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Balancing and the Unauthorized Disclosure of National Security Information: A Response to Mark Fenster's *Disclosure Effects: WikiLeaks and Transparency*

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Balancing and the Unauthorized Disclosure of National Security Information

A Response to Mark Fenster's *Disclosure's Effects: WikiLeaks and Transparency*

Mary-Rose Papandrea*

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INTRODUCTION

In his recent article, *Disclosure's Effects: WikiLeaks and Transparency*,¹ Mark Fenster argues that WikiLeaks demonstrates the “impossibility” of balancing the public benefits of national-security-information disclosure with the effects of the disclosure on the nation’s national security and foreign policy interests.² This article is a continuation of Professor Fenster’s previous work examining the costs and benefits of transparency.³ In his prior work, he fleshes out the criticisms of the current transparency regime that appear somewhat fleetingly here: namely, that we should question the assumption that transparency promotes an informed and engaged electorate as well as better, more responsive, and accountable government.⁴

I wholeheartedly agree with Professor Fenster’s argument that calculating the costs and benefits of the disclosure of national security information is a frustratingly difficult task. I am not sure anyone truly disagrees with that argument. But an underlying assumption of Professor Fenster’s argument is that balancing the effects of disclosure against the benefits to the public discourse are at the heart of the laws relating to the unauthorized disclosure of national security information by government insiders and outsiders. Although the various statutes and regulations aimed at controlling the disclosure of sensitive national security information may strive to strike the right balance between the harm to national security and the free flow of information in a democracy, judges themselves are rarely required to do this kind of explicit balancing. While balancing is common in other areas of the First Amendment, such as the rights of government employees,⁵ the reporters’ privilege,⁶ and the right to engage in anonymous speech,⁷ it is not clear that balancing is required in cases involving the unauthorized disclosure of national security information.

1. Mark Fenster, *Disclosure's Effects: WikiLeaks and Transparency*, 97 IOWA L. REV. 753 (2012).

2. *Id.* at 782.

3. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 893 (2006) (“Rather than abstract normative claims and rhetoric, what is needed is some realism about transparency’s costs and benefits for the public, for governance, and for the relationship between the public and government.”).

4. *Id.*

5. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (holding that the First Amendment requires courts to balance “the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees”).

6. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1173–78 (D.C. Cir. 2006) (Tatel, J., concurring) (suggesting balancing of harm against newsworthiness to evaluate reporter-privilege claims in leak cases).

7. Some lower courts, considering motions to “unmask” an anonymous speaker, have held one of the relevant factors is whether the alleged harm to the plaintiff outweighs the value of the anonymous speech. *See, e.g.*, *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Doe v. 2theMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001);

Examining this underlying premise is important because Professor Fenster's ultimate conclusion is that because judges are not equipped to do this balancing, it should be left to expert commissions and panels.⁸ It is unclear, however, what expert commission or panel Professor Fenster has in mind to resolve any criminal charges the government might attempt to bring against Julian Assange or any other government outsider who engages in the unauthorized dissemination of national security information, or for the criminal charges increasingly levied against government insiders who leak. I agree with Professor Fenster that it would be a great idea to embrace entities like the Interagency Security Classification Appeals Panel that help eliminate excessive overclassification. But they cannot resolve the difficult questions that arise when government insiders disclose and government outsiders disseminate information that the government had wanted to keep secret.

Going forward, Congress and the courts must do some serious thinking about when the unauthorized disclosure of national security information is protected as a matter of statutory or constitutional law. I agree with Professor Fenster's criticisms of any test that would require a court to balance the costs and benefits of disclosure. I suggest some approaches Congress could take that might approximate this balance without requiring the courts to do the balancing on a case-by-case basis.

I. OVERSTATING THE ROLE OF BALANCING

Throughout his article, Professor Fenster emphasizes how WikiLeaks has demonstrated how difficult it is for judges to balance the harm to national security against the benefits of disclosure. A balancing test is not as ingrained in the law as Professor Fenster suggests, however; indeed, he has noted this himself in his prior work, at least with respect to the Freedom of Information Act ("FOIA").⁹ It may be the goal of any attempt to resolve the tug-and-pull between necessary secrecy and an informed democracy, but the balance does not explicitly appear in most of the relevant statutes. It is also hardly settled that the First Amendment requires such a balance.

It is useful to distinguish among three sets of legal rules: (1) legal rules that affirmatively require the government to disclose information; (2) legal

Mobilisa, Inc. v. Doe, 170 P.3d 712 (Ariz. Ct. App. 2007); *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

8. Fenster, *supra* note 1, at 807 ("A more effective approach would be to strengthen and model new entities on permanent or temporary administrative bodies that more independently and expertly decide consequential claims about disclosure's dangerous effects . . . [and that] have been more effective than courts in making difficult decisions about information disclosure.").

9. See Fenster, *supra* note 3, at 938 & n.230 (noting that "courts reviewing FOIA challenges to government refusals to disclose documents generally do not make particularized considerations that weigh the respective values of disclosure and nondisclosure," except in cases involving the FOIA's privacy exceptions in 5 U.S.C. § 552(b)(6), (b)(7)(C) (2006)).

rules that apply to government “insiders” (government employees and contractors) who engage in the unauthorized disclosure of information; and (3) legal rules that apply to government “outsiders” (those without authorized access to government information) who engage in the unauthorized disclosure of information. Balancing is more prevalent in statutes and regulations that govern what the government is affirmatively obligated to disclose, not clearly present or required in cases involving government outsiders, and entirely absent in cases involving government insiders.

