromising the mine run of individually tolerable, and collectively beneficial, classified information disclosures.

The government's relatively aggressive response to Daniel Ellsberg's and Bradley Manning's general, tangible leaks<sup>395</sup>—a mode of disclosure associated with disaffected junior officials that no rational administration should welcome—suggests that when maximizing deterrence is seen as an unalloyed good, distributors become much more vulnerable. WikiLeaks may deserve to be treated as “the press” for various First Amendment purposes. But it does not function anything like a traditional U.S. media outlet in the way it bypasses oral exchanges with high-ranking power players in favor of document drops by marginal dissenters. Inasmuch as its aim or effect with regard to U.S. government information is to publicize only those confidential items that cast top officials in a harsh light, WikiLeaks puts enormous pressure on the source/distributor divide.

Second, these same insights strengthen the First Amendment case for press immunity. In numerous areas of law, the Supreme Court has read the First Amendment to permit direct restrictions on public employees' speech or private actors' expressive conduct, while prohibiting restrictions on the subsequent dissemination of information relating to that speech or conduct.<sup>396</sup> Most recently, in *United States v. Stevens*,<sup>397</sup> the Court struck down a federal statute criminalizing the creation, sale, or possession of certain depictions of animal cruelty, including acts of unlawful cruelty. The Court has clarified, however, that even in the absence of criminal solicitation, inducement, or conspiracy, certain speech acts may be proscribed when they are intimately and “intrinsically related” to the underlying crime, as by incentivizing its commission or magnifying its harms.<sup>398</sup>

As a matter of common sense, the media's publication of protected national defense information might seem related to the crime of leaking such information in precisely these ways. However, only a subset of these leaks is potentially criminal—the legally unauthorized subset.

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<sup>394</sup> See *supra* notes 353-363 and accompanying text (summarizing cases that have been brought to date).

<sup>395</sup> See *supra* notes 42, 100 and accompanying text (discussing general leaks and the government's efforts to obtain a prior restraint against publication of the Pentagon Papers); Benkler, *supra* note 296, at 330-47 (discussing efforts by government officials and private actors to disrupt the work of WikiLeaks).

<sup>396</sup> See STONE, *supra* note 13, at 26 n.8.

<sup>397</sup> 130 S. Ct. 1577 (2010).

<sup>398</sup> See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U. S. 234, 249-50 (2002) (child pornography); *New York v. Ferber*, 458 U.S. 747, 759-62 (1982) (same).

And as just discussed, the media cannot reliably ascertain which disclosures fall on the unauthorized side of the line; the executive has devised a system that keeps this line vague and discourages reporters from looking into questions of authorization too closely. The resulting ambiguity attenuates the relationship between the crime of leaking national defense information and the practice of researching and writing news stories thereon. In so doing, it renders the Espionage Act substantially overbroad with respect to national security journalism under the logic of cases like *Stevens*.<sup>399</sup> A law that criminalized only the publication of exceptionally sensitive information received from demonstrably or manifestly unauthorized sources, and that defined these terms, would have a better chance of meeting the “intrinsicly related” standard. Because such a law would be contrary to the interests of those who run the government,<sup>400</sup> it would also presumably never be enacted.

### ***B. Silver Linings and Media Narratives***

Some readers may wish to learn more about the national security damage caused by classified information leaks. Does the theory of leaking developed in this Article pay sufficient heed to all of the tactical advantages and public dollars that have allegedly been squandered?<sup>401</sup> I do not doubt that some disclosures have caused significant harm, worthy of sanction and condemnation. I worry about this issue as a citizen. However, several considerations complicate the standard picture of leaks as exclusively a menace to national security interests, even if we bracket all the diffuse benefits that leaking provides in the aggregate for the executive<sup>402</sup> and focus only on the short-term production of security.

The first, and in my view least significant, consideration has already been suggested in the literature: In cases where a secret is already known or assumed by adversaries, media leaks can puncture a false sense of comfort. Harold Edgar and Benno Schmidt opined forty years ago that “[t]he greatest damage occurs when the government believes that ‘secrets are secret’ . . . when in fact they are not. In that situation, the government is easy prey to tactics that take advantage of its predispositions and biases.”<sup>403</sup> The very same legibility of leaks that makes them so worrisome to secret-keepers, the way they sit there for all to see in the morning newspaper, is also what enables corrective action and creates the possibility for security-promoting substitution away from policies that have already been compromised. Espionage, by contrast, has no such built-in damage control mechanism; it may go on indefinitely without the government having a

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<sup>399</sup> See *Stevens*, 130 S. Ct. at 1586, 1592 (explaining why *Ferber*’s “intrinsicly related” rationale does not save the statute at issue); *Ashcroft*, 535 U.S. at 250 (demanding more than a “contingent” causal link between the proscribed category of speech and the first-order criminality it purportedly fosters). Whether this attenuation similarly renders the Espionage Act overbroad with respect to the activities of an outfit like WikiLeaks is a trickier question. WikiLeaks’ model, the government might argue, has a much tighter connection to unlawful, unauthorized disclosures. These, and not pleaks or plants, are the very divulgences WikiLeaks most seems to crave.

<sup>400</sup> See *supra* notes 263-265 and accompanying text.

<sup>401</sup> See *supra* Part I.D (discussing governmental claims about the harms caused by leaks).

<sup>402</sup> These benefits were explored in detail in Part II.B *supra*.

<sup>403</sup> Edgar & Schmidt, *supra* note 281, at 401; accord Melville B. Nimmer, *Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L. REV. 639, 656 (1975); Edward L. Xanders, Note, *A Handyman’s Guide to Fixing National Security Leaks: An Analytical Framework for Evaluating Proposals to Curb Unauthorized Publication of Classified Information*, 5 J.L. & POL. 759, 780 (1989).

clue.<sup>404</sup> Edgar and Schmidt’s insight is powerful conceptually. It is impossible to make any strong claims about its practical significance, however, because it is impossible to estimate with any confidence the relative frequency of leaks that have uncovered false (non-)secrets versus leaks that have uncovered true secrets. It might be the case that national security-related media leaks are more likely to occur after adversaries have already stolen, gleaned, or guessed the putatively secret information—for instance, because adversaries tend to focus their acquisitive efforts on the policy planning stage whereas leakers tend to turn to the press during the policy execution stage. But we cannot even begin to test that hypothesis.

A second, and more global, consideration is epistemic in nature. As Mark Fenster has illustrated, in a great number of situations the government does not know what the consequences of revealing classified information will be, whether for good or for ill.<sup>405</sup> By the terms of the executive order, every classified item must threaten “damage to the national security” if disclosed.<sup>406</sup> Those threat assessments are often speculative at best. (What it even means to threaten “national security” is itself hardly pellucid.<sup>407</sup>) Given the limitless range of variables that may bear on how information is processed, mediated, and used by private and public actors, the effects of disclosure are apt to be highly contingent and contextual, and to defy reliable modeling.<sup>408</sup> This predictive problem has always dogged the classification system. Reviewing the categories of Confidential, Secret, and Top Secret, a Defense Department committee observed in 1956 that “[t]wo reasonable men of similar background and possessing equal knowledge could well disagree on the application of these criteria to a particular piece of information.”<sup>409</sup> The problem has only grown more acute in the years since. “As information implicating national security has become more heterogeneous and more abundant,” and as the pace of technological and social change has quickened, “we increasingly do not know what information matters, or who has it, or how to control it.”<sup>410</sup> Together with bureaucratic incentives, government culture, and collective action problems, this pervasive uncertainty helps explain the persistence of overclassification.<sup>411</sup>

Against this backdrop, leaks can be usefully information-eliciting. We have already explored how leaks (including pleaks and plants) can be an efficiency-enhancing vehicle through which

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<sup>404</sup> As a Defense Department committee poignantly noted in 1956, “[t]he unknown [unauthorized disclosures] are probably the most vicious in that they are likely to include those involving real espionage. We can only hope that there are not many of them.” COOLIDGE REPORT, *supra* note 137, at 6.

