Cornell Law Review

Volume 69
Issue 4 *April 1984*

Article 2

Judicial Supervision of Executive Secrecy: Rethinking Freedon of Expression for Government Employees and the Public Right of Access to Goverment Information

Mary M. Cheh

JUDICIAL SUPERVISION OF EXECUTIVE SECRECY: RETHINKING FREEDOM OF EXPRESSION FOR GOVERNMENT EMPLOYEES AND THE PUBLIC RIGHT OF ACCESS TO GOVERNMENT INFORMATION

Mary M. Cheh†

INTRODUCTON

American presidents enjoy almost uncontrolled discretion to withhold military, diplomatic, and other "national security" information from the public. The Freedom of Information Act (FOIA),[1] the principal statutory protecton of the public's right to information, exempts disclosure of information properly classified as "secret in the interest of national defense or foreign policy."[2] Because the executive branch both establishes the criteria for classification[3] and performs the actual classifi-

† Associate Professor of Law, George Washington University. B.A. 1972, J.D. 1975 Rutgers University; LL.M. 1977, Harvard University.

1 5 U.S.C. § 552 (1982).

2 *Id.* § 552(b)(1)(A).

3 Exec. Order No. 12,356, 3 C.F.R. 166 (1983) (establishing categories of information eligible for three levels of classification: top secret, secret, and confidential). *See Executive Order on Security Classification: Hearings Before the Subcomm. on Government Information and Individual Rights of the House Comm. on Government Operations,* 97th Cong., 2d Sess. (1982). Although executive secrecy existed in one form or another since the founding of the nation, the first national security system for the civil department of the federal government only appeared in an Executive Order issued by President Truman in 1951. Exec. Order No. 10,290, 3 C.F.R. 789 (1949-1953), *revoked by* Exec. Order No. 10,501, 3 C.F.R. 979 (1949-1953), *amended by,* 3 C.F.R. 292 (1971), *reprinted in* 50 U.S.C. § 401 (1970). Presidents Eisenhower, Nixon, and Carter all recognized the need to revise these orders because they resulted in too much secrecy. *See* Exec. Order No. 10,501, 3 C.F.R. 979 (1949-1953), *amended by,* 3 C.F.R. 292 (1971), *reprinted in* 50 U.S.C. § 401 (1970) (Eisenhower Order); Exec. Order No. 11,652, 3 C.F.R. 678 (1971-1975), *reprinted in* 50 U.S.C. § 401 (Supp. III 1973), *implemented in accordance with* National Security Council Directive of May 17, 1972, 37 Fed. Reg. 10,053 (1972), 50 U.S.C. § 401 (Supp. III 1973) (Nixon Order); Exec. Order No. 12,065, 3 C.F.R. 190 (1978), *reprinted in* 50 U.S.C. § 401 (Supp. V 1981) (Carter Order).

Only President Reagan has acted to increase secrecy. The current executive order retains the three levels of classification—"Top Secret," "Secret," and "Confidential"—which first appeared in the Eisenhower Order. The new classfication order differs markedly from its predecessor in that it requires that all doubts about classification be resolved in favor of secrecy. The Carter Order provided that certain categories of information could be kept secret only if publication would result in "identifiable" damage to the national security; such information could be withheld only if the harm to national security outweighed the benefits of public release of the information. The Reagan Order mandates secrecy upon any claim of national security harm no matter how minor, remote, or speculative. It mandates continued

cation of such information, the FOIA national security exception is not so much an exemption as it is a license to withhold.[4]

Judicially enforced constitutional restraints on the executive's power to withhold information are even less effective. Courts tend to draw a sharp constitutional distinction between the Executive's power to withhold information and the Executive's power to recover information that has already fallen into the hands of the press or the public.[5] The power to withhold is essentially unregulated; it is a matter generally left to the good faith, good sense, and political choice of the President.[6]

---

secrecy even if the public benefits from disclosure are clear and overwhelming. *See* Cheh, *Government Control of Private Ideas—Striking a Balance between Scientific Freedom and National Security,* 23 JURIMETRICS J. 1, 18 (1982). For a historical summary of executive classification of documents, see *Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary,* 92d Cong., 2d Sess., pt. 3D, at 3063-144 (1972).

4 For a discussion of the Freedom of Information Act (FOIA) and the national security exemption, see Note, *National Security Information Under the Amended Freedom of Information Act: Historical Perspectives and Analysis,* 4 HOFSTRA L. REV. 759 (1976); Note, *National Security and the Public's Right to Know: A New Role for the Courts Under the Freedom of Information Act,* 123 U. PA. L. REV. 1438 (1975); Note, *National Security and the Amended Freedom of Information Act,* 85 YALE L.J. 401-22 (1976). There is extensive literature on the FOIA. Useful general references include: FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P.L. 93-502) SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, 94th Cong., 1st Sess. (1975); SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, S. DOC. NO. 82, 93d Cong., 2d Sess. (1974); Davis, *The Information Act: A Preliminary Analysis,* 34 U. CHI. L. REV. 761 (1967); Giannella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations,* 33 AD. L. REV. 217 (1971); Koch, *The Freedom of Information Act: Suggestions for Making Information Available to the Public,* 32 MD. L. REV. 189 (1972); Nader, *Freedom from Information: The Act and the Agencies,* 5 HARV. C.R.-C.L. L. REV. 1 (1970); Note, *The Freedom of Information Act: A Seven-Year Assessment,* 74 COLUM. L. REV. 895 (1974).

5 *See, e.g.,* New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (government's petition to enjoin *New York Times* from publishing Pentagon Papers). In his concurrence Justice Stewart noted:

> Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. . . . [T]he Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise . . . power successfully. . . . [I]t is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regnlations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

Id. at 728-30 (Stewart, J., concurring); *see also* A. BICKEL, THE MORALITY OF CONSENT 79-83 (1975).

6 The power to withhold is, in some instances, within the discretion of other executive officials. *See, e.g.,* Houchins v. KQED, Inc., 438 U.S. 1 (1978) (media has no constitutional right of access to penal facilities). *But cf.* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (right of press to attend criminal trials constitutionally guaranteed).

The courts have, however, squarely faced and more strictly supervised claims that executive privilege excuses the President or executive officials from producing evidence in court. In these cases specific constitutional due process interests are at stake as well as the courts' direct interest in carrying out their constituitonal functions. There are a number of "executive privi-

The power to recover is severely restricted; the courts will only assist the Executive in preventing the dissemination of secrets if further revelation would result in immediate and grave harm to the Nation.[7]

The separation of powers doctrine explains this judicial treatment.[8]

---

leges" or claims of power to withhold information; the courts "police" some more than others. The state secrets privilege allows the government to resist discovery of information that if disclosed would injure the national defense or foreign policy. *See, e.g.,* United States v. Reynolds, 345 U.S. 1, 6-7 (1953) (government can invoke military secrets privilege to prevent release of documents under Federal Rule of Civil Procedure 34 in Tort Claims Act case resulting from military airplane crash). Although the court is the ultimate judge of the existence of the privilege in a given case, the standard for recognizing the privilege is relatively easy to satisfy and designed to protect security interests. Courts will recognize the privilege if there is a "reasonable danger that discovery will disclose information prejudicial to the national security." Note, *The Military and State Secrets Privilege and Protection for the National Security or Immunity for the Executive?,* 91 YALE L.J. 570, 573-74 (1982). The privilege is, moreover, absolute in that the courts do not balance the interests in disclosure against the interests in secrecy. *Id.* at 575 (citing United States v. Reynolds, 345 U.S. 1 (1953), for proposition that state secrets privilege is absolute). For a background discussion of this privilege, see Zagel, *The State Secrets Privilege,* 50 MINN. L. REV. 875 (1966).

Another privilege, specific to law enforcement, is the informer's privilege. It permits law enforcement officials to withhold the identity of those "who furnish information of violations of law to officers charged with enforcement of that law." Roviaro v. United States, 353 U.S. 53, 59 (1957) (citations omitted). Finally, there is an internal deliberation privilege with respect to governmental operations that presumptively protects presidential conversations and correspondence. *See* United States v. Nixon, 418 U.S. 683 (1974). Courts recognize that some confidentiality is necessary to enable officials to perform their tasks. The courts have the final say on whether to honor this privilege; they balance the moving party's need for the information against the Executive's reasons for insisting on confidentiality. Generalized assertions of need for confidentiality will not prevail if there is a "demonstrated, specific need for evidence in a pending criminal trial." *Id.* at 713.

7 *See* New York Times Co. v. United States, 403 U.S. 713 (1971); *supra* note 5. The present Court's test of prior restraint is probably not as vigorous as the test used in the *Pentagon Papers* case. In Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976), the Supreme Court employed the Learned Hand formulation—"whether the gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *See* United States v. Progressive, Inc., 467 F. Supp. 990, 993-94, 999 (W.D. Wis.) (publication of article describing operation of hydrogen bomb "could possibly provide sufficient information" to enable nation to construct bomb or reduce time required to achieve thermonuclear capability), *appeal dismissed,* 610 F.2d 819 (7th Cir. 1979). *See also* Cheh, *The Progressive Case and the Atomic Energy Act: Waking to the Dangers of Government Information Controls,* 48 GEO. WASH. L. REV. 163, 199-200 (1980) (arguing that district court abandoned *New York Times* rule in *Progressive).*

8 The differential treatment obviously makes little sense from the perspective of first amendment values. Secrecy imposed from within can severely affect the rights of free expression of government employees and seriously curtail the amount of information available to the public. *See infra* notes 23-30 and accompanying text. The dichotomy also makes little sense in terms of the courts' competence to judge the need for secrecy. Judges do not become wiser or better equipped to assess national security claims simply beeause a secret is now in the hands of the press or a member of the public. Unlike issues involving the power to withhold information, however, the courts' duty to protect constitutional rights of free expression once information has become public is very clear. *See, e.g.,* Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (publication of newspaper article on pending confidential inquiry protected by first amendment); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (judge's order restraining publication or broadcast of criminal defendant's confessions or admissions violates first amendment).

The judiciary has the constitutional power and duty to protect both individual liberty and the democratic process. The executive branch has the power and duty to protect military and diplomatic secrets as well as other sensitive governmental data.[9] The distinction between the power to withhold and the power to recover provides a bright, but arbitrary, line along which to divide responsibilities between the two branches. This line-drawing reflects a judicial reluctance to encroach upon presidential prerogatives in sensitive areas of military and foreign affairs and a fear that any other approach would involve the courts in a standardless second-guessing of political judgments.[10]

Allowing the executive branch a virtual free hand to withhold information is not, however, cost free. It invites excessive secrecy and abuse of power.[11] It may result in silencing public employees or punishing them for "unauthorized" speech. It inevitably reduces the amount of information available to the public. These dangers were illustrated anew in the Supreme Court's decision in *Snepp v. United States*[12] and in President Reagan's recently issued and now temporarily suspended[13] National Security Decision Directive (Directive).[14]

In *Snepp* the Supreme Court, in a per curiam opinion without benefit of briefs or argument[15] concluded that the Central Intelligence

---

9 *See infra* notes 31-37 and accompanying text.

10 *See, e.g.,* Houchins v. KQED, Inc., 438 U.S. 1, 14 (1978); New York Times Co. v. United States, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936); *see* A. BICKEL, *supra* note 5, at 79-87; BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle,* 68 CALIF. L. REV. 482, 510-16 (1980); Henkin, *The Right to Know and The Duty To Withhold: The Case Of The Pentagon Papers,* 120 U. PA. L. REV. 271 (1971).

11 *See infra* notes 22-30, 113-20 and accompanying text.

12 444 U.S. 507 (1980) (per curiam).

13 Amidst mounting public and congressional criticism, *see infra* note 125 and accompanying text, President Reagan has decided to suspend temporarily the prepublication review and lie-detector provisions of the Directive. *Reagan to Relent on Secrecy Pledge,* N.Y. Times, Feb. 14, 1984, at A1, col. 1. Observers believe he will seek a compromise of some sort with Congress or simply reissue the order if he is reelected.

14 National Security Decision Directive No. 84 (Mar. 11, 1983) [hereinafter cited as *Directive*], *reprinted in President Issues Directive on Safeguarding National Security Information,* 5 ABA STANDING COMMITTEE L. AND NAT'L SECURITY INTELLIGENCE REP. 1 (May 1983).

15 The Court's summary action was especially questionable given the procedural posture of the case. The CIA prevailed in the district court; that court issued an injunction and imposed a constructive trust on the profits from Snepp's book. The court of appeals affirmed on the merits, but reversed the award of a constructive trust and remanded for consideration of punitive damages. Snepp sought Supreme Court review on his first amendment claims and, in response, the government filed a conditional cross-petition for certiorari on the question of damages. The government stated that it was satisfied with its award to that point and sought review only if the Court agreed to hear Snepp's claims. The Supreme Court summarily dismissed Snepp's claims and essentially addressed the question of further relief for the goverument. Justice Stevens noted the impropriety of this action stating: "Given the Government's position, it would be highly inappropriate, and perhaps even beyond this Court's jurisdiction, to grant the Government's petition while denying Snepp's. Yet that is in essence what has been done." *Snepp,* 444 U.S. at 524 (footnote omitted) (Stevens, J., dissenting). In a

Agency (CIA) could require government employees to sign prepublication review agreements as a condition of employment.[16] Frank Snepp, a former CIA agent, wrote a book entitled *Decent Interval* that was highly critical of CIA activities in Vietnam but contained no classified information.[17] Snepp had signed a prepublication review agreement but published his book without first submitting it to the CIA for clearance.[18] The agreement prohibited Snepp from publishing any information about the agency—classified or unclassified, important or innocuous—without receiving prior government approval.[19] In an action by the government for breach of contract, the Court, in a six-to-three decision, not only upheld the contract and enjoined Snepp from further violations, but also invoked the equitable doctrine of constructive trust and confiscated, for the government's benefit, all of Snepp's future publica-

---

footnote Justice Stevens added: "I have been unable to discover any previous case in which the Court has acted as it does today, reaching the merits of a conditional cross-petition despite its belief that the petition does not merit granting certiorari." *Id.* at 524 n.15. *See* Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court,* 94 HARV. L. REV. 1, 8-10 (1980) (criticizing Court for not giving case "deliberate judicial consideration").

16 444 U.S. at 509 n.3. Commentary on *Snepp* has been decidedly negative. *See, e.g.,* Anawalt, *A Critical Appraisal of* Snepp v. United States: *Are There Alternatives to Government Censorship?,* 21 SANTA CLARA L. REV. 697 (1981); Medow, *The First Amendment and the Secrecy State:* Snepp v. United States, 130 U. PA. L. REV. 775 (1982); Comment, Snepp v. United States: *The CIA Secrecy Agreement and the First Amendment,* 81 COLUM. L. REV. 662 (1981).

17 The government stipulated that Snepp's book contained neither classified information nor any information about the CIA that the CIA had not already made public. United States v. Snepp, 595 F.2d 926, 931 (4th Cir. 1979), *rev'd in part,* 444 U.S. 507 (1980)(per curiam).

18 United States v. Snepp, 456 F. Supp. 176, 178 (E.D. Va. 1978), *rev'd in part,* 595 F.2d 926 (4th Cir. 1979), *reinstated per curiam,* 444 U.S. 507 (1980).

