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Just When I Thought I Was Out, They Pull Me Back In: Executive Power and the Novel Reclassification Authority

Luppe B. Luppen

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Just When I Thought I Was Out, They Pull Me Back In: Executive Power and the Novel Reclassification Authority

Luppe B. Luppen*

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* Candidate for J.D., Washington and Lee University School of Law, May 2008; B.A.S., Stanford University, 2005. I would like to thank Professors Brian Murchison, Darryl Brown, Mark Grunewald, and Scott Sundby for their wise counsel in developing the topic. I would also like to thank Heather Curlee and Clint Carpenter for providing valuable guidance throughout the writing process.

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*"Conceal a flaw, and the world will imagine the worst."*¹

I. Introduction

In April 2006, the *Washington Post* uncovered a secret agreement between the National Archives and Records Administration (NARA), the Air Force, the Central Intelligence Agency (CIA), and other federal agencies to withdraw and reclassify records from NARA's publicly accessible shelves.² This reclassification program was disclosed by an amateur historian whose "requests for formerly available documents were delayed or denied."³ After another secret reclassification agreement was discovered, the Archivist of the United States announced that he was discontinuing all secret reclassification projects within NARA.⁴

Later that April, the Information Security Oversight Office (ISOO), a branch of NARA, released a report that attempted to quantify and, as much as practicable, describe the records affected by the program of secret withdrawals.⁵

1. MARCUS VALERIUS MARTIALIS, *EPIGRAMMATA* 102 (W.M. Lindsay ed., Oxford University Press 1922) ("[Q]uod tegitur, maius creditur esse malum.").

2. See Christopher Lee, *Archives Kept a Secrecy Secret: Agencies Removed Declassified Papers from Public Access*, WASH. POST, Apr. 12, 2006, at A6 (reporting the existence of the secret agreement); see also Memorandum of Understanding (MOU) Between the National Archives and Records Administration and the United States Air Force (Mar. 7, 2002), <http://www.archives.gov/declassification/mou-nara-usaf.pdf> (providing the text of the agreement).

3. Christopher Lee, *Archives Pledges to End Secret Agreements*, WASH. POST, Apr. 18, 2006, at A4.

4. See *id.* (quoting the statement of the ISOO's director).

5. See generally INFO. SEC. OVERSIGHT OFFICE, *AUDIT REPORT: WITHDRAWAL OF RECORDS FROM PUBLIC ACCESS AT THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION FOR CLASSIFICATION PURPOSES* (2006), <http://www.archives.gov/isoo/reports/2006-audit-report.pdf>

The ISOO auditors found that at least 25,315 publicly available records had been withdrawn⁶ and concluded that over a third of the withdrawn records did not clearly meet the executive branch's standards for reclassification.⁷ Their report illuminates a program of tremendous reach; for instance, the auditors write:

[A] significant number of records that were withdrawn had actually been created as unclassified documents but were subsequently classified by CIA at the time of re-review (often 50 years later) solely because they contained the name of a CIA official in the list of individuals provided a copy.⁸

The report goes on to describe the minimalist limiting principle which informed the agencies' reclassification activities:

Based upon review of withdrawn records as well as interviews with concerned personnel, it is apparent that records were often withdrawn because the agency *can* continue classification of a specific record, with infrequent consideration as to whether classification *should* be continued.⁹

It seems reasonable to conclude from the foregoing that, having been given the opportunity, government agencies involved in intelligence and defense clandestinely, liberally, and aggressively pursued the reclassification of public documents.¹⁰

At the time the first agreement was signed on March 7, 2002, the handling of classified information was governed by a Clinton-era policy directive—Executive Order 12,958, which prohibited the practice of reclassification—directing that "[i]nformation *may not be* reclassified after it has been declassified and released to the public under proper authority."¹¹ In March 2003, just over a year later, the George W. Bush Administration (Bush Administration) amended Executive Order 12,958 to effectively reverse the above prohibition. The amended executive order provided:

[hereinafter AUDIT REPORT].

6. *Id.* at 1.

7. *Id.* (finding that 24% of withdrawn records "were clearly inappropriate for continued classification" and 12% "were questionable").

8. *Id.* at 2.

9. *Id.* at 20.

10. *See id.* at 2 ("NARA has not had the necessary resources available to keep up with the agencies' re-review activity The most significant deficiency identified by this audit, however, was the absence of standards, including requisite levels of transparency, governing agency re-review activity").

11. Exec. Order No. 12,958, 60 Fed. Reg. 19,825, 19,829 § 1.8(c) (Apr. 17, 1995) (emphasis added) [hereinafter Original Order].

Information *may be* reclassified after declassification and release to the public under proper authority only in accordance with the following conditions:

- (1) the reclassification is taken under the personal authority of the agency head or deputy agency head, who determines in writing that the reclassification of the information is necessary in the interest of the national security;
- (2) *the information may be reasonably recovered*; and
- (3) the reclassification action is reported promptly to the Director of the Information Security Oversight Office.¹²

This reclassification authority is apparently novel and untested.¹³ While the first and third conditions of the amended provision recite relatively straightforward procedural safeguards restricting reclassification, the second condition describes a substantive—and substantially ambiguous—standard.¹⁴ As of this writing, the phrase "reasonably recovered" does not appear, except as a direct reference to the Amended Order, in the U.S. Code, the Code of Federal Regulations, or the Federal Register. It is an entirely novel standard in federal law. As such, the constitutional significance of the reasonably recovered provision is largely an open question, which the Executive and Judicial branches will have a role in answering. This Note will attempt to predict the likely contours of that answer.

Determining the force and meaning of the reasonably recovered standard requires a basic understanding of (a) the Executive Branch's own interpretation of the standard, as revealed by its public statements and actions; (b) the importance of classified information to the national security of the United States and the legal tools in place to protect that information; (c) the overall inclination of the courts to delve into national security issues; and (d) the meaning courts have ascribed to reasonableness standards in other national security matters. To that end, Part II of this Note will examine the regulations

12. Exec. Order No. 13,292, 68 Fed. Reg. 15,315, 15,318 § 1.7(c) (Mar. 25, 2003) (emphasis added) [hereinafter Amended Order].

13. See AUDIT REPORT, *supra* note 5, at 5 (noting that, "[S]ince the March 2003 amendment to the Order and prior to the onset of this audit, no agency had reported to the ISOO any reclassification action under this provision," and further explaining, in a footnote, that a single such action had subsequently been reported and was under review); see also *infra* Part II.A (discussing the implications of the limited record of reclassification).

14. See Amended Order, *supra* note 12, for the text of the conditions.

promulgated under the reclassification authority of the Amended Order and review documented reclassification actions. Part III will provide background on the classification program, its theoretical justifications, its operating structure, and the legislature's parallel enforcement mechanism. Part IV will argue that the judicial tradition of deference to the political branches in national security matters has declined to the point of irrelevance in modern jurisprudence, and judicial deference is therefore unlikely to shield reclassification actions from constitutional scrutiny. Part V will examine how constitutional scrutiny is likely to proceed, focusing on the confusing construction of the concept of reasonableness in Fourth Amendment and First Amendment cases relating to national security. That examination will illuminate the multitude and diversity of exceptions to First and Fourth Amendment doctrines afforded to the Executive in past national security cases; these exceptions suggest that established constitutional law may fail to reliably restrain reclassification activities. Part VI concludes that, if reclassification authority ever comes into conflict with individual liberties, the authority will largely survive the constitutional scrutiny that it is likely to endure.

II. Executive Interpretation of the Reach of Reclassification Authority

This Part briefly introduces and examines the Executive Branch's interpretation of the reasonably recovered standard. Subpart A addresses the dearth of documentation on the actual use of the reclassification authority, which severely handicaps any pragmatic understanding of what the reasonably recovered standard means. Subpart B seeks a theoretical understanding of the reclassification standard by analyzing the ISOO's official guidance on its meaning.

A. The Limited Record of Reclassification Actions

This subpart demonstrates that the limited public record of actual applications of the reasonably recovered standard precludes a pragmatic understanding of the standard's meaning. Between March 2003 and April 2006, when the ISOO began its investigation of the withdrawal of records from NARA's shelves, no reclassification actions had been reported to the ISOO as required by the Amended Order.¹⁵ Since the ISOO began its investigation, only

15. See AUDIT REPORT, *supra* note 5, at 5 ("It should be noted that since the March 2003

one such report has been publicly acknowledged (about which detailed information does not seem to be available).¹⁶ Publicly available records of the use of the reclassification authority, therefore, lack credibility as a guide to understanding the Amended Order's reclassification standards. The uses of the authority about which we have detailed information—the withdrawal of records from NARA¹⁷—did not comply with the Amended Order in at least one significant respect: The uses were not reported as required.¹⁸ Those uses, therefore, do not provide trustworthy guidance of how the government interprets the standards of the Amended Order.¹⁹ The single instance of compliance with the Amended Order,²⁰ which might provide some insight into the meaning of reasonably recovered, is not documented in sufficient detail to draw any conclusion. Any understanding of what the Executive means by its reasonably recovered standard therefore will have to remain somewhat theoretical—drawn not from actual use but rather from the best available source, public statements explaining the standard's meaning.

B. ISOO Guidance on the Reasonably Recovered Standard

The official guidance on the meaning of the reasonably recovered standard provides negligible restraints on government action. The ISOO offered its definition of "reasonably recoverable" in 2003:

In making the decision to reclassify information that has been declassified and released to the public under proper authority, . . . the agency must deem the information to be reasonably recoverable which means that:

amendment to the Order and prior to the onset of this audit, no agency has reported to ISOO any reclassification action under this provision.").

16. *See id.* at 5 n.2 (acknowledging one instance had been reported and was under review).

17. *See generally id.* (referring apparently to the withdrawal of records from NARA).

18. *See* Amended Order, *supra* note 12, at 15,318 (directing that all agencies report reclassification actions to the ISOO promptly).

19. *See* AUDIT REPORT, *supra* note 5, at 6–12 (describing how many of the records withdrawn from NARA did not meet the Amended Order's standards). Nevertheless, the investigation of the withdrawals from NARA shows that government agencies have engaged in aggressive reclassification when given the opportunity. *See supra* note 10 and accompanying text (evaluating the government's conduct based on the evidence in the AUDIT REPORT).

20. *See* AUDIT REPORT, *supra* note 5, at 5 n.2 (mentioning the single report of a reclassification that the ISOO has received).

- (1) Most individual recipients or holders are known and can be contacted and all forms of the information to be reclassified can be retrieved from them and
- (2) If the information has been made available to the public via means such as Government archives or reading rooms, it is withdrawn from public access.²¹

This pragmatic definition lacks any sense of prudential or constitutional limitation on the government's reclassification authority. Further, the purely procedural limitation found in the two elements of the definition does not place much of a check on government conduct. Indeed, the second element seemingly does not present a limiting condition at all. The withdrawal of information from publicly accessible archives is an aim of reclassification, not a limitation upon it. Thus, the only limitation on the reclassification authority the ISOO's definition contemplates is in the first element, which merely requires that a majority ("most") of the individuals who have the information be within the government's reach.²²

Neither the Amended Order nor the ISOO's definition explicitly prohibit (or explicitly approve) the newfound reclassification authority from operating outside the walls of the government and, ultimately, affecting private citizens. Moreover, a close reading of the Amended Order and the ISOO's definition supports the view that the reclassification authority is intended to reach members of the public at large. The Amended Order specifically authorizes the recovery of information "after declassification and *release to the public*."²³ Further, the ISOO's definition specifically contemplates the recovery of information from "*individual* recipients and holders," as distinct from

21. 32 C.F.R. § 2001.13 (2006); *accord* 68 Fed. Reg. 55,168, 55,170 (Sept. 22, 2003).