<sup>405</sup> See generally Fenster, *supra* note 149. Fenster supports this theoretical claim with a detailed analysis of WikiLeaks’ effects, which he concludes have thus far been “uneven and unpredictable” overall and “relatively insubstantial” in the United States as compared to other countries. *Id.* at 758.

<sup>406</sup> Exec. Order No. 13,526, § 1.2(a), 75 Fed. Reg. 707, 707-08 (Dec. 29, 2009).

<sup>407</sup> See JEREMY WALDRON, TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE 112 (2010) (stating that “there has been little or no attempt in the literature of legal and political theory to bring any sort of clarity to the concept” of national security).

<sup>408</sup> Cf. Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1356 (discussing “the undeniably contextual and contingent nature of the value of transparency”).

<sup>409</sup> COOLIDGE REPORT, *supra* note 137, at 3; accord COMM’N ON PROTECTING AND REDUCING GOV’T SECRECY, REPORT, S. DOC. NO. 105-2, at 25 (1997) [hereinafter MOYNIHAN COMMISSION REPORT].

<sup>410</sup> Pozen, *supra* note 96, at 651.

<sup>411</sup> Cf. *supra* notes 297-300 and accompanying text (discussing overclassification).

government insiders learn from and about each other.<sup>412</sup> In some cases, the executive can also benefit from what it learns about adversaries and allies through their reactions to media disclosures. Even if, in their first-best world, certain disclosures never would have been made, U.S. policymakers can still exploit leaks as an observational window to gauge how outside actors process new information and respond to perceived U.S. plans and vulnerabilities—at least in situations where those actors’ responses are themselves discernible. This is the familiar logic that motivates the use of plants and pleaks as “trial balloons,”<sup>413</sup> translated to the realm of national security rather than ordinary politics and to unintended eruptions rather than controlled experiments. Policymakers can gain additional valuable information through the enhanced criticism and input from domestic actors that leaks enable. They can break through some of the insularity and groupthink that, in the view of many, characterize the national security state.<sup>414</sup> As one White House official reflected, “[t]here’s always a silver lining to intelligence being released into the world before it was meant to be.”<sup>415</sup>

There is also a more direct way in which leaks may serve security objectives: through what security strategists call “deterrence by denial.” Originally theorized during the Cold War,<sup>416</sup> deterrence by denial aims to prevent adversarial action not by increasing the expected cost of punishment but by increasing the expected odds of failure. Instead of deterring enemies through threats of post hoc retaliation or preempting their plots through ex ante detection, deterrence by denial aims to dissuade “a broader pool of current and would-be [enemies] by impressing upon them the unlikelihood that their endeavor will bear fruit.”<sup>417</sup> On this approach, the U.S. government should want prospective terrorists to believe it has terrific capabilities of surveillance, infiltration, incapacitation, and so forth, regardless of the true state of those capabilities. Indeed, the larger the gap between our actual expenditures on defensive measures and adversaries’ perceptions of their potency, the more efficient our system of deterrence.

Inasmuch as leaks are systematically skewed toward publicizing the aggressive, effective, or legally dubious aspects of our national security efforts—as seems impressionistically to be the case—they may be well suited to delivering this sort of deterrence. Media leaks can allow U.S. officials to send dissuasive signals, purposefully and inadvertently, to a distributed network of known and unknown enemy cells, without incurring an obligation to proffer details, substantiate claims of success, or permit a full legal accounting. So long as they are not tangible and general

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<sup>412</sup> See *supra* Part II.B.4. Like the previous efficiency argument, see *supra* note 289 and accompanying text, the one made above is a second-best claim.

<sup>413</sup> See *supra* note 89 and accompanying text (discussing this phenomenon).

<sup>414</sup> See generally Brandon Kennedy, Note, *The Hijacking of Foreign Policy Decision Making: Groupthink and Presidential Power in the Post-9/11 World*, 21 S. CAL. INTERDISC. L.J. 633 (2012) (reviewing arguments to this effect); see also PAUL ‘T HART, GROUPTHINK IN GOVERNMENT ch. 14 (1990) (analyzing the executive’s management of the Iran-Contra affair through the lens of groupthink theory).

<sup>415</sup> Interview with White House official (Aug. 20, 2012).

<sup>416</sup> The foundational works are GLENN H. SNYDER, DETERRENCE BY DENIAL AND PUNISHMENT (1959), and GLENN H. SNYDER, DETERRENCE AND DEFENSE: TOWARD A THEORY OF NATIONAL SECURITY (1961).

<sup>417</sup> Samuel J. Rascoff, *Deterr(or)ence 2* (July 2012) (unpublished manuscript) (on file with author); see also David P. Auerswald, *Deterring Nonstate WMD Attacks*, 121 POL. SCI. Q. 543, 547 (2006) (“[W]hereas defense is the use of brute force to repel or defeat an attack, deterrence by denial uses the *threat* of defeat to prevent the attack before it occurs.”).

in form, leaks typically provide enough information to put adversaries on notice of a given plan or policy, but not enough to enable a sophisticated assessment. As Samuel Rascoff notes, “[i]f terrorists did not know of the existence of certain surveillance modalities, they could hardly be deterred by them,” and yet “understanding the scope and methodologies of those programs might tend to undermine the deterrent effect.”<sup>418</sup> Because they are not subject to the same discourse constraints as official disclosures, leaks may hit the sweet spot between these two poles.

Whether or not leaks are ideal instruments of deterrence by denial, they have become indispensable instruments. Such deterrence is possible only when we “publicly disseminate at least some information regarding our defensive measures.”<sup>419</sup> However, the scope of the classification system ensures that almost all relevant facts about those measures will technically be unsusceptible to public dissemination. Authorized disclosures to the press enable the administration to bypass some of these restrictions; unauthorized and quasi-authorized disclosures ensure the reporting is seen as credible. Leaks help overcome a fundamental obstacle to fulfilling the “expressive dimension”<sup>420</sup> of national security.

Consider two recent examples. In May 2012, the *New York Times* and other publications revealed that the United States had successfully planted a double agent in al Qaeda’s Yemeni cell and thereby thwarted an airplane bombing.<sup>421</sup> Less than a month later, the *Times* revealed that the United States had helped plan and execute the Stuxnet cyberattack on Iranian nuclear enrichment facilities.<sup>422</sup> In both cases, critics asserted the leaks would have devastating consequences for our national security. The opposite may be just as likely. These stories dramatically showcased the U.S. government’s power and resolve, without revealing anything significant about the limits of either. As Bill Keller of the *Times* speculated—in self-interested fashion, to be sure, but plausibly—the “double-agent revelations may well have been good for American security,” if they “sow[ed] some corrosive mistrust among the fanatics” who plan such suicide bombings.<sup>423</sup> Jack Goldsmith’s analysis of the Iran leak is particularly apposite:

While many in the U.S. government are no doubt genuinely angry that the U.S. government hand in Stuxnet was revealed, this revelation probably has the happy effect of enhancing U.S. cyber deterrence. For it demonstrates that the U.S. government has sophisticated cyberweapons that—despite legal and other obstacles—it is willing to deploy, even in a preemptive fashion.<sup>424</sup>

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<sup>418</sup> Rascoff, *supra* note 417, at 8.

<sup>419</sup> Auerswald, *supra* note 417, at 548.

<sup>420</sup> Rascoff, *supra* note 417, at 8.

<sup>421</sup> Scott Shane & Eric Schmitt, *Airline Plotter a Double Agent, U.S. Officials Say*, N.Y. TIMES, May 9, 2012, at A1.

<sup>422</sup> See *supra* note 262 and accompanying text.