19 One must distinguish prepublication review agreements from other "secrecy agreements" that merely prohibit the employee from disclosing classified information. Under this latter type of agreement, previously known as the "standard form secrecy agreement," an employee or former employee need not submit his writings prior to publication. He is liable under the contract only if he publishes or divulges classified information. For a discussion of this type of agreement, see Comment, *Government Secrecy Agreements And The First Amendment,* 28 AM. U.L. REV. 395, 396-99 (1979). In United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied,* 409 U.S. 1063 (1972), the Court of Appeals for the Fourth Circuit upheld the standard form secrecy agreement and enjoined former CIA agent Victor Marchetti from publishing a book about the CIA without first getting CIA clearance. 466 F.2d at 1316-18. Although the injunction rested on Marchetti's repeated past disclosures of classified information and his planned publication of classified information, it converted Marchetti's agreement into a form of prepublication review. In contrast to the conclusion reached in *Snepp,* the Fourth Circuit explained:

> We readily agree with Marchetti that the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship. It precludes such restraints with respect to information which is unclassified or officialy disclosed . . . .

Id. at 1313. In *Snepp* the Supreme Court distinguished *Marchetti* stating that the Fourth Circuit only adjudged the constitutionality of the standard form agreement and "therefore did not consider the appropriate remedy for the breach of an agreement to submit *all* material for prepublication review." 444 U.S. at 510 n.4 (emphasis in original).

tion profits.[20] The Court did not explicitly confine its holding to intelligence agencies' use and, indeed, seemed to suggest that the government could require prepublication review agreements from any employee who had access to confidential information.[21]

Armed with *Snepp's* reaffirmation of the Executive's broad power to withhold information, President Reagan has taken a series of unprecedented actions to increase the amount of information classified as secret and to prevent leakage of all such information.[22] President Reagan's

---

20 The majority opinion, issued per curiam, was joined by Chief Justice Burger and Justices Stewart, White, Blackmun, Powell, and Rehnquist. Justices Brennan and Marshall joined in the dissenting opinion authored by Justice Stevens.

The Court's majority and dissenting opinions were primarily devoted to the propriety of imposing the constructive trust remedy. The district court applied the constructive trust remedy but the court of appeals reversed and remanded to compute punitive damages. The court of appeals reasoned that the constructive trust remedy was appropriate only to redress a breach of fiduciary duty and prevent unjust enrichment. The court of appeals concluded that Snepp was not a fiduciary and that he was not unjustly enriched by earning profits based exclusively on his own efforts and without use of classified information. 595 F.2d at 935-36.

On certiorari, however, the Supreme Court held that Snepp, as a fiduciary, breached not only his contract but also his duty of confidentiality arising from his position of trust. The majority concluded that under such circumstances the constructive trust remedy was appropriate. 444 U.S. at 515-16. More to the point, however, the majority viewed alternative remedies as not forceful or severe enough to deter Snepp or others from bypassing prepublication review, *Id.* at 514.

Justice Stevens in dissent argued that "Snepp did not breach his duty to protect confidential information. Rather, he breached a contractual duty . . . ." *Id.* at 518. Snepp "did not use confidential information in his book" and the CIA "would have been obliged to clear [Snepp's] book for publieation in prccisely the same form as it now stands. Thus . . . the Government, rather than Snepp, will be unjustly enriched if he is required to disgorge profits attributable entirely to his own legitimate activity." *Id.* at 521 (Stevens, J., dissenting) (footnote omittcd).

At the time of suit, Snepp had already received about $60,000 in advance payments. 456 F. Supp. 176, 179 (E.D. Va. 1978). The book earned many thousands thercaftcr. As Snepp had already spent a good dcal of his advance, Snepp's case demonstrates the severity of the constructive trust remedy. The damage award left him in debt and he was forced to write and lecture just to brcak even.

Commentators have criticized the Court's use of the constructive trust remedy on several grounds. Although most agree that the imposition of monetary penalties is an appropriate remedy, they would limit such relief to the actual harm caused by knowing disclosures of only classified information. *See, e.g.,* Medow, *supra* note 16, at 835-56.

21 *See* 444 U.S. at 507 n.3.

22 One observcr summarized President Reagan's actions as follows:

> In the two and a half years it has been in power, the Reagan Administration has:
>
> [1] Consistently sought to limit the scope of the Freedom of Information Act (F.O.I.A).
>
> [2] Barred the entry into the country of foreigu speakers, including Hortensia Allende, widow of Chilean President Salvador Allende, because of concern about what they might say.
>
> [3] Inhibited the flow of films into and even out of our borders . . . .
>
> [4] Rewritten the classification system to assure that *more* rather than less information will be classified.
>
> [5] Subjected governmental officials to an unprecedented system of lifetime censorship.

Directive is perhaps the most extraordinary of these actions; it accepts the tacit invitation of *Snepp* and extends the use of prepublication review agreements to the entire executive branch.[23]

The Directive requires hundreds of thousands of federal employees with access to classified data to sign agreements not to disclose that information.[24] Thousands more, with access to high-level classified data, must also sign *Snepp*-like prepublication review agreements.[25] This includes at a minimum all senior officials in the Departments of State and Defense, all members of the National Security Council and staff, all senior military and foreign service officers, and many senior White House officials.[26] Like Frank Snepp, all of these officials will be bound by a lifetime obligation to submit all books, lectures, speeches, and testimony that are based on their previous government experience for prepublication review.[27] Advance clearance is required even if the information

---

> [6] Flooded universities with a torrent of threats relating to their right to publish and discuss unclassified information—usually of a scientific or technological nature—on campus.

Abrams, *The New Effort To Control Information,* N.Y. Times, Sept. 25, 1983, § 6 (Magazine), at 22-23 (emphasis in original); *see also* Cheh, *supra* note 3, at 3-4, 28 n.188.

23 The Directive followed and was in part based on recommendations made to the President by an interdepartmental group headed by Deputy Assistant Attorney General Richard K. Willard. *Study Recommended Reagan's National Security Directive,* 5 ABA STANDING COMMITTEE L. AND NAT'L SECURITY INTELLIGENCE REP. 2, 7 (June 1983).

24 *President Orders Curbs In Handling of Classified Data,* N.Y. Times, Mar. 12, 1983, at 1, col. 4 (estimate of number of federal employees affected). The Directive provides: "All persons with authorized access to classified information shall be required to sign a nondisclosure agreement as a condition of access." *Directive, supra* note 14, § 1.a., *reprinted in President Issues Directive on Safeguarding National Security Information,* 5 ABA STANDING COMMITTEE L. AND NAT'L SECURITY INTELLIGENCE REP. 1, 2 (May 1983).

25 The Directive also provides that: "All persons with access to Sensitive Compartmented Information (SCI) shall be required to sign a nondisclosure agreement as a condition of access to SCI . . . ." *Directive, supra* note 14, § 1.b., *reprinted in President Issues Directive on Safeguarding National Security Information,* 5 ABA STANDING COMMITTEE L. AND NAT'L SECURITY INTELLIGENCE REP. 1, 2 (May 1983). SCI is "information that not only is classified for national security reasons as Top Secret, Secret, or Confidential, but also is subject to special access and handling requirements because it involves or derives from particularly sensitive intelligence sources and methods." Department of Justice, Internal Security Order No. 2620.8, § 4, 48 Fed. Reg. 39,313, 39,314 (1983). *See also* Abrams, *supra* note 22, at 22.

26 Abrams, *supra* note 22, at 22; Halperin, *Reagan's National Security Censorship: A Mockery of this First Amendment,* 8 FIRST PRINCIPLES Mar.-Apr. 1983, at 1.

27 Abrams noted that:

> prepublication review will be required of all books (fiction or non-ficton), newspaper columns, magazine articles, letters to the editor, pamphlets and scholarly papers by officials with access to S.C.I. materials so long as what is written describes activities that relate to SCI, classified information from intelligence reports or "any information"—classified or not—"concerning intelligence activities, sources or methods."
>
> Under the new policy, there is no need to submit for prepublication review material consisting "solely of personal views, opinions or judgments" on topics such as "proposed legislation or foreign policy." But the Catch-22 is this: If the opinion even implies "any statement of fact" that falls within the range of review, then the material must be cleared by the Government before it is published. Since most opinions worth expressing about American defense

contained in the writing is unclassified, unimportant, already public, or widely known.[28] The Directive also goes beyond *Snepp* by authorizing executive agencies to use lie detectors to investigate unauthorized disclosures of classified data[29] and by mandating punishment for those who leak information or fail to cooperate in the investigation of leaks.[30]

These developments raise the question whether Congress or the courts can play a more active role in supervising executive power to withhold government information and thus play a more active role in checking the abuses of executive secrecy. This article focuses primarily on the courts. It proceeds from the premise that current constitutional doctrine—which effectively offers a choice of either unlimited presidential power to withhold information or standardless, judicial second-guessing of executive secrecy decisions—presents a false dilemma. There

---

> or intelligence policies at least imply some proscribed facts, what the new requirement amounts to is a massive intrusion of the Government into the right of former officials to speak and of the public to listen.

Abrams, *supra* note 22, at 25 (quoting Department of Justice, Internal Security Order No. 2620.8, *supra* note 25, § 5.d, .h). For an even broader interpretation of what prepublication review may cover, see Agee v. CIA, 500 F. Supp. 506, 510 (D.D.C. 1980) (injunction based upon prepublication review and past history of unauthorized disclosures extends to all oral statements except those "[e]xtemporaneous oral remarks that consist solely of personal views" and even to information learned outside CIA employment).

28 *See* Abrams, *supra* note 22, at 25.

29 The Directive requires that all agencies having access to classified data revise their regulations

> so that employees may be required to submit to polygraph examinations, when appropriate, in the course of investigations of unauthorized disclosures of classified information. As a minimum, such regulations shall permit an agency to decide that appropriate adverse consequences will follow an employee's refusal to cooperate with a polygraph examination that is limited in scope to the circumstances of the unauthorized disclosure under investigation.

Directive, supra note 14, § 5, *reprinted in President Issues Directive on Safeguarding National Security Information,* 5 ABA STANDING COMMITTEE L. AND NAT'L SECURITY INTELLIGENCE REP. 1, 13 (May 1983). Although this article focuses on the prepublication review features of the Directive, it must be noted that this provision itself raises serious due process issues. The polygraph is not only an arguably unreliable instrument for determining truth, but it necessarily invades individual privacy because polygraph methods invariably elicit answers to questions well beyond the matter at hand. *See* Pyle, *Managing by Intimidation,* 8 FIRST PRINCIPLES Mar.-Apr. 1983, at 1, 2, 10; *see also* Craver, *The Inquisitorial Process In Private Employment,* 63 CORNELL L. REV. 1, 28-30 (1977); Note, *Free Speech, the Private Employee, and State Constitutions,* 91 YALE L.J. 522, 529 n.41 (1982). *See generally* Note, *The Presidential Polygraph Order and the Fourth Amendment: Subjecting Federal Employees to Warrantless Searches,* 69 CORNELL L. REV. 896 (1984).

30 *Directive, supra* note 14, §§ 2.e., 5, *reprinted in President Issues Directive on Safeguarding National Security Information,* 5 ABA STANDING COMMITTEE L. AND NAT'L SECURITY INTELLIGENCE REP. 1, 13 (May 1983). The Directive also requires all agencies to adopt appropriate policies "to govern contacts between media representatives and agency personnel, so as to reduce the opportunity for negligent or deliberate disclosures of classified information." *Id.* § 1.d. It is unclear what additional restriction these new policies will entail. *See also White House Eases on Contacts, Starts New Leak Control System,* Washington Post, Feb. 3, 1982, at A5, col. 1 (discussing short lived presidential directive requiring advance approval by "a senior official" of all contacts between reporters and officials "in which classified National Security Council matters or classified intelligence information are discussed").

are better ways to umpire the competition between presidential prerogatives and judicial protection of freedom of speech and the free flow of information to the public. The answer lies, first, in distinguishing between the government's methods of keeping secrets and the type of information that requires secrecy. It lies, second, in strengthening the first amendment rights of government employees—against whom most methods of secrecy are directed—and in understanding the nature, source, and limits of a constitutional right of access to government information.

Part I of this article argues that courts can and should actively supervise executive decisions regulating how secrets are kept by requiring the President to respect the free speech rights of government employees. Part II suggests that courts have an important, although necessarily more limited, role in supervising executive decisions concerning what information should be kept secret. The courts' latter role is confined to (1) ensuring that the President does not unnecessarily restrict the flow of government information to the public or use secrecy to hide violations of law and (2) preserving a new, due-process-based right of access to certain governmental institutions. The courts simply cannot decide, by force of the Constitution alone, whether particular information should be classified or released to the public. Recasting the free speech rights of government employees and reformulating the public right of access will yield a doctrine that is more consistent with underlying constitutional values. Additionally, such an analysis will generate principled rules by which courts can restrain the kind of excess of executive secrecy embodied in *Snepp* and the Directive.

I
THE METHODS OF MAINTAINING SECRECY—RETHINKING THE FIRST AMENDMENT RIGHTS OF PUBLIC EMPLOYEES

Everyone acknowledges that all governments must sometimes keep certain information from public view. The difficult issues involve determining what information should be kept secret, who should decide, and how secrecy should be enforced. The *Snepp* case and President Reagan's Directive focus on the methods of maintaining secrecy and assume that decisions about what information should be kept secret are legitimately made by the Executive pursuant to guidelines found in Executive Order No. 12,356, entitled *National Security Information.*[31] In reality, the issues of what information should be kept secret and how secrecy should be enforced are closely related.[32] For example, preserving the confidential

31 Exec. Order No. 12,356, 3 C.F.R. 166 (1983).

32 *See* New York Times Co. v. United States, 403 U.S. 713, 729 (1971) (Stewart, J.,

status of a few particularly sensitive documents will almost certainly require less active enforcement than withholding many thousands of documents. Nevertheless, by separating the two issues, one can assess the *Snepp* decision and the Directive on their own terms. More importantly, one can set out more precisely the appropriate judicial role for checking the abuses of executive secrecy.

The Executive enforces secrecy in both formal and informal ways. Formally, the Executive selects trustworthy personnel,[33] maintains the physical security of secret data,[34] conditions employment on promises of secrecy,[35] and investigates[36] and punishes breaches of security.[37] Although the Directive relies primarily on the last two methods, all of these strategies, except physical controls, can intrude upon constitutional liberties such as freedom of speech or equal protection of the law. To illustrate, in conditioning employment on promises of secrecy, the government might ask that employees avoid criticism of government policies or restrict their contact with members of the press.[38] In hiring only trustworthy personnel, the government might reject individuals along impermissible lines, refusing to hire communists, homosexuals, or women.[39]

One way to check excesses in withholding information is to limit the President to methods of maintaining secrecy that respect constitutional rights, particularly the fragile right of freedom of expression protected by the first amendment.[40] Emphasizing constitutional limits on

---

concurring) ("[W]hen everything is classified, then nothing is classified . . . ."); Cheh, *supra* note 3, at 26.

33 Exec. Order No. 12,356, § 4.1(a), 3 C.F.R. 166, 174 (1983) ("A person is eligible for access to classified information provided that a determination of trustworthiness has been made . . . .").

34 *Id.* § 4.1(b).