A. AFFIRMATIVE DUTY TO DISCLOSE

Balancing is most prevalent in statutes and regulations that affirmatively require the disclosure of information. Certain privacy exemptions of the FOIA require judges to balance the privacy interests at stake with the public interest in disclosure.¹⁰ The various exemptions from the FOIA’s sweep perhaps represent a higher-level form of categorical balancing, in that Congress must have decided with respect to each exempted category that the public’s interest in disclosure did not outweigh the interests of secrecy. But for some of these categories, the public’s interest is given very little weight, while the government’s interest in nondisclosure is given inordinate weight. Federal regulations require agencies to consider declassifying documents when “the need to protect properly classified information ‘may be outweighed by the public interest in disclosure of the information,’”¹¹ although, notably, the judicial branch is not authorized to review or apply this standard. Judicial review of FOIA claims seeking disclosure of information that the government claims is exempt under exemption one for national security or foreign defense information¹² is typically deferential to the agency.¹³ Furthermore, in determining whether exemption one applies, courts are permitted to consider only whether information is properly classified.¹⁴

10. See 5 U.S.C. § 552(b)(6), (b)(7)(C) (2006).

11. 32 C.F.R. § 1902.13 (2011).

12. Exemption states that the government may withhold information that is “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) [is] in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1).

13. See Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL’Y REV. 399, 407 (2009) (noting that federal courts are very deferential to the executive branch and “almost never overturn agency classification decisions”); Mary-Rose Papandrea, *Under Attack: The Public’s Right To Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35, 52 (2005) (noting that the “efforts to force disclosure of information pertaining to the government’s counterterrorism efforts through the . . . FOIA have been largely unsuccessful”); Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. PITT. L. REV. 753, 760 (1988) (noting that judicial review of classified information under the FOIA “often seems to be done in a perfunctory way”).

14. See 5 U.S.C. § 552(a)(4)(B), (b).

Information is properly classified when its disclosure would risk some harm to national security, regardless of the public interest in that information. The level of classification also depends entirely on the level of possible damage to national security. For example, “Confidential” information is reasonably expected “to cause damage to the national security”; “Secret” information is reasonably expected “to cause serious damage to the national security”; and “Top Secret” information is reasonably expected “to cause exceptionally grave damage to the national security.”¹⁵ The classification regulations that prohibit the classification of information designed to “conceal violations of law, inefficiency, or administrative error,” or to “prevent embarrassment to a person, organization, or agency,”¹⁶ might be seen as an effort to balance national security risk against the public interest, but only in a very narrow and limited way. Some presidents, including President Obama, have told agencies to apply a presumption of disclosure whenever there is significant doubt of the need to classify,¹⁷ but again this does not require a consideration of the public interest in disclosure but rather simply the disclosure’s risk of harming national security.

Professor Fenster rightly praises the success of the Interagency Security Classification Appeals Panel (“ISCAP”). Steven Aftergood has proclaimed that the ISCAP “is among the most successful classification reform initiatives of the last half century.”¹⁸ The ISCAP’s record is impressive; it “has overturned more executive branch classification decisions than any court or legislative action.”¹⁹ According to the most recent government report, the panel has declassified information in sixty-five percent of its decisions since 1996.²⁰ In 2010, thirty-six percent of documents reviewed were declassified in their entirety, thirty-two percent were declassified in part, and thirty-two percent remained classified.²¹ The ISCAP arguably provides a more effective means of obtaining national security information from the government than the FOIA because FOIA court appeals are time-consuming, expensive, and usually unsuccessful given the court’s deference to the government on national security matters.²² Aftergood has suggested that the success of the

15. Exec. Order No. 13,526 § 1.2(a)(1)–(3), 75 Fed. Reg. 707–08 (Jan. 5, 2010).

16. *Id.* § 1.7(a).

17. *Id.* § 1.1(b).

18. Steven Aftergood, *Roslyn Mazer To Be ODNI Inspector General*, SECURITY NEWS (Apr. 6, 2009), http://www.fas.org/blog/secretcy/2009/04/mazer_odni_ig.html.

19. Steven Aftergood, *National Security Secrecy: How the Limits Change*, 77 SOC. RES. 839, 848 (2010).

20. INFORMATION SECURITY OVERSIGHT OFFICE, 2010 REPORT TO THE PRESIDENT 26 (2011), *available at* <http://www.archives.gov/isoo/reports/2010-annual-report.pdf>.

21. *Id.*

22. Nate Jones, *The CIA’s Covert Operation Against Declassification Review and Obama’s Open Government*, UNREDACTED (Feb. 10, 2012), <http://nsarchive.wordpress.com/2012/02/10/the-cias-covert-operation-against-declassification-review-and-obamas-open-government/>.

ISCAP is due to its ability to eliminate the bureaucratic and political uses of secrecy.²³ The ISCAP's success is not due, however, to its special ability to determine the public's interest in information, or in balancing those interests against the harm of disclosure. Instead, the expertise of the members of the panel lies in assessing national security risk.

Although the ISCAP has certainly declassified a significant amount of materials, the lack of a robust staff to deal with increasing amounts of appeals received, larger systemic issues of over-classification, and the possibility for agencies to appeal the panel's decision over its head remain significant challenges.²⁴ Furthermore, even if we magically could resolve this country's massive overclassification problem, we would still have to determine when, if ever, the First Amendment protects the disclosure of classified information by government insiders or outsiders.

B. GOVERNMENT INSIDERS

The statutory provisions potentially applicable to government employees and independent contractors with access to confidential information (government insiders) do not require courts to undertake a balancing of competing interests. Furthermore, although the Supreme Court has never considered whether government insiders have any First Amendment right to engage in the unauthorized disclosure of national security information to the public, the Court's primary decision in this area—*Snepp v. United States*²⁵—strongly indicates that they do not, regardless of the balance of interests in any given case.