<sup>423</sup> Keller, *supra* note 4. Keller further contended that “in this case, reporters who worked the story sought and received assurances that the [outed] agent had finished his work and moved to safety.” *Id.*

<sup>424</sup> Jack Goldsmith, *The Significance of Panetta’s Cyber Speech and the Persistent Difficulty of Deterring Cyberattacks*, LAWFARE, Oct. 15, 2012, <http://www.lawfareblog.com/2012/10/the-significance-of-panettas-cyber-speech-and-the-persistent-difficulty-of-deterring-cyberattacks/> (“USG” replaced with “U.S. government” throughout).

In demonstrating such decisiveness, the episode suggested that those who wish to menace the United States will find it very tough sledding. One of the most assailed disclosures in recent history, a disclosure that helped prompt a vituperative congressional hearing and widespread calls for criminal prosecution,<sup>425</sup> may have been an important instance of deterrence by denial.

Furthermore, even in cases where leaks do not deliver security benefits, two other features of our system can reduce their security costs. The first relates to the temporality of secrecy. Many (though by no means all) of the government's most significant secrets are highly time-sensitive, in that the expected damage from disclosure falls precipitously after some initial implementation window has closed. Information concerning specific operations and negotiations often loses most of its value within several months—and then remains classified for years.<sup>426</sup> The policy development process is also more conducive to compartmentalization. Fewer officials are needed to devise than to execute any given scheme. And those officials who participate in secretive policy development exercises not only are often preselected for discretion and loyalty, but also face an especially high risk of being discovered if they defect through leaking. As a general matter, even habitual leakers may prefer to sit on secrets for a while before going to the press, lest the timing of the revelation pinpoint them. The gestation period that policies go through before they become routinized marks both an especially critical phase in many secrets' life cycle and an especially difficult phase in which to make clandestine disclosures.

An additional buffer against certain forms of national security damage comes from the nature of the journalistic enterprise. Some nontrivial percentage of the U.S. government's most sensitive information is so technical and abstruse that it cannot realistically be leaked via the press, because it is not readily reducible to a news story. Consider what may be the single most sensitive area in government these days: "cyber."<sup>427</sup> It would be of minimal benefit to our allies and adversaries to learn, in layperson's terms, much of what we are thinking and doing in the realms of cybersecurity and cyberwarfare. They already understand the general parameters. What they really want to learn are precise technical details about our defensive and offensive plans and capabilities. And yet it is hard to imagine the *Times* ever running a story to this effect, for doing so would not likely make good copy, win professional esteem, or meet even a loose conception of what the public deserves to know.

On this account, what limits the spread and cost of leaks is not necessarily the mainstream media's ethic of responsible journalism—an ideal the government has not put much faith in since the Watergate era. It is their simple need to tell stories that are intelligible and interesting to a

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<sup>425</sup> See *National Security Leaks and the Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. or the H. Comm. on the Judiciary*, 112th Cong. 1-2 (2012); Kim Zetter, *Sen. Feinstein Calls for Hearing on Stuxnet Leaks as FBI Begins Probe*, WIRED, June 6, 2012, <http://www.wired.com/threatlevel/2012/06/stuxnet-leak-investigation/>.

<sup>426</sup> See MOYNIHAN COMMISSION REPORT, *supra* note 409, at 59; ARVIN S. QUIST, 2 SECURITY CLASSIFICATION OF INFORMATION ch. 2 (1993), available at [http://www.fas.org/sgp/library/quist2/chap\\_2.html](http://www.fas.org/sgp/library/quist2/chap_2.html).

<sup>427</sup> See, e.g., SANGER, *supra* note 180, at 265 ("Reluctant as the White House is to discuss drones . . . it is absolutely allergic to talking about our cyber-offense capabilities.").

mass audience. There is a related resource constraint, too. A media outlet can only allocate so many pages or so much air time to any given news item.<sup>428</sup>

With this in view, we can see more clearly why WikiLeaks looks so scary to the U.S. government: *It has no narrative imperative.* As a pure pass-through with no comparable need to sell newspapers or tell stories, it can reveal arcane details as well as general outlines, code as well as characterization. It can simply dump general leaks, in toto, into the public domain. Tech-savvy platforms such as Slashdot and *Wired* magnify the risk that significant nuggets will be identified. Given how important the technical specifics are in fields like cyber, a pure pass-through model is far more vexing to policymakers. The single greatest external safeguard of the government's most recondite secrets was never reporters' professional norms, patriotism, repeat contacts with top officials, elite socialization, or the like. It was their genre constraints.

To recapitulate, a thorough assessment of leaks' national security consequences must take into account the structural factors that have traditionally limited some of their downside, as well as their potential to yield security dividends by deflating unwarranted optimism, eliciting information, and facilitating deterrence. And to be clear, none of this is to suggest that the majority of leaks have been more salutary than harmful or that some leaks do not cause very serious damage. I do not take this position. (Nor is any firm empirical stance possible, as nearly all of the arguments on this subject are perforce conclusory or conjectural.) What I do mean to suggest is that, on balance, classified information disclosures to the press are more ambiguous events from a national security perspective than the government or the literature has acknowledged. Leaks present opportunities as well as risks. Under the conditions in which the U.S. executive branch has historically operated, a permissive approach to enforcement in this area is not necessarily suicidal or even severely security-reducing. Perhaps the best evidence for this point is the government's longstanding tolerance of leaks.

### *C. Seeing Like a National Security State*

Some readers may be particularly troubled, not by the volume or security impacts of U.S. government leaks, but by the ad hockery and internal imbalances embedded in the disciplinary system described in this Article. Low- and mid-level employees certainly generate some notable disclosures, and they typically escape punishment. Yet, as explained in Part I, the executive's highest-ranking officials produce the bulk of what we call "leaks" (a category that encompasses leaks, pleaks, and plants). And, as explained in Parts II and III, even though the laws against leaking and the classification guidelines are written in generally applicable terms, in practice these senior policymakers are given substantially more leeway to disregard them without risk of formal sanction. Against the background of an overbroad law, executive branch principals have used their enforcement discretion and informational advantages to fashion a significantly more flexible, and self-serving, regime for regulating leaks than the one presented to the public through their rules and their rhetoric.<sup>429</sup>

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<sup>428</sup> The cost of making primary documents publicly available has, however, been diminishing rapidly on account of the Internet. And trade publications have long complicated the media marketplace along some of the dimensions discussed above.

<sup>429</sup> Note, however, that this is not a regime where, as with plea bargaining in the shadow of statutory minimum sentences, the very-high-yet-rarely-exacted penalty set by the legislature itself produces a disciplining effect,

It does not take much critical imagination to find fault with an enforcement model that insulates the most porous stratum of government from the most coercive forms of discipline. On a cynical reading, this is purely a function of power dynamics and elite networks. High-level sources acquire the right allies, attend the right dinner parties, accumulate the resources and connections necessary to fend off formal sanctions. The system gives them favored treatment not because they deserve it in any valid normative sense, but because they run the system.

Such cynicism may not be unfounded, but it is too easy. More sympathetic readings of this enforcement asymmetry are available. Authorization to leak is not binary, as explored above, and high-level officials will often have a better claim to some kind of communicative warrant—to a legal claim of declassification authority, under the executive order on classification, or to a bureaucratic claim of disclosure authority, under the principles of pleaking and planting.<sup>430</sup> Importantly, these officials may also be better positioned to judge potential harms from revelation. Their jobs afford them the richest understanding of U.S. plans and interests, the thickest ties to members of Congress, other executive branch principals, and foreign allies, and the lion's share of public scrutiny and political accountability. They are more likely to have amassed relevant facts and experiences with which to contextualize new information, and to have internalized any signals that the president and agency heads may be sending. The leak laws, as enforced, are most apt to chill those employees who feel least secure about the contours of the policy debates and practical objectives that key decisionmakers are pursuing at any given time. At least for the ends of national security and effective governance, it is not clear this is a bad arrangement.<sup>431</sup>

The literature on social planning furnishes additional reasons to resist equating the superficial lawlessness of the leak regime with opportunistic rent seeking or bureaucratic chaos. In *Seeing Like a State*, the anthropologist James Scott famously critiqued centralized programs of social engineering as elevating the schematic, rationalistic ideology of “high modernism” over the local, practical knowledge encapsulated in the Greek term *mētis*.<sup>432</sup> Scott's dichotomy is highly stylized, and he never considers national security examples. But it does not seem fanciful to

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shaping interactions between executive officials and the accused in a quasi-formal system of justice. *See generally* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004). The Espionage Act may scare some government employees, but there is little reason to believe it exerts such a profound influence when it is hardly ever dangled before suspects as a possible penalty. Across most of the government, leak suspects are almost never identified or even meaningfully pursued.