35 *See, e.g.,* Comment, *supra* note 19, at 397-406 (general description and analysis of governmental secrecy and prepublication review agreements).

36 *See, e.g.,* Exec. Order No. 12,333, § 1.7(d), 3 C.F.R. 200, 205 (1982) (heads of certain government departments must report possible unlawful intelligence activities to Intelligence Oversight Board).

37 *See, e.g.,* Exec. Order No. 12,356, § 5.4(c), 3 C.F.R. 166, 177 (1983) (listing sanctions for violating that order).

38 The Directive anticipates at least some restrictions on employee-press contacts, but does not control how each agency will implement its rules. *Directive, supra* note 14, § 1.d, *reprinted in President Issues Directive on Safeguarding National Security Information,* 5 ABA STANDING COMMITTEE L. AND NAT'L SECURITY INTELLIGENCE REP. 1, 13 (May 1983); *see supra* note 30.

39 *See, e.g.,* United States v. Robel, 389 U.S. 258, 260 (1967) (Court invalidated statute criminalizing attempt by any member of communist-action organization " 'to engage in any employment in any defense facility' ").

40 The courts have recognized that no matter how important particular secrets may be, the means of protecting them must still comply with constitutional norms. *See, e.g.,* United States v. Robel, 389 U.S. 258, 264 (1967) (" '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.' ") (quoting Home Bldg. Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934)); Agee v. CIA, 500 F. Supp. 506, 508 (D.D.C. 1980).

methods will avoid serious separaton of power difficulties because the courts are not required to second-guess presidential decisions on what information must be withheld and what information may be disclosed. The President retains discretion to make these decisons but he is restrained in the means available to protect secret information.

Admittedly, some methods of ensuring secrecy are more efficient than others. For example, firing all suspected leakers might be more efficient than investigating and adjudicating the guilt of each actual transgressor. If constitutional values are to mean anything, however, they must rank higher than convenience and efficiency.[41] Similarly, some methods of maintaining secrecy are more effective than others. Censoring all employee expression may be more effective than post hoc punishment for wrongful disclosure.[42] Nevertheless, forcing the President to respect constitutional liberties reaffirms the notion that constitutional rights must be taken seriously[43] and, that consequently, liberty must sometimes outrank effectiveness. Effectiveness is not, in any event, a zero-sum game. What the President cannot accomplish in one way, he can usually accomplish in another way. Indeed, ultimate effectiveness is never sacrificed; if a particular method is necessary to achieve a compelling objective, constitutional rights are not absolute and will give way.[44]

A. The Inadequacy of Current Employee Speech Protections

For decades, courts considered government employment and other forms of government largess privileges, not rights.[45] As privileges they could be offered on any condition the government imposed including the sacrifice of constitutional rights.[46] In recent years, the Supreme

---

41 This theme is pervasive in constitutional law. *See, e.g.,* Goldberg v. Kelly, 397 U.S. 254, 266 (1970) (procedural safeguards necessary to protect welfare applicant's due process right take precedence over inconvenience to government of conducting hearings prior to termination of aid).

42 Censorship may, in fact, be less effective than criminal penalties. *See infra* note 121 and accompanying text.

43 *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 190-92 (1977).

44 *See, e.g.,* Emerson, *First Amendment Doctrine and the Burger Court,* 68 CALIF. L. REV. 422, 433-38 (1980).

45 As the oft-quoted phrase of Justice Holmes explains: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439, 1439-40 (1968).

46 It is surprising that the right-privilege distinction lasted as long as it did. As a basis for overriding the constitutional rights of public employees, the distinction is analytically empty. As others have shown, it simply does not follow that merely because someone is not entitled to a job, he must comply with outrageous conditions in order to keep it. *See* Van Alstyne, *supra* note 45, at 1458-60. Calling public employment a privilege was just another way of announcing a court's conclusion that it would grant no relief. *See id.* at 1459. In addition to being logically unsound, the right-privilege distinction carried implications that were impossible to accept. If the government could really condition employment or largess

Court has rejected the idea that public employment is a privilege[47] and has thus laid the foundation for requiring executive actions, including secrecy decisions, to conform to constitutional norms. The Court has recognized, for example, that public employees do not sacrifice rights of free expression merely upon assuming the status of public employee.[48]

Before the first amendment rights of public employees can serve as an effective check on executive secrecy methods aimed at silencing public employees or punishing them for "unauthorized" speech and, indeed, before public employees can enjoy meaningful first amendment rights, a fundamental flaw in the Court's treatment of employee free speech issues must be corrected and a new analytic framework constructed. Currently the Court does not protect a government employee's speech under the exacting scrutiny[49] of traditional first amendment doctrine. Instead,

---

on any basis it chose, then presumably, it could offer public housing only to Republicans, fire government employees for voting for the "wrong" candidates, or summarily suspend a physician's license to practice medicine because he criticized United States foreign policy. *See id.* at 1445-49. After developing a variety of exceptions to escape the consequences of the doctrine, *see, e.g.,* Perry v. Sindermann, 408 U.S. 593, 597 (1972) (exception of "unconstitutional condition"), the courts simply announced the demise of the right-privilege distinction.

The "privileged" nature of government employment still exerts, however, a strong influence over judicial thinking. Consider, for example, the district court's finding in *Snepp* that "[Snepp] knew that employment by the government was a privilege—not a right." United States v. Snepp, 456 F. Supp. 176, 179 (E.D. Va. 1978).

47 *See, e.g.,* Graham v. Richardson, 403 U.S. 365, 374 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970). *See generally* Van Alstyne, *supra* note 45.

48 *See, e.g.,* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' ") (quoting Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967)).

49 This article makes no attempt to refashion general first amendment doctrine. There is, however, a good deal of literature on the appropriate general approach to first amendment adjudication and no paucity of different theories and views. *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); Baker, *Scope of the First Amendment Freedom of Speech,* 25 U.C.L.A. L. REV. 964 (1978); Blasi, *The Checking Value in First Amendment Theory,* 1977 AM. B. FOUND. RES. J. 521 (1977); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 HARV. L. REV. 1482 (1975); Karst, *Equality as a Central Principle in the First Amendment,* 43 U. CHI. L. REV. 20 (1975).

In referring to traditional first amendment analysis, this article refers primarily to two guiding principles on which there seems to be substantial agreement among theorists and judges. One guiding principle is that expression, defined as nonviolent, noncoercive conduct intended to communicate ideas and emotions, is entitled to special and vigorous judicial protection. Government regulations aimed at the *content* of such expression, as opposed to time, place, and manner restrictions unrelated to content, are presumptively unconstitutional. This protection may be "full" or "absolute," *see, e.g.,* T. EMERSON, *supra*, or it may be accomplished via a refined balancing test that makes the government establish a compelling need for its action unrelated to suppression and limits the government to means precisely tailored to avoid unnecessary abridgement of first amendment interests. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 580-84 (1978). No matter what one thinks of this form of balancing or the least restrictive means analysis, it seems clear that a fundamental difference exists between the refined balancing test and the simple ad hoc balancing and reasonableness standards. Refined balancing requires a government to show that a restriction was essential to a need unrelated to suppression, and to assure that there was no better way to

the Court employs a standard that is weak and easy to manipulate. According to the Court's standard, acceptable limits on employee expression may include content restrictions and even prior restraints as long as the government regulations are reasonably necessary to further an important government objective, and, as long as, on balance, the government's need for secrecy outweighs the employee's interest in free speech.[50] Under such a standard, it is more accurate to view employee

---

accomplish the objective. The second guiding principle is that certain forms of control over expression—prior restraints—are almost wholly prohibited. Only a very few, narrowly defined exceptions to the general prohibition are permissible. The exception based on national security requires, for example, clear and convincing government proof that a given publication will result in grave, irreparable harm to the United States. New York Times Co. v. United States, 403 U.S. 713, 713 (1971).

50 *See, e.g.,* United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied,* 409 U.S. 1063 (1972). The test evolved and progressively weakened over time. When the courts discarded the right-privilege distinction they never seemed entirely sure about what should replace it. On the one hand, the courts recoguized that it was unacceptable to permit the government to condition employment on any grounds it chose, but on the other they also recognized distinctions between the government's interests as an employer and its interests as a sovereign. Initially the courts seemed to follow the approach suggested here, incorporating employee first amendment rights into traditional doctrine and accounting for the government's interests as employer only within the framework of that preexisting doctrine. *See, e.g.,* United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967). In Pickering v. Board of Educ., 391 U.S. 563 (1968), however, the Court, in upholding the right of a teacher to criticize the operations of a school system, stated that the approach is a "balance" and suggested courts should measure employees' free speech rights under standards less severe than ordinarily applied:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id. at 568. After *Pickering,* the Court occasionally invoked traditional first amendment standards in cases invoking employee first amendment rights. *See, e.g.,* Elrod v. Burns, 427 U.S. 347, 363 (1976) (dismissal of employee struck down because it did not "further some vital government end by a means that is least restrictive of freedom of belief and association"); *see also* Branti v. Finkel, 445 U.S. 507, 518 (1980) (applying the *Elrod* approach). Increasingly, however, despite occasional strict language, the courts have tended to apply a "loose" reasonableness test. *See, e.g.,* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564-67 (1973); *see* Comment, *supra* note 16, at 407-10; Comment, *National Security and The First Amendment: The CIA In The Marketplace of Ideas,* 14 HARV. C.R.-C.L. L. REV. 655, 672-81 (1979). Touchstones of first amendment strict scrutiny such as less drastic means analysis and rigorous vagueness and overbreadth standards were eroded in employee speech cases. *See, e.g.,* Broadrick v. Oklahoma, 413 U.S. 601 (1973) (overbreadth must be "substantial"). *Compare* Keyishian v. Board of Regents, 385 U.S. 589, 597-610 (1967) (state law providing that public school teachers who engage in "seditious" utterances or acts may be fired is unconstitutionally vague, and state law providing that public school teachers who are members of Communist Party may be fired is unconstitutionally overbroad) *with* Cole v. Richardson, 405 U.S. 676, 683-86 (1972) (termination of state employee for failure to take oaths to "uphold and defend" constitutions of Massachusetts and United States and to "oppose the overthrow" of those two governments was constitutional and oaths were not void for vagueness).

In the recent case of Connick v. Myers, 103 S.Ct. 1684 (1983) (a 5-4 ruling upholding the discharge of a former assistant district attorney because of on-the-job speech addressed to, inter alia, transfer policies of the office), a bare majority of the Court suggested a refinement to the balancing test. The government, it said, has greater latitude to regulate on-the-job

first amendment guarantees as only due process checks against arbitrariness.

In *Snepp v. United States* the Supreme Court indicated that this type of diluted first amendment protection even applies to *former* government employees where the expression at issue grows out of, or in some sense relates back to, the former employment.[51] Snepp, a former CIA agent, claimed that the CIA prepublication review agreement was "unenforceable as a prior restraint on protected speech."[52] Snepp invoked traditional first amendment doctrine arguing that (1) his book contained no classified information and was political speech lying at the core of first amendment protections; (2) prepublication review was a prior restraint that could be sustained only by the government's clear and convincing showing that such a restraint was necessary to prevent immediate, inevitable, and grave harm to the Nation; and, (3) such a showing was not made with respect to his unclassified critique of CIA policies in Vietnam.[53]

The Court did not reject Snepp's formulation of traditional first amendment doctrine, nor did the majority disagree with Justice Stevens's dissenting observation that prepublication review would be unconstitutional if applied to ordinary citizens.[54] Nevertheless the Court summarily dismissed Snepp's claim in a footnote.[55] The CIA agreement, it said, was a "reasonable means" of protecting "the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."[56] Some scholars have attributed this abrupt treatment to the majority's distaste for Snepp's actions.[57] The legal doctrine that made the outcome possible and even likely, however, originated not in political bias but rather in the diluted standard of review applied to the

---

employee speech unrelated to "any matter of political, social, or other concern to the community"; and less latitude to regulate such speech if related to matters of "public concern." *Id.* at 1690. The basic flaw in the "refinement" - aside from inherent weakness of ad hoc balancing as a means of protecting expression - is that it makes first amendment safeguards depend on the Court's view of the value or importance of particular speech rather than focus on the adequacy of the government's justification to regulate that speech.

51 Under an appropriate first amendment analysis, it should not matter whether an individual is an employee or a former employee. *See infra* notes 92-96 and accompanying text. Rather, the analysis should depend upon whether the employee revealed information that he acquired in confidence, knowing it to be confidential, and whether the information is otherwise unavailable to the public.

52 444 U.S. at 509 n.3.

53 *See, e.g.,* New York Times Co. v. United States, 403 U.S. 713 (1971); Litwack, *The Doctrine of Prior Restraint,* 12 HARV. C.R.-C.L. L. REV. 519 (1977).

54 444 U.S. at 520 n.9 (Stevens, J., dissenting).

55 *Id.* at 509 n.3.

56 *Id.*

57 *See* Cox, *supra* note 15, at 8-9.

free expression rights of public employees. The question is: Are these weakened, reasonableness-balancing standards legitimate or justifiable?

The usual justification lies in the government's greater and more obvious interest in controlling the behavior of its employees than its interest in controlling the conduct of citizens in general.[58] Applying rigorous first amendment rules to the public workplace, the argument runs, would deny the government the common and ordinary prerogatives of an employer, disrupt normal and efficient operations, and open the door to special harms caused only by employee speech. Unfortunately, the reasonableness-balancing test is a crude method of differentiating between the rights of employees and citizens.

Under this test, the government may censor, regulate, and punish merely because the source of speech is a public employee. To be sure, this allows the government wide latitude in controlling its employees, but it does so at a considerable loss to employee liberty and sacrifice of first amendment values. It also risks a general weakening of first amendment standards as it is likely, perhaps inevitable, that the precedents established in employee speech cases will be carried over to other kinds of speech issues. There is evidence that this creeping dilution has already occurred.[59]

1. *The Special Problem of the Speaker's Identity*

The error and illegitimacy of the reasonableness-balancing ap-

---

58 *See, e.g.,* Pickering v. Board of Educ., 391 U.S. 563, 570-73 (1968). For a discussion of *Pickering,* see *supra* note 50. For a discussion of the private employer's interest in controlling employee speech, see Note, *Free Speech, the Private Employee, and State Constitutions,* 91 YALE L.J. 522 (1982).

Of course, employee speech, even on-the-job speech, is not *always* different from citizen speech. To take an example, consider an employee of the Department of Transportation who complains about working conditions, criticizes foreign policy in a letter to a newspaper, or simply engages in conversation with coworkers. The government's interest in controlling or suppressing such speech is not *always* stronger or more legitimate than in controlling or suppressing citizen speech. More importantly, even if the government's interest were stronger or more legitimate, it simply does not follow that that interest can only be taken into account by diluting ordinarily applicable first amendment protections.

Support for the weak reasonableness-balancing test may also lie in judicial fear that extensive supervision of employer decisions affecting free speech will inundate the courts with litigation, cause undue friction and interference with executive branch decisionmaking, and result in excessive formalization of what is essentially the informal, flexible relationship of federal employer and employee. Whatever force such fears may have had in the past, they are no longer substantial today. Federal employees labor under an extensive and formal system of rules and protections which are ultimately enforced by the courts. The harms, if any, which flow from such supervision have long since occurred.