22. *See* 32 C.F.R. § 2001.13 (stating the requirement).

23. Amended Order, *supra* note 12, at 15,318 (emphasis added); *see also* discussion *infra* Part III.A.2 (concluding that the standards for an original classification do not necessarily apply to reclassification). The discussion in Part III.A.2 may serve to answer one potential objection to the analysis in this paragraph: One might contend that reclassification authority cannot reach the public at large because information may only be originally classified if it is "owned by, produced by or for, or is under the control of the United States government." Amended Order, *supra* note 12, at 15,315. There are two responses to this objection. The first is that although a given piece of information subject to reclassification is no longer "under the control of the United States government," it likely will have been "produced by or for" the government and still may be "owned by" the government. *Id.* Most information, therefore, will remain classifiable even when it has left government possession. The second response is the claim supported *infra* that many of the standards for an original classification exist in tension with the reclassification authority and may not apply, therefore, to reclassifications.

withdrawal of information from "[g]overnment archives and reading rooms."²⁴ In short, one might suppose from the ISOO's definition that any datum that the government could sequester from a majority of its holders was a proper and a reasonable subject for reclassification.

Such an extensive power, if utilized, is likely to conflict with the constitutional rights of citizens.²⁵ In the event that reclassification authority is used to the full extent seemingly tolerated by the Executive Branch's official guidance, the affected citizens will likely ask the Judicial Branch to explain how the reclassification authority is limited by the constitutional rights of citizens. The remainder of this Note will provide extensive background on the classified information system and, subsequently, focus on the Judiciary's likely interpretation of reclassification authority.

III. The Handling of Classified Information in the United States

As a means to understand how the Judiciary will address the government's newfound reclassification authority, this Part provides some context on the classification program in general. Subpart A briefly introduces official justifications for classifying information. Subpart B describes the structure and limitations of the classification system. Finally, subpart C examines the statutory enforcement mechanism for unauthorized disclosures.

A. Justification

The motivating concern of the classification program has always been the potential for "damage to the national security" that would flow from the disclosure of certain information. The stable definitions of each of the three classification levels demonstrate the centrality of the government's concern for national security:

- (1) "Top Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause *exceptionally grave damage to the national security* that the original classification authority is able to identify or describe.

24. 32 C.F.R. § 2001.13 (emphasis added).

25. See *infra* Part V (examining how recoveries of information for reclassification are likely to impact First and Fourth Amendment rights).

- (2) "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause *serious damage to the national security* that the original classification authority is able to identify or describe.
- (3) "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause *damage to the national security* that the original classification authority is able to identify or describe.²⁶

The potential for damage to the national security that attaches to a given piece of information both animates the need for secrecy and indicates how closely it should be held.²⁷

Despite the permanence of the concern for national security, the official justification for classifying information tends to shift in harmony with the sitting President's foreign policy focus and rhetorical predisposition.²⁸ For instance, consider the justifying language in the preamble to the Clinton Administration's Original Order, which explains:

[T]hroughout our history, the national *interest* has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, and our *participation within the community of nations*.²⁹

As revised in the Bush Administration's Amended Order, that sentence reads:

[T]hroughout our history, the national *defense* has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our *homeland security, and our interactions with foreign nations*.³⁰

The Original Order's conception of advancing the national interest through tactful participation in a community of nations is replaced, in the Amended

26. Amended Order, *supra* note 12, at 15,315–16 (emphasis added); *accord* Original Order, *supra* note 11, at 19,826.

27. *See* Amended Order, *supra* note 12, at 15,315–16, 15,324–27 (defining the classification levels and describing the measures taken to safeguard classified information).

28. *Compare* Original Order, *supra* note 11, at 19,825 (detailing the Clinton Administration's approach) *with* Amended Order, *supra* note 12, at 15,315 (detailing the Bush Administration's approach).

29. Original Order, *supra* note 11, at 19,825 (emphasis added).

30. Amended Order, *supra* note 12, at 15,315 (emphasis added).

Order, with an emphasis on maintaining security through secrecy in a series of discrete interactions with individual nations.

B. Structure and Limitations

Whatever the justification, the somewhat abstract concern for national security gives rise to a classification system that is governed by significant procedural and substantive safeguards. These safeguards can be further divided into those mandates that govern access to classified information (protecting the integrity and secrecy of the information itself) and those that limit authority to classify information (protecting the system from abuse).³¹ The former safeguards address who can view classified information and how it must be stored and handled.³² The latter safeguards, which will be the focus of the discussion herein, address the introduction of a piece of information into the classified system: Specifically, who may classify information at its first appearance, what types of information may be classified, and what other conditions must exist for a valid classification.³³

1. Access

The government attempts to ensure the continued integrity of its secrets by placing strict procedural safeguards on who can access classified information, how that information may be accessed and shared, and how it is stored.³⁴ The safeguard which is perhaps most familiar to the public is the process of granting security clearances—privileges to access classified information commonly held by officials, government employees, contractors, etc.³⁵ The security clearance

31. Compare Amended Order, *supra* note 12, at 15,324–27 (restricting access to and directing the handling of classified information), with *id.* at 15,315–19 (setting out the standards of original classification). See also *id.* at 15,315 ("This order prescribes a uniform system for classifying, safeguarding, and declassifying national security information . . .").

32. See *id.* at 15,324–27 (restricting access to and directing the handling of classified information); see also Exec. Order No. 13,381, 70 Fed. Reg. 37,953, 37,953 (June 27, 2005) ("Strengthening Processes Relating to Determining Eligibility for Access to Classified National Security Information.").

33. See Amended Order, *supra* note 12, at 15,315–19 (setting out the standards for original classification).

34. *Supra* note 31 and accompanying text.

35. See, e.g., Richard Willing, *White House Looks for Faster Top-Secret Clearances*, USA TODAY, Feb. 14, 2007, available at <http://www.usatoday.com/news/washington/2007-02->

process takes place at the agency level and generally entails an extensive background investigation.³⁶ These vetted personnel will ultimately handle information that is carefully isolated behind alarmed vault doors and in burglary resistant safes³⁷ or can be accessed only through secure computer networks³⁸ or in hardened and well-defended facilities.³⁹

2. Authority

The power to classify information in its first instance, "original classification authority" (OCA), is subject to severe limitations. At the Top Secret level, OCA can be received from the President, the Vice President,⁴⁰ an agency head, or an official whom the President designates in the Federal Register.⁴¹ OCA for Secret and Confidential information may also be delegated

14-top-secret-clearances_x.htm (documenting a proposal to expedite the process of granting security clearances in order to fill vacant jobs at government agencies and defense contractors) (on file with the Washington and Lee Law Review).

36. See *id.* at 15,324 ("A person may have access to classified information provided that . . . a favorable determination of eligibility for access has been made by an agency head or the agency head's designee . . .").

37. See GENERAL SERVS. ADMIN., SCHEDULE 71-III-E (2007), available at http://www.gsaelibrary.gsa.gov/ElibMain/ScheduleSummary?scheduleNumber=71+III+E#FSS_71_III_E (listing, among other things, storage containers and vault doors approved for the storage of classified information).

38. See A. Denis Clift, *Intelligence in the Internet Era: From Semaphore to Predator*, 47 STUD. INTELLIGENCE No. 3, article 6 (2003), available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol47no3/article06.html> (last visited Sept. 5, 2007) (describing the evolution of rapid, secure communication of intelligence information and the networks currently in use) (on file with the Washington and Lee Law Review). The networks currently in use are the Secure Internet Protocol Router Network (SIPRNET), for Secret or less sensitive information, and the Joint Worldwide Intelligence Communication System (JWICS), for Top Secret information. *Id.*

39. See Central Intelligence Agency Electronic Reading Room, *Physical Security Standards for Sensitive Compartmented Information Facilities*, <http://www.foia.cia.gov/search.asp> (search for "SCIF"; then follow "Physical Security Standards For Sensitive Compartmented Information Facilities" hyperlink) (last visited Sept. 5, 2007) (directing standards for the construction, maintenance and defense of Secure Compartmented Information Facilities (SCIF), which are used for the handling and storage of highly classified information) (on file with the Washington and Lee Law Review).

40. Compare Amended Order, *supra* note 12, at 15,316 (conferring a novel power—to delegate original classification authority—upon the Vice President in the exercise of his executive duties), with Original Order, *supra* note 11, at 19,827 (doing no such thing).

41. See Amended Order, *supra* note 12, at 15,316 (defining who may classify information originally).

by a senior agency official who has Top Secret OCA and administers a "Special Access Program."⁴² In this respect, OCA is similar to reclassification, a relatively small number of high ranking officials—agency heads and their deputies—wield the authority to reclassify information.⁴³ By contrast, a much larger subset of officials hold "derivative classification authority."⁴⁴

The relatively small number of officials to whom OCA is delegated is further limited by substantive standards; OCA only applies to information that relates to:

- a. military plans, weapons systems, or operations;
- b. foreign government information;
- c. intelligence activities (including special activities), intelligence sources or methods, or cryptology;
- d. foreign relations or foreign activities of the United States, including confidential sources;
- e. scientific, technological, or economic matters relating to the national security, which includes defense against transnational terrorism;
- f. United States Government programs for safeguarding nuclear materials or facilities;
- g. vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism; or

42. See Amended Order, *supra* note 12, at 15,316 (granting classification authority); see also *id.* at 15,333 (defining "Special Access Program" as an initiative that safeguards a specific class of classified information, presumably highly sensitive, by imposing special access and handling requirements).

43. See *id.* at 15,318 (directing that reclassifications must take place under the personal authority of an agency head or deputy agency head).

44. See *id.* at 15,319 (regulating the use of derivative classification). Derivative classification can be used by anyone who reproduces, analyzes, extracts, or summarizes information that has already been classified. *Id.* A classification level is applied to the work product of these officials according to detailed classification guides, which are promulgated by an OCA. *Id.*

h. weapons of mass destruction.⁴⁵

Importantly, information to be classified must be in some way proprietary to the U.S. government.⁴⁶ Further, the official exercising OCA must be able to identify the damage that disclosure of the subject information would do to national security.⁴⁷

The Amended Order does not make clear which of the substantive standards governing OCA, if any, would apply to reclassification authority. Some of those standards appear to logically conflict with the reclassification authority as it is framed. For instance, the specific authority granted by the Amended Order to reclassify information "after declassification and release to the public"⁴⁸ is in tension with the requirement that the classifying official identify what damage to the national security would result from disclosure of the subject information.⁴⁹ By definition, a reclassification occurs after the subject information has been publicly disclosed, when whatever damage its disclosure will do is, in all probability, a *fait accompli*. In any case, the only problem the reclassification authority can address is the damage from continued exposure, not disclosure. Requiring the reclassification authority to identify the damage that would flow from the disclosure of already public information seems counterintuitive at best. It is therefore reasonable to believe that reclassifications may be evaluated under different standards than original classifications.

C. Penalties for Unauthorized Disclosure of Sensitive Information

To understand the context in which the courts would approach disputes arising from the reclassification authority, it is necessary to examine how Congress has addressed disclosures of sensitive information.⁵⁰ As will be

45. Amended Order, *supra* note 12, at 15,317.

46. *See id.* at 15,315 ("[T]he information is owned by, produced by or for, or is under the control of the United States government.").

47. *See id.* ("[T]he original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security . . . and the original classification authority is able to identify or describe the damage.").

48. *Id.* at 15,318.

49. *See supra* note 26 and accompanying text (setting forth the requirement, which is part of the definition of each classification level).