<sup>430</sup> *See supra* Part II.B.1-2.

<sup>431</sup> If it seems odd that officials who play by the executive's own rules would get off scot-free for breaking the leak laws, it should not. At least as a formal matter, they may get off scot-free for breaking all manner of laws. *See* Stephen Holmes, *The Spider's Web: How Government Lawmakers Routinely Elude the Law*, in *WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION* 121 (Austin Sarat & Nasser Hussain eds., 2010) (explaining this phenomenon as the product of factors such as legal immunities, evidentiary difficulties, risk spreading, congressional acquiescence, and popular acceptance). It is exceedingly difficult to imprison or collect damages from a federal employee who has violated a statute or someone's rights in the course of performing a national security-related function. In all but the most extreme cases, there is no criminal or civil liability. There are no truth commissions. The curious feature of the leak situation is not that executive officials avoid meaningful accountability under law, but rather that they are given the freedom to engage in legally dubious conduct that seems, on its face, like it may run counter to the executive's own interests.

<sup>432</sup> JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998).

suppose that he might find in the stuff of classified documents—war, diplomacy, statecraft, counterterrorism—precisely those sorts of complex policy challenges that demand *mētis*-friendly institutional responses.<sup>433</sup> Foreign policy and national security implicate values such as on-the-ground insight, common sense, experience, adaptation, improvisation. Their practice is not amenable to synoptic mastery or standardized formulae, not conducive to the universalizing, acontextual logic of what the Greeks called *techne*.<sup>434</sup> They are an art, not a science. Our ability to predict the consequences of disclosing information about them is modest. The uncertainties and contingencies in these areas are so daunting that sometimes we may do better to bypass top-down approaches and trust the judgment of regime participants, allow them to “apply educated guesswork,” proceed piecemeal, feel their way.<sup>435</sup> Regardless, Scott suggests, any effort to banish such initiative will prove quixotic. Human beings will always resist “the more severe forms of social straitjacketing.”<sup>436</sup>

Scott is hardly unique in emphasizing the virtues of adaptable, decentralized approaches in information-rich environments. The great Austrian economists Ludwig von Mises and Friedrich Hayek, for instance, similarly stressed the importance of assimilating dispersed wisdom, changing variables, and unintended consequences into the policy process.<sup>437</sup> Any functional bureaucratic system, these theories insist, “must create and maintain a space for those on the spot to use their local, practical knowledge (even if the hierarchs of the system pretend not to notice this flexibility).”<sup>438</sup>

As compared to a system with greater compliance, coordination, and enforcement levels, the U.S. government’s approach to leaking allows for a larger “space” of this sort. Its leak regime, we have seen, is substantially more orderly and White House-friendly than it might appear from the outside. But it is also substantially more fluid, nuanced, and decentralized than one would ever surmise from reading the statutes and regulations. Assistant secretaries who speak regularly with foreign counterparts, NSC members who read copious intelligence reports, ambassadors and military commanders who toil in the field<sup>439</sup>—all are given bounded discretion to reveal confidential information as they deem appropriate, subject to the front-end check of social norms against especially harmful types of disclosure and the back-end check of possible informal sanction. The leak regulation that we have in practice functionally empowers those agency leaders and White House aides with greatest exposure to any given national security issue. It creates opportunities for abuse, to be sure. Parochial personal and institutional agendas may play an outsized role. But in broad terms, the shift this reflects from *techne* to *mētis* can be

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<sup>433</sup> See *id.* at 315 (describing “war diplomacy and politics more generally” as “*mētis*-laden skills”).

<sup>434</sup> See *id.* at 319-23 (contrasting *techne* and *mētis*).

<sup>435</sup> *Id.* at 327-28.

<sup>436</sup> *Id.* at 348.

<sup>437</sup> See, e.g., LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS pt. 5 (Ludwig von Mises Inst. 1998) (1949); F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

<sup>438</sup> J. Bradford DeLong, *Seeing One’s Intellectual Roots: A Review Essay*, 12 REV. AUSTRIAN ECON. 245, 245 (1999) (discussing commonalities between Hayek and Scott).

<sup>439</sup> Whether because of their physical and cultural distance from Washington, their professional incentive structure, or their relatively intimate relationships with the reporters who live overseas with them, ambassadors are a famously leaky lot. See *supra* note 81 and accompanying text (noting one prominent example).

sympathetically construed, not as the spoliation of rational design but as an organic, efficient subversion of a scheme to centralize information control that was always utopian.

Although this sketch of a Scottian/Hayekian defense of our system is my own invention, interviews uncovered some evidence to suggest that executive branch secret-keepers have consciously internalized the core ideas. “Part of the trust instilled in political appointees,” one former Defense Department official remarked, “is that they have the judgment to talk about what’s appropriate and not talk about what’s inappropriate.”<sup>440</sup> Lived experience underwrites this practical wisdom: “These judgment calls are made every day by political appointees in every agency and department.”<sup>441</sup> Another former Defense Department official stressed the importance of quick decisionmaking and “situational sense” in fluid contexts involving sensitive national security information. “You don’t want to ossify things too much here.”<sup>442</sup>

Whether these sorts of arguments amount to a persuasive consequentialist defense of existing practices is a large subject, and I have only scratched the surface. There are undoubtedly grounds for skepticism. Perhaps the element of surprise in warmaking and counterterrorism demands a higher-than-normal degree of central planning. Perhaps the irreversibility of publicity, the fact that secrets cannot be re-concealed once revealed, exerts its own ossifying influence, thwarting valuable modes of observation and adaptation. Perhaps the fear of leaks pushes policymakers toward destructive levels of secrecy in the planning process<sup>443</sup> or biases them toward “short, discreet, one-off operations.”<sup>444</sup> (To the extent this occurs, leaking may have perverse dynamic effects not just on deliberation and strategy but also on transparency within government.) Perhaps legal theory’s current “cult of flexibility” was misguided from the start with respect to much bureaucratic decisionmaking.<sup>445</sup>

The claim here is not that Scott’s or Hayek’s theories ultimately show the system we have is superior to less leaky alternatives on efficiency or social welfare grounds. The claim is that these theories, and the lessons they hold about the importance of information flows and the dangers of central planning, provide resources with which to make the case. They further complicate the common notion that a leaky ship of state is more vulnerable than a watersealed one.

#### ***D. Democracy, Discourse, and Rule of Law***

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<sup>440</sup> Interview with Phillip Carter, former Deputy Assistant Secretary of Defense for Detainee Policy (Aug. 28, 2012). My special thanks to Mr. Carter for being willing to speak with me on the record.

<sup>441</sup> *Id.*

<sup>442</sup> Interview with former Defense Department official (Aug. 29, 2012).

<sup>443</sup> See LINSKY, *supra* note 20, at 188-89 (explaining that “policymakers expect leaks, anticipate their impact, [and] take preventive measures” such as minimizing written documentation).

<sup>444</sup> See GOLDSMITH, *supra* note 12, at 68 (crediting the view “that broad, continuous long-term operations involving many people tend to leak out, while short, discreet, one-off operations . . . are more likely to remain secret”).

<sup>445</sup> David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1375 (2011); see also Adrian Vermeule, *Local and Global Knowledge in the Administrative State* (2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2169939> (identifying theoretical complications with Hayekian critiques of centralized administrative oversight).