59 Structural concessions in any area of first amendment protections tend to weaken the overall structure of those protections. For example, in Broadrick v. Oklahoma, 413 U.S. 601 (1973), the Supreme Court weakened first amendment overbreadth doctrine by requiring that overbreadth be "substantial." Although *Broadrick* was an employee free speech case decided under less rigorous first amendment standards, it has become the authority for the "substantial" overbreadth rule applied generally in first amendment law.

proach is manifest in all of the cases where the Court has considered whether the identity of the speaker (or source of speech), whether public employee,[60] student,[61] corporation,[62] or member of the military,[63] deprives speech of its ordinary and rigorous first amendment protections. The chief difficulty arises when the Court fails to distinguish the two ways in which identity can be relevant in constitutional adjudication.

In the first case, identity operates as a threshold question and can negate the existence of the constitutional right at issue. For example, only "citizens" as opposed to persons or corporations enjoy the privileges and immunities of national citizenship.[64] In the second case, identity is relevant, but only in a subsidiary way as one of many factors used to decide whether a court will honor an existing constitutional right in a particular case.[65] The distinction is crucial because once a court makes the initial determination that identity is irrelevant and that a constitutional right exists, it follows that all of the rules that ordinarily protect such a right apply. This is so because a "right" is simply the sum total or all the rules that give it life.

2. *The Lessons of* Bellotti

The case of *First National Bank v. Bellotti*[66] presents a good example of the use and misuse of identity in first amendment theory. In *Bellotti,* the Supreme Court concluded that the first amendment protects expenditures made to influence voting on public questions whether the speaker is a corporation or an individual. In reaching its conclusion, the majority ignored the textual question of whether corporations possess the same first amendment rights as "persons" within the meaning of the fourteenth amendment. The majority labeled this issue the "wrong question,"[67] explaining that concentration on the narrow question of whether corporations are "persons" ignores the dual nature of the first amendment. The first amendment protects both the right of the indi-

---

60 *See, e.g.,* Pickering v. Board of Educ., 391 U.S. 563 (1968).

61 Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (reversing lower court rulings that school board could prohibit students from wearing black bands in protest of Vietnam war).

62 First Nat'l Bank v. Bellotti, 435 U.S.765, *reh'g denied,* 438 U.S. 107 (1978).

63 Brown v. Glines, 444 U.S. 348 (1980) (reversing lower court rulings that military base commander could not require prior approval for petitions circulated at military installations regarding grooming regulations); Greer v. Spock, 424 U.S. 828 (1976) (reversing lower court rulings that military authorities could not prohibit political demonstrations within public areas of military installation).

64 U.S. CONST. amend. XIV, § 1. *See* Bickel, *Citizenship in the American Constitution,* 15 ARIZ. L. REV. 369, 387 (1973) (discussing citizenship limit as tenuous safeguard of liberties).

65 *See, e.g.,* Tinker v. Des Moines School Dist., 393 U.S. 503, 511-13 (1969) (that student protest took place within school setting was one factor in Court's analysis but not determinative).

66 435 U.S. 765 (1978).

67 *Id.* at 776.

vidual to speak and the collective right to hear and to be informed.[68] The majority found that corporate expenditures made in connection with a public referendum were a form of speech "at the heart of" first amendment protection.[69] It was, therefore, protected speech notwithstanding "the identity of its source, whether corporation, association, union, or individual."[70]

Having thus eliminated corporate identity as a relevant threshold consideration, the majority invoked traditional first amendment "strict scrutiny" and struck down the Massachusetts criminal statute that prohibited corporations from spending money on referenda issues unconnected with corporate business. In the majority's view, the statute, prohibiting the speech itself, was neither justified by a "compelling" interest nor narrowly tailored to avoid unnecessary abridgement of free speech interests.[71] The majority acknowledged that corporate identity could be relevant as a subsidiary factor in determining whether the government had a compelling interest in regulating speech. Because the state had not, however, shown any particular evil flowing from the corporate source of the speech nor any special need to protect interests unique to a corporation, such as the interests of shareholders,[72] the majority also found corporate identity to be irrelevant as a subsidiary factor.

Four Justices dissented. Justice Rehnquist concluded that corporate identity was relevant in the fundamental, threshold sense, resting

---

68 *Id.* at 776-77 & n.12.

69 *Id.* at 776.

70 *Id.* at 777. The Court added:

> We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property.

Id. at 784.

71 *Id.* at 786-95. The Court conceded that preserving the integrity of the electoral process, a chief argument advanced to support the statute, was an interest of "the highest importance." The Court, however, stated that "there has been no showing that the relative voice of corporations has been overwhelming or even siguificant in infiuencing referenda in Massachusetts . . . ." *Id.* at 789. The Court might have taken a different view "[i]f appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes . . . ." *Id.* Rejecting the state's second justification—"preventing the use of corporate resources in furtherance of views with which some shareholders may disagree," *id.* at 792-93—the Court found the statute was both underinclusive and overinclusive. It was underinclusive because it made no attempt to prohibit corporate lobbying or expenditures on public issues not on a ballot, *id.* at 793, and was overinclusive because it would prohibit corporate referenda expenditures even if the shareholders unanimously authorized that action. *Id.* at 794.

72 *Id.* at 777-78 n.13. The Court found no "occasion to consider *in this case* whether, under different circumstances, a *justification* for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities." *Id.* (emphasis added).

his view primarily on the fourteenth amendment's textual restriction to "persons."[73] Corporations, Rehnquist argued, were not persons for the purpose of enjoying all of the liberties constitutionally extended to natural persons but only for those " 'incidental to its very existence.' "[74] He doubted whether the right of political expression was such a liberty and suggested that corporations, as corporations, did not enjoy the right to freedom of speech on public referenda having no material effect on their business.

Justice White, joined by Justices Brennan and Marshall, seemed to view corporate identity as siguificant both as a fundamental, threshold issue and as a subsidiary factor in evaluating the government's interest in regulating speech. The dissenters' failure to distinguish the two issues clearly, however, led them into a novel and highly questionable reading of the first amendment. Justice White began by asking whether profitmaking corporations enjoyed first amendment rights.[75] He followed the majority's approach of ignoring the textual question of corporations' "personhood," and asked whether the values of free expression were served by such corporate speech. Justice White wrote that the "principal" values of "self-expression, self-realization, and self-fulfillment"[76] were not at all furthered by this kind of corporate speech and that the first amendment value of fostering the exposition of ideas was only minimally served.[77] From this he concluded that, although, profitmaking corporations possessed some freedom of speech, they did not enjoy the freedom of individual self-expression traditionally protected by the first amendment.[78] They enjoyed only a diluted right, a new form of free speech protected under diminished standards of review.[79]

Perhaps Justice White meant only to conclude that corporate speech was important as a subsidiary factor, and that Massachusetts had an overriding and compelling justification to regulate such speech. The Massachusetts statute, Justice White said, prevented "corporate domination" of the electoral process and "the coerced support by sharehold-

---

73 435 U.S. at 822-28 (Rehnquist, J., dissenting).

74 *Id.* at 824 (quoting Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819)).

75 *Id.* at 804-06.

76 *Id.* at 804.

77 *Id.* at 804-07.

78 *Id.* at 804.

79 435 U.S. at 806-07 (White, J., dissenting). Justice White assigned corporate speech lower priority than individual self-expression, particularly in the context of a political question. White questioned the corporation's ability to represent the views of all of its shareholders, valuing the individual opinions of shareholders higher than the corporation's right to express its general interests. White stated: "Ideas which are not a product of individual ehoice are entitled to less First Amendment protection." *See id.* at 807.

ers of causes with which they disagree."[80] He seemed, however, to be saying something more; his remarks seemed to touch on the threshold question of identity as well. He appeared to suggest that the Court could calibrate first amendment rights according to how well a particular speaker served the values of freedom of expression. If a certain speaker did not significantly advance those values, then the Court would minimally safeguard even political speech, a kind of expression normally entitled to full first amendment protection. Serious unanswered questions attend such a view, such as what other types of speakers may be subjected to those minimal first amendment protections. How will the court judge and calibrate the extent to which a speaker serves first amendment values? What implications will such "refinements" have for the entire system of freedom of expression, which would now be based not only on the nature of the speech but also on the identity of the speaker?[81]

---

80 435 U.S. at 821; *see also id.* at 809.

81 Perhaps most troublesome is the mischief necessarily worked by drawing distinctions, as the dissenters had to do, between profit corporations and nonprofit corporations, between media corporations and nonmedia corporations, between corporate communications in the form of advertising, promotions, and matters related to the functioning of the corporation and other forms of communication. Justice White recognized that certain corporate communications, such as advertising, are essential to the public's right to receive information. He concluded that "[n]one of these considerations . . . are implicated by a prohibition upon corporate expenditures relating to referenda concerning questions of general public concern having no connection with corporate business affairs." *Id.* at 808.

Only two clear conclusions can be drawn from Justice White's opinion. First, to the extent he used the identity of the profitmaking corporation to carve out a new, diluted first amendment right, he departed from prior first amendment cases that have distinguished among types of speech but not among types of speakers. *See, e.g.,* L. TRIBE, *supra* note 50, at 580-682. Second, however else Justice White viewed corporate identity he considered it relevant in the subsidiary sense; the identity of the speaker provided Massachusetts with an "overriding" reason to regnlate the speech.

As the majority in *Bellotti* pointed out, the question of whether the first amendment protects corporate speech traditionally has dependcd on the value of the speech at stake and the government's interest in regnlating that speech. First amendment rights have not depended merely on the simple status of a corporation as a corporation. 435 U.S. at 778-79 n.14. The Court, however, has had considerable difficulty in applying the first amendment to the military. *See* Brown v. Glines, 444 U.S. 348 (1980); Greer v. Spock, 424 U.S. 828 (1976). In *Greer,* the Court (6-2) upheld military regnlations that barred political speeches and distribution of literature from public areas of a military base unless the speaker received prior approval from post headquarters. Because it was a military base, the majority concluded that the commanding officer could exclude all civilians and prohibit all civilian political activities. The majority did not rely on traditional first amendment analysis, which would demand more than the majority's ruling in *Greer* that the policy of exclusion was evenhandedly applied and, therefore, acceptable. Justice Brennan, joined by Justice Marshall, dissentcd. Brennan agreed that military needs might justify restrictions on speech that otherwise would be unconstitutional. *Id.* at 861. He disagreed strenuously, however, with the majority's approach and the result that approach produced in *Greer.* He stated: "The Court's opinion speaks in absolutes, exalting the need for military preparedness and admitting of no careful and solicitous accommodation of First Amendment intcrests to the competing concerns that all concede are substantial." 424 U.S. at 851. He chided the Court for its "uncnlightening generality" and emphasized that despite the majority's observation that " 'the primary busi-

Returning to the issue of public employee free speech, when the Supreme Court recognizes that public employees enjoy first amendment rights but, as in *Snepp,* fails to protect those rights under traditional and rigorous first amendment standards, it is doing one of two things. It is either saying that identity as a public employee is, after all, important in the threshold, fundamental sense and that public employees enjoy a different, diluted kind of first amendment right. Or, as Justice White may have done in *Bellotti,* it is simply confusing identity in its fundamental and subsidiary senses. That is, the Court is allowing the government's justification for not honoring free speech rights of public employees in certain cases (subsidiary sense) to serve as the basis of changing the nature of the right itself (fundamental sense). That the Court is simply confused is borne out by a fresh look at the question and by the Court's own recognition in earlier cases,[82] and even occasionally now,[83] that public employees do enjoy first amendment rights as traditionally defined and protected.

B. The Case for Applying Traditional First Amendment Standards to Employee Expression

The simple antidote for the confusion surrounding whether one's identity as a public employee negates the existence or changes the nature of first amendment rights lies in traditional methods of constitutional analysis.[84] Conventional analysis looks first to the words of the text as written or as interpreted from history, contemporaneous understanding, or the structure of the government as a whole. Second, it examines the nature of the right to determine whether the values at stake are the same notwithstanding identity. Under such analysis it is plain that public employees should enjoy full rights of freedom of expression.

First, there is nothing in the text of the first or fourteenth amendments, as written or as interpreted, that negates the rights of public employees.[85] Second, and more affirmatively, the values that underlie

---

ness of armies and navies [is] to fight or be ready to fight,' " *id.* at 838, (quoting United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955)), he stressed that "the training of soldiers does not as a practical matter require exclusion of those who would publicly express their views from streets and theater parking lots open to the general public." *Id.* at 852.

82 *E.g.,* Keyishian v. Board of Regents, 385 U.S. 589 (1967).

83 *See, e.g.,* Branti v. Finkel, 445 U.S. 507 (1980); Elvod v. Burns, 427 U.S. 347 (1976).

84 Applying this method of analysis the Court has determined, for example, that only persons and not fetuses enjoy the protections of the fourteenth amendment, Roe v. Wade, 410 U.S. 13, *reh'g denied,* 410 U.S. 959 (1973), that corporations are "persons" for the purpose of enjoying due process of law but not for the purpose of claiming the privilege against self-incrimination, Smith v. Ames, 169 U.S. 466, 522 (1898) (corporation protected under due process clause); United States v. White, 322 U.S. 694, 698-701 (1944) (corporations do not enjoy privilege against self-incrimination beeause right is purely personal), and that students no less than other persons are entitled to freedom of expression, Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969).

85 U.S. CONST. amend. I; *id.* amend. XIV, § 1. One might speculate that in drafting the

freedom of expression—self-fulfillment, the advancement of knowledge and the discovery of truth, and preservation of an informed electorate[86]—are the same whether the speaker is a public employee or a private citizen.

Government limitation on employee speech can take many forms but typically includes: (a) prohibiting public criticism of governmental actions or public airing of job-related complaints, (b) limiting activities outside of employment that "conflict" with governmental service, such as political activities, (c) restricting contact with certain persons while on or off the job, such as members of the press, (d) prohibiting authoritative statements made or having the appearance of having been made as a governmental spokesperson, and (e) limiting specific information that may not be revealed because it is confidential, sensitive, or secret.[87] In every instance—except limits on those acting as governmental spokespersons—the intrinsic value of self-fulfillment is at stake to some degree. Individuals do not shed their personal identities on the job. In fact, the job may be the principal place where an individual interacts with others, forms opinions, and expresses his views. It may be the center of his social and political life.

Protecting employee expression also directly serves the instrumental values fostered by the first amendment—knowledge, truth, and availability of public information. This becomes apparent as one recalls that the government is the greatest single source of information about what is going on in general and about its own activities in particular. Indeed, it may be more crucial to protect employee speech than to protect the speech of private citizens. Employees are uniquely situated to furnish information about government action, inaction, and wrongdoing. They are also in a direct position to influence policy and thus the entire society benefits if they are free to express their views fully and independently.[88]

To appreciate the importance of allowing government employees to engage in free speech protected by traditional first amendment standards, one need look no further than Frank Snepp. Snepp joined the CIA as a young graduate student and served two tours of duty in Viet-

---

fourteenth amendment the Framers might have intended to distinguish between the state acting in a govenmental capacity and a proprietary capacity, thus justifying a distinction between the rights of private citizen-individuals and those of public employees. *See, e.g.,* Van Alstyne, *supra* note 45, at 1460-61.