50. *See generally* Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973) (discussing the legislative enactment of the Espionage Act and related statutes). Edgar and Schmidt introduce their

discussed in Part IV, the amount of deference the Executive branch receives in a national security dispute is often connected to the amount of legislative guidance available on the subject of the dispute. If a court is persuaded that a certain area of conduct is the subject of a democratic consensus, it is less likely to approve unilateral Executive action to limit that conduct.⁵¹

The foregoing principle will become especially important in subsequent Parts because of the significant disparities in how Congress and the Executive approach sensitive information. Specifically, Congress protects the majority of sensitive information through its own definitions, in the Espionage Act⁵² and associated statutes, and not by recourse to the Executive's classification scheme.⁵³ Congress's approach renders irrelevant the classification (or reclassification) status of a given piece of information in the majority of disclosure prosecutions.⁵⁴ Further, Congress has provided most criminal penalties only for disclosures with the specific intent (or reason to believe) that the disclosed information will be used to harm the United States or its agents—a definition that apparently excludes most politically motivated or inadvertent leaks.⁵⁵ This narrow definition of criminal intent tends to limit the frequency of disclosure prosecutions.⁵⁶

examination with a note of caution that bears repetition:

When we turned to the United States Code to find out what Congress had done, we became absorbed in the effort to comprehend what the current espionage statutes mandate with respect to the communication and publication of defense information. The longer we looked, the less we saw. Either advancing myopia had taken its toll, or the statutes implacably resist the effort to understand. In any event, whether the mote be in our eye or in the eyes of the draftsmen, we have not found it possible to deal with the espionage statutes except at forbidding length.

Id. at 929.

51. See *infra* Part IV.A (discussing the Supreme Court's refusal to prevent the publication of leaked, classified information in a controversial decision during the Vietnam War).

52. 18 U.S.C. § 793 (2000).

53. See *infra* notes 57–69 (describing the structure of the Espionage Act and associated statutes which criminalize disclosures of sensitive information); see also *supra* Part II.A–B (describing the structure of the classified system under the Amended Order).

54. See *United States v. Safford*, 40 C.M.R. 528, 532 (A.B.R. 1969) ("[I]nformation need not be 'classified' to constitute [disclosures of that information as] offenses under the Espionage Act."); see also *Gorin v. United States*, 312 U.S. 19, 25–27 (1941) (determining whether the Espionage Act protects a piece of information by reference to the language of the Espionage Act itself).

55. See *infra* notes 64–66 and accompanying text (describing the nature of the intent requirement).

56. See *United States v. Morison*, 844 F.2d 1057, 1067 (4th Cir. 1988) ("It is unquestionably true that the prosecutions generally under the Espionage Act . . . have not been

Federal law, through the Espionage Act and related statutes, protects sensitive information in a manner that is largely independent from the Executive's classification system.⁵⁷ Significantly, the disclosure statutes of title 18, chapter 37 of the U.S. Code frame the penalties for unauthorized disclosure of sensitive information somewhat differently than the measures for protection in the Executive Orders.⁵⁸ With limited exceptions, the disclosure statutes do not require evidence of the disclosed information's classified status.⁵⁹ Instead, the statutes seek to encompass the whole body of classifiable information with their own definitions, which rest primarily on the concept of "information respecting the national defense."⁶⁰

The "national defense" concept is absent, however, from 18 U.S.C. § 798, which provides penalties for disclosing classified information related to cryptography,⁶¹ and from 50 U.S.C. §§ 421–26, the Intelligence Identities

great. This is understandable. Violations under the Act are not easily established."); *see also* Mitchel J. Michalec, *The Classified Information Protection Act: Killing the Messenger or Killing the Message*, 50 CLEV. ST. L. REV. 455, 467–77 (2003) (discussing the limited number of prosecutions under the Espionage Act and associated statutes, as well as providing general background on the judicial interpretation of those laws).

57. *See, e.g.*, Espionage Act, 18 U.S.C. § 793 (2000) (criminalizing disclosures of sensitive national defense information). The statute provides:

Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation . . . copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense . . .

. . . .

. . . [s]hall be fined under this title or imprisoned not more than ten years, or both.

Id.

58. *See generally* 18 U.S.C. §§ 793–98 (protecting information related to the national defense).

59. *Cf.* United States v. Morison, 844 F.2d 1057, 1065–66 (4th Cir. 1988) (arguing that the classified system does control one element of an Espionage Act offense—whether the person to whom the information is communicated is "entitled to receive" that information). The analysis of the Espionage Act in *Morison* suggests that Congress designed the law to rely on one element of the classified system—the determination of which persons should have access to sensitive information, *supra* Part III.B.1—but not to rely on another element—the determination of which information is sensitive, *supra* Part III.B.2. *Morison*, 844 F.2d at 1065–66.

60. *See* 18 U.S.C. §§ 793–94 (protecting information related to the national defense).

61. *See* 18 U.S.C. § 798 (criminalizing the disclosure of classified information related to cryptography and signals intelligence); *see also* Edgar & Schmidt, *supra* note 50, at 1064 (discussing the relative clarity in the drafting of 18 U.S.C. § 798 compared to 18 U.S.C. §§ 793–94). Edgar and Schmidt write: "Ambiguities do not cloud the relevance of section 798

Protection Act, which makes it a crime for someone who has had access to classified information to disclose the identity of a covert intelligence agent under certain circumstances.⁶² These two provisions are the only ones that make the classification status of the disclosed information an element of a crime.⁶³ The classification, declassification, or reclassification of a given piece of sensitive information would, therefore, be only directly relevant in prosecutions under the Intelligence Identities Protection Act and for prosecutions related to cryptography or those that signal intelligence disclosures.

The narrowness of the intent requirements and strictness of the substantive requirements of the disclosure laws significantly limit the scope of statutory power to punish unauthorized disclosures. The legislative burden of protecting information related to the national defense is, for the most part, carried by 18 U.S.C. § 793, which prescribes penalties of up to ten years in prison for gathering, transmitting, or losing "information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States."⁶⁴ More sinister disclosures are governed by 18 U.S.C. § 794, which prescribes penalties up to and including death for activities conducted with "intent or reason to believe that [the disclosed information] is to

to the coverage of the Espionage Act of 1917. This provision was enacted in 1950 . . . to cover cryptographic information, material surely at the heart of the 'related to the national defense' conception." *Id.*

62. See 50 U.S.C. §§ 421–26 (2000) (criminalizing the disclosure of the identity of a covert agent who had been posted overseas in the past five years by a person who has, or had, access to classified information and knew that the government was attempting to keep the agent's identity a secret).

63. See, e.g., Edgar & Schmidt, *supra* note 50, at 1065 ("[T]he inevitable vagueness in defining what cryptographic information is subject to restriction is substantially mitigated, although perhaps at the cost of overbreadth, by making classification an element of the offense.").

64. 18 U.S.C. § 793 (2000); see also Edgar & Schmidt, *supra* note 50, at 986 (discussing the intent requirement). Edgar and Schmidt criticize the framing of the intent element:

[T]he espionage laws share the characteristic ills of federal criminal law that result from the use of undefined and exceedingly complex culpability standards to demarcate the boundaries of federal offenses. . . . That prosecutions have been directed at clandestine transfer of information to foreign agents has led courts to construe the culpability terms rather broadly. Because the courts have not had to confront the culpability issues in the context of public speech, current judicial constructions tend to aggravate the problems of plain meaning constructions.

Id.

be used to the injury of the United States" or with intent to aid an enemy,⁶⁵ provided that the challenged activities

resulted in the identification by a foreign power . . . of an individual acting as an agent of the United States and consequently in the death of that individual, or directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.⁶⁶

The specific intent requirements of the foregoing laws are not reflected in the laws which rely on classified status, the Intelligence Identities Protection Act, and 18 U.S.C. § 798; however, both laws have such narrow substantive focuses and knowledge requirements that prosecution under their authority would be a formidable challenge.⁶⁷

In crafting this legislative scheme, Congress has mostly disregarded the Executive's classification scheme and, seemingly, narrowed the focus of the laws to the gravest of disclosures.⁶⁸ In that sense, Congress has not endorsed a broad governmental interest in preserving the integrity of the Executive's classified system that is substantial enough to justify infringing the liberties of individual citizens. Even though such protection of the classified system might be justifiable by reference to the country's security, commentators Harold Edgar and Benno C. Schmidt, Jr. have identified why Congress chose not to do so:

The countervailing consideration is, of course, the fact routinely accepted in all quarters that the Executive Branch abuses the power of classification. To give the Executive unreviewable power to invoke a prohibition on the communications of everyone, even as to a relatively narrow category of information, seems to be of doubtful wisdom.⁶⁹

Congress's choice not to broadly protect the classified program provides ample reason to doubt that Congress would approve a wide-ranging reclassification power for the Executive; this implicit lack of congressional support for the

65. See 18 U.S.C. § 794(a)–(b) (describing the intent element of the crime).

66. 18 U.S.C. § 794(a).

67. See *supra* notes 56–57 and accompanying text (describing the limits of the two laws).

68. See *supra* notes 49–50 (describing Congress's approach to disclosures of sensitive information).

69. Edgar & Schmidt, *supra* note 50, at 1066 (discussing the Executive's classification power in the course of arguing that improper classification should be a defense to 18 U.S.C. § 798).

reclassification program carries a great deal of significance for the analysis of how the judiciary will approach reclassification.

IV. The Fading Tradition of Judicial Deference to the Executive and Legislative Branches in National Security Affairs

This Part assesses the likelihood that federal courts will apply constitutional scrutiny to the use of reclassification authority against individuals by concurrently examining two related doctrines. First, the examination focuses on traditional judicial deference to what has been described as the pure executive authority to protect the national security and to conduct foreign relations.⁷⁰ Second, the analysis discusses judicial deference to congressionally designed national security programs that the Executive administers.⁷¹ This Part concludes that, while the latter deference remains more respected in the courts, both species of deference are in decline in the face of a mounting judicial determination to impose constitutional discipline upon the President's national security activities (at least to the extent that they impact individual liberties).

Federal courts may be asked to determine whether the Executive's exercise of reclassification authority is consistent with the Constitution and laws of the United States; whether the courts will resolve that question is uncertain.⁷² Before it reached the constitutionality of an executive reclassification action, the judiciary would have an opportunity to avoid passing judgment on the underlying issue by simply deferring to the Executive Branch in its role as the guarantor of national security or by deferring to the joint endeavors of the political branches (Executive and Legislative) in their role as the bodies of government more directly accountable to the people.

The analysis of deference begins with the roundly criticized decision in *Korematsu v. United States*.⁷³ This case traces the decline of the deferential principle by attempting to follow the progress and growing influence of an old

70. See *infra* notes 74, 78, 90, 110, 111, and accompanying text (providing examples of this deferential description of Executive power).

71. See *infra* notes 86–92 and accompanying text (discussing the interaction of executive power and congressional legislation).

72. Compare *infra* Part IV.A–C (describing judicial skepticism of executive power over sensitive information disclosures), with *infra* Part V (describing judicial support of restricting individual rights because of national security reasons).

73. See *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944) (ratifying the forced relocation of persons of Japanese ancestry based on asserted military necessity).

idea: In order for our democratic system to be preserved, each element must act as a check on the Executive, even in times of great exigency.