Still other readers will be concerned principally with leakiness's relationship to democracy and the rule of law. Once more, the issues are immensely complex and contestable. Once more, my method will be to steer clear of global judgments and optimistic prescriptions, and instead to try to draw attention to some particularly intriguing hypotheses.

The implications of this Article's positive analysis for values associated with democracy and the rule of law are, I believe, decidedly mixed. Indeed, the complicated portrait painted in Parts II and III helps illuminate why categorical normative positions are difficult to sustain in this area. It should now be easier to see, for example, why the argument that "leaking is an assault on democratic self-governance"<sup>446</sup> relies on an arid and implausible conception of democratic self-governance. The argument not only minimizes the potential public benefits afforded by leaking,<sup>447</sup> but also overlooks that our democratically selected leaders have themselves established a regulatory environment in which certain types of leaks are effectively permitted.

Leaking is, however, an assault on a certain vision of the unitary executive. Its ubiquity both reflects and exacerbates what Jack Balkin and Sanford Levinson refer to as the United States' "distributed dictatorship," in which the presidency amasses ever greater powers even as the president himself experiences diminishing ability to control their use.<sup>448</sup> The intrabranch struggles that manifest in leaks provide a glimpse of the pluralism and competition that characterize modern administrative decisionmaking. To some significant extent, the rising volume of leaks that many have observed in recent years<sup>449</sup> may be an epiphenomenal expression of such struggles: In these disclosures, we see surfacing some of the underlying tensions fostered by the executive's simultaneous growth in functional authority and internal complexity. While privacy proponents were lamenting the loss of control over one's information and image that individuals have been experiencing in the private sphere, the government was experiencing an analogous loss of self-possession in the public sphere. Prominent legal theorists Eric Posner and Adrian Vermeule have been asking Americans to accept that they cannot hope to control the executive branch through law in any rigorous, *ex ante* fashion.<sup>450</sup> The phenomenon of leaks suggests the president cannot hope to do so either.

A slew of additional concerns are raised by the extent to which the executive's regulatory choices have come to overwhelm the statutory scheme. Such divergence between the law on the books and the law in action is always problematic. A congressionalist might see this as a pernicious form of executive aggrandizement and a displacement of legislative and popular will. A legalist might worry about the seeming surfeit of law violations by government officials. A technocrat might criticize the drift away from coordinated solutions toward relatively haphazard forms of policymaking. All of these critics might wonder whether permissive neglect enhances

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<sup>446</sup> Schoenfeld Testimony, *supra* note 109, at 56.

<sup>447</sup> To take just one, leaks may serve the "checking value" of enabling public opinion to curb the worst abuses of government. *See generally* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

<sup>448</sup> Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1840-43 (2010).

<sup>449</sup> *See supra* note 69 and accompanying text.

<sup>450</sup> *See generally* POSNER & VERMEULE, *supra* note 160.

the leverage of top military officials, such as regional commanders and members of the Joint Chiefs of Staff, to the point of threatening the principle of civilian control.<sup>451</sup>

These concerns are not minor. For some, they may provide decisive reasons to denounce the status quo, even if their empirical underpinnings (e.g., the frequency with which military brass are able to hem in the president through pleaking) remain murky. What tends to soften, but not fully blunt, their critical edge is the order that lies beneath the disorder. While no president could plug all the leaks, the story told in this Article demonstrates that the Oval Office retains significant power to shape the context in which they occur. Through internal signals, informal sanctions, and media messaging, every White House continually elaborates the structure of the game of leaks—and plays the strongest hand—even though it exercises little control over many moves within the game. The mystery surrounding these maneuvers is not purely a cost for outsiders. To depress the volume of truly damaging disclosures, maintain flexibility in response to changing threat environments, and avoid showing open contempt for enacted law, it may be necessary for the executive to conceal its “real” operational code on leaking to some significant degree. The slack in the system serves a more basic public purpose. So long as classification levels remain gargantuan and the president retains unfettered declassification authority, as most assume he will in the absence of a contrary statute, an off-the-books disclosure regime of immaculate legality and regularity would in fact be quite scary. All that would remain are plants. The president could use selective declassification to reduce national security information policy to his personal agenda. It is the legally and bureaucratically dubious component of the system, the leaks and the pleaks, that most immediately enables external oversight and constrains the president from consolidating power in this way. Some loss in compliance values may be the price we have to pay to preserve this more fundamental rule-of-law value of nondomination. The choice between seeing leakiness as a crisis in presidential governance or a healthy form of democratic self-correction is a false choice. It shares attributes of both.

Part II’s explanation of how the practice of “leaking” involves a larger amount of planting and pleaking than wholly unauthorized disclosures, may particularly alarm some readers. The observation seems to take a fundamental pillar of good governance and turn it on its head, re-appropriating transparency as a means of control and subversion. This is the dark side of a journalistic culture that relies so heavily on anonymous U.S. government sources. We might worry, further, that the surreptitious nature of planting and pleaking reflects poorly on, and actively corrodes, the character of those officials who aspire to influence policy from behind closed doors. Such esoteric rituals are a far cry from the civic republican ideal of vigorous, mature, and courageous public debate.<sup>452</sup> The instrumental, competitive cast of much of this behavior may seem similarly disheartening. It disserves the ideal of the nation’s secrets as a kind of common good over which government employees serve as mere trustees.

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<sup>451</sup> See, e.g., BOB WOODWARD, *OBAMA’S WARS* 195 (2010) (describing President Obama’s frustration that the “White House was losing control of the public narrative” concerning Afghanistan troop levels on account of “leaking” by top military officials). See generally BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* ch. 2 (2010) (arguing that a variety of structural transformations have politicized the military high command, strengthened its ties to the media, and “placed the future of civilian control in jeopardy”).

<sup>452</sup> See Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 99-103 (1991).

Once again, though, it is important not to see only darkness where there is also light. Plants and pleaks release an enormous amount of raw data into circulation. Their abusive potential is tempered by other features of the system, such as the way in which these disclosures can enable different parts of government to communicate more efficiently, facilitate healthy modes of intrabranch contestation (what some call the internal separation of powers<sup>453</sup>), and stimulate congressional and civil society inquiry. Whether or not leaks tend to be self-serving or reporters' interests tend to coincide with their sources', newspapers promote checking and balancing in this context simply by externalizing the executive branch's internal power struggles. A press that was little more than a cipher would still, in publishing leaks, be a font of illumination and constraint. If the U.S. government really does function as this Article describes it, then we should understand leakiness not so much as a perversion of transparency as a more complicated kind of transparency. The unwritten norms that circumscribe leak-law enforcement help align this administrative realm, imperfectly, with basic liberal values.

Leaks' signature virtue, of course, is their capacity to contribute to public accountability and debate. The notion of leaks as a democratic "safety valve" is an old one.<sup>454</sup> If anything, I believe the point has been underemphasized. Numerous commentators have stressed that leaks can expose controversial practices, empower dissenters, pierce the government's deepest secrets, trigger transparency cascades, and so on.<sup>455</sup> Less appreciated is the significance of the manner in which they impart information. Leaking is a highly salient mode of disclosure. Its promise of authentic revelation, its association with palace intrigue, its whiff of illegality—all help to whet reader appetites and generate front-page coverage. At least so long as they do not spread false information, this special salience of leaks (including pleaks and plants) enhances their educative and deliberative value for members of the public, just as it does for government consumers.<sup>456</sup> In an age of information overload, media fragmentation, and hyperpolarized political discourse, leaks can cut through some of the noise and convey a particularly loud, credible message.