86 *See, e.g.,* T. EMERSON, *supra* note 49, at 6-7; *see* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763-65 (1976) (emphasizing public interest in free flow of information in free enterprise system); Cohen v. California, 403 U.S. 15, 24-26 (constitutional right of free expression intended to "produce a more capable citizenry and a more perfect polity"), *reh'g denied,* 404 U.S. 876 (1971).

87 *See supra* notes 31-39 and accompanying text.

88 *See, e.g.,* Arnett v. Kennedy, 416 U.S. 134, 228 (Marshall, J., dissenting), *reh'g denied,* 417 U.S. 977 (1974).

nam between 1970 and 1975. He left Vietnam during the fall of Saigon when the United States was forced to quit the country in haste and desperation. Snepp had served as the CIA's "principal briefer and political-strategic analyst at the [American] Embassy."[89] He returned from Vietnam disillusioned with the CIA and yearning to tell what he had learned from his inside position about the CIA's responsibility for the fall of Saigon.[90] In writing *Decent Interval* he fulfilled his yearning and at the same time contributed significantly to the public debate about the United States' involvement in Southeast Asia.

Thus, examination of the underlying purpose of the first amendment and the values it serves leads to the conclusion that a person's identity as a government employee does not negate otherwise applicable rights.[91] This conclusion, however, does not force a disregard of the obvious differences between employees and private citizens. Certainly public employees are more than just individual citizens who happen to work for the government. They themselves constitute the government, and, if government is to govern, it must have at least the power to ensure its own effective operation. This necessitates implementing controls over government employees that have no comparability to controls over private citizens. Government service requires standards of competence and obedience, as well as rules regulating organizational behavior.[92] For example, although insulting langnage from a citizen is constitutionally tolerable as long as it falls short of an "unambiguous invitation to brawl,"[93] such language may permanently destroy an employee's effectiveness on the job.

Moreover, some employee activity is unique to government service. Public employees have unique access to certain governmental information; they can control data completely unavailable to the public.[94] In addition, only public employees can speak for the government and, as official representatives, can potentially cause more harm in exercising their right of free expression than can private citizens. Obviously the public will give more credence to a CIA spokesman's allegation that the CIA has assassinated a political leader than to a private individual's. Finally, public employees can engage in certain associational activities that transcend the usual features of group activity. Because of their po-

89 F. SNEPP, DECENT INTERVAL (1977).

90 *Id.*

91 In this regard, employee speech is unlike even corporate speech, as to which some argument can be made that first amendment values are not well or materially served. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

92 *See, e.g.,* T. EMERSON, *supra* note 49, at 567.

93 Ely, *supra* note 49, at 1493 (discussing Cohen v. California, 403 U.S. 15 (1971)).

94 *See, e.g.,* Pickering v. Board of Educ., 391 U.S. 563, 570-72 (1968) (teachers' freedom to express views on expenditures by school board essential because they are most likely to have informed and definite opinions).

sitions, public employees are a discreet group simultaneously dependent upon and controlled by governmental and political leaders. As a discreet group they are uniquely situated to exploit and to be exploited.[95]

All of these unique needs and special problems associated with public employment must be taken into account, but they are matters important only in the subsidiary consideration of identity; they are merely factors to be weighed under traditional first amendment rules in assessing the potential danger of the speech.

In constitutional terms, the following reformulated rules should govern in all employee speech cases:

1. Public employee rights of free expression derive from the freedoms protected by the first amendment;
2. An employee enjoys rights of free expression to the same extent as any other citizen unless the nature of an employee's expression is
   (a) uniquely incompatible with his status as an employee or
   (b) an official government statement or
   (c) a knowing disclosure of confidential information that is nonpublic and otherwise unavailable to the public
3. When employee expression or association falls into one of the three categories listed in section two above, the government has a compelling interest sufficient to allow it to regulate that behavior, but the means it uses must comply with traditional first amendment doctrine.[96]

---

95 *See, e.g.,* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564-67 (1973).

96 *See supra* note 49. The salutary consequences of such an approach are indirectly illustrated in Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), a case that, by way of analogy to government employees, considered the nature and scope of first amendment rights of students. In *Tinker,* students challenged a district wide regulation forbidding the wearing of armbands in school. The regulation was not part of a general prohibition on the wearing of political symbols. It was a special rule adopted to thwart protest about United States involvement in the Vietnam War. Such a rule, if applied to citizens generally, would violate the first amendment's nearly total ban on suppression of particular political messages. But, as a threshold matter, the Court had to determine whether students enjoyed the same rights as other persons. The Court concluded that neither one's identity as a student nor the fact that the expressive activity took place within a school rendered the first amendment inapplicable. "[S]tudents in school as well as out of school," Justice Fortas wrote, "are 'persons' under our Constitution . . . possessed of fundamental rights which the State must respect." *Id.* at 511. The Court also concluded that neither identity nor context justified a dilution or watering down of traditional first amendment protections. The Court acknowledged that the school environment had special characteristics distinguishing it from conventional first amendment arenas via a reasonableness standard, which balanced ad hoc the school's generalized fear of disturbances from armbands against the students' interest in expression. Rather, the Court extended "comprehensive protection," Ely, *supra* note 49 at 1492, to student speech by applying a kind of clear and present danger test. The armband regulation could not survive, the Court said, because the expressive activity did not materially disrupt classwork or involve substantial disorder or invasion of the rights of others. Although the Court should have expressed its clear and present danger standard more forcefully, it is plain that, although the special interests of the government in controlling student behavior were taken into ac-

C. Applying Traditional Standards to Police the Secrecy Methods of *Snepp* and the Directive

Under these reformulated rules, public employee rights of free speech will be taken seriously and, as a by-product, the intrusions that both *Snepp* and the Directive make on employee expression can be effectively policed. In *Snepp,* the Court held that the government has a "compelling"[97] interest in "protecting . . . the secrecy of information important to our national security,"[98] and in preserving the "appearance of confidentiality"[99] and that the CIA's prepublication review agreement, although a form of prior restraint, was enforceable by court injunction as a valid and "reasonable means" of protecting the government's interests.[100] The court also held that where an employee breaches a prepublication review agreement, as did ex-agent Snepp, the fairest, most effective—and hence most appropriate[101]—remedy is a constructive trust imposed for the benefit of the government over all profits the defendant might earn from the uncleared publication. Finally, the Court concluded that prepublication review was congressionally authorized under statutory provisions requiring the CIA Director to " 'protec[t] intelligence sources and methods' from unauthorized disclosure."[102]

Each of these conclusions is suspect when measured against the reformulated standards. Again, these standards dictate that employee speech must be governed by traditional first amendment standards. These require that, when government regulations prohibit speech itself, "the [Government] may prevail only upon showing a subordinating interest which is compelling . . . ,"[103] and that "the burden is on the government to show the existence of such an interest."[104] Even then, the Government must employ "means closely drawn to avoid unnecessary abridgement."[105]

Regarding the government's interest in controlling Snepp's expression, the government does have a legitimate, unique, and hence compelling interest as an employer in preventing its employees from disclosing classified information acquired only by virtue of their employment. The

---

count, the government's regulation still had to measure up to rigorous first amendment standards. 393 U.S. at 512-14.

For a recent case upholding a prepublication review scheme under an analysis similar to that employed here, see McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983).

97 444 U.S. at 509 n.3.

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.* at 515-16; *see supra* note 20.

102 *Id.* (quoting 50 U.S.C. § 403(d)(3) (1976)).

103 Bates v. Little Rock, 361 U.S. 516, 524 (1960).

104 Elrod v. Burns, 427 U.S. 347, 362 (1976).

105 Buckely v. Valeo, 424 U.S. 1, 25 (1976).

public has no right of access to such information, and the government employee's access is conditioned and premised upon maintaining confidentiality.[106] Thus, expression based on this information may be controlled so long as the forms of control meet otherwise applicable first amendment tests.[107]

The government's interest in *Snepp* in preserving the "appearance of confidentiality" is quite different. First, it is empirically debatable whether this interest can be appropriately characterized as "compelling." The Court relied on "[u]ndisputed evidence"[108] presented by the Director of the CIA that "a CIA agent's violation of his obligation to submit writings about the Agency for prepublication review impairs the CIA's ability to perform its statutory duties" and, that as a result of Snepp's expression and similar activities by others, CIA sources have "discontinue[d] work with [the United States]" or "questioned whether they should continue exchanging information with us."[109] Justice Stevens in his dissent viewed this "truncated" evidence skeptically, stating that it was "difficult to believe that the publication of a book like Snepp's, which does not reveal classified information, has significantly weakened the Agency's position."[110] Commentators have expressed similar doubts concerning the CIA's claims. They suggest that significant leaks and consequent loss of confidence arise either from top officials' intentional attempts to manipulate public opinion or the CIA's own lax security procedures.[111] Given this divergence of opinion, it is at least doubtful that the government actually proved the compelling nature of its confidentiality interest.

Second, even assuming the CIA had made its case, it is extremely unlikely that the government could prove a compelling interest in the appearance of confidentiality outside of the narrow field of foreign intelligence. Although the CIA may have a plausible claim that prepublication review is necessary to assure foreign intelligence sources of confidentiality, surely no similar justification can be made for extending prepublication review to the thousands of employees now subject to it under the Reagan Directive.

Finally and more fundamentally, the government's interest in appearing able to keep secrets—if divorced from its interest in keeping the secrets themselves—is per se an illegitimate one. That is, the government may have a compelling interest in keeping classified information secret and it may claim that it must censor classified and unclassified

106 *See supra* notes 94-96 and accompanying text.

107 *See supra* notes 49, 96.

108 444 U.S. at 512.

109 *Id.*

110 *Id.* at 523 (Stevens, J., dissenting).

111 *See, e.g.,* Franck & Eisen, *Balancing National Security And Free Speech,* 14 J. INT'L L. & POL. 339, 353-56 (1982).

information as the *means* of protecting secrets. But once the government claims an independent interest in appearing able to keep secrets, its claim, restated, is that it must be able to tell the world that its employees say only that which the government sanctions.[112] Such an interest fundamentally opposes all first amendment values.

Accepting that the government has a compelling interest in protecting classified information acquired in confidence, neither prepublication review nor the potentially severe economic punishment of a constructive trust are means carefully formulated to avoid unnecessary abridgement of free speech interests. These methods of control are both underinclusive and overinclusive.

The constructive trust penalty is underinclusive because it fails to deter the one-time-only ideological leaker who cares nothing for profits from compromising classified data.[113] It is also overinclusive because it may impose a severe economic fine on authors like Snepp whose writings threaten no cognizable harm to the government.[114]

Similarly, prepublication review, even when later joined with a court imposed injunction, is underinclusive because it will not deter those who leak for ideological reasons; it may not even deter the profit seekers.[115] Yet such review is markedly overinclusive because it imposes a lifelong obligation of preclearance whether or not the disclosure includes classified information and whether or not the information will actually harm national security or merely embarrass public policymakers.[116]

Prepublication review is especially overbroad in that, by its very operation, it will delay or suppress unclassified criticism of government policies by those most likely and able to offer it.[117] Indeed, the Directive presents an information management scheme so unprecedented in scope

---

112 One commentator argued that the compelling interest in the appearance of confidentiality is problematic because the means chosen by the government to preserve this appearance will depend upon what appeases foreign intelligence agencies. "In the end, the American civil liberties would live under the thumb of foreign veto." Medow, *supra* note 16, at 827-28.

113 *See, e.g.,* Franck & Eisen, *supra* note 111, at 356-57.

114 As Justice Stevens correctly concluded, the government has a legitimate interest in preventing the disclosure of classified information. 444 U.S. at 518 (Stevens, J., dissenting); *see supra* note 22 and accompanying text.

115 Franck & Eisen, *supra* note 111, at 356-59.

116 The Administration has not offered specific justification for the Directive or given specific examples of harm to national security that could have been avoided by prepublication review. *See* Pear, *President Orders Curbs in Handling of Classified Data,* N.Y. Times, Mar. 12, 1983, at 1, col. 4; Lewis, *Men of Zeal,* N.Y. Times, Mar. 31, 1983, at A23, col. 1.

117 Abrams, *supra* note 22, at 25-26; Halperin, *supra* note 26, at 1-2. If prepublication review had been instituted earlier, the requirement would have stifled a significant amount of recent criticism and comment concerning foreign affairs and military matters. *See* Abrams, *supra* note 22, at 25-26. One irony is that Stansfield Turner, the former CIA Director who supervised the prepublication review scheme under President Carter, has himself been involved in a long wrangle with his former Agency over whether a book he has written does or

that it may alter the entire nature of national public debate.[118] The change will be insidious but nevertheless real. The public will not know what voices it did not hear or what those voices were precluded from saying. Citizens may not even realize that what is written by any of thousands of former top officials is a sanitized, government-approved version. Furthermore, the very breadth of the Directive almost ensures arbitrary applieation or, worse, favoritism toward "friendly critics."[119] In short, the nature and operation of this prior restraint, especially when considered in light of our historical intolerance of such schemes,[120] renders it incompatible with traditional first amendment means standards.[121]

---

does not contain classified information. *See* Hersh, *Ex-Intelligence Director Disputes Censorship of His Book on C.I.A.,* N.Y. Times, May 18, 1983, at A1, col. 1.

118 *See, e.g.,* Abrams, *supra* note 22, at 22 (Reagan Administration's requirement of prepublication review "appears to be hostile to basic tenet of first amendment that democracy requires informed citizenry to argue and shape policy").

119 There is evidence to suggest that the CIA has used its prepublieation review system to block publication of writings critical of the Agency. *See, e.g.,* Agee v. CIA, 500 F. Supp. 506, 509 (D.D.C. 1980) (Court indicated there was "factual issue" whether CIA's past enforcement record has been "clouded by content considerations rather than wholly legitimate concerns for security"). One flaw of prior restraints is that they allow for excessive review and discriminatory treatment. *See* T. EMERSON, *supra* note 49, at 9-10; Medow, *supra* note 16, at 820 (censors tend to oppose disclosure of embarrassing or politically damaging material).

120 Aversion to prior restraints is the foundation of first amendment doctrine. *See* L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 190, 193, 201-03, 206 (1960) (noting inference of Blackstonian concept that freedom of press meant freedom from prior restraint). The prohibition against prior restraints, although not absolute, is subject to few exceptions. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569-70 (1976) (threat to defendant's "fair trial rights" might justify restraint on first amendment rights); *see also* Litwack, *The Doctrine of Prior Restraint,* 12 HARV. C.R.-C.L. L. REV. 519, 541-49 (1977) (prior restraint on obscenity and speech that will cause direct and immediate harm to life or national security permissible); *cf.* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (" 'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' " (quoting Baxter Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)); Organization For A Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (vacating injunction prohibiting distribution of literature critieal of realtor's "blockbusting" because restraint unjustified). This constitutional disfavor is a rcaction to the devastating efficiency with which prior restraints suppress expression, and a recognition of the tendency of prior restraints, once established, to expand beyond their original boundaries. T. EMERSON, *supra* note 49, at 9-10.