At the outset, it is worth noting that Congress has not been able to pass the equivalent of an official-secrets act that would authorize the punishment of government insiders for the mere revelation of classification information, regardless of its content, the harm it might have on national security, or the intent of the leaker.²⁶ In vetoing one attempt to pass such legislation, President Clinton noted that the law failed to strike the appropriate balance between the need to protect national security secrets and the need for the free flow of information in a democracy.²⁷

The Espionage Act and related statutes potentially applicable to government insiders who leak national security information do not require any sort of balancing test but instead appear to attempt to balance the competing interests at a higher, categorical level. Section 793(d) of the Espionage Act, which applies to those with authorized possession of national

23. Aftergood, *supra* note 13, at 407–09.

24. *Id.*

25. *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam). See *infra* text accompanying notes 37–42.

26. Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 262–63 (2008).

27. H.R. Doc. No. 106-309, at 1–2 (2000).

security information, prohibits the unauthorized disclosure of national security information which “the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.”²⁸ The Act does not require that the disclosure harm our nation; it can be sufficient if the disclosure advantages a foreign nation, friend or foe, and the leaker’s intent to contribute to the public debate is also irrelevant.²⁹ Furthermore, the harm that the government must show is minimal; courts have held that the prosecution must simply show the disclosure is “potentially damaging to the United States.”³⁰

Other provisions applicable to government insiders do not require even this minimal proof of harm. Section 798 bans the dissemination of “classified information . . . concerning the communication intelligence activities of the United States.”³¹ This statute does not require any showing of harm or “intent or reason to believe” any such harm or benefit to a foreign power would result. The Atomic Energy Act permits government insiders to be prosecuted for communicating “Restricted Data” to anyone not authorized to receive it, as long as they did so “knowing or having reason to believe” that the information was Restricted Data.³² Leakers have also been charged under 18 U.S.C. § 641, which imposes criminal penalties for the theft of government property; this provision also does not require any showing of harm to the United States or any consideration of the public interest.³³

In drafting the various provisions that criminalize the dissemination of national security information, Congress attempted to balance the need to protect national security interests with the value to public debate. In some cases, Congress concluded the harm of disclosure for certain types of information—such as information relating to communications intelligence or atomic energy—always outweighed any contribution the information might make to the public debate. In other provisions, Congress imposed additional requirements for prosecution with the intent of striking a more careful balance between national security and informed public debate. The best example of this is the Intelligence Identities Protection Act, which

28. 18 U.S.C. § 793(d) (2006).

29. See *United States v. Morison*, 844 F.2d 1057, 1071–74 (4th Cir. 1988).

30. See, e.g., *Morison*, 844 F.2d at 1071; see also *id.* at 1086 (Phillips, J., concurring) (“One may wonder whether any information shown to be related somehow to national defense could fail to have at least some such ‘potential.’”); *United States v. Rosen*, 445 F. Supp. 2d 602, 621 (E.D. Va. 2006), *aff’d*, 557 F.3d 192 (4th Cir. 2009).

31. 18 U.S.C. § 798(a).

32. 42 U.S.C. § 2277 (2006). “Restricted Data” is statutorily defined as “all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy.” *Id.* § 2014(y).

33. 18 U.S.C. § 641; see also *Morison*, 844 F.2d at 1076–77 (affirming conviction of military intelligence employee who leaked information to a periodical publisher).

prohibits the identification of covert agents, but only if the identification was part of “a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States.”³⁴ The pattern and intent requirements were specifically included to protect legitimate news reporting regarding government misconduct.³⁵ The legislative history of the statute indicates that prosecutors would have to present some evidence that the disclosure was likely to cause harm and permit a defendant to present to the jury evidence of an intent to contribute to the public debate.³⁶ Because Congress drafted the statute in a way that reflects its judgment regarding the proper balance between national security and informed public debate, the courts do not have to undertake this balance themselves.

It is not clear whether the First Amendment places any limits on the statutory framework outlined above. The Supreme Court has never explicitly addressed whether government insiders have a First Amendment right to disclose national security information without authorization, but in the decision most closely related to this issue, the Court suggested that they do not.

In *Snepp*, the Supreme Court held that current and former public employees and contractors (government insiders) who have signed nondisclosure agreements must submit to prepublication clearance before disclosing any information relating to their dealings with the government, or else risk the imposition of a constructive trust on any profits they might make from their work.³⁷ In that case, a former CIA employee published a book without first submitting it for clearance, as required by the nondisclosure agreements that he had signed.³⁸ One of the author’s primary defenses was that he did not actually publish any classified information, so there was no need for the prepublication review.³⁹ In addition, the government conceded that it had not suffered any harm as a result of his failure to submit to that review process.⁴⁰ The Court held that it was irrelevant that the author did not reveal any classified information because the CIA had an interest in protecting the appearance of secrecy.⁴¹ The Court did not address the value of the information to the public or conduct any

34. 50 U.S.C. § 421(c) (2006).

35. See Papandrea, *supra* note 26, at 276.

36. See *id.*

37. *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam); see also 28 C.F.R. § 17.18 (2011) (requiring all government employees with access to sensitive information to sign a nondisclosure agreement, thereby agreeing to submit to prepublication review).

38. *Snepp*, 444 U.S. at 507–08.

39. See *id.* at 509–10.

40. See *id.* at 511–12 (noting that in that stage of the litigation the government was not contending that *Snepp*’s book contained confidential information).