Leaks, moreover, can play a pivotal role in enabling certain specialized forms of critical discourse. Not infrequently, former government officials and sophisticated lay observers suspect that the executive is pursuing a secret policy of some sort, but they feel unwilling or unable to discuss their suspicions publicly. Then a leak comes along, stating, for instance, that the CIA is flying lethal drones in Yemen.<sup>457</sup> Henceforth, knowledgeable citizens—say, the authors of the influential Lawfare blog—have a ready means to talk about the CIA's operations in Yemen without acting recklessly or violating any confidences (much less any laws): They can assume *arguendo* that the leak is correct, and start discussing.<sup>458</sup> At the same time, these insider-

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<sup>453</sup> See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

<sup>454</sup> See, e.g., HECLO, *supra* note 17, at 231; Kielbowicz, *supra* note 89, at 480; Clarence Page, *Leaks: Democracy's Safety Valve*, CHIC. TRIB., Oct. 27, 1991, at 3C.

<sup>455</sup> For a particularly important elaboration of these points, see Kreimer, *supra* note 79, at 1033-46. See also Pozen, *supra* note 307, at 275-323 (arguing that "deep secrets," or unknown unknowns, work special constitutional, democratic, and policy harms).

<sup>456</sup> See *supra* Part II.B.4.

<sup>457</sup> See *supra* notes 224-226 and accompanying text.

<sup>458</sup> See, e.g., Robert Chesney, *What Law Would Preclude DOD, But Not CIA, from Carrying Out Strikes in Yemen Without Yemen's Consent?*, LAWFARE, June 15, 2011, <http://www.lawfareblog.com/2011/06/what-law-would->

outsiders can ignore other media reports that they know to be less credible or illuminating. Government officials, in turn, can respond to relevant commentary through still more anonymous disclosures.

False leaks are systematically less likely to have this catalytic effect. Through these discursive processes, the more accurate, significant disclosures come to be accredited, and critical scrutiny comes to crystallize around them. A *cycle of validation* progressively filters the government's leaky matter and refines the associated public debate.

### ***E. Comparative Convergence, Obama's Uptick, and the Road Ahead***

Let us close this Part with two particularly important open questions and suggestions for future research.

The first question relates to the exceptionalism of the United States' regulatory model. A central trope in the U.S. legal conversation on leaking is that, for better or worse, we do not have anything like the United Kingdom's Official Secrets Act. Originally enacted in 1911,<sup>459</sup> the Official Secrets Act broadly criminalizes the dissemination and retention of numerous classes of government information, including by members of the media. In light of the United States' First Amendment guarantees and tradition of press freedom, many have asserted that such a law "would not be tolerated" here.<sup>460</sup> "We have no Official Secrets Act and can have none restraining publication of most secrets," Alexander Bickel once remarked.<sup>461</sup> For some American observers who see leaks as compromising national security, this disparity is cause for lament. For most who have noted the disparity, it is a source of pride—and a touchstone for advocacy. The suggestion that a proposed reform would import Official Secrets Act tactics into the U.S. system is a common rhetorical device employed by liberal opposition.<sup>462</sup>

What the conventional wisdom misses, I suspect, is that at least in general terms the United States and the United Kingdom have been converging on a common approach to regulating leaks. This approach combines expansive formal prohibitions and permissive enforcement practices, together with weak whistleblower protections, strong norms against "unpatriotic" high-risk, low-value disclosures, and the effective exemption of full-time journalists from civil or criminal liability. Following the overhaul of the Official Secrets Act in 1989,<sup>463</sup> U.K. law on leaks has become less draconian. Following the Fourth Circuit's opinion in *Morison* the year

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preclude-dod-but-not-cia-from-carrying-out-strikes-in-yemen-without-yemens-consent/ (analyzing legal issues pertaining to targeted killings in Yemen on the basis of a "series of articles over the past few days [that] have discussed plans for the CIA to operate armed drones" there).

<sup>459</sup> Official Secrets Act, 1911, 1 & 2 Geo. 5, c. 28 (Eng.). Section 2 of the 1911 Act was the notorious provision focused on leaks, as distinct from espionage.

<sup>460</sup> ABEL, *supra* note 15, at 8.

<sup>461</sup> BICKEL, *supra* note 10, at 80.

<sup>462</sup> Recall that in lobbying President Clinton to pardon convicted media leaker Samuel Morison, Arthur Schlesinger and Anthony Lewis each sought to associate his conviction with the Official Secrets Act. See *supra* note 357.

<sup>463</sup> Official Secrets Act, 1989, c. 6 (U.K.) [hereinafter OSA]. For a history of the Act prior to this reform, see DAVID HOOPER, OFFICIAL SECRETS: THE USE AND ABUSE OF THE ACT (1987).

before,<sup>464</sup> U.S. law has become more stringent—with questions about whether the Espionage Act and 18 U.S.C. § 641 could be applied to media leakers, as a legal matter, largely giving way to questions about how aggressively they should be applied, as a policy matter.<sup>465</sup> The plain text of the Official Secrets Act still reaches journalists and the mere unauthorized possession of protected information.<sup>466</sup> So does the plain text of the Espionage Act.<sup>467</sup> The Official Secrets Act covers a wide range of information relating to intelligence, defense, and international relations.<sup>468</sup> So does the Espionage Act, as it has been construed by the courts.<sup>469</sup> The Official Secrets Act effectively puts the burden on defendants to show their disclosure was not “damaging.”<sup>470</sup> So does the Espionage Act, as it has been applied to classified information.<sup>471</sup> The Official Secrets Act does not permit a defense of improper classification or compelling public interest.<sup>472</sup> Neither does the Espionage Act.<sup>473</sup> The daylight between these two laws is nowhere near as great as is commonly imagined. And this is before one even turns to all of the other U.S. criminal laws that may be used against leakers.<sup>474</sup>

Convergence has occurred at a functional level as well. The Official Secrets Act now requires the consent of the Attorney General for most prosecutions to be brought,<sup>475</sup> in line with the U.S. custom of keeping leak cases in Main Justice and requiring the Attorney General’s signoff for journalist subpoenas. Since the current version entered into force in 1990, twelve individuals have been prosecuted for leak-related offenses under the Official Secrets Act,<sup>476</sup> as against more than thirty prosecutions in the preceding decade.<sup>477</sup> Ten of the twelve were current or former public employees or contractors; one was a Member of Parliament’s staffer; one was an independent scholar and freelance journalist whose case was dropped prior to trial.<sup>478</sup> U.S. prosecution levels during this period, we have seen, are comparable in raw numeric terms.<sup>479</sup> A high-level committee was recently convened in the United Kingdom to examine possible

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<sup>464</sup> *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).

<sup>465</sup> *See supra* notes 25-39, 353-363 and accompanying text (discussing *Morison* and subsequent case law).

<sup>466</sup> OSA §§ 5-6, 8.

<sup>467</sup> *See supra* note 45 and accompanying text.

<sup>468</sup> OSA §§ 1-3.

<sup>469</sup> *See supra* notes 29-31 and accompanying text.

<sup>470</sup> OSA §§ 1(5), 2(3), 3(4); *see also* *R. v. Keogh*, [2007] EWCA (Crim) 528 (Eng.) (upholding this “reverse burden of proof” and explaining that it is evidentiary in nature as applied to defense and international relations information).

<sup>471</sup> *See supra* notes 29-31, 39 and accompanying text.

<sup>472</sup> OSA *passim*; *see also* *R. v. Shayler*, [2003] EWCA (Crim) 2218 (Eng.) (discussing the lack of a public interest defense).

<sup>473</sup> *See supra* note 32 and accompanying text.

<sup>474</sup> *See supra* notes 25-35 and accompanying text (cataloguing these laws).

<sup>475</sup> OSA § 9.

<sup>476</sup> For a summary of these cases, see SANDRA COLIVER & ZSOLT BOBIS, OPEN SOCIETY JUSTICE INITIATIVE, THE UNITED KINGDOM’S OFFICIAL SECRETS ACT 1989, at 4-8 (Dec. 14, 2011), <http://www.right2info.org/resources/publications/UKOfficialSecretsAct1989byOSJI.pdf> (updated version on file with author).