121 The government may in an individual case be able to show that, unless the court issues an injunction, an employee or former employee will disclose classified information acquired confidentially while on the job. *See, e.g.,* United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied,* 409 U.S. 1063 (1972) (affirming injunction ordering Marchetti to provide CIA in advance any writing relating to Agency but remanding for revision of order to limit its scope to classified information). Aside from the question of statutory authorization, it is arguable that such an injunction is warranted but the court must be careful to specify and limit the scope of its order. One commentator has suggested ways to refine the application of prepublieation review so that, in his opinion, it could survive constitutional scrutiny. Anawalt, *supra* note 16, at 714-15. It is doubtful, however, that any adjustments could make this a more precise and hence less drastic method of protecting the government's interest than an alternative method based on specific, narrowly drawn criminal penalties. *See, e.g.,* Franck & Eisen, *supra* note 111, at 359-61; Medow, *supra* note 16, at 836-40. There is no general

The final point of vulnerability of both *Snepp* and the Directive relates to whether the Executive has the authority without specific congressional approval to exact prepublication review promises from public employees. Presumably, unilateral presidential power is insufficient, and thus some form of congressional approval is necessary.[122] In *Snepp,* the Court evidenced its implicit agreement with this presumption by finding that the statutory charter of the CIA, which empowers the Director to "protec[t] intelligence sources and methods from unauthorized disclosure,"[123] authorized the CIA's system of prepublication review. It is unclear, however, what kind of approval is, or should be, necessary before the Executive can request such promises.

If congressional silence or the most general grant of power, such as the CIA charter or statutes establishing standards of employee conduct,[124] delegates such power to the Executive, then nothing short of actual disapproval will negate it. Congress has come very close to such disapproval by postponing implementation of the Directive's prepubli-

---

criminal penalty for unauthorized disclosures of classified information but certain statutes, such as the Atomic Energy Act, criminalize the disclosure of particular kinds of classified information. 42 U.S.C. § 2274 (1976). Although the espionage laws are the principal statutes governing disclosure of sensitive governmental information, these laws are limited to disclosures of national defense information made with intent to injure the national interest. They are largely irrelevant to simple unauthorized disclosures of classified data. Internal Security Act of 1950, 18 U.S.C. §§ 793-794 (1982). *See generally* Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information,* 73 COLUM. L. REV. 929 (1973); Willard, Report of the Interdepartmental Group on Unauthorized Disclosures of Classified Information, C-2 to C-9 (Mar. 31, 1982) (on file at *Cornell Law Review*) [hereinafter cited as WILLARD REPORT].

Many analysts believe that criminal sanctions on the disclosure of classified information are unwise as a matter of policy, *see, e.g.,* Halperin & Hoffman, *Secrecy And The Right To Know,* 40 LAW & CONTEMP. PROBS. 132, 148-50 (1976) (there should be no criminal penalties for "any and all disclosures of classified information"), or that subsequent punishment, "calculated as it is to suppress by a self censorship that evades judicial review," may be more dangerous to first amendment values than some forms of prior restraint. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine,* 67 CORNELL L. REV. 245, 270 (1982). Nevertheless most agree that criminal penalties are the strongest means constitutionally available to prevent employee disclosures of classified information. *See, e.g.,* Franck & Eisen, *supra* note 111, at 359-66; Medow, *supra* note 16, at 836, 838. The executive cannot, of course, establish criminal penalties by executive order, *cf.* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime . . . ."), and this may explain the appeal of prepublication review to the current Administration).

122 *See, e.g.,* Fleshman & Aufses, *Law and Orders: The Problem Of Presidential Legislation,* 40 LAW & CONTEMP. PROBS. 1, 14-19 (1976) (discussing "direct" or "implicit" means of congressional authorization for executive orders); Rosenberg, *Beyond The Limits Of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291,* 80 MICH. L. REV. 193, 246 (1981) (executive order to improve efficiency of Agency informal rulemaking procedures "exceed[ed] the proper bounds of presidential authority").

123 50 U.S.C. § 403(d)(3) (1976).

124 *E.g.,* 5 U.S.C. § 7532 (1982) (provides for suspension or removal of certain federal employees if such action is found to be "necessary in the interest of national security"). *See* WILLARD REPORT, *supra* note 121, at C-9, C-10 ("There is not general statute providing for such penalties or injunctive relief in cases of disclosure of classified information").

cation review provisions until April 15, 1984.[125] It remains unclear, however, what action, if any, will be taken after that time. One might argue that Congress has manifested sufficient disapproval in the Freedom of Information Act (FOIA), which provides that disclosure, not secrecy, must be the dominant objective.[126] But the FOIA does not specifically outlaw prepublication review or any other particular secrecy scheme.

The question of executive authority to issue the Directive and how that authority is manifested is closely related to the protection of the first amendment rights of public employees. In this regard, it is crucial to recall that under our constitutional scheme, liberty is preserved in two fundamental ways. One way is by placing the regulation of certain subjects beyond governmental control. The other way is by separating and dividing governmental powers through "diffused sovereiguty."[127] When the judiciary is called upon to adjudicate the validity of governmental action against a claim of individual liberty, it may draw on both methods of protection. At times governmental action involves an invasion of liberty that is neither so gross nor so clear that a court can confidently declare it substantively out of bounds. The action may be sufficiently drastic, however, that the court seeks to ensure that the decisionmaking process that produced the action gave full account to the liberty interest. This explains the courts' narrow construction of statutes of doubtful constitutionality and their tendency to remand such matters to the legislature for more careful reflection.[128] At other times the courts confront governmental action that intrudes on liberty interests but the nature of the issue is such that a court feels institutionally unable or unwilling to set down precise or enduring substantive rules. Again, however, the curtailment of liberty is sufficiently serious that the courts will require a clear statement that Congress approved of the action.[129]

The courts should apply this approach to evaluation of prepublication review. Even if the courts remain institutionally hesitant to review the Executive's methods of maintaining secrecy where those methods tread heavily on free speech values, the question of the Executive's

---

125 Department of State Authorization Act, Fiscal Years 1984 and 1985, Pub. L. No. 98-164, § 1010, 97 Stat. 1061 (1983)

126 EPA v. Mink, 410 U.S. 73, 80 n.6 (1973) (FOIA seeks "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineating statutory language") (quoting S. REP. NO. 813, 89th Cong., 1st Sess. 5 (1965)).

127 *See* Tushnet, *Following The Rules Laid Down: A Critique of Interpretivism And Neutral Principles,* 96 HARV. L. REV. 781, 784 (1983).

128 *See, e.g.,* L. TRIBE, SUPRA note 49, at 1140-44.

129 In this regard, one factor in the Supreme Court's decision to deny the Executive a prior restraint against publication of the Pentagon Papers was the lack of specific congressional authorization. *See id.; cf.* Greene v. McElroy, 360 U.S. 474 (1959) (requiring explicit congressional or presidential approval for Defense Department security program that allowed employees to be fired without opportunity to confront sources of derogatory information).

power must be construed narrowly.[130] The principle of decision based on the first amendment values would be this: A court might conclude that the executive branch may not impose prepublication review on employees or otherwise seriously limit the free flow of governmental information to the public without explicit, specific approval by Congress.[131]

This last requirement, together with the exacting demands of traditional first amendment doctrine, would jeopardize all executive secrecy schemes bottomed on prepublication review. They would surely doom the methods validated in *Snepp* and sanctioned by the Directive.

III
WHAT CAN BE KEPT SECRET—REFORMULATING THE CONSTITUTIONAL RIGHT OF ACCESS TO GOVERNMENT INFORMATION

In addition to its intrusion upon the first amendment rights of government employees, the *Snepp* decision also failed to protect adequately the "public's right to know" or the "right of access" to governmental information.[132] The same criticism applies to the Directive, which more severely affects the public's right to know.[133]

A right to know claim may take one of two forms. The first, weak form is based on the conventional first amendment argument that limitations on free expression are more serious if, in addition to affecting an individual's rights, they limit the stock of ideas available to the public.[134] This form of the right to know argument is adequately accounted

---

130 Another approach for the courts is to heighten statutory requirements regulating executive secrecy in all cases where executive action raises significant first amendment issues. *See* McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983).

131 The Supreme Court has demonstrated its willingness to reject congressional "approvals" based on general statutes or inaction. Unfortunately, the Burger Court opinions tend to correlate strongly with the outcome and not with the pristine question of constitutional interpretation. The Court's selective reading has led it, for example, to find approval in congressional silence in order to uphold the Secretary of State's passport revocation of a former CIA agent who revealed the identity of CIA operatives in foreigu countries. Haig v. Agee, 453 U.S. 280 (1981); *see, e.g.,* Dames & Moore v. Regan, 453 U.S. 654, 680 (1981) (Congress "implicitly approved the practice of claim settlement by executive agreement"). At the same time, the Court found language in the 1974 Developmentally Disabled Act, that is rather specific, to be too ambiguous to create a right of minimally restrictive treatment for the mentally retarded. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981). Despite this apparent bias toward reading statutes broadly in order to restrict liberty, the serious risk posed to first amendment values by prepubliation review may prod the Court to reconsider its past interpretations.

132 *See* Medow, *supra* note 16, at 823-24 ("Information concerning public issues is the lifeblood of democracy; an uninformed citizenry is, by definition, an ineffective check on both official misconduct and misguided policy."); *see also* Cox, *supra* note 15, at 9, 10 (right to know issue was at least serious enough to warrant fuller consideration by Court).

133 *See* Abrams, *supra* note 22, at 22; Halperin *supra* note 26, at 2; *President Orders Curbs In Handling Of Classified Data, supra* note 24, at 1, col. 4; *supra* notes 22-30 and aecompanying text.

134 *See, e.g.,* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845-46 (1978)

for by reformulating the first amendment rights of government employees.[135]

The second, strong form of the right to know argument focuses on an independent public right of access to governmental information.[136] It imposes an affirmative governmental obligation to disclose.[137] This right is not simply coextensive with a speaker's rights; it can exist even if a speaker may be constitutionally silenced. This right transcends the weak form of the right to know because it posits a right to receive information that the government may be unwilling to share.[138]

The right of access is a direct claim to information and it is only

---

(invalidating state statute imposing criminal sanction for divulging information relating to state judicial review commission hearings); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496-97 (1975) (invalidating state statute prohibiting publishing name of rape victims). Some commentators have suggested that the only reasons to protect the speaker are the public's right to know and the value of political discussion. *See, e.g.*, A. MEIKLEJOHN, POLITICAL FREEDOM (1960); Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 24-26 (1971); Meiklejohn, *The First Amendment is an Absolute,* 1961 SUP. CT. REV. 245. The Supreme Court has "rejected suggestions that the scope of the first amendment be limited to narrow categories such as 'political speech.'" Emerson, *supra* note 44, at 440. The Court, instead, has accepted the traditional first amendment values: "(1) Individual self-fulfillment; (2) the advancement of knowledge and (3) participation in decisionmaking by all members of society; and (4) the discovery of truth, maintenance of proper balance between stability and change." *Id.* at 423, 440. Nevertheless, the Court has, in other contexts, manifested its concern for the public's right to know. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978) ("[T]he First Amendment . . . prohibit[s] government from limiting the stock of information from which members of the public may draw.")

135 *See supra* notes 49-50 and accompanying text.

136 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Emerson, *The Affirmative Side Of The First Amendment,* 15 GA. L. REV. 795, 828-31 (1981); Emerson, *Legal Foundations Of The Right To Know,* 1976 WASH. U.L.Q. 1, 14-20 [hereinafter cited as Emerson, *Legal Foundations*]; Note, *The First Amendment Right To Gather State-Held Information,* 89 YALE L.J. 923 (1980).

137 The Supreme Court has generally rejected the argument that the Constitution imposes affirmative obligations on the government. It has found that the equal protection clause does not guarantee minimum governmental services. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education). *But see* Plyler v. Doe, 457 U.S. 202 (1982) (same). There is no constitutional right to government subsidies even when the funds facilitate the exercise of constitutional rights. *See* Harris v. McRae, 448 U.S. 297 (1980). The right of access to governmental information has been criticized because it suggests an affirmative governmental obligation to disclose information and is said to contravene the Constitution's essentially "negative" character. *See* BeVier, *supra* note 10, at 516. The distinction between affirmative and negative rights, even if valid, is more difficult to draw than might first appear. The Court is correct to "reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State,'" Regan v. Taxation with Representation, 103 S. Ct. 1997, 2001 (1983) (quoting Commanaro v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)), but surely a right of access is not an "affirmative" right in that sense. One might even cast the right of access as a "negative" right; the right to be free of governmental interference designed to prevent the natural and inevitable flow of information from the government to the people.

138 For a more elaborate discussion of the difference between these two forms of the right to know, see BeVier, *supra* note 10, at 485-88. *See also* BeVier, *Justice Powell and The First Amendment's "Societal Function": A Preliminary Analysis,* 68 VA. L. REV. 177, 182-85 (1982) [hereinafter cited as BeVier, *Justice Powell*].

indirectly related to how secrets are kept. It presupposes the competence of courts to supervise executive decisions concerning what information government may keep secret and what information it must disclose.[139] Nevertheless, it is relevant to *Snepp* and the Directive—methods of control—on the theory that prepublication review operates to keep too much information secret. Critics contend for example that the Directive will "cut off most of the information that Americans rely on to understand foreign affairs"[140] and "drastically alter the conditions of public debate on national security issues."[141]

Constitutional scholars have long argued that the first amendment embodics a "right to know" of the strong form discussed above, guaranteeing a right of access to governmental information.[142] The thesis, in brief, is that a central purpose of the first amendment is to protect and sustain the process of representative democracy by maintaining an informed electorate. Because the government is best able to provide information concerning its own activities, the public has a right of access to information within the government's control in order to maintain and nourish the democratic process.[143] This thesis was developed by Professor Thomas Emerson in an early and influential article in which he described the right of access as the "right of the public to obtain information from the government."[144] "If democracy is to work," he argued, "the public, as sovereign, must have all information available in order to instruct its servants, the government."[145]

The same line of thinking is found in opinions of Justices Powell, Stevens, and Brennan.[146] Justices Powell and Stevens locate the right of

---

139 *See* BeVier, *supra* note 10, at 508-12.

140 *President Orders Curbs In Handling of Classified Data, supra* note 24, at 11, col. 2.

141 Halperin, *supra* note 26, at 2.

142 *E.g.,* Emerson, *Legal Foundations, supra* note 136, at 14-17.

143 *Id.*

144 *Id.* at 14.

145 *Id.*

146 Although all three Justices recognize a right of access, their individual support for this notion rests on somewhat different theoretical bases. Justice Powell, for example, adopts the premise that the first amendment protects "public discussion of governmental affairs." Saxbe v. Washington Post Co., 417 U.S. 843, 862 (1974) (Powell, J., dissenting). Justice Stevens adopts the same premise. Houchins v. KQED, Inc., 438 U.S. 1, 31 n.20 (1978) (Stevens, J., dissenting). From this Stevens concludes that "information gathering is entitled to *some* measure of constitutional protection." 438 U.S. at 32 (emphasis added). This view represents the minimal right of access. It suggests that the courts might constitutionally police secrecy practices to ensure that such practices do not unnecessarily limit the flow of information concerning governmental action. Justice Brennan's "structural" model also proceeds from the first amendment's relationship to self government. For Brennan, the basic value is not simply to protect discussion of public affairs, but rather to preserve democracy itself. Brennan, *Address by Justice Brennan,* 32 RUTGERS L. REV. 173, 175-77 (1979). Government has an obligation to safeguard the indispensible conditions of democracy, namely the opportunity for individuals to see, to understand, and to criticize the operations of government. *Id.* Brennan's view might be termed the expansive right of access. If followed to its logical conclusion, it would

access in the " 'societal function of the First Amendment,' "[147] and Justice Brennan finds it in the "structural" role of the guarantee.[148] According to Justices Powell and Stevens, the first amendment embodies more than "individualistic values" of the right to speak and to hear. It includes the societal interest in maintaining the integrity of the political process and the ability of the public to assert meaningful control over governmental action.[149] This can only be done if there is "informed public debate" about governmental affairs.[150] For Justice Powell, the societal function of the first amendment requires that the government "substantially accommodate the public's legitimate interest in a free flow of information and ideas" about governmental affairs such as the operation of federal prisons.[151] Similarly, Justice Brennan's "structural" interpretation obligates the government to provide the information that is necessary to meaningful discussion of governmental affairs.[152] The first amendment guarantees that the people remain able, through observation and discussion, to govern themselves.[153]

There are two basic objections to a constitutional right of access. The first is that the first amendment cannot legitimately be read to provide such a right.[154] This argument proceeds from a narrow, interpretivist[155] reading of the constitution, a view that constitutional rights

---

place a constitutional duty on the government to enhance communication and public discussion of public affairs.