41. *Id.* at 515–16.

meaningful inquiry into the national security harm the publication of the book may have caused.⁴²

In *Snepp* the Court inexplicably failed to address the applicability of *Pickering v. Board of Education*, in which the Court adopted a balancing test to evaluate the First Amendment claims of public employees.⁴³ In *Pickering*, the Court recognized “that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”⁴⁴ At the same time, the Court noted, “free and open debate is vital to informed decision-making by the electorate,” and government employees often are the ones “most likely to have informed and definite opinions” about matters of public concern relating to their employment.⁴⁵ To reconcile these competing interests, the Court set up a balancing test for determining whether the employee’s constitutional rights had been violated. This test requires “a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”⁴⁶ In the decades following the *Pickering* decision, the Court has incrementally scaled back on the First Amendment rights of public employees—most notably requiring that the speech involve a matter of public concern in order to trigger the balancing test—but the balancing test remains very much at the heart of any public employee’s free-speech claim. Although *Pickering* itself contained caveats upon which the *Snepp* Court could have relied to distinguish national security employees,⁴⁷ the Court did not even attempt to justify its rejection of a balancing approach.

The Supreme Court has never considered whether the First Amendment provides any measure of protection to a government insider who leaks national security information to the press or public without

42. Indeed, the CIA recently announced it is conducting an internal investigation to determine whether the publication review board’s decisions have been influenced by political considerations that are less favorable to those who are critical of the agency. See Greg Miller & Julie Tate, *CIA Probes Publication Review Board over Allegations of Selective Censorship*, WASH. POST (May 31, 2012), http://www.washingtonpost.com/world/national-security/cia-probes-publication-review-board-over-allegations-of-selective-censorship/2012/05/31/gJQAhfPT5U_story.html.

43. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568–70 (1968). The Court subsequently applied the *Pickering* test to independent government contractors. See *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996).

44. *Pickering*, 391 U.S. at 568.

45. *Id.* at 571–72.

46. *Id.* at 568.

47. See *id.* at 570 n.3 (noting the possibility of a different result in cases where “the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal,” or where the employer and supervisor have “such a personal and intimate” working relationship such that any criticism would undermine the effectiveness of that relationship); *id.* at 572 (noting the possibility of a different result in a case where the employee has greater access to the real facts than the general public).

authorization. *Snepp* certainly indicates that any argument for constitutional protection would face an uphill battle. Indeed, the lower courts disagree whether the unauthorized dissemination of national security information by government insiders is even speech within the scope of the First Amendment.⁴⁸ In addition, the Court recently held that government employees have no First Amendment rights when they engage in expressive activities “pursuant to the employee’s official duties.”⁴⁹ At least one commentator has interpreted *Garcetti* broadly to strip public employees of First Amendment protection whenever they disclose national security information they accessed through their government employment.⁵⁰ Regardless of whether this interpretation of *Garcetti* is correct, the decision does indicate the Court’s inclination to force leakers to rely on statutory rather than constitutional protections even when they engage in whistleblowing. Currently national security whistleblowers are entitled to very minimal statutory protection that covers only those who follow the proscribed reporting hierarchy to report flagrantly unlawful activity.⁵¹ The current statutory regime reflects an extremely lopsided balance of the public’s interest against potential national security harm.

Most scholars and commentators have been willing to give the government broad authority to punish leakers,⁵² although some, including

48. Compare *United States v. Kim*, No. 10-225 (CKK), 2011 WL 838160, at *30 (D.D.C. Mar. 2, 2011) (“To the extent that the defendant’s conduct constitutes speech, that speech is wholly unprotected by the First Amendment.”), with *United States v. Rosen*, 445 F. Supp. 2d 602, 630 (E.D. Va. 2006) (rejecting government’s categorical argument that the espionage statutes do not implicate the First Amendment), *aff’d*, 557 F.3d 192 (4th Cir. 2009). In *United States v. Morison*, the panel opinion stated that “we do not perceive any First Amendment rights to be implicated here.” *United States v. Morison*, 844 F.2d 1057, 1068 (4th Cir. 1988). However, two of the three judges indicated in their concurring opinions that they simply believed that the conviction in that particular case did not offend the First Amendment. See *id.* at 1081 (Wilkinson, J., concurring) (“I do not think the First Amendment interests here are insignificant.”); *id.* at 1085 (Phillips, J., concurring) (“I agree with Judge Wilkinson’s differing view that the [F]irst [A]mendment issues raised by *Morison* are real and substantial . . .”).

49. *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006).

50. Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM. U. L. REV. 1531, 1534–35, 1540–41 (2008). Others have similarly suggested, without explicitly relying on *Garcetti*, that public employees have no First Amendment right to share information they learned only as a result of their employment. See Geoffrey R. Stone, *WikiLeaks, the Proposed SHIELD Act, and the First Amendment*, 5 J. NAT’L SECURITY L. & POL’Y 105, 111–12 (2011).

51. See Papandrea, *supra* note 26, at 246–48. Efforts to reform whistleblower protections failed when Bradley Manning’s alleged disclosures came to light, even though he would have received no protection under revised provisions. Miranda Leitsinger, *As Manning Heads to Trial over WikiLeaks, New Push for Whistleblower Protections*, NBC NEWS (Dec. 16, 2011, 6:54 AM), http://usnews.nbcnews.com/_news/2011/12/16/9483316-as-manning-heads-to-trial-over-wikileaks-new-push-for-whistleblower-protections.