A. *Korematsu and Pentagon Papers*

With its controversial ruling in *Korematsu*,⁷⁴ the Supreme Court articulated a categorical principle of wartime judicial deference to the Executive Branch.⁷⁵ In less infamous decisions, the Supreme Court approvingly observed a similar principle: "[T]he generally accepted view that foreign policy [is] the province and responsibility of the Executive."⁷⁶ In

74. *See id.* (upholding an exclusion order for relocating persons of Japanese ancestry). In *Korematsu*, the Supreme Court considered the constitutionality of an American citizen's criminal conviction for remaining in a military area where persons of Japanese ancestry had been ordered excluded. *Id.* at 215–16. The citizen, Fred Toyosaburo Korematsu, was charged with violation of Exclusion Order No. 34 for failing to leave his home and going to a designated Assembly Center until taken by military escort to a Relocation Center for an indefinite period. *Id.* at 222–23. After dispensing with preliminary matters, the Court considered Korematsu's contention that the Exclusion Order amounted to an unconstitutional deprivation of liberty without due process. *Id.* at 223. The Court summarily dismissed this contention as a confused and mistaken statement of the issue. *Id.* The Court, instead, recognized that the case turned on a military question and refused to apply retrospective disapproval to the military commanders' apprehension that the West Coast of the United States might be invaded by the Empire of Japan and their subsequent calculation that, because of the disloyalty of some citizens of Japanese descent, the all-inclusive Exclusion Order was a necessary defensive measure. *Id.* at 223–24.

75. *See id.* at 223–24 (uncritically accepting the Executive Branch's assertions of military necessity and ratifying the drastic curtailment of the civil rights of a single racial group). The Court writes:

To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Id.

76. *Haig v. Agee*, 453 U.S. 280, 293–94 (1981); *see also United States v. Nixon*, 418 U.S. 683, 710 (1974) (noting that "courts have traditionally shown the utmost deference to Presidential responsibilities" in his judgments respecting foreign policy and national security).

another decision, the Justices wrote: "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military or national security affairs."⁷⁷ The following discussion argues that such deferential holdings have become increasingly atypical.

Though *Korematsu* has never been explicitly overruled, the deferential principle articulated therein—when it collides with the constitutional rights of citizens—has since been honored mainly in the breach.⁷⁸ The deliberate, if not wholly unanimous, movement away from *Korematsu*'s central holding is illuminated by the deeply divergent opinions in *New York Times Co. v. United States (Pentagon Papers)*,⁷⁹ a case which prompted all nine Justices to write separately. Wholly absent from the per curiam holding and concurrences in *Pentagon Papers* is any semblance of the distaste for second-guessing military judgment that is so evident in the *Korematsu* majority opinion.⁸⁰ Justice Brennan's concurrence regards the urgency and gravity of the interests at stake

77. *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988); *see also* *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (refusing to allow military personnel to sue their superior officers for damages on the basis of alleged constitutional violations); *Schlesinger v. Councilman*, 420 U.S. 738, 757–58 (1975) (abstaining from reviewing a case until the military judicial process has concluded); *Burns v. Wilson*, 346 U.S. 137, 142–44 (1953) (deferring, in most cases, to the decisions of the military justice system); *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953) ("[J]udges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates.").

78. *But see, e.g.*, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) (holding that the President's power to conduct foreign relations is his alone, and further declaring that the power to engage in sovereign interactions with other nations does not depend on a constitutional provision). *Curtiss-Wright* provides an earlier example of a similarly deferential posture. *Id.*

79. *See* *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 719 (1971) (rejecting, on First Amendment grounds, the government's attempt to prevent the publication of a leaked, classified study of Vietnam war policy). In *Pentagon Papers*, the Supreme Court considered whether an injunction sought by the government to prevent the *New York Times* and *Washington Post* from publishing the contents of a classified military document was consistent with the First Amendment. *Id.* at 714. The government claimed the authority to suppress the document in question—a study entitled *History of U.S. Decision-Making Process on Viet Nam Policy*—on the grounds that (a) the publication of the study would endanger the national security and (b) the President's authority as Commander-in-Chief and his authority to conduct foreign affairs allowed him to protect the nation against such harm. *Id.* at 718 (Black, J., concurring). The Court, unimpressed with the Executive Branch's appeal for deference to its wartime judgment, held that the government had not provided sufficient justification for its actions to overcome the heavy presumption that any prior restraint of expression is constitutionally invalid. *Id.* at 714.

80. *See supra* note 74 and accompanying text (describing in detail the *Korematsu* ruling).

in *Pentagon Papers* as a contemptible, single-serving excuse for the interim restraints on expression which allowed the case to reach the Supreme Court.⁸¹ Further, Justice Black's concurrence regards any deference to the President's inherent powers at the cost of individual liberties as constitutionally repugnant.⁸² The only hint of *Korematsu*-style deference appears in Justice Harlan's dissent, which advocates limits on the scope of the Court's second-guessing.⁸³

81. See *Pentagon Papers*, 403 U.S. at 725 (Brennan, J., concurring) (criticizing the stays on publication which preserved the matter for review as contrary to the First Amendment). Justice Brennan writes:

The relative novelty of the questions presented, the necessary haste with which decisions were reached, the magnitude of the interests asserted, and the fact that all the parties have concentrated their arguments upon the question whether permanent restraints were proper may have justified at least some of the restraints heretofore imposed in these cases. . . . But even if it be assumed that some of the interim restraints were proper in the two cases before us, that assumption has no bearing upon the propriety of similar judicial action in the future. . . . [T]he First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented in these cases.

Id. (Brennan, J., concurring).

82. See *id.* at 718–19 (Black, J., concurring) (arguing that allowing the President to restrain the publication of news for national security reasons is contrary to the intent of the framers of the Constitution). Justice Black writes:

To find that the President [acting in the name of national security] has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make "secure". . . . [I]t was injunctions like those sought here that [James] Madison and his collaborators intended to outlaw in this Nation for all time.

Id. at 719 (Black, J., concurring).

83. See *id.* at 757 (Harlan, J., dissenting) ("[T]he judiciary may not properly . . . redetermine for itself the probable impact of disclosure on the national security."). Harlan argues that such issues were "within the proper compass of the President's foreign relations power." *Id.* (Harlan, J., dissenting); see also Peter D. Junger, *Down Memory Lane: The Case of the Pentagon Papers*, 23 CASE W. RES. L. REV. 3, 27–28 (1972) (analyzing Justice Harlan's dissent). Junger writes:

Justice Harlan seems . . . to raise but not answer an extremely important question: by what test can one locate the "proper compass of the President's foreign relations power"? It would seem that one could not merely decide that any action having a major influence on foreign affairs is within the compass, otherwise the President could simply line the editors of the *New York Times* up against a wall and shoot them. Obviously the nature of the action must also be considered. Shooting citizens without trial within the territorial limits of the United States, however much it might benefit our foreign relations, is, I hope, not within anyone's concept of the President's foreign relations power.

Id.

The reasoning adopted in the majority Justices' concurrences suggests that the government can expect minimal deference for its unilateral reclassification power. *Pentagon Papers* resolves a clearly apposite question: How far may the Executive's power reach to exert control over secret information that has made its way into the public eye?⁸⁴ The majority concurrences look to Congress to determine the scope of Executive power and the degree of the Court's deference.⁸⁵ For instance, Justice Marshall writes:

[The Court is] not faced with a situation where Congress has failed to provide the Executive with broad power to protect the nation from disclosure of damaging state secrets. Congress has on several occasions given extensive consideration to the problem of protecting the military and strategic secrets of the United States. This consideration has resulted in the enactment of statutes making it a crime to receive, disclose, communicate, withhold, and publish certain documents, photographs, instruments, appliances, and information.⁸⁶

In other words, the Government failed to persuade Justice Marshall that Congress's laws criminalizing disclosure were insufficient to remedy the substance of the claim against the newspapers.⁸⁷ Noticing the majority's emphasis on congressional authorization, commentators Harold Edgar and Benno C. Schmidt, Jr., drew a persuasive analogy between *Pentagon Papers* and *Youngstown Sheet & Tube Co. v. Sawyer*.⁸⁸ Edgar and Schmidt write: "All

84. See *supra* note 79 and accompanying text (describing the Government's attempt to obtain an injunction preventing newspapers from publishing a classified study which had been leaked).

85. See Edgar & Schmidt, *supra* note 50, at 931 (interpreting the majority opinions in the *Pentagon Papers* as reflecting the Justices' hesitation to act without legislative guidance). Edgar and Schmidt write:

The central theme sounded in the opinions of the six majority Justices was reluctance to act in such difficult premises without guidance from Congress. That reluctance necessarily lost the case for the Government, which argued that, without regard to legislation, the President's constitutional powers as Commander-in-Chief and foreign relations steward entitled him to injunctive relief to prevent "grave and irreparable danger" to the public interest.

Id.

86. *N.Y. Times Co., v. United States (Pentagon Papers)*, 403 U.S. 713, 744 (1971) (Marshall, J., concurring); see also *supra* Part III.C (describing the laws Congress has passed to protect state secrets).

87. See *Pentagon Papers*, 403 U.S. at 744–45 ("If the Government had attempted to show that there was no effective remedy under traditional criminal law, it would have had to show that there is no arguably applicable statute.").

88. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (denying the President's authority to seize the nation's steel mills to mitigate the consequences of a labor

the Justices concurring with the judgment [in *Pentagon Papers*] . . . stressed the Government's failure to premise its case on legislative authority. Thus the Supreme Court's decision resembles in result a similar failure for unadorned claims of executive power in *Youngstown Steel*.⁸⁹ The principle asserted by the majority in *Pentagon Papers* is the same principle Justice Jackson introduced in his influential *Youngstown* concurrence: Actions by the Executive that serve the purposes of existing law but operate outside its ambit threaten the constitutional balance of power and therefore deserve vigilant scrutiny from the Court.⁹⁰ This

dispute). In *Youngstown*, the Court reviewed President Truman's Executive Order No. 10,340 that directed the military to take control of most of the nation's steel mills. *Id.* at 582. Truman's decision was prompted by the threat of a general strike by the United Steelworkers of America, C.I.O, because of an intractable labor dispute. *Id.* The Court considered whether the President had the power to issue his order in the absence of an explicit grant of authority from Congress. *Id.* at 585. Finding no congressional authority for the President's action, the Court reasoned that the only possible source of authority to close the steel mills was the Constitution. *Id.* at 587. Finding no basis for the President's asserted authority in his constitutional, military, or executive powers, the Court concluded that the President had acted without authority and affirmed the lower courts in vacating his order. *Id.* at 587-89. In a widely noted concurrence, Justice Jackson laid out a three-tiered structure for examining presidential authority:

- (1) When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .
- (2) When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .
- (3) When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

Id. at 635-37 (Jackson, J., concurring).

89. Edgar & Schmidt, *supra* note 50, at 932. See also Junger, *supra* note 83, at 18-28 (discussing the analogy of *Pentagon Papers* with *Youngstown* and its meaning for executive power). Junger writes:

[T]he strongest memory recalled to my mind when I first read the opinions in *New York Times* [i.e. *Pentagon Papers*] was *Youngstown*. . . . The haste with which the opinions in *New York Times* were produced led inevitably to a certain obscurity of expression, but each cryptic sentence in *New York Times* evoked entire paragraphs from the opinions in *Youngstown*. It was almost as if the Supreme Court had set out, like some poet in the *Arabian Nights*, to extemporize the same song twice using completely different words and meters.

Id. at 18.

90. See *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring) ("Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be

line of reasoning indicates that the Executive can expect minimal deference to reclassification activities because the protection of sensitive national security information is the subject of robust legislation.⁹¹ Further, because those disclosure laws do not, except for specialized exceptions, depend on the classification status of a particular piece of information for their effectiveness,⁹² it appears unlikely that a court would consider the Executive's exercise of a prerogative to reclassify as a particularly compelling occasion to defer.