147 Houchins v. KQED, Inc., 438 U.S. 1, 31 n.20 (1978) (Stevens, J., dissenting) (quoting Saxbe v. Washington Post Co., 417 U.S. 843, 862 (1974) (Powell, J., dissenting)). *See* BeVier, *Justice Powell, supra* note 138, at 182-88 (criticizing Justice Powell's "societal function" analysis).

148 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587-89 (1980) (Brennan, J., concurring); Brennan, *supra* note 146, at 176-77.

149 Houchins v. KQED, Inc., 438 U.S. 1, 31 (1978) (Stevens, J., dissenting) ("In addition to safeguarding the right of one individual to receive what another elects to communicate, the First Amendment serves an essential societal function."); Saxbe v. Washington Post Co., 417 U.S. 843, 862 (1974) (Powell, J., dissenting) ("[T]hese individualistic values . . . are not directly implicated . . . . What is at stake here is the societal function of the First Amendment.").

150 *Saxbe,* 417 U.S. at 862-63 (Powell, J., dissenting) ("[P]ublic debate must not only be unfettered; it must also be informed.").

151 *Id.* at 872.

152 *Richmond Newspapers,* 448 U.S. at 587 & n.3 (Brennan, J., concurring); *see* Cox, *supra* note 15, at 150-54 (analyzing Justice Brennan's "structural" thesis).

153 *Richmond Newspapers,* 448 U.S. at 587-88 (Brennan, J., concurring).

154 BeVier, *supra* note 10, at 499-503.

155 Interpretivism (not to be confused with literalism) requires that judges "confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution." J. ELY, DEMOCRACY AND DISTRUST 1 (1980). Noninterpretivism accepts the legitimacy of a judge's going outside the text, playing an "additional role as the expounder of basic national ideals of individual liberty and fair treatment." Grey, *Do We Have An Unwritten Constitution?,* 27 STAN. L. REV. 703, 706 (1975). The literature presenting the debate between interpretivists and noninterpretivists is extensive. *Compare* J. ELY, *supra* (espousing process-oriented approach that steers path between interpretivism, which is impossible, and noninterpretivism which is illegitimate) *with* M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN

must rest directly on the constitutional text, its history, or the structure of government it prescribes. Under this view, because neither the text nor the history indicates the existence of a right of access, the only possible basis of justification lies in the constitutional system of representative self government.[156] This too is unavailing, according to the critique, because self government under our system does not, in fact or theory, contemplate or require continuous public involvement in the day-to-day affairs of government.[157]

The interpretivist position is fiawed, however, because the right of access does not depend on a constitutionally based Massachusetts-town-meeting-like model of self government. For Justice Brennan, for example, it proceeds from the idea that the first amendment protects the right of people ultimately to govern and the notion that governing means witnessing in order to learn about, discuss, and check governmental action.[158] It is a concept quite at home with a functional reading of constitutional guarantees—a reading well supported by prior precedent.[159] One thing is certain: it would not be *contra-constitutional*[160] to find a constitutional right of access in the first amendment's protections of speech and assembly. Beyond this, the view of interpretivists and noninterpretivists may remain irreconcilable.

The second, more substantial claim raised against the right of access formulation is that courts lack a principled way to apply or confine it.[161] A right may "exist" in the Constitution but unless the courts are able to apply it in a principled way,[162] it is not a judicially enforceable

---

RIGHTS (1982) (offering functional justification for noninterpretivist review) *and* Bork, *supra* note 134, at 8 (presenting straightforward interpretivist position: "The judge must stick close to the text and the history, and their fair implications, and not construct new rights.").

156 BeVier, *supra* note 10, at 503-06.

157 *See id.*

158 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 584-89 (1980) (Brennan, J., concurring); *see also* Blasi, *supra* note 49, at 554-67 (first amendment serves "checking" function that should equalize power of press on behalf of public and government). This right of access argument can also rest on the view that first amendment protection of discussion of public affairs demands *some* protection for information gathering. *See supra* note 146.

159 *See, e.g.,* Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 580 ("[F]undamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined"); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (right of association).

160 That is, there is nothing in the Constitution that *proscribes* "reading in" a right of access. *See, e.g.,* M. PERRY, *supra* note 155, at 20; *see also* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT xvii-xviii (1980).

161 *See* BeVier, *supra* note 10, at 509-12; O'Brien, *The First Amendment And The Public's "Right To Know,"* 7 HASTING CONST. L.Q. 579 (1980).

162 Theorists agree that the legitimacy of the Court's constitutional protection of values not plainly derived from the text must lie in the exercise of a Court function compatible with representative democracy and appropriate to an institution that is insulated from the political process. *See* J. ELY, *supra* note 155, at 75 n.*. Although commentators disagree over what

right. The issue comes to this: By what standard can the courts decide how much information is sufficient to make democracy work?[163] Since all government information is arguably relevant to informed decision-making, even supporters acknowledge that a right of access is "theoretically endless."[164] Similarly by what standard will the courts determine what secrets must be kept secret? How much room must be left to the Executive to perform his constitutional duties and to carry out the task of document classification; a task that even Congress seems to agree he is best positioned to do?[165] The difficulty in applying a first amendment right of access has generally restricted the protection of a "right to know" to the traditional protection accorded those who seek ideas and information from willing sources. It no doubt explains why the Supreme Court has tended to reject the argument that the public possesses a right of access to information within the government's control.

The question of the public's right to extract information from an unwilling government first arose in three cases involving press access to prisons. In *Pell v. Procunier*[166] and *Saxbe v. Washington Post Co.*,[167] the press argued that face-to-face interviews with specific inmates was essential to fair and accurate reporting on prison conditions and challenged state and federal regulations that barred such interviews.[168] The issue of a right of access was squarely raised because there was no governmental restraint on publication of information that the press had already acquired and no limitation on gathering information from willing sources

---

that function should be, *see supra* note 155, there must be *some* difference between the political-legislative task and the judicial constitutional task. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 1-33 (1962). A court's decision is principled and hence different from a legislative decision if it (1) identifies the protected right and articulates the rationale for awarding it fundamental status and (2) defines and defends a rule to protect that right that is sufficiently neutral and general to transcend the particular case. *See* A. BICKEL, *supra;* M. PERRY, *supra* note 155; Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959). *But see* Tushnet, *supra* note 127, at 781 (doubting viability of neutral principles because they depend on nonexistent or weakly shared understanding or consistency of meaning).

163 *See* BeVier, *supra* note 10, at 506-08.

164 Brennan, *supra* note 146, at 177. In Branzburg v. Hayes, 408 U.S. 665 (1972), the Court held that a newspaperman could be constitutionally required to appear and testify before a grand jury. Discussing the press's right to gather news, the Court stated:

> "There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right."

Id. at 684 n.22 (quoting Zemel v. Rusk, 381 U.S. 1, 16-17 (1965)).

165 *See* Freedom of Information Act, 5 U.S.C. 552(b)(1)(A) (1982) (removing from public view "matters that are specifically authorized under criteria established by an Executive order to be kept secret").

166 417 U.S. 817 (1974).

167 417 U.S. 843 (1974).

168 *Pell,* 417 U.S. at 819-21; *Saxbe,* 417 U.S. at 844-45.

outside the government. Nevertheless, a divided Court upheld the regulations but sidestepped the right of access issue. Writing for the majority in both cases, Justice Stewart characterized the press's challenge as a claim of "special access to information not shared by members of the public generally"[169] and disposed of it on the narrow ground that the Constitution does not require preferential treatment for the press.[170] Nevertheless, the tenor of the Court's opinion combined with Justice Stewart's later comment that "[t]he First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government,"[171] support the view that *Pell* and *Saxbe* implicitly reject a right of access.[172]

In *Houchins v. KQED,*[173] the Court expressly rejected the right of access. The holding was clouded, however, by a discussion of preferential press access and a four-to-three plurality decision.[174] In *Houchins,* the plurality rejected a television station's claim that the first amendment protected the right of the press to film portions of a county jail where conditions had become a matter of public controversy.[175] Speaking for three Justices, Chief Justice Burger stated that "until the political branches decree otherwise, as they are free to do, the media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally."[176] But the Chief Justice preceded this statement with a general rejection of a right of access—whether for the press or the public: "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information . . . within the government's control."[177] The right of access claim is flawed, he said, because "it invites the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political processes."[178] Furthermore, he stated, "[b]ecause the Constitution affords no guidelines, absent statutory stan-

---

169 *Pell,* 417 U.S. at 834 (footnote omitted).

170 *Id.* at 834-35.

171 *Houchins,* 438 U.S. at 16 (Stewart, J., concurring).

172 *But see* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 582-84 (1980) (Stevens, J., concurring) (reading *Houchins* and *Saxbe* narrowly).

173 438 U.S. 1 (1978).

174 The precedential significance of *Houchins* is also unclear because of later interpretations by the individual Justices. *Houchins* can be read narrowly to hold that the press is entitled to no greater rights of access than the public. *See, e.g.,* J. BARRON & C. CIENES, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 944 (2d ed. 1982). Alternatively, it may stand for a general rejection of a right of access, albeit with only four Justices supporting that interpretation. In *Richmond Newspapers,* Justice Brennan read the prior cases as "not rul[ing] out a public access component to the First Amendment . . . ." 448 U.S. at 586 (Brennan, J., concurring).

175 438 U.S. at 8-16.

176 *Id.* at 16.

177 *Id.* at 15.

178 *Id.* at 12.

dards, hundreds of judges would . . . be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems 'desirable' or 'expedient.' "[179]

Avoiding the access issue entirely, the majority in *Snepp* made no mention of a public right to know and the dissenters referred to it only in the weak sense of the public's interest in receiving information provided by a willing speaker.[180] This is somewhat surprising because, at the time *Snepp* was handed down, the Court was considering *Richmond Newspapers, Inc. v. Virginia*[181] in which it subsequently held, for the first time, that the first amendment embodies a right of access to at least some governmental information.[182] That Snepp cast his defense in terms of his individual right might explain the Court's silence.[183] Perhaps, however, the *Snepp* ruling reflects the problems in applying a right of access and the Justices' uncertainty over its existence, nature, and scope.[184]

The difficulty of applying the right of access also explains the widely divergent views of the Justices in *Richmond Newspapers*. There the Court struck down a state statute that permitted trial closures at the unfettered discretion of the judge and the parties.[185] Eight Justices participated and, of the seven who agreed that the statute violated the first amendment, six wrote separate opinions. The most elaborate and distinct analyses of the right of access emerge from Chief Justice Burger's plurality opinion for the Court and from Justice Brennan's concurring opinion.[186]

The Chief Justice first reviewed the long history of open criminal trials and concluded that openness was an "indispensable attribute" of the courts' functioning.[187] He acknowledged, however, that the right to attend a criminal trial is not expressly guaranteed under the Constitu-

---

179 *Id.* at 14.

180 In a recent court of appeals decision upholding prepublication review, one member of the three judge panel wrote separately for the purpose of discussing the effect such secrecy schemes have on the public's right of access to government information. Although concluding that the courts have neither the authority nor the competence to " 'balance' the public's right to know against an acknowledged national security risk," Judge Wald said that it was important for "some governmental institution, if not the classifieation system itself, to conduct such a balance." McGehee v. Casey, 718 F.2d 1137, 1150 (D.C. Cir. 1983) (Wald, J., separate statement).

181 448 U.S. 555 (1980).

182 *Id.* at 575-780; *see infra* text accompanying notes 185-97.

183 United States v. Snepp, 456 F. Supp. 176, 177-78 (E.D. Va. 1978), *rev'd in part,* 595 F.2d 926 (4th Cir. 1979), *reinstated,* 444 U.S. 507 (1980) (per curiam).

184 *See infra* text accompanying notes 185-96.

185 448 U.S. 555, 580-81 (1980).

186 For a discussion of *Richmond Newspapers* and an analysis of the opinions of Chief Justice Burger and Justice Brennan, see BeVier, *Like Mackerel In The Moonlight: Some Reflections on* Richmond Newspapers, 10 HOFSTRA L. REV. 311 (1982).

187 448 U.S. at 569.

tion and that historical practice is insufficient to establish a constitutional right. Nevertheless, he concluded that a right of access is implicit in, and "indispensable to," the expressly guarantced rights of freedom of speech and freedom of assembly.[188] These freedoms, he stated, "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government," including the criminal justice system.[189] This core purpose would lose its "meaning" if there were no right of access to the system[190] because intelligent communication would be precluded. The Chief Justice's opinion contained no hint of his earlier view in *Houchins* that "no discernible basis for a constitutional duty to disclose"[191] exists; indeed, the Chief Justice offered a broad justification for a right of access. Yet, presumably because he feared the complications of a general right of access, he artificially limited the reach of his analysis to criminal trials.[192] The Chief Justice distinguished the prison access cases by observing that prisons, unlike courts, do not share a long tradition of openness.[193] Although understandable, this reasoning is ultimately unpersuasive because the Chief Justice failed to provide a principle consistent with his own first amendment rationale that would limit the theory expounded in *Richmond Newspapers* to criminal trials.

Even Justice Brennan, who unmistakably tied the right of access to the broad "structural" purpose of the first amendment—protecting public discussion about public institutions in order to ensure popular control over government[194]—displayed concern that "the stretch of this protection is theoretically endless."[195] He cautioned that rights of access must be invoked with "discrimination and temperance"[196] and offered two limiting principles:

> First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. . . . Second, the value of access must be measured in specifics . . . . [W]hat is crucial in individual cases is whether access to a particular government process is important in terms of that very process.[197]

---

188 *Id.* at 580.

189 *Id.* at 575.

190 *Id.* at 576-77; *cf. id.* at 587-88 (Brennan, J., concurring).

191 Houchins, 438 U.S. at 14.

192 *Richmond Newspapers,* 448 U.S. at 575-78. Chief Justice Burger began his opinion by stating: "The narrow question presented in this case is whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution." *Id.* at 558.

193 *Id.* at 576 n.11.

194 *See supra* notes 152-53 and accompanying text.

195 *Richmond Newspapers,* 448 U.S. at 588 (Brennan, J., concurring) (quoting Brennan, *supra* note 146, at 177).