52. See, e.g., ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 79–82 (1975) (arguing for robust government authority to punish leakers but expansive authority for the press to publish the leaks).

myself, have begun to question the wisdom of this approach. Professor Geoffrey Stone is among those who have reconsidered this binary approach and has suggested that a more appropriate approach would be to balance the potential harm to national security against the value to public discourse,⁵³ the kind of balancing test Professor Fenster criticizes in his article. This is not, however, the test that any court to date has embraced.

C. GOVERNMENT OUTSIDERS

The statutes potentially applicable to government outsiders do not require balancing. Many of them do not even require any showing of harm to national security or the intent to harm national security. It is also very unclear whether the First Amendment requires courts to conduct a balancing test.

Many of the statutory provisions identified in the prior subsection relating to government insiders are potentially applicable to government outsiders as well. For example, section 798's prohibition on the disclosure of communications intelligence, the Atomic Energy Act's ban on the communication of Restricted Data, and the Intelligence Identities Protection Act are all equally applicable to government outsiders and do not require courts to balance disclosure's potential harm against its value to the public debate. Section 793(e) criminalizes not only the willful communication of any document or information relating to the national defense but also the willful failure to return such documents to an appropriate United States official.⁵⁴ If a defendant is charged with communicating information relating to the national defense, the statute requires a showing that the defendant did so with "reason to believe [it] could be used to the injury of the United States or to the advantage of any foreign nation."⁵⁵ Some courts have interpreted this as requiring a showing that the defendant had a "bad faith purpose to either harm the United States or to aid a foreign government."⁵⁶ Although this requirement might offer protection to well-meaning defendants who believed the disclosed information was important for the public to know, it does not require a court to balance the harm of disclosure against its benefits. It is also possible that government outsiders could be prosecuted for aiding and abetting and conspiracy charges whenever they obtain information from a source who

53. Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939, 961 (2009).

54. 18 U.S.C. § 793(e) (2006).

55. *Id.*

56. *United States v. Rosen*, 445 F. Supp. 2d 602, 626 (E.D. Va. 2006), *aff'd*, 557 F.3d 192 (4th Cir. 2009).

violates federal law through the disclosure. Moreover these statutes do not require the government to satisfy any sort of balancing test.⁵⁷

Because the relevant statutes do not require any sort of balancing inquiry, the question is then whether the First Amendment requires such a balance. The Supreme Court has explicitly considered the First Amendment rights of government outsiders to disseminate national security information in only one case, *New York Times Co. v. United States*, the “Pentagon Papers” case.⁵⁸ The Court issued a per curiam opinion stating only that the government had failed to bear its heavy burden to justify a prior restraint preventing newspapers from publishing the contents of a top-secret study of the Vietnam War.⁵⁹ Justice Brennan, in a concurring opinion, stated that he would permit a prior restraint only based on proof that publication would “inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea.”⁶⁰ Justice Stewart similarly stated that a prior restraint is unconstitutional unless the government can demonstrate “direct, immediate, and irreparable damage to our Nation or its people.”⁶¹ None of the Justices argued that the Court should balance the potential for harm against the value to public debate to determine whether the newspapers could publish the Pentagon Papers.⁶²

The upshot of the *Pentagon Papers* decision is that when the government is seeking a prior restraint, the focus is solely on whether the government has demonstrated a sufficient risk of harm; any potential benefits that disclosure would have for the public discourse is simply not relevant. To be sure, it is unclear how the Court would have resolved the more difficult situation where the threatened disclosure both posed a high risk of harm and offered an important contribution to the public debate, but there is nothing in the Court’s opinion to suggest that balancing would be the appropriate approach even in that set of circumstances.

The government has sought to enjoin publication only one other time, in *United States v. Progressive, Inc.*⁶³ Relying on the Atomic Energy Act,⁶⁴ the

57. See Papandrea, *supra* note 26, at 277; Steven I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL’Y REV. 219 (2007).

58. *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (per curiam).

59. *Id.* at 714.

60. *Id.* at 726–27 (Brennan, J., concurring).

61. *Id.* at 730 (Stewart, J., concurring).

62. As Patricia Bellia has recently noted, the Court appeared to trust the newspapers to consider the competing interests at stake when making their publication decisions. Patricia L. Bellia, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 YALE L.J. 1448, 1505 (2012) (“The *Pentagon Papers* case assured that, once information of high public value was in the hands of the press, the press’s assessment would prevail over the government’s . . .”).

63. *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979). The government has not sought a prior restraint since then, no doubt due not only to the high burden of proof the government must satisfy, but also its demonstrated ineffectiveness. Technological advances

government sought a temporary restraining order prohibiting the publication of an article entitled “The H-Bomb Secret: How We Got It, Why We’re Telling It.”⁶⁵ The district court did superficially conduct the sort of balancing test Professor Fenster criticizes in his article,⁶⁶ but the court was plainly overwhelmed by the perceived risk of national security harm to give the information’s potential contribution to the public debate full consideration. In other words, although the court said it was balancing, its decision rested almost completely on its conclusion that the government had met the high burden the Court set for prior restraints in the *Pentagon Papers* case. Furthermore, the court cites no authority for its balancing approach. The case was mooted on appeal after the information at issue became widely available.⁶⁷

It is entirely unclear whether a majority of the Court would apply the same stringent burden of proof of direct and immediate harm to national security in a criminal prosecution based on the unauthorized disclosure of national security information. Prior restraints are historically disfavored, and a careful reading of the various opinions in the *Pentagon Papers* case indicate that a majority of Justices might have ruled in the government’s favor had it not sought a prior restraint but rather prosecuted the newspapers after publication.⁶⁸

It is therefore certainly possible that a court confronted with a criminal prosecution against a government outsider based on the unauthorized dissemination of national security information would decide that balancing the harm to national security against the value to the public debate is an appropriate method of resolving the First Amendment concerns at stake. Indeed, in *United States v. Rosen*, the only district court to rule on a prosecution against a government outsider gave lip service to a balancing inquiry.⁶⁹ In that case, the government prosecuted two lobbyists for violating the Espionage Act.⁷⁰ In evaluating the defendants’ First Amendment defense, the court said that it had to determine whether Congress had struck a “constitutionally permissible” balance between the competing interests of national security and informed public debate.⁷¹ To do this, the

permitting the easy transmission and distribution of information on the internet make it exceedingly unlikely that the government ever will.