<sup>477</sup> K.D. EWING & C.A. GEARTY, FREEDOM UNDER THATCHER: CIVIL LIBERTIES IN MODERN BRITAIN 139 (1990).

<sup>478</sup> COLIVER & BOBIS, *supra* note 476, at 4-8.

<sup>479</sup> *See supra* notes 102-113 and accompanying text.

responses to widespread leaking, only to run up against the uncomfortable finding that “the majority of leaks tend[] to be political in origin, primarily coming from special advisers or ministers” and above all “the Downing Street machine.”<sup>480</sup> The U.S. government, we have seen, has a long history of commissioning thoughtful, fruitless reports of this nature.<sup>481</sup> The streamlining of its criminal regime seems to have sharpened the U.K. government’s informal norms on disclosure discipline. The 1989 Official Secrets Act is especially harsh on intelligence leaks<sup>482</sup> and, like their American counterparts, British prosecutors appear to be focusing on lower-level officials accused of disclosing tangible, intelligence-related materials.<sup>483</sup> Certain specific substantive norms, such as the strong norm against divulging information for money, fairly clearly obtain on both sides of the Atlantic.<sup>484</sup>

The scope of convergence should not be overstated. There are profound differences in the two countries’ media practices, government structure, and (quasi-)constitutional free speech law<sup>485</sup> that complicate apparent similarities. Political appointees are as a rule much less powerful and civil servants more powerful in the British parliamentary system, which may reduce factionalism, turnover, and incentives for pleaking. Through its Defence Advisory (DA) Notice system, a U.K. government committee has issued a standing request to the media not to publish stories discussing five categories of sensitive information, including “Military Operations, Plans & Capabilities.”<sup>486</sup> Compliance with the DA-Notice system is optional, but reportedly regular.<sup>487</sup> Moreover, in cases where it seeks to block publication, the U.K. government retains somewhat greater legal authority than the U.S. government to obtain a prior restraint.<sup>488</sup>

This brief discussion is plainly insufficient to make out a convincing case for the convergence thesis. I hope it is sufficient, however, to put the thesis on the map. Detailed comparative research could make a large contribution in exploring whether and to what extent the United States and United Kingdom—among other advanced democracies with substantial national security bureaucracies—have arrived at common solutions for regulating leaks on the books and, more importantly, in action. The suggestion here is that the systemic benefits of

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<sup>480</sup> LEAKS IN WHITEHALL, *supra* note 254, at 13.

<sup>481</sup> *E.g.*, ASHCROFT REPORT, *supra* note 37; COOLIDGE REPORT, *supra* note 137; WILLARD REPORT, *supra* note 29.

<sup>482</sup> See Laurence Lustgarten, *Freedom of Expression, Dissent, and National Security in the United Kingdom*, in *SECRECY AND LIBERTY*, *supra* note 144, at 457, 471.

<sup>483</sup> See COLIVER & BOBIS, *supra* note 476, at 4-8.

<sup>484</sup> See *supra* notes 357-359 and accompanying text.

<sup>485</sup> In the British case, key quasi-constitutional authorities on freedom of expression include article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, and section 12 of the Human Rights Act of 1998, c. 42 (Eng.).

<sup>486</sup> *Standing DA-Notices*, DEFENCE, PRESS AND BROADCASTING ADVISORY COMM., <http://www.dnotice.org.uk/danotices/index.htm> (last visited Dec. 4, 2012). This committee also periodically issues guidance letters on specific matters. For a summary of the evolution of the DA-Notice system, see Laura Donohue, *Terrorist Speech and the Future of Free Expression*, 27 CARDOZO L. REV. 233, 287-90 (2005).

<sup>487</sup> See, *e.g.*, *Frequently Asked Questions*, DEFENCE, PRESS AND BROADCASTING ADVISORY COMM., <http://www.dnotice.org.uk/faqs.htm#4> (last visited Dec. 4, 2012) (considering why “the media follow[s] a voluntary code”).

<sup>488</sup> See DAVID FELDMAN, *CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES* 869-89 (2d ed. 2002) (comparing U.S. and U.K. law on prior restraints against publication of official secrets).

leaks may be too great, and the costs of enforcement too high, for any modern, democratically accountable executive to maintain a system that is effective at plugging them.

The second question relates to the exceptionalism of President Obama's first term. Critics have been asking how a president who campaigned on a transparency platform could preside over an unprecedented—though still statistically meager—succession of leak prosecutions. There are numerous possible explanations for this uptick in enforcement.

The uptick may have been “accidental,”<sup>489</sup> the product of idiosyncratic circumstances unlikely to be replicated in the future with any regularity. (Recall in this regard that at least two of the six cases commonly attributed to President Obama were initiated in the prior administration.<sup>490</sup>) The uptick may have been driven by the advent of investigative and communicative technologies that make it easier to locate leakers,<sup>491</sup> and aided further by the decline over the past decade of the federal reporter's privilege.<sup>492</sup> It may have been spurred by the creation of the NSD in 2006, inasmuch as this unit has brought additional resources or a more aggressive mindset to the Justice Department's work on leak matters.<sup>493</sup> It may reflect the Obama administration's concern to burnish its national security credentials<sup>494</sup> or its alarm over WikiLeaks.<sup>495</sup> More generally, it may respond to a perception that the government has suffered a rising number of disclosures that are genuinely threatening to security interests—for instance, because of the larger volume of sensitive counterterrorism information produced since 9/11 or because of adversaries' enhanced capacity to exploit data-mining and pattern-analysis tools—or a rising number of disclosures that are threatening to other political or policy objectives—for instance, because of lower-level employees' increased access to nonestablishment media outlets or their increased capacity to carry out large-scale leaks.<sup>496</sup> Most generally, the uptick may respond to a deep anxiety within some parts of the executive about the continued viability of secrecy as a strategic tool. To be efficacious in the twenty-first century, the U.S. government

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<sup>489</sup> Shane & Savage, *supra* note 112.

<sup>490</sup> See *supra* note 112 and accompanying text.

<sup>491</sup> See, e.g., Shane Harris, *The Obama Administration's War on Information Leaks*, WASHINGTONIAN, June 14, 2012, <http://www.washingtonian.com/blogs/capitalcomment/news-gossip/the-obama-administrations-war-on-information-leaks.php> (arguing that enforcement levels are up because the government “has the technological capabilities to track and monitor government employees' phone calls and e-mails in a way it hasn't in the past”).

<sup>492</sup> See *supra* notes 47-53 and accompanying text (describing this doctrinal trend).

<sup>493</sup> See *supra* note 114 and accompanying text (explaining that the NSD now coordinates leak investigations and prosecutions with the FBI).

<sup>494</sup> See, e.g., Sari Horwitz, *In Probing Disclosures, Officials Face Massive Task*, WASH. POST, June 16, 2012, at A8 (citing several defense attorneys for this view). During the recent presidential race, President Obama's campaign trumpeted the historically unprecedented number of leak prosecutions as a rebuttal to charges of excessive planting. See *Fact Check: President Obama Has Aggressively Pursued and Addressed National Security Leaks*, OBAMA FOR AMERICA (Aug. 16, 2012), <http://www.barackobama.com/truth-team/entry/fact-check-president-obama-has-aggressively-pursued-and-addressed-national/>. Part II's analysis shows why this response was a non sequitur. If anything, the use of White House-approved plants becomes more, not less, troubling when combined with a crackdown on leaks. The decision to advance such a spurious argument reflects—and exploits—deep popular confusion about the leak/pleak/plant distinction.

<sup>495</sup> See, e.g., Horwitz, *supra* note 494 (attributing this view to Steven Aftergood).