B. Mitchell v. Forsyth

Mitchell v. Forsyth,⁹³ a wiretapping case, is another example of the Court's increasing discomfort with the *Korematsu* principle of deference to the Executive

scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." Cf. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) (holding that the President's power to conduct external relations is his sovereign prerogative and not a lawmaking power). The power to keep information secret undeniably aids the President's conduct of external sovereignty, which *Curtiss-Wright* shields from constitutional challenge. *See id.* ("[T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."). Nevertheless, the power to classify information, in practice, has such a strongly domestic character that it seems unlikely to fall under *Curtiss-Wright's* protection, which does not extend to internal affairs. *See id.* at 315–16 (presenting an important distinction between when Congress acts to regulate internal affairs and when it acts to affect an external situation).

91. *See supra* Part III.C (describing the provisions of federal law that protect information related to the national defense and other sensitive information).

92. *See supra* Part III.C (noting that the only offenses which depend on classification status relate to the disclosure of information involving cryptography, signals intelligence, and the identity of a covert operative).

93. *See Mitchell v. Forsyth*, 472 U.S. 511, 536 (1985) (dismissing the Attorney General's claim to absolute immunity from suit in matters concerning national security but granting him qualified immunity). In *Mitchell*, the court considered three issues:

[W]hether the Attorney General [of the United States was] absolutely immune from suit for actions undertaken in the interest of national security; if not, whether the District Court's finding that the petitioner is not immune from suit for his actions under the qualified immunity standard . . . is appealable, and, if so, whether the District Court's ruling on qualified immunity was correct.

Id. at 513 (citations omitted). In 1970, the FBI uncovered plots by members of an antiwar group to blow up heating tunnels linking federal buildings in Washington, D.C. and to kidnap National Security Adviser Henry Kissinger. *Id.* On the basis of this information, Attorney General John Mitchell approved a warrantless wiretap on the phone line of William Davidon, a college professor and member of the group. *Id.* As a product of this wiretap, the government intercepted three apparently innocuous conversations between Professor Davidon and Keith Forsyth. *Id.* After discovering the existence of the wiretap, Mr. Forsyth sued former Attorney General Mitchell for violating the Fourth Amendment and applicable law. *Id.* at 513–15. There

Branch in national security matters.⁹⁴ In this case, the Supreme Court rejected the Attorney General's asserted absolute immunity from suit.⁹⁵ Whereas *Pentagon Papers* rejected the principle of deference to the Executive in the context of the First Amendment,⁹⁶ *Mitchell* rejects it in the context of the Fourth Amendment.⁹⁷

In order to approach the Court's holding in *Mitchell*, it is necessary to understand the Court's previous holdings on the privileges enjoyed by high government officials. Certain officials—because of their special functions or constitutional status—are entitled to absolute immunity from lawsuits for damages arising from their official actions.⁹⁸ Within the Executive Branch, those entitled to absolute immunity include prosecutors, executive officers engaged in adjudicative functions, and the President of the United States.⁹⁹ The majority of executive officials, by contrast, are only entitled to qualified, good-faith immunity;¹⁰⁰ a judicial finding of bad faith will eviscerate their immunity defense.¹⁰¹

Nevertheless, in defending against Fourth Amendment claims premised on a warrantless wiretap, Attorney General Mitchell claimed absolute immunity, not qualified immunity, for actions taken in furtherance of his national security

being no dispute that the warrantless domestic wiretap violated the Fourth Amendment, the only genuine constitutional dispute on appeal to the Supreme Court was the extent of the immunity to which Mitchell was entitled in national security matters. *Id.* at 516. Finding no common law basis for granting absolute immunity to a Cabinet Officer's "national security function," the Court weighed the risk that actual abuses would go uncovered against the countervailing risks that "fancied abuses will give rise to unfounded and burdensome litigation" and that the threat of personal liability would chill administration officials in the performance of their duties. *Id.* at 522. Finding the latter risks unpersuasive compared to the former, the Court held that no absolute immunity should apply to the Attorney General's national security conduct. *Id.* at 523. However, the court was sufficiently persuaded by the risk of "frivolous and vexatious" lawsuits to grant the Attorney General qualified immunity in most circumstances. *Id.* at 524.

94. See *Mitchell*, 472 U.S. at 523 ("[B]uilt-in restraints on the Attorney General's activities in the name of national security . . . do not exist. And despite our recognition of the importance of those activities to the safety of our Nation and its democratic system of government, we cannot accept the notion that restraints are completely unnecessary.").

95. *Id.* at 520.

96. *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 726–27 (1971) (Brennan, J., concurring).

97. *Mitchell*, 472 U.S. at 535–36.

98. See, e.g., *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 510–11 (1975) (recognizing an absolute immunity for congressmen and senators in the "legislative sphere").

99. See *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (cataloguing the officials in all three branches who are entitled to absolute immunity).

100. See *id.* (discussing the nature of qualified immunity).

101. See *id.* (discussing the consequences of a finding of bad faith for officials with qualified immunity).

functions.¹⁰² Because the Attorney General's national security functions do not relate to any of his prosecutorial duties or any constitutional status, this argument could not rely on traditional sources of absolute immunity; instead, the only plausible basis for absolute immunity was the traditional deference afforded to the Executive in areas of national security.¹⁰³ Emphasizing the need to make officials accountable even when protecting national security, the Court rejected any immunity based on traditional, *Korematsu*-style deference:

[T]his is precisely the point . . . : "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate. . . ." This is as true in matters of national security as in other fields of governmental action. We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.¹⁰⁴

The issue of immunity from personal liability is a narrow one, and the facts in *Mitchell* do not, of course, suggest any threat to national security on the scale of a feared Japanese invasion of the West Coast.¹⁰⁵ Nevertheless, the *Mitchell* court was willing to scrutinize national security arguments and to countenance lawsuits attaching personal liability to officials who claim to be safeguarding national security; such a ruling can only cast doubt on the remaining persuasive power of deference to the Executive in national security matters.

Considered together, the holdings in *Pentagon Papers* and *Mitchell* reflect a Supreme Court that has embraced the enforcement of constitutional and legislative discipline on the Executive's national security function. Since *Korematsu*, the Supreme Court has been unwilling to delineate a purely executive area of national security action that is beyond the power of the courts and Congress to jointly

102. See *Mitchell v. Forsyth*, 472 U.S. 511, 516 (1985) (describing the claim to absolute immunity).

103. See *id.* at 521 (deciding that the national security functions Mitchell was performing were the only possible basis for his claim to absolute immunity). The majority wrote:

Mitchell's claim, then, must rest not on the Attorney General's position within the Executive Branch, but on the nature of the functions he was performing in this case. Because Mitchell was not acting in a prosecutorial capacity in this case, the situations in which we have applied a functional approach to absolute immunity questions provide scant support for blanket immunization of his performance of the "national security function."

Id. (citations omitted).

104. *Id.* at 524 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)).

105. See *supra* note 74 and accompanying text (stating the Court's reasoning in *Korematsu*).

restrain.¹⁰⁶ As will be shown in the following discussion of the Guantanamo Bay detainee cases, the Court has recently gone even further, acting to enforce constitutional challenges against the Executive despite Congress's attempts to restrain the Court's jurisdiction.

C. Guantanamo Bay Detainee Cases

For the most recent evidence of the decline of judicial deference in matters touching upon national security, this subpart examines the Supreme Court's interventions in the Bush Administration's detention policies at Guantanamo Bay. Between 2004 and 2006, the Supreme Court manifested its determination to discipline the Executive Branch's activities at Guantanamo Bay in three cases which dealt with the legality of the confinement and trial of detainees.

The issue of deference to the Executive is first addressed in *Rasul v. Bush*,¹⁰⁷ which holds that foreign nationals imprisoned at Guantanamo possess the ability to petition for habeas corpus in a U.S. district court.¹⁰⁸ Considering an argument for deference to the Executive's detention, the Court finds its precedents persuasively affirm its powers of review:

[T]his Court has recognized the federal courts' power to review applications for *habeas* relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace. The Court has, for example, entertained the habeas petitions of an American citizen who plotted an attack on military installations during the Civil War, and of admitted enemy aliens convicted of war crimes during a declared war and held in the United States [or] its insular possessions.¹⁰⁹

The *Rasul* opinion largely ignores, and therefore implicitly rejects, those precedents which weigh in favor of deference to the Executive's approach to protecting national

106. See *infra* Parts IV.C, V.A (providing examples of judicial restrictions on Executive actions regarding national security).

107. See *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (holding that the federal habeas corpus statute conferred on district courts the jurisdiction to hear challenges from aliens imprisoned at Guantanamo Bay).

108. See *id.* at 473 ("Congress has granted federal district courts, within their respective jurisdictions, the authority to hear applications for habeas corpus by any person who claims to be held in custody in violation of the Constitution or laws or treaties of the United States." (citations omitted)). The Court went on to hold that the Guantanamo Bay detainees and their custodians were properly within the jurisdiction of the federal district courts. *Id.* at 484.

109. *Id.* at 474–75 (emphasis added) (citations omitted).

security¹¹⁰ and conducting foreign relations.¹¹¹

A more explicit rejection of Executive deference can be found in *Rasul*'s companion case, *Hamdi v. Rumsfeld*.¹¹² "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."¹¹³ In other words, the Supreme Court will not simply defer to the President in national security matters when individual liberties are at issue.¹¹⁴

Finally, *Hamdan v. Rumsfeld*¹¹⁵ reaffirms the Court's enthusiasm for reviewing the Executive Branch's conduct of national security affairs. The *Hamdan* opinion also reveals the Court's willingness to undertake such a review despite congressional

110. See *Johnson v. Eisenstrager*, 339 U.S. 763, 774 (1950) ("Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security.").

111. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936) (confirming the President's extensive power to conduct external relations). The majority wrote:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

Id.

112. *Hamdi v. Rumsfeld*, 542 U.S. 507, 538–39 (2004) (recognizing the Due Process rights of a U.S. citizen detained at Guantanamo Bay, including the right to present evidence before a neutral decisionmaker during a habeas corpus hearing).

113. *Id.* at 536.

114. *Id.*

115. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006) (rejecting the use of a military commission to try a foreign national detainee suspected of aiding terrorism). In *Hamdan*, the Court first addressed whether the Detainee Treatment Act of 2005 deprived the Court of jurisdiction, and whether abstention would be appropriate to avoid interfering in an ongoing military trial. *Id.* at 2762, 2769–70. Deciding these foregoing issues in the negative, the Court then looked at the legality of the military commission: (a) whether the establishment of the military commission was authorized by Congress; (b) whether a military commission established to try only violations of the laws of war could hear a charge of conspiracy; (c) whether the commission's procedures were in accord with the Uniform Code of Military Justice; and (d) whether the commission satisfied the Geneva conventions. *Id.* at 2779, 2786, 2793. The case was brought on behalf of Salim Ahmed Hamdan, a Yemeni national held in custody at Guantanamo Bay, Cuba. *Id.* at 2759. The Government charged Hamdan with participating in Al Qaeda's conspiracies and planned to try him by military commission at Guantanamo. *Id.* at 2761. Ruling against the military commission on each of these three points, the Court invalidated the Executive's plan to subject Hamdan to trial. *Id.* at 2798.

roadblocks.¹¹⁶ The Court in *Hamdan* considered the legitimacy of military commissions established to try Guantanamo detainees.¹¹⁷ The resulting opinion takes a constitutionally strict view of Executive authority in times of national emergency: "Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by [the judicial provisions of] the Constitution unless some other part of that document authorizes a response to the felt need."¹¹⁸ The *Hamdan* opinion's stern insistence on constitutional authorization derives from the Court's Civil War jurisprudence, which condemned unchecked Executive power.¹¹⁹

The resolution of the *Hamdan* merits is notable for both its substance and for the fact of its existence. With the Detainee Treatment Act of 2005, Congress arguably intended to prevent the Court from hearing *Hamdan* and cases like it.¹²⁰

116. *See id.* at 2762–69 (concluding that congressional legislation did not deprive the Court of jurisdiction over the case).