196 *Richmond Newspapers,* 448 U.S. at 588 (Brennan, J., concurring).

197 *Id.* at 589 (Brennan, J., concurring) (citation omitted).

Although more elaborate, these limitations are no more principled or persuasive than those of the Chief Justice; they create logical inconsistencies with Justice Brennan's broad structural first amendment rationale.[198] Brennan's formulation does explain the outcome in *Richmond Newspapers;* criminal trials have traditionally been open, and public access to trials supports the goals of public confidence, accurate fact-finding, and citizen observation of a process akin to legislative lawmaking—all goals that Brennen finds are part of the trial process itself. His formulation does not, however, justify access to other institutions such as prisons, which Justice Brennan previously supported.[199] Access to prisons arguably satisfies neither condition. Prisons have not enjoyed a tradition of openness and the goals of the prison process—punishment and rehabilitation—are not served by the presence of the public.[200] It is not enough to say that the operation of a prison seeks to inspire confidence because that position sets no limits at all—all government institutions and practices are presumably intended to inspire public confidence.

More fundamentally, Justice Brennan's limits are relevant only to claims of access to governmental institutions, and not access to particular governmental information. Indeed, the entire question of limiting a right of access is best presented by the difficult issue of how to apply the right to a public request for a particular document, be it a CIA file, a report of a presidential advisory commission, or a plan for a new military weapon. It is precisely here that the subjectivity of access standards is revealed. In *Saxbe,* Justice Powell suggested that the guide should be a judicious, sensitive, particularized balance of competing interests.[201] The Court would carefully, on a case-by-case basis, weigh the public's need to have certain information against the government's need to keep that information secret.[202] Or, as Justice Brennan suggested elsewhere: "This inquiry is impersonal, almost sociological in nature. . . . [T]he Court must weigh the effects of the imposition inhibiting press [and public] access against the social interests served by the imposition."[203] Such a deferential, careful, and even meticulous approach may be comforting but it still does not indicate what weights will be accorded the different interests, and it does not explain how a final decision will be

198 *See* BeVier, *supra* note 186, at 336-39.

199 *See* Houchins v. KQED, Inc., 438 U.S. 1, 19-40 (1978) (Stevens, J., dissenting).

200 *But see id.* at 36-38 (some public presence necessary to ensure fair treatment of inmates). For further elaboration of the "fairness" basis of a right of access, see *infra* notes 219-26 and accompanying text.

201 Saxbe v. Washington Post Co., 417 U.S. 843, 864 (1974) (Powell, J., dissenting).

202 *Id.* at 864-65 (Powell, J., dissenting).

203 Brennan, *supra* note 146, at 177.

any less a standardless, second-guessing of Executive secrecy decisions.[204]

Professor Emerson suggests a somewhat more specific approach that analyzes the right of access from the fundamental principle that citizens have a right to "all information in the possession of the government" because all such information is relevant.[205] Professor Emerson recognizes that evolution of a right to know through judicial review of public information requests will involve "a long and tedious process," but he suggests that progress is already at hand by looking to the model of the Freedom of Information Act (FOIA).[206]

The problem with all such "presumptively open" approaches, however, is that they must inevitably make exceptions, and the exceptions are the issue. As Emerson himself concedes, some "scrupulously limited" exceptions are necessary. He lists as one example "sensitive national security data," which he would limit to "tactical military movements, design of weapons, operation of espionage or counterespionage, and similar matters."[207] Yet, Emerson's formulation, like other schemes that presume that information will be generally available, offers no clear guidance as to whether or to what extent courts should independently assess the propriety of exceptions. On the one hand, courts could make an independent judgment on the validity of exceptions and again address the problems of standards, competence, and potential usurpation of presidential prerogatives. The courts would thereby commit themselves to a massive, case-by-case undertaking concerning issues that are not best handled by open review, formal rules, or even reasoned elaboration.[208] On the other hand, courts could follow the FOIA model—itself a questionable suggestion because the FOIA was the product of a long process of political compromise and expediency[209]—and essentially give the President free rein in deciding what information should be kept secret.[210]

Under the FOIA, as long as information is properly classifiable under the criteria established by an executive order and the information is in fact properly classified, it is exempt from disclosure.[211] The courts are empowered to inquire into the procedural and substantive validity

---

204 BeVier, *supra* note 10, at 509-12.

205 Emerson, *Legal Foundations, supra* note 136, at 16 (emphasis added).

206 *Id.* at 17.

207 *Id.*

208 *See, e.g.,* BeVier, *supra* note 10, at 508-12.

209 *Id.* at 513 n.117.

210 There is a third alternative which links the FOIA to a constitutional rights protection. That is, wherever, as in *Snepp,* serious constitutional objections are raised, national security classifications will be reviewed under a heightened standard and lose the usual presumption of regularity that the courts afford. McGehee v. Casey, 718 F.2d 1137, 1148-49 (D.C. Cir. 1983).

211 5 U.S.C. § 552(b)(1) (1982); *see, e.g.,* Halperin v. Department of State, 565 F.2d 699, 702-03 (D.C. Cir. 1977).

of a particular classification but the critiera for such inquiry are established by the Executive.[212] More important, although a court may conduct in camera inspection of disputed documents to reach its conclusion and may disagree with a particular classification decision, proper classification is almost always a matter proved by extrinsic evidence. Only where classification judgments are based on "claims too sweeping or suggestive of bad faith" will a court go beyond government affidavits in support of its actions.[213] In this regard Professor Henkin was surely right when he suggested that court review of specific secrets is doomed to fail: "Inevitably the courts will have to legislate gross categories ('diplomatic correspondence,' 'internal memoranda') and even then virtually rubber stamp (and legitimate) governmental concealment. In the result there will be . . . few cases in which the Court will in fact reverse the Executive."[214]

These difficulties do not mean that the courts have no role to play in supervising secrecy decisions; rather they indicate that the courts' role must be limited. To sketch the proper approach it is necessary to distinguish between two separate types of access—the right of access to governmental information and the right of access to governmental institutions. Current doctrine draws no such distinction, but it is the key to understanding the nature of a right of access and to understanding what the courts have in fact done.

With respect to access to information, there appears no principled, workable way for the courts to review the validity of particular secrecy decisions. Instead, the courts' role should be confined to that suggested by Justiee Stevens in his dissent in *Houchins*—policing and striking down official policies or processes of concealment that arbitrarily cut off the flow of information about governmental affairs.[215] In other words, the courts are charged with reviewing the system of secrecy, but not the secrets themselves. If the system is overbroad and beyond all reasonable needs of secrecy, then it violates a first amendment-based right of access to governmental information.

Plainly there is ambiguity here, as the approach suggested is almost intuitive. There must be some implicit standard against which to measure the legitimacy of secrecy to determine whether a particular system is overbroad; a standard that will undoubtedly vary among different

---

212 S. REP. NO. 1200, 93d Cong., 2d Sess. 11-12, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6267, 6290; *see, e.g.,* Halperin v. Department of State, 565 F.2d 699, 703 (D.C. Cir. 1977).

213 Weissman v. CIA, 565 F.2d 692, 698 (D.C. Cir. 1977); *see also* Bell v. United States, 563 F.2d 484, 487 (1st Cir. 1977). *But see* McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983).

214 Henkin, *supra* note 10, at 279.

215 438 U.S. at 34-36 (Stevens, J., dissenting).

In this regard, the right of access would theoretically be the minimal one suggested by Justice Stevens and not the expansive one offered by Justice Brennan. *See supra* note 146.

judges. Yet the objective itself is not in doubt: to correct what James Bradley Thayer in another context called "clear mistakes."[216] Establishing such an objective is an acceptable and judicially familiar way of controlling manifest excesses. This approach may even create a sufficient in terrorem effect if once applied successfully.

The only circumstances in which a court would be constitutionally justified in examining particular secrets and ordering their disclosure are those in which reasonable grounds exist to believe that the President or executive officials are using secrecy to cover up violations of federal law.[217] This exception is necessary to ensure that official action is not above the law. Although judicial action in this situation may be no less of an intrusion into "political" decisionmaking, executive compliance with the law is a basic prerequisite of constitutional government. In addition, the need the invoke the exception will be, presumably, limited.

The information access approach suggested here is not directly relevant in challenging a specific case of prepublication review. It may, however, form the basis for a challenge to the entire system of prepublication clearance or the entire classification system on which prepublication review rests. The current classification order, for example, is arguably a "clear mistake," which produces a manifestly excessive secrecy system.[218]

With respect to access to governmental institutions, the difficulty of applying the first amendment right of access should lead to consideration of whether this aspect of the right might be more appropriately based on a due process guarantee of open process than on a first amendment right to know or be informed. In essence, the chief value at stake in the institutional access cases is not a better working democracy but

---

216 Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law,* 7 HARV. L. REV. 129 (1893).

217 *Cf.* United States v. Nixon, 418 U.S. 683 (1974); *see* Paust, *Is The President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined,* 9 HASTINGS CONST. L.Q. 719, 765 (1982). It should be noted that the current Executive order governing classification specifically prohibits classifying information "to conceal violations of law" Exec. Order No. 12,356, 3 C.F.R. 166, 170 (1983).

218 The current executive order on classification requires that all doubts about classification be resolved in favor of secrecy. To classify information, a burcaucrat need not find that "identifiable" harm to national security would result from publieation, and he need not consider at all the public benefits served by disclosure. When viewed against the Executive's inability to demonstrate the need for such provisions, the clear past trend in favor of greater openness, and the demonstrated record of over-classification under more liberal classification schemes, *see Hearings on the Reagan Administration Proposal to Revise the E.O. on National Security Information, Before the Subcomm. on Government Information and Individual Rights of the House Comm. on Government Operations,* 97th Cong., 2d Sess. (1982), these and other increased secrecy fcatures, *see, e.g.,* Exec. Order No. 12,356, 3 C.F.R. 166 (1983), make the current Directive a clear and excessive obstruction of public access to governmental information. *But see* McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983) (upholding constitutionality of provisions of former classifieation order and suggesting approval of current order).

rather protection against arbitrary governmental action.[219] The right of institutional access is not so much based on a desire to know what is going on so that the citizenry can vote approval or disapproval or otherwise practice democracy; rather, it is more a desire to acquire information in order to stop improper governmental behavior or, by public scrutiny, prevent it from ever occurring. Because the due process clause directly embodies the fundamental idea that government may not exercise coercive power over individuals in an arbitrary, capricious, or unreasonable manner, a right of access anchored in due process permits the expression of the implicit view that fuels most access demands, namely, that secret government is presumptively arbitrary.

Such an approach also generates a normative standard that the judiciary may apply in a principled way: whenever the government operates directly and coercively on individuals, the process by which that action is taken is presumptively open. Thus, public access to institutions such as legislatures,[220] courts,[221] jails,[222] mental institutions, schools, the military,[223] and even "company towns"[224] shall be the norm unless the government can show overriding and legitimate reasons for curtailing public access. At the same time this approach would suggest natural limits on the right—limits based on the prospect of direct, coercive governmental power over individuals and on the special, specific, and proven needs of the institution. They would not be, as others have suggested, the rather arbitrary or uncertain limits arising from historical practice or the role of a particular institution in preserving the workings of democracy.[225]

The new right of open process for institutions would not aid a chal-

---

219 *See, e.g.,* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 592 (1980) (Brennan, J., concurring); Houchins v. KQED, Inc., 438 U.S. 1, 36-38 (1978) (Stevens, J., dissenting).

220 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 587-88 (Brennan, J., concurring).

221 *Id.* at 580-18.

222 *See* Houchins v. KQED, Inc., 438 U.S. 1 (1978); Pell v. Procunier, 417 U.S. 817 (1974).

223 *See* Greer v. Spock, 424 U.S. 828 (1976).

224 *See* Marsh v. Alabama, 326 U.S. 501 (1946).

225 Protecting against arbitrary, coercive government behavior is the common theme in the opinions that recognize a right of access to courts and to prisons. In *Richmond Newspapers,* Chief Justice Burger spoke of the need to keep courts open to ensure justice, 448 U.S. at 569, and Justice Brennan stated that openness is an "effective restraint on possible abuse of judicial power" and necessary to a system of justice that demonstrates the fairness of law to our citizens. *Id.* at 596 (Brennan, J., concurring) (quoting *In re* Oliver, 333 U.S. 257, 270 (1948). Similarly, in *Houchins,* Justice Stevens argned for access to prisons and prisoners in these words: "[The prisoner] retains constitutional protections against cruel and unusual punishment, . . . a protection which may derive more practical support from access to information about prisous by the public than by occasional litigation in a busy court." 438 U.S. at 36-37 (Stevens, J., dissenting) (citation omitted) (footnote omitted). The emphasis on openness as a safegnard against arbitrariness also explains Justice Stevens's comment in *Richmond Newspapers* that it was "somewhat ironic that the Court should find more reason to recognize a right

lenge to prepublication review, but prepublication review challenges may be the catalyst to force an entire rethinking of right of access issues. That rethinking should begin with a distinction between access to institutions and access to information, as suggested here. To paraphrase Justice Black, the surest foundation for a constitutional right is a specific understanding of what that right does and does not include.[226]

CONCLUSION

Professor Alexander Bickel once suggested that, when it comes to withholding information from the public, the President can constitutionally do as he pleases. "[T]he power to arrange security at the source, looked at in itself, is great," and "the law in no wise guarantees its prudent exercise or even effectively guards against its abuse."[227] The only countervailing powers that Professor Bickel perceived were the institutionalized press and the political process.[228]

This article argues that there is another countervailing power, namely, the courts. In the name of the Constitution, the courts have a significant role to play in keeping governmental secrecy within bounds. First, with respect to the methods of secrecy, the courts must require the Executive to respect meaningful free speech rights of public employees. This will mean judging employee free speech issues under traditional and rigorous first amendment standards and abandoning the reasonableness test that now gives the government broad authority to regulate merely because the identity of the speaker is a public employee. It will also mean that the courts must reinvigorate a structural check on secrecy abuse by invoking the so-called clear statement rule. The courts must insist that Congress specifically approve all executive secrecy actions, such as prepublication review, that significantly diminish individual rights of free expression or seriously curtail public access to governmental information.

Second, with respect to the keeping of particular secrets, the courts should review the system or guidelines under which secrecy decisions are made in order to ensure that they do not arbitrarily and unnecessarily deny information to the public or operate to cover up violations of law.

---

of access today than it did in *Houchins; Houchins* involved the plight of a segment of society least able to protect itself . . . ." 448 U.S. at 583 (Stevens, J., concurring).

This new constitutional right of open process would validate the result reached in *Richmond Newspapers* on first amendment grounds but would require reversal in the prison cases where despite the absence of clear and compelling need for secrecy access was denied.

226 *See, e.g.,* Rochin v. California, 342 U.S. 165, 177 (1952) (Black, J., concurring) ("[The] accordion-like qualities of this [Frankfurter due process] philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights.")(footnote omitted).

227 A. BICKEL, *supra* note 5, at 80.

228 *Id.* at 80-81.

This will not directly affect the validity of prepublication review, but it may provide the basis for challenging the entire system of document classification on which prepublication review rests. More generally, the inquiry into the courts' proper role in policing specific secrets may lead to a more refined approach to access issues and, ultimately, to the recognition of a new due process-based right of access to government institutions.