64. 42 U.S.C. § 2280 (2006).

65. *Progressive*, 467 F. Supp. at 991.

66. *See id.* at 996 (balancing the risk to national security against the defendants’ interest in promoting public knowledge).

67. *See* Papandrea, *supra* note 26, at 273 (“The government ultimately abandoned its case against *The Progressive* because other publications revealed the same information . . .”).

68. *See id.* at 279–80.

69. *United States v. Rosen*, 445 F. Supp. 2d 602, 645–46 (E.D. Va. 2006), *aff’d*, 557 F.3d 192 (4th Cir. 2009).

70. *Id.* at 607–11.

71. *Id.* at 629.

court stated, it “must begin with an assessment of the competing societal interests at stake and proceed to the delicate and difficult task of weighing those interests to determine whether the resulting restriction on freedom [of speech] can be tolerated.”⁷²

Despite all its talk about balancing, however, the court in *Rosen* did not engage in a straightforward balancing of competing interests, at least not in the context-specific way that courts typically conduct balancing tests. Instead, the court recognized the dangers of permitting the government to restrict the dissemination and discussion of any information—even national security information—and determined that the First Amendment would therefore tolerate such restrictions only when the government can demonstrate that the disclosure involved closely held information regarding “the nation’s military activities, intelligence gathering, or foreign policy” that was potentially harmful to national security and that the defendant knew of this potential harm.⁷³ Indeed, the court concluded its opinion by noting that its conclusion that the relevant statutes are constitutional “does not reflect a judgment about whether Congress could strike a more appropriate balance between these competing interests, or whether a more carefully drawn statute could better serve both the national security and the value of public debate.”⁷⁴ The district court plainly did not conduct its own context-specific balancing inquiry; instead, it considered the weight of the competing interests at a high level of generality. Furthermore, the harm standard the court adopted—a “potentially damaging” standard⁷⁵—is not a difficult standard for the government to meet, or for a court to apply.

Despite their discussion of balancing, then, the underlying assumption of both *The Progressive* and *Rosen* is that information that poses a grave (or, as in *Rosen*, a potential) risk of harm to national security does not meaningfully contribute to the public debate. It remains unclear how the courts would deal with a case where both the potential harm to national security and the value of the information to the public dialogue are high. Some scholars have argued that even in cases where the government has made a showing that disclosure threatens grave harm to national security, courts should go on to consider whether the disclosure would “meaningfully contribute to public

72. *Id.* at 633 (citations omitted) (internal quotation marks omitted).

73. *Id.* at 643. The court also held that the government must demonstrate that a valid government regulation or order restricted the dissemination of information to a restricted set of individuals, that the person who received the information was outside of this set, and the defendant delivered the information to the unauthorized person despite knowing that the information was restricted and the recipient was outside of the group authorized to receive it and that therefore the communication was illegal. *Id.* In addition, the court held that in cases involving the disclosure of intangible information, the government must demonstrate “that the defendant had a reason to believe that the disclosure of the information could harm the United States or aid a foreign nation.” *Id.*

74. *Id.* at 646.

75. *Id.* at 621.

debate.”⁷⁶ Importantly, however, this approach does not require courts to *balance* the harms and benefits of disclosure; even if the information does pose a grave harm to national security, the defendant will prevail as long as the disclosure is valuable to the public.

If the Court applies the same standard for both prior restraints and criminal prosecutions,⁷⁷ without requiring an additional, explicit balancing inquiry, it will not be necessary for courts to balance incommensurate interests. The government will not be able to satisfy a direct, immediate, and unavoidable harm requirement in most cases. In addition, judges will have the benefit of hindsight to evaluate the government’s claims that the disclosure caused direct and immediate harm. Judges would not have to engage in the sort of “predictive calculations” that concern Professor Fenster to determine whether to credit the government’s arguments.⁷⁸ If the government is unable or unwilling to demonstrate the resulting harm, the government will lose.

Putting to one side the *Pentagon Papers* case—which does not indicate that any balancing is required—it is somewhat unclear from the Court’s other First Amendment cases whether courts evaluating the First Amendment claims of government outsiders should balance the competing interests at stake. Balancing is certainly present in other areas of the First Amendment.⁷⁹ Furthermore, the Court’s decision in *Dennis v. United States*, which balanced competing interests in the context of incitement, has never been overruled.⁸⁰ Perhaps most significantly, the Court suggested the possibility of a balancing approach in its prior decisions involving the dissemination of lawfully obtained information. In *Bartnicki v. Vopper*, the Court held that the First Amendment prohibited the prosecution under state and federal wiretap laws of individuals who lawfully obtained an illegally intercepted copy of a private phone call conversation about ongoing union negotiations.⁸¹ The majority held that the privacy interests at stake “give way when balanced against the interest in publishing matters of public importance.”⁸² In an important concurring opinion, Justice Breyer argued

76. See, e.g., Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL’Y REV. 185, 204 (2007).

77. I have argued elsewhere that the Court should apply the same standard in criminal prosecutions. Papandrea, *supra* note 26, at 280–81; see also Stone, *supra* note 53, at 958 (the government should be required to demonstrate “grave and imminent harm”).