117. *See supra* note 115 (describing the issues the Court considered).

118. *Hamdan*, 126 S. Ct. at 2773 (citations omitted).

119. In *Ex parte Milligan*, the majority wrote:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority Certainly no part of judicial power of the country was conferred on [military commissions]

Ex parte Milligan, 71 U.S. (4 Wall) 2, 120–21 (1866).

120. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2742 (codified as amended at 28 U.S.C. § 2241 (2006)) ("[N]o court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba . . ."). In debating the Detainee Treatment Act, which was an amendment to the defense appropriations bill for that year, the author referred to the *Hamdan* proceedings as justification:

There is another Supreme Court case dealing with the due process rights of determining whether a person is an enemy combatant. . . . There was a stay by Federal District Judge [sic], staying military commission trials. The DC Circuit Court of Appeals overrode the lower court. That has gone up to the Supreme Court right now. . . . So the purpose of this amendment . . . is for Congress to legitimize what is going on at Guantanamo Bay about determining enemy combatant status, legitimizing that review process by making some changes. If we would do that, I am convinced the courts would welcome that involvement and a lot of this litigation would end overnight.

151 CONG. REC. S11,061-03, S11,074 (daily ed. Oct. 5, 2005) (statement of Sen. Graham); *see*

As a direct result of joint congressional and presidential action, *Hamdan* presented the last habeas corpus issue that the Court was likely to hear out of Guantanamo Bay.¹²¹ Nevertheless, the *Hamdan* opinion avoids all opportunities to equitably abstain from reaching the merits in anticipation of either a more apposite procedural posture in light of the Detainee Treatment Act¹²² or a more conclusive resolution of the military's process.¹²³ The Court's choice to use its last bullet to slay the Guantanamo military commissions' system is further evidence of the Court's determination to make its voice heard on national security matters.

The *Hamdan* decision, in concert with other Guantanamo opinions, represents the logical conclusion of the assault on the deferential principle discussed in this Part. A determination to discipline Executive authority, perhaps born in the shadow of *Korematsu*, has found its fullest expression in the Judiciary's mounting power over the sun-soaked prisons of Guantanamo Bay.¹²⁴ If the Supreme Court is

also 151 CONG. REC. S12,777-02, S12,796 (daily ed. Nov. 15, 2005) (statement of Sen. Specter) ("Under the language of exclusive jurisdiction in the DC Circuit, the U.S. Supreme Court would not have jurisdiction to hear the Hamdan case . . ."). Compare *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2766 n.10 (2006) (arguing that the statements by Senators during debate, which support the majority's interpretation that the statute does not apply to pending cases, carry more weight than other Senators' statements, which were appended to the record after the measure was passed), with *id.* at 2815 (Scalia, J., dissenting) (arguing that the majority misapplies the legislative history). Justice Scalia writes:

These statements were made when Members of Congress were fully aware that our continuing jurisdiction *over this very case* was at issue. The question was divisive, and floor statements made on both sides were undoubtedly opportunistic and crafted *solely* for use in this very litigation.

Id.

121. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 (2006) (responding to the Government's argument that Congress had no reason to preserve habeas jurisdiction over pending detainee cases if Congress's purpose was to strip the federal courts of the power to decide those cases in the future). Justice Stevens seemingly concedes the premise (while disputing the conclusion):

There is nothing absurd about a scheme under which pending habeas actions—particularly those, like this one, that challenge the very legitimacy of the tribunals whose judgments Congress would like to have reviewed—are preserved, and more routine challenges to final decisions rendered by those tribunals are carefully channeled to a particular court and through a particular lens of review.

Id.

122. See *id.* (arguing that Congress would prefer to see the legitimacy of the tribunals reviewed in the Supreme Court rather than rely on a review in the D.C. Circuit Court of Appeals, to which Congress had just given exclusive jurisdiction over the subject matter).

123. See *id.* at 2769–72 (rejecting the Government's contention that the Court should await the final outcome of the military's proceedings in accordance with its precedents).

124. But see *Boumediene v. Bush*, 476 F.3d 981, 987–93 (D.C. Cir. 2007) (holding that the Military Commissions Act effectively withdraws habeas corpus rights from Guantanamo

determined to confront the President wherever his national security activities collide with individual liberties, it follows that the reclassification authority cannot be applied to individual citizens without inviting judicial scrutiny. Judicial skepticism is likely to be intensified by the sense, discussed above, that the Executive's classification system is of minimal importance to Congress's scheme for protecting sensitive national security information.¹²⁵

*V. The (Vexing and Inscrutable) Meaning of "Reasonable" Government
Conduct in National Security Affairs*

This Part examines the constitutionality of using the reclassification authority contained in the Amended Order to physically recover information from private individuals. The need to address this issue arises from the seemingly permissive language emanating from the Executive Branch¹²⁶ and from "the fact routinely accepted in all quarters that the Executive Branch abuses the power of classification."¹²⁷ A collision of the reclassification power with individual liberties will likely implicate the First and Fourth Amendments. Fortunately for the Executive, exceptions abound to the fairly rigid doctrines of those two Amendments which drain them of much of their practical force.

The Amended Order ostensibly gives the government the right to reclassify information that was declassified but is "reasonably recoverable."¹²⁸ Implicit in that reclassification power is the authority to reach beyond the boundaries of the Executive's classification system and seize information in order to bring it back under the government's cloak of secrecy.¹²⁹ Sometimes, as with the National

detainees without violating the Constitution's Suspension Clause).

125. See *supra* Part III.C (discussing Congress's legislative scheme for protecting sensitive information).

126. See *supra* Part II.B (discussing how the Amended Order and the ISOO guidance on it both seem to tolerate the use of the reclassification authority against private citizens).

127. Edgar & Schmidt, *supra* note 50, at 1066 (discussing the Executive's classification power in the course of arguing that improper classification should be a defense to one of the disclosure laws).

128. See Amended Order, *supra* note 12, at 15,318 ("Information *may be* reclassified after declassification and release to the public under proper authority only in accordance with the following conditions . . . (2) the information may be reasonably recovered . . ." (emphasis added)).

129. See 32 C.F.R. § 2001.13(a)(1)(i) (2006) (defining reasonably recoverable information, in part, as meeting the following condition: "Most individual recipients or holders are known and can be contacted and all forms of the information to be reclassified can be retrieved from them . . .").

Archives matter, the reclassifying agency will be recovering its material from other government agencies, in which case constitutional concerns are trivial.¹³⁰ Nevertheless, the ISOO guidance associated with the Amended Order explicitly contemplates "retriev[ing]" information from "individual recipients or holders" as well—a power which raises serious constitutional questions.¹³¹

Because the language of recovery¹³² and retrieval¹³³ is unfamiliar in discussions of government action against individual citizens, this Part invokes the language of the First and Fourth Amendments to analyze the Amended Order.¹³⁴ An examination of how the reclassification power interacts with individual rights will need to analogize the novel reclassification power to better understood powers of government. The manner in which the reclassification authority is framed indicates that the power to retrieve information from individuals within the United States is functionally equivalent to the more familiar police powers of search and seizure.¹³⁵ Thus, a constitutional analysis of the reasonableness of a reclassification action conducted against an individual will take most of its cues from the Court's Fourth Amendment jurisprudence.¹³⁶

130. See *supra* Part I (providing a narrative of the National Archives matter).

131. See 32 C.F.R. § 2001.13(a)(1)(i) (specifying that information can be retrieved from individuals possessing it so long as most of them are known and can be reached); see also *supra* Part II.B (discussing the ISOO guidance in more depth).

132. See Amended Order, *supra* note 12, at 15,318 (providing the substantive standard, "reasonably recovered," by which to judge whether information that has been released to the public may be reclassified).

133. See 32 C.F.R. § 2001.13(a)(1)(i) (explaining that "reasonably recoverable" means that most of the individual recipients and holders of the information are known, can be contacted, and the information can be *retrieved* from them).

134. See *supra* Parts I, II.A (discussing the absence of a "reasonably recovered" standard in any other area of federal law and the limited public record of reclassification actions).

135. See *supra* Part II.B (discussing the Executive Branch's conception of the reclassification authority).

136. See *Camara v. Mun. Court*, 387 U.S. 523, 534–35 (1967) (holding that administrative searches that intrude significantly on the interests protected by the Fourth Amendment must be accompanied by a warrant procedure, and that such a procedure must be governed by the Fourth Amendment's requirement of reasonableness but not necessarily by the probable cause requirements which apply to criminal investigations); see also U.S. CONST. amend. IV (establishing the rights in question). The Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

Further, there is another constitutional interest at stake, as the majority recognized in *United States v. U.S. District Court*.¹³⁷ "National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of ordinary crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech."¹³⁸ Because the exercise of the police power to safeguard the national interest is often bound up with political and expressive issues, constitutional analysis of the reclassification authority will also necessarily implicate the values of the First Amendment.¹³⁹ An extended discussion of how the Court has approached the concept of reasonableness in its Fourth Amendment cases, and especially in those that deal with national security matters and the First Amendment, should therefore provide a greater understanding of what sort of reclassification recoveries the Court is likely to consider reasonable.

Subpart A of this Part addresses complications which may arise from the application of traditional Fourth Amendment jurisprudence to potential reclassification activities. To that end, subpart A begins with an analysis of the potential efficacy of the Fourth Amendment's warrant requirement as a check on reclassification activity; it concludes with an analysis of how courts are likely to address the reasonableness of a warrantless seizure for the purposes of reclassification. Subpart B discusses the Court's reception of First Amendment claims with national security implications.

A. Reasonableness and the Fourth Amendment in a National Security Context

The Fourth Amendment warrant requirement and concept of reasonableness,¹⁴⁰ which together guide criminal investigations, are unlikely to translate into meaningful restraints on retrievals of information for reclassification. The purely Executive character of reclassification activity precludes the exclusionary rule, the traditional judicial enforcement mechanism for Fourth Amendment violations, from discouraging overzealous conduct.¹⁴¹ Moreover, the

137. See *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 303–08 (1972) (finding that the President is required to obtain a warrant when conducting domestic electronic surveillance for national security purposes).

138. *Id.* at 313.

139. See *id.* (discussing the nature of national security cases).

140. See *infra* Part V.A.2 (demonstrating that Fourth Amendment reasonableness, as conceived by the Supreme Court, bears only a passing relationship to the layperson's understanding of that term).

141. See *infra* Part V.A.1 (analyzing the exclusionary rule's extremely limited persuasive

warrant requirement, drained of practical force by copious judicially crafted exceptions, is unlikely to meaningfully restrain reclassification actions.¹⁴² Finally, the gravity of the asserted interests at stake in national security affairs arguably could render any executive policy reasonable, negating the force of the reasonableness requirement as it applies to reclassification.¹⁴³

1. *The Exclusionary Rule*

National security operations frustrate the ordinary mechanisms of the judicial process because the government's activities in national security affairs are not geared toward criminal prosecution.¹⁴⁴ Ordinarily the government's leeway in its investigative activities is constrained by the strictures of the exclusionary rule: Improperly gathered evidence is excluded from judicial proceedings.¹⁴⁵ The rule punishes overly aggressive, or otherwise illicit, information-gathering by making it harder for prosecutors to build their case.¹⁴⁶ In national security activities, the government seeks information for proprietary use by Executive Branch officials, meaning that the exclusion of improperly acquired information from future judicial proceedings may not provide any disincentive.¹⁴⁷ Because the presumptive purpose of any reclassification activity would be to halt and reverse the dissemination of a piece of information, the irrelevant consequences of the exclusionary rule would not act as a check on abusive activity.

force outside of the trial context).