<sup>496</sup> See AMBINDER & GRADY, *supra* note 230, at 43 (arguing that the “Internet has moved the power” away from journalists “to the leakers themselves,” as the latter “no longer need[] . . . the *Washington Post* to alert the world”).

must be increasingly wired, networked, and distributed in its communications and operations. Those same dynamics give rise to a greater risk of unwanted exposure through observation by external actors or revelation by internal agents, as spectacularly exemplified by Bradley Manning's and WikiLeaks' exploitation of vulnerabilities in the Defense Department's SIPRNet network.<sup>497</sup>

These hypotheses are all potentially meritorious and deserve careful consideration. The technological explanation strikes me as particularly plausible; if it becomes increasingly easy to catch criminals, it may become increasingly difficult to justify the failure to do so. We cannot rule out the possibility that some of these factors are putting the regulatory paradigm described in this Article under unsustainable strain. Even small changes to complex ecologies can have large consequences. It is conceivable that, in the fullness of time, the Article's elaboration of the permissive neglect model will come to feel antiquated, more like a requiem than current reality.

Yet none of these hypotheses is testable in the near term. New technologies that become available to leakers and journalists may help to foil more than facilitate investigations. And this Article's positive analysis gives reason to doubt that most executive branch principals would welcome any qualitative shift in enforcement. This is not the first time the secrecy system has been challenged. Notably, in the aftermath of the Pentagon Papers case, many voiced concerns that technology would "make[] document copying ever more simple,"<sup>498</sup> while "the growth of underground newspapers and the educational experience of Vietnam" would corrode "voluntary restraint by the press."<sup>499</sup> Those concerns were borne out, and the enforcement rate barely moved.

Moreover, the single most important driver of the Obama uptick may be a dynamic that has gone unnoted—not White House meddling with prosecutorial decisionmaking, as some have speculated,<sup>500</sup> but rather the absence thereof. Interviews and news reports suggest that, in reaction to what many Democrats saw as the excessive politicization of DOJ by the Bush II administration, the Obama White House insulated itself from leak cases to an exceptional degree.<sup>501</sup> On this account, the administration abetted the increase in enforcement, not by encouraging DOJ to crack down on media leakers, but by failing to send the normal cautionary signals. To the extent this "political-to-prosecutors" signaling explanation is correct, it is a variable that can be adjusted with ease. To the extent this Article is correct that disrupting the

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<sup>497</sup> Julian Assange was out to exploit this conundrum. His fundamental goal with regard to the U.S. government, as I understand him, was not so much to reveal and deter discrete abuses as to induce sufficient paranoia about the prospect of revelation that the government would stanch internal information flows, thereby destroying from within its capacity to project power. See generally JULIAN ASSANGE, CONSPIRACY AS GOVERNANCE (Dec. 3, 2006), available at <http://cryptome.org/0002/ja-conspiracies.pdf> (developing this theme); Fenster, *supra* note 149, at 774-81 (identifying and assessing the "disclosure as radical resistance" strain in WikiLeaks' self-conception).

<sup>498</sup> Edgar & Schmidt, *supra* note 29, at 1078.

<sup>499</sup> WISE, *supra* note 88, at 161 (internal punctuation omitted).

<sup>500</sup> See Harris, *supra* note 491 (noting the view of some journalists that "President Obama's historic leaker hunt [is attributable] to some kind of personal disgust he has for the spilling of state secrets").

<sup>501</sup> See *supra* note 336 and accompanying text; see also Shane & Savage, *supra* note 112 (reporting that "Mr. Obama and Mr. Holder, who are social friends, have avoided discussing investigations and prosecutions to avoid any appearance of improper White House influence, a charge Democrats lodged against the Bush administration").

flow of leaks is more harmful to the presidency than has been realized, it is a variable to which future administrations will want to attend carefully.

In fact, there is already some anecdotal evidence to suggest that key Obama officials have started to do so. The *New York Times* recently reported that Attorney General Eric Holder “told associates that he has no desire for leak prosecutions to be his legacy.”<sup>502</sup> Which is to say, through his own strategic use of the press, the Attorney General has now signaled to the law enforcement bureaucracy to slow down.<sup>503</sup>

For all the reasons detailed in Parts II and III, there is a strong basis for predicting that the current “leak panic”<sup>504</sup> will soon fade and that prosecutorial excess in this area ought to be self-correcting. It is simply too costly for the president and his team to maintain any substantial rate of enforcement, any widespread perception that unauthorized disclosures really are being stamped out. There is room to debate what qualifies as substantial enforcement, and it is impossible to forecast with any confidence where a new equilibrium would settle. Technological innovation, in particular, has unanticipated disruptive potential. But history as well as theory is on the side of the leaker. Permissive neglect has proven a remarkably resilient model over many decades in the face of great social, technological, journalistic, and bureaucratic change.

## V. CONCLUSION

In 1975, Michel Foucault famously asked why, after more than a century, the western world’s efforts to rehabilitate prisoners had proven utterly unsuccessful.<sup>505</sup> The failure to transform criminals into law-abiding citizens was routinely denounced by public officials, in a “monotonous critique,”<sup>506</sup> and yet neither the practices of punishment nor the rate of recidivism seemed to budge. The answer to this question, Foucault theorized, lay in the motivations and dispositions of those individuals and institutions who ran the carceral state: These groups, these social structures, these patterns of thought—at some fundamental level they did not *want* to rehabilitate prisoners. They preferred delinquency.<sup>507</sup>

It is time to ask a similar question about the persistence of massive leaking of government information. There is no need to accept Foucault’s methodology or worldview to embrace his revisionist instincts in this case. The literature on leaks has largely taken it for granted that the authorities would like to escalate enforcement, if only they had the capacity to punish more offenders. Relax this assumption—which Part II demonstrated to be untenable in any strong form—and an entirely different set of questions, a new way of looking at leaks, comes into focus. This Article has unearthed the executive branch’s varied interests in maintaining a regime

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<sup>502</sup> Shane & Savage, *supra* note 112.

<sup>503</sup> See *supra* Part II.B.4 (discussing the intragovernmental communicative economy of leaks, pleaks, and plants).

<sup>504</sup> Keller, *supra* note 4.

<sup>505</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975).

<sup>506</sup> *Id.* at 268.

<sup>507</sup> *Id.* at 264-92. For a succinct restatement, see Michel Foucault, *Prison Talk*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977*, at 37, 40 (Colin Gordon ed., Colin Gordon et al. trans., 1980).

of widespread classified information disclosures to the press, as well as the various tools it has developed to manage this regime. Considered in light of these dynamics, the longstanding failure of leak-law enforcement is not a failure. Rather, it is a strategic response spearheaded by presidents and their appointees to a set of profound challenges confronting the modern administrative state. Even if we bracket all of the standard arguments about leaks' value for transparency, public debate, and the like, the counterintuitive yet inescapable conclusion is that some substantial amount of leaking is deeply valuable for the executive itself. Foucault told a story about the disciplinary impulses that lay beneath the enlightenment rhetoric of the early welfare state. This is a story about the permissive (though still power-serving) impulses that lie beneath the disciplinary rhetoric of the postwar national security state.

It is easy to find fault with the equilibrium that has emerged. Indeed, from virtually any first-best normative standpoint, it is difficult to justify such high levels of classification and clandestineness and such low levels of legal accountability. That this regulatory regime has proven functional hardly means that it is attractive, or that new approaches to secretive executive branch activities could not make the world a better place. Any such effort, however, would have to take into account the complex of factors that has historically generated so many leaks, constrained and allied so many implicated parties, allowed so many offenders to escape punishment, frustrated so many would-be reformers.

The great secret about the U.S. government's notorious leakiness is that it is a highly adaptive mechanism of information control, which has been rationalized through a nuanced system of social norms. The great secret about the laws against leaking is that they have never been used in a manner designed to curtail leaking—and that their implementation threatens not just gauzy democratic ideals but practical bureaucratic imperatives, not just individual whistleblowers but the institution of the presidency. If it were to be expanded and entrenched, the recent upsurge in criminal enforcement would jeopardize the habits and agendas of many powerful actors, as much as any First Amendment principles. And thus we may find that the “war” against leaking yields once again to monotonous and ineffectual critique.