78. See, e.g., Fenster, *supra* note 1, at 791 (noting that the WikiLeaks disclosures would require “the courts to explicitly perform some predictive calculation” to determine the threat of harm); *id.* at 806–07 (“Courts can continue to rely upon the idea that they are ‘balancing’ various ‘interests,’ but all they do in such instances is make intuitive guesses as to what might happen in the wake of disclosure or its absence.”).

79. See *supra* text accompanying notes 5–7.

80. *Dennis v. United States*, 341 U.S. 494 (1951).

81. See *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

82. *Id.* at 534.

that the plaintiffs “had little or no *legitimate* interest in maintaining the privacy of the particular conversation,” while the public had a particularly high level of interest in the conversation because it concerned a threat of violence.⁸³

Nevertheless, one reason why balancing may not play an important role in a prosecution of Julian Assange is that the government is likely to allege that he was somehow complicit in the leaks themselves. Under this approach, the government would rely on *Bartnicki* not so much because the government believes the balance of interests tips in its favor but rather because that decision undermines any First Amendment claim Assange might make.⁸⁴ *Bartnicki* suggests that the First Amendment does not offer any protection to a defendant who obtains the national security information at issue unlawfully. *Bartnicki* itself does not draw a clear line between what constitutes lawful and unlawful acquisition of information, but under current law, government outsiders could be prosecuted for aiding and abetting a government insider’s disclosure.⁸⁵ If a source simply drops classified documents in someone’s mailbox, as happened in *Bartnicki*, solicitation has not occurred, but any conduct beyond that might be sufficient. Taking a source out to dinner or a ballgame might be enough; even simply providing a fax machine—or electronic drop box—to make disclosures easier might be sufficient.⁸⁶ The government may have even unearthed some evidence that Assange was involved in a conspiracy to reveal U.S. government secrets; if that is the case, he will have a particularly difficult time mounting a successful First Amendment defense.

II. WIKILEAKS: NOT THE MOST DIFFICULT CASE

It is not usually the courts that weigh the harm to national security against the public interest in the information; instead, it is the *New York Times* and other journalists and media outlets who conduct this balancing test when they decide what information to disseminate. Frequently journalists meet with government officials to help them determine the harm to national security, but then the journalists and publications make their own editorial decisions about what information to publish and what

83. *Id.* at 539 (Breyer, J., concurring).

84. See Peter Grier, *WikiLeaks Chief Julian Assange: “Terrorist” or Journalist?*, CHRISTIAN SCI. MONITOR (Dec. 20, 2010), <http://www.csmonitor.com/USA/2010/1220/WikiLeaks-chief-Julian-Assange-Terrorist-or-journalist>; Vladeck, *supra* note 57, at 232–36 (discussing the implications of *Bartnicki* for defendants charged with inchoate crimes).

85. Furthermore, as Justice Breyer suggested in his concurrence, Congress could pass a law criminalizing the knowing receipt of illegally acquired information. See *Bartnicki*, 532 U.S. at 538 (Breyer, J., concurring).

86. See *United States v. Rosen*, 445 F. Supp. 2d 602, 607–11, 644 (E.D. Va. 2006) (addressing a government outsider charged with aiding and abetting the illegal disclosure of national security information by providing a fax machine on which to receive information), *aff’d*, 557 F.3d 192 (4th Cir. 2009).

information to redact. At times editors even heed officials' requests to delay or even forego publication.⁸⁷ Prior to entities like WikiLeaks, those who wanted to leak sensitive national security information generally had to go through an intermediary if they wanted anyone in the world to pay attention to it. For the most part, that is still true, but WikiLeaks and everything it represents—easy technology, disclosure outside of U.S. borders—raise the specter that these gate-keeping intermediaries making generally responsible publication decisions are no longer necessary.

Thus, as Professor Fenster himself notes, WikiLeaks is primarily notable—and a cause for concern in the United States—not because of *what* it disseminated but the *quantity* of what it disseminated.⁸⁸ WikiLeaks is notable not because the disclosures were all that harmful, but because government officials fear they are losing the ability to control classified information and that the generally responsible mainstream media will not always stand in between a leaker and the American public (or the world).⁸⁹

This is not to discount Professor Fenster's important work suggesting that we need to think very carefully about what it means for transparency to serve the public interest. It just means that a close examination of WikiLeaks is not necessarily the best vehicle for doing so. There have been other leaks that have presented the concerns Professor Fenster raises in a much more profound manner. For example, the recent leaks about U.S. policy regarding drone attacks and cyberattacks are examples of leaks that are both arguably harmful to national security but also contribute immensely to the public debate on whether and how we are going to use these relatively new tools to fight terrorism.⁹⁰

It is easiest to identify harms when a disclosure undermines the nation's ability to preserve its physical safety or the safety of its personnel and facilities. Most people agree that disclosures revealing the movements of troops or ships or uncovering the identity of intelligence operatives, sources, and methods undermine their effectiveness. In those situations, secrecy is essential, and the harm that results from exposure will be imminent. Other

87. *Congress Eyes Crackdown over Leaks About Secret Programs* (PBS television broadcast June 7, 2012), http://www.pbs.org/newshour/bb/politics/jan-june12/leaks_06-07.html (David Sanger states that he withheld technical details about Obama's national security policies in new book after talking to government officials).