142. See *infra* Part V.A.2 (describing the evolution and criticism of the extensive exceptions to the warrant requirement).

143. See *infra* Part V.A.3 (evaluating the likely force of a reasonableness requirement in efforts to protect the nation's security).

144. See, e.g., *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 322 (1972) ("We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of ordinary crime. . . . [T]he emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the government's preparedness for some possible future crisis or emergency.").

145. See *Mapp v. Ohio*, 367 U.S. 643, 657–58 (1961) (applying the exclusionary rule to state courts as well as federal courts).

146. See *id.* at 648 (describing the exclusionary rule as the principle that evidence gained in violation of an individual's Fourth Amendment rights could not be used against that individual).

147. See *Keith*, 407 U.S. at 325 (Douglas, J., concurring) ("[E]ven the risk of exclusion of tainted evidence would here appear to be of negligible deterrent value inasmuch as the United States frankly concedes that the primary purpose of these searches is to fortify its intelligence collage rather than to accumulate evidence to support indictments and convictions.").

2. The Warrant Requirement

One potential check on government authority to reasonably recover information from individuals for the purposes of reclassification would be to judge the reasonableness of a proposed information recovery through some form of the warrant process contemplated by the Fourth Amendment.¹⁴⁸ The potential check of a warrant process for reclassification, however, is complicated by the lack of a clear rule in the Court's opinions dictating when the procurement of a warrant is required and when a government search or seizure may be constitutionally reasonable without a warrant. The Court has stated a basic rule that warrantless searches "are *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions."¹⁴⁹ Nevertheless, some opinions have argued that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."¹⁵⁰ Other majority opinions take a nearly opposite view:

The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check

148. *Cf. Beck v. Ohio*, 379 U.S. 89, 96 (1964) (discussing the warrant requirement as an important procedural check on government authority to make an arrest, which is analogous to the authority to seize information). The majority writes: "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure on an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Id.*

149. *Katz v. United States*, 389 U.S. 347, 357 (1967).

150. *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950). The majority also stated that: "A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search." *Id.* at 65. By contrast, Justice Frankfurter, in his dissent, argued:

The purpose of the Fourth Amendment was to assure that the existence of probable cause as the legal basis for making a search was to be determined by a judicial officer before arrest and not after, subject only to what is necessarily to be excepted from such requirement. The exceptions cannot be enthroned into the rule. The justification for intrusion into a man's privacy was to be determined by a magistrate uninfluenced by what may turn out to be a successful search for papers, the desire to search for which might be the very reason for the Fourth Amendment's prohibition.

Id. at 80 (Frankfurter, J., dissenting).

the "well-intentioned but mistakenly over-zealous, executive officers" who are a part of any system of law enforcement.¹⁵¹

To be sure, the idea that warrants are required largely prevails in a rhetorical sense. Nevertheless, the Court's jurisprudence provides exceptions to the requirement that degrade its practical force.¹⁵² Justice Scalia ably summarizes this situation:

By the late 1960's, the preference for a warrant had won out, at least rhetorically. . . .

The victory was illusory. Even before today's decision, the "warrant requirement" had become so riddled with exceptions that it was basically unrecognizable. In 1985, one commentator cataloged nearly 20 such exceptions, including "searches incident to arrest . . . automobile searches . . . border searches . . . administrative searches of regulated businesses . . . exigent circumstances . . . searches incident to nonarrest when there is probable cause to arrest . . . boat boarding for document checks . . . welfare searches . . . inventory searches . . . airport searches . . . school searches . . ." Since then, we have added at least two more. Our intricate body of law regarding "reasonable expectation of privacy" has been developed largely as a means of creating these exceptions, enabling a search to be denominated not a Fourth Amendment "search" and therefore not subject to the general warrant requirement.¹⁵³

The practical implications of this complicated jurisprudence for reclassification are clear. On one hand, if the warrant requirement is adhered to, the government will have to obtain advance judicial approval of the reasonableness of its actions, and it will have to act under the significant constraints of longstanding rules for seizure warrants. Courts have long held that valid seizure warrants "shall particularly

151. *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971).

152. See Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473–80 (1985) (suggesting that the Supreme Court's jurisprudence on the warrant requirement creates exceptions that practically swallow the rule). Professor Bradley writes:

As anyone who has worked in the criminal justice system knows, searches conducted pursuant to these [warrant requirement] exceptions, particularly searches incident to arrest, automobile and "stop and frisk" searches, far exceed searches performed pursuant to warrants. The reason that all of these exceptions have grown up is simple: the clear rule that warrants are required is unworkable and to enforce it would lead to exclusion of evidence in many cases where the police activity was essentially reasonable.

Id. at 1475.

153. *California v. Acevedo*, 500 U.S. 565, 582–83 (1991) (Scalia, J., concurring) (citations omitted) (quoting Bradley, *supra* note 152, at 1473–74). See generally, Charles W. Chotvacs, *The Fourth Amendment Warrant Requirement: Constitutional Protection or Legal Fiction? Noted Exceptions Recognized by the Tenth Circuit*, 79 DENV. U. L. REV. 331 (2002) (describing extensive warrant requirement exceptions recognized in the Tenth Circuit Court of Appeals).

describe the things to be seized"¹⁵⁴ in order to render "general searches under [seizure warrants] impossible and prevent[] the seizure of one thing under a warrant describing another."¹⁵⁵ Under a seizure warrant, with regard "to what is taken, nothing is left to the discretion of the officer executing the warrant."¹⁵⁶ On the other hand, if the warrant requirement does not apply or is ignored, the government—freed of the seizure warrant rules—can be confident of having the operational latitude to recover all the information it seeks. Further, in case there is a legal dispute, the government can hope to take advantage of the relatively magnanimous attitude of the judiciary toward crafting exceptions to the rigors of the warrant requirement.¹⁵⁷

3. "Special Needs" and Warrantless, Reasonable Seizures

The erosion of the warrant requirement has prompted the Supreme Court to frame a model of the Fourth Amendment with the Reasonableness Clause at its core. Professor Scott Sundby writes: "The Court announced that if the government

154. *Marron v. United States*, 275 U.S. 192, 196 (1927); *accord* *Stanford v. Texas*, 379 U.S. 476, 485 (1965) ("[T]he constitutional requirement that warrants must particularly describe the 'thing to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain.") *and* *Andresen v. Maryland*, 427 U.S. 463, 480 (1976) ("General warrants . . . are prohibited by the Fourth Amendment."); *see generally* Note, *The Warrant Requirement*, 32 GEO. L.J. ANN. REV. CRIM. PROC. 18 (2003) (describing the current features of the warrant requirement).

155. *Marron*, 275 U.S. at 196.

156. *Id.*

157. *See* Bradley, *supra* note 152, at 1470 (describing the Court's accommodating view of seemingly reasonable police action). Professor Bradley writes:

[T]he Court is loathe to declare searches unconstitutional, with the concomitant evidentiary exclusion, in cases where the police have essentially acted reasonably, even if they have not exactly conformed to existing Supreme Court doctrine. The result is that the Court strives to justify such police behavior by stretching existing doctrine to accommodate it.

Id.; *see also supra* note 150 and accompanying quotation (describing the appropriate Fourth Amendment test as whether the search was reasonable and not whether it would have been reasonable to get a warrant). *Compare* *Carroll v. United States*, 267 U.S. 132, 151–53 (1925) (holding that moving vehicles stopped incident to arrest can be searched without a warrant because the potential that the vehicle may be rapidly moved outside the jurisdiction presents an exigent circumstance), *with* *Chambers v. Maroney*, 399 U.S. 42, 49–52 (1970) (holding that a vehicle held in government possession at a police station following an arrest could also be searched without a warrant because the justifying exigent circumstance described in *Carroll* had existed in the past and the challenged search presented a "lesser intrusion" on the suspect's Fourth Amendment interest).

could show 'special needs' other than crime detection, then suspicionless searches would be permissible if the government's justification outweighed the intrusion on the privacy interest."¹⁵⁸ That analysis, which was first fully announced in *National Treasury Employees Union v. Von Raab*,¹⁵⁹ controls the Court's conclusion about the reasonableness of the disputed action.¹⁶⁰ The reclassification power, if used to justify a search or seizure, would seem to implicate a *Von Raab* analysis because it operates outside the context of criminal investigation.¹⁶¹ The court has made clear that a *Von Raab* analysis does not depend on the particular facts in the challenged situation, but rather on the reasonableness of the government's overarching objective.¹⁶² A judge reviewing a challenged

158. Scott E. Sundby, *Protecting the Citizen "Whilst He is Quiet": Suspicionless Searches, "Special Needs" and General Warrants*, 74 Miss. L.J. 501, 511 (2004).

159. See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989) (approving the suspicionless drug testing of some Customs Service employees). The majority in *Von Raab* wrote:

In particular, the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, especially where the Government seeks to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person. . . . Our precedents have settled that, in certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion. . . . We think the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms.

Id. (citations omitted).

160. See, e.g., *California v. Acevedo*, 500 U.S. 565, 573 (1991) (holding that the exception to the warrant requirement for searches of moving vehicles must be extended to discrete closed containers found within a vehicle); see also Sundby, *supra* note 158, at 503 (discussing the Court's emphasis on privacy as "the centerpiece of the [Fourth] Amendment's protections"). In light of the Court's decisions in *Katz* and *Camara*, Professor Sundby writes: "[W]eighing . . . the government's need for the intrusion against the severity of the intrusion on the individual's privacy interest made logical sense." *Id.*

161. See *supra* Part V.A.1 (discussing the minimal relevance of the exclusionary rule to the non-judicial motives of reclassification).

162. See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 633 (1989) (upholding a suspicionless program of drug testing for railroad employees). The majority in *Skinner* holds:

We conclude that the compelling Government interests . . . would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee. In view of our conclusion that, on the present record, the toxicological testing contemplated by the regulations is not an undue infringement on the justifiable expectations of

reclassification activity, therefore, would have to decide the case as a policy matter, answering whether the government's need for a reclassification program outweighed the level of intrusion on the citizen.¹⁶³

The application of this method of judgment to national security matters is complicated by the changing nature of reasonableness as one's analytical focus moves away from criminal investigations to the defense of the nation, a more perilous area of government activity.¹⁶⁴ Because the judicial inquiry into reasonableness is policy based and not fact based,¹⁶⁵ the abstract peril that national security policy purports to address could drastically skew the reasonableness inquiry in the reclassification program's favor. When acting in the interest of national security, the government can claim that it is facing down lethal, and often existential, threats to itself and to the populace.¹⁶⁶ In the face of such grave consequences, almost any policy adopted to protect the people's collective security could be characterized as reasonable.

The foregoing arguments for the reasonableness of the reclassification policy would contend with arguments that the interest the policy protects is fairly trivial. The latter arguments might draw substantial strength from Congress's apparently paltry

privacy of covered employees, the Government's compelling interests outweigh privacy concerns.

Id.

163. See Sundby, *supra* note 158, at 512–13 (explaining how the decline of the warrant-preference model led the Court to move away from factual inquiry and towards a policy inquiry in determining the reasonableness of an intrusive government program).

164. See *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) ("Consistently, therefore, with Congress's power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior."). The qualitative difference in the balance of reasonableness when the government is acting to protect the nation would likely apply to reclassification actions, which would also be premised on national security. See *supra* Part III.A (discussing the national security justifications for the classified system).

165. See *supra* notes 151–55 and accompanying text (discussing the policy emphasis of a *Von Raab* special needs analysis).

166. See, e.g., President George W. Bush, Address at Fort Bragg, North Carolina (July 4, 2006), <http://www.whitehouse.gov/news/releases/2006/07/20060704.html> (last visited Oct. 9, 2007) (describing the stakes of the Iraq war and the war on terror) (on file with the Washington and Lee Law Review). The President said:

We're engaged in a global struggle against the followers of a murderous ideology that despises freedom and crushes all dissent, and has territorial ambitions and pursues totalitarian aims. This enemy attacked us in our homeland on September the 11th, 2001. They're pursuing weapons of mass destruction that would allow them to deliver even more catastrophic destruction to our country and our friends and allies across the world. They're dangerous.

Id.

regard for the integrity of the classified system¹⁶⁷ and from the extreme novelty of the reclassification power itself, following a long period of prohibition.¹⁶⁸

The stakes of the judicial inquiry into the reasonableness of reclassification policy are high: The Judiciary's recognition of reclassification policy's reasonableness could serve to immunize abusive applications of that policy against judicial scrutiny.¹⁶⁹ By contrast, the Judiciary's denial of the reasonableness of reclassification policy might deprive the Executive of the authority to recover sensitive information from individual citizens, potentially imperiling the nation's security in a case of extreme contingency. Because of the stakes, it is reasonable to speculate that the outcome of a future inquiry into the reasonableness of reclassification policy will (perversely) depend on the particular facts underlying the dispute. If the challenged reclassification clearly averted a significant national danger, it seems likely that a court would endorse—or at least defer to—the Executive's contention that reclassification policy is reasonable because the nation's security interest trumps the Fourth Amendment. By contrast, if the challenged reclassification was clearly abusive behavior that resulted in a negligible security benefit, it seems equally likely that a court would judge the reclassification policy over-inclusive and unreasonably intrusive upon Fourth Amendment interests. As a result, the outcome of a *Von Raab* inquiry into the reasonableness of reclassification policy is fundamentally uncertain and therefore unreliable as a guarantee of individuals' rights under the Fourth Amendment.

B. Reasonableness and the First Amendment in a National Security Context

After a brief examination of the Supreme Court's First Amendment decisions, this subpart concludes that the Court is generally unwilling to interfere with the protection of national security on the basis of a free speech claim. A full consideration of the First Amendment implications of reclassification is beyond the scope of this Note. Nevertheless, the foregoing Fourth Amendment analysis would not be complete

167. See *supra* Part III.C (concluding that Congress's exclusion of classified status from much of the law on disclosure of sensitive information reflected a minimal respect for the Executive's classification system).

168. See *supra* notes 11–12 and accompanying text (noting that reclassification was forbidden by executive order until March of 2003).

169. See *supra* note 163 (noting that the determination of a *Von Raab* reasonableness inquiry turns on the contested policy and not the particular facts of the case); see also *supra* note 8 and accompanying quotation (recording, in a number of instances of potential abuse, how the CIA withdrew extremely old unclassified documents from NARA because copies of them had once been given to long-dead CIA officials).

without some consideration of how an executive seizure of information interacts with expressive rights.

The First Amendment regulates government search and seizure efforts, like reclassification, that target information in order to suppress it. Justice Brennan once wrote:

The use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new. Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power.¹⁷⁰

Despite its historical underpinnings, the First Amendment's protection of expressive freedom has not been a dependable check on government action that is undertaken to protect national security. The clear rule previously discussed in the *Pentagon Papers* case,¹⁷¹ which held that the Executive could not enjoin the publication of a classified study of Vietnam war policy, is steadily contradicted by a line of cases, historical and modern, which subordinate First Amendment interests to national security.

National security trumps free speech in *Haig v. Agee*,¹⁷² in which the Supreme Court upheld the Executive's authority to restrict the travel—and by extension, the

170. *Marcus v. Search Warrants of 104 E. Tenth St.*, 367 U.S. 717, 724 (1961).

171. *See supra* Part IV.A (describing the diverse opinions in *Pentagon Papers* in the context of a discussion of deference to the Executive).

172. *See Haig v. Agee*, 453 U.S. 280, 308–10 (1981) (holding that the Government's legitimate interest in protecting the national security and foreign relations of the United States trump the free speech rights of a disgruntled former intelligence officer). The *Haig* litigation resulted from the government's attempt to deal with an intransigent former spy who was endangering the lives of American intelligence personnel and undermining intelligence operations by publicly revealing classified information (including the identities of intelligence officers). *Id.* at 283–85. In response to continuing, damaging disclosures, the Secretary of State revoked the passport of the rogue spy, Agee, and delivered an explanatory notice to him—claiming as his authority a federal statute and accompanying regulation which seemed to grant the Secretary the right to revoke passports to protect the national security. *Id.* at 286. Agee immediately sued on First and Fifth Amendment grounds, claiming the government had violated his due process rights, infringed his right to travel, and stifled his right to express dissent. *Id.* at 287. The Court first decided affirmatively the narrow question of whether the Secretary had the asserted statutory authorization to revoke a passport for national security purposes. *Id.* at 289–305. Proceeding to Agee's constitutional claims, the Court found them entirely without merit. *Id.* at 306–10. With regard to the right to travel, the Court distinguished between the robust right to interstate travel (a virtually unqualified right) and much less extensive right to international travel (which can be regulated within the bounds of due process), and found no violation. *Id.* at 307–08. With regard to Agee's right of free expression, the Court found no constitutional protection for speech with the declared purpose of interfering with the conduct of intelligence. *Id.* at 308–09. The Court further wrote, "[t]o the extent the revocation of his passport operates to inhibit Agee, it is an inhibition of action, rather than speech." *Id.* at 309. Finally, the Court briskly concluded that Agee had all the due process he was entitled to. *Id.* at 309–10.

speech—of an intransigent former intelligence officer.¹⁷³ *Haig* presented a particularly dismal set of facts for the protection of the former intelligence officer's free speech rights—he had used those rights to expose and endanger CIA officers.¹⁷⁴ Accordingly, the majority took a dim view of the First Amendment protections which Agee claimed:

[R]epeated disclosures of intelligence operations and names of intelligence personnel . . . are clearly not protected by the Constitution. The mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law.¹⁷⁵

In reaching the conclusion that the protection of national security trumped First Amendment interests in some cases, the Court approvingly recalled some earlier dicta, from *Near v. Minnesota*,¹⁷⁶ which could be seen as authorizing a far reaching reclassification power.¹⁷⁷ In that holding, the Court deprecated constitutional checks

173. *See id.* at 308–10 (dismissing Agee's First Amendment claims).

174. *See id.* at 284–85 (discussing Agee's declared purpose to expose the cover of CIA officers). The majority recounts:

Agee and his collaborators have repeatedly and publicly identified individuals and organizations located in foreign countries as undercover CIA agents, employees, or sources. The record reveals that the identifications divulge classified information, violate Agee's express contract not to make any public statements about Agency matters without prior clearance by the Agency, have prejudiced the ability of the United States to obtain intelligence, and have been followed by episodes of violence against the persons and organizations identified.

Id. Interestingly, it was Agee's conduct that prompted Congress to pass the Intelligence Identities Protection Act. *See INTELLIGENCE IDENTITIES PROTECTION ACT OF 1982*, S. REP. NO. 97-201, at 151 (1981) (explaining that Agee's conduct was a principal motive for the legislation); *see also supra* note 61 (relating the legislation's strict requirements and its reliance on the classified system).

175. *Haig*, 453 U.S. at 308–09. *But see id.* at 319 (Brennan, J., dissenting) (questioning the breadth of the majority's First Amendment holding); Brennan writes:

I suspect that this case is a prime example of the adage that "bad facts make bad law." Philip Agee is hardly a model representative of our Nation. And the Executive Branch has attempted to use one of the only means at its disposal, revocation of a passport, to stop respondent's damaging statements. But just as the Constitution protects both popular and unpopular speech, it likewise protects both popular and unpopular travelers. And it is important to remember that this decision applies not only to Philip Agee, whose activities could be perceived as harming the national security, but also to other citizens who may merely disagree with Government foreign policy and express their views.

Id. (Brennan, J., dissenting).

176. *See Near v. Minnesota*, 283 U.S. 697, 716 (1931) (holding, by analogy to national security, that the government could regulate obscene publications in order to protect the security of the community).

177. *Id.*

on the Executive's power to recover national security information: "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."¹⁷⁸ The foregoing language of restriction recalls another, older holding in *Schenck v. United States*,¹⁷⁹ which seemed to authorize the government to make sweeping restrictions on speech in the name of national security:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.¹⁸⁰

The interests of a nation at war trump the expressive interests of its citizens.

From these opinions, it is reasonable to assert that the Court has a substantial history of tolerating national security motivated restrictions on speech. Even in *Pentagon Papers*, a number of Justices openly speculated in dicta that, even though injunction of publication was not permissible, newspapers might be prosecuted under the Espionage Act for revealing state secrets.¹⁸¹ This history arguably determined the outcome of the controversial decision in *United States v. Rosen*,¹⁸² a recent lower court case which upheld, against a First Amendment challenge, the Espionage Act prosecution of two private individuals who had allegedly obtained and disseminated classified information.¹⁸³ Surprisingly, the court in *Rosen* relies heavily on *Pentagon Papers* to uphold its restriction on speech.¹⁸⁴ This line of reasoning immediately elicited withering criticism:

178. *Id.* (dictum).

179. *See* *Schenck v. United States*, 249 U.S. 47, 52 (1919) (upholding the prosecution, under the Espionage Act, of the author of a pamphlet which encouraged opposition to the World War I draft).

180. *Id.*

181. *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 744 (Marshall, J., concurring); *see also supra* note 86 and accompanying text (analyzing Justice Marshall's suggestions for the Government).

182. *See* *United States v. Rosen*, 445 F. Supp. 2d 602, 643 (E.D. Va. 2006) (dismissing the First Amendment claims of two Israeli-American lobbyists charged with Espionage Act violations for disseminating classified information).

183. *See id.* at 638 (discussing the dicta in *Pentagon Papers* as persuasive evidence that prosecutions of private individuals, under § 793(e) of the Espionage Act, for publishing previously secret defense information are constitutional).

184. *See id.* at 639 ("[T]hus, the Supreme Court's discussion of § 793(e) in the *Pentagon Papers* case supports the conclusion that § 793(e) does not offend the [C]onstitution.").

By misconstruing precedent, the *Rosen* court reached the wrong result. . . . Although the government undoubtedly has an interest in ensuring national security—an interest that might sometimes entail prosecuting transmitters and recipients of information whose behavior implicates the First Amendment—the Espionage Act, as written, is an unconstitutional vehicle through which to pursue such an interest.¹⁸⁵

While the *Rosen* court's reasoning may be open to question, its holding is clearly in line with the Supreme Court's decisions, discussed above, which establish that the First Amendment does not protect those who endanger national security.

In sum, the Supreme Court's treatment of First Amendment rights suggests that the Court will accept aggressive government action to prevent disclosure of sensitive national security information, even when that action infringes on the expressive rights traditionally protected by the First Amendment. It is reasonable to expect the Court to be similarly generous if that government action takes the form of reclassification.

VI. Conclusion

Through the phenomenal power of a loosely drafted Executive Order, the recently created reclassification authority arguably holds the potential to reach into the lives and homes of individual citizens. Should that potential ever be realized, the foregoing inquiries portend some unfavorable results for those hoping the Judicial Branch will find some constitutional basis to protect them from Executive reclassification efforts. The Supreme Court is certainly willing to exercise constitutional review over the President's national security actions when those actions collide with individual liberty. Nevertheless, the Court's decisions seem equally willing to craft exceptions to First and Fourth Amendment doctrines in order to approve seemingly reasonable Executive conduct and to avoid unduly interfering with the defense of the nation.

185. Recent Case, *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006), 120 HARV. L. REV. 821, 821 (2007).