88. Fenster, *supra* note 1, at 776–77.

89. Relatedly, WikiLeaks also raises interesting questions regarding the extraterritorial application of the Espionage Act and related statutes, whether extradition law and treaties would permit noncitizens to be extradited to the United States for prosecution, and whether the First Amendment offers any protection to noncitizens prosecuted for conduct abroad.

90. See Scott Shane, *U.S. Attacks, Online and from the Air, Fuel Secrecy Debate*, N.Y. TIMES (June 6, 2012), <http://www.nytimes.com/2012/06/07/world/americas/drones-and-cyberattacks-renew-debate-over-security.html>. I recognize that these leaks occurred after Professor Fenster completed his article; I simply offer them as examples of leaks for which a balancing of interests would be particularly difficult.

kinds of harm are much less tangible. Secrecy may encourage foreign nations to be more forthcoming and cooperative with the U.S. Discussions among government officials may not be as robust and honest if participants cannot depend upon secrecy. Officials from foreign nations may not be as willing to have open and frank communications with their U.S. counterparts if they cannot trust that the dialogue will remain confidential.

Striking the appropriate balance is extremely difficult. In some instances, the harm is significant and the public benefit likely small—like revealing the identities of confidential intelligence sources. In other cases, the risk is small but the public interest great. The hard cases, however, are those where both the harm to national security interests and the public interest in disclosure are great. Harm can range from tangible to intangible, from imminent to long-term, from minor to severe. In other instances, leaks may hurt national security in the short run but serve to strengthen it in the long run. Robert Gates has said that he frequently heard about problems he needed to correct only through the media, and not from the affected agencies themselves. For example, he said that he learned about the lack of armored vehicles in Iraq from a story in USA Today.⁹¹

Fenster also suggests that the WikiLeaks disclosures do not serve the public interest because no one seems to care. He notes that no political movements have resulted from these disclosures, and public opinion is not strongly supportive of WikiLeaks's mission. Taking the last point first, it is hardly surprising that the public does not support WikiLeaks, because the mainstream media has done a fabulous job of portraying Julian Assange as a social misfit.⁹² The lack of political movements is not irrelevant, but if the need for government accountability is measured solely by whether a political movement has resulted, most government operations will be cloaked in secrecy.

III. GOING FORWARD

The WikiLeaks saga initially led many, including myself, to suggest that courts were finally going to end the “benign indeterminacy” surrounding the First Amendment rights of government outsiders who disseminate national security information.⁹³ But the reaction to the recent series of leaks

91. Al Kamen, *Robert Gates on Obama, Leaks and More*, WASH. POST (Mar. 20, 2012), http://www.washingtonpost.com/blogs/in-the-loop/post/robert-gates-on-obama-leaks-and-more/2012/03/20/gIQAExr3PS_blog.html.

92. See Yochai Benkler, *A Free Irresponsible Press: WikiLeaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311 (2011).

93. Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 936 (1973); see also William H. Freivogel, *Publishing National Security Secrets: The Case for “Benign Indeterminacy,”* 3 J. NAT’L SECURITY L. & POL’Y 95 (2009) (arguing against a bright-line rule for journalists that may be in violation of the Espionage Act).

about President Obama's national security policies with respect to drone attacks and cyber-warfare indicates that the focus will be not on the rights of government outsiders to disseminate information they receive from leakers, but on the rights of leakers who share that information in the first place. Congress and the courts have great work to do in this area if they intend to even attempt to balance national security and the free flow of information.

As Professor Fenster has noted in his prior work, government entities are skilled at avoiding disclosure requirements under the FOIA, open meeting laws, and related statutes.⁹⁴ For better or for worse, leaks help fill the gaps of our statutory system and play an essential role in checking government abuse.⁹⁵ Although leaks play this important role, prevailing wisdom has been that government insiders have been granted little protection, while government outsiders have functioned with virtual *carte blanche* to publish or otherwise disseminate whatever they could get their hands on. The reasons why this approach worked relatively well was that the government had a very difficult time figuring out who the leakers were, which meant that we did not have to worry very much about chilling legitimate leaks. Technological changes have made it much easier for the government to identify and prosecute leakers, and the government is taking full advantage of this opportunity to teach leakers a lesson.

If the government intends to prosecute government insiders for leaking national security information and government outsiders for distributing it, these criminal statutes require significant revisions. For all of the reasons Professor Fenster gives in his article, Congress should be reluctant to embrace a standard that requires courts to weigh the costs and benefits of disclosure. Instead, Congress should give careful consideration to what categories of information are most important to keep secret. But Congress should not stop there. Fenster suggests that there is a category of cases in which no balancing is needed because the arguments against disclosure are so strong, such as cases involving "the disclosure of advanced military technologies, current troop movements and similar operative war plans, and the identities of intelligence sources."⁹⁶ The problem is that even with respect to these categories, there may be instances where disclosure truly serves the public interest. As a statutory matter, Congress should give serious consideration to providing greater protections for national intelligence whistleblowers who reveal government malfeasance of some kind, such as fraud, waste, or illegality. In addition, Congress should consider providing protection for government insiders who have a good-faith belief that the information they are disclosing reveals those things. With respect to

94. Fenster, *supra* note 3, at 933–34 (noting that government can change its practices to avoid disclosure laws and openness requirements).

95. See Papandrea, *supra* note 26, at 240–62 (outlining the history and important role of leaks).

96. Fenster, *supra* note 1, at 782.

government outsiders, Congress should recognize that the First Amendment protects their right to disseminate information they have lawfully acquired absent serious, imminent, and irreparable harm to national security.

Given the increasing number of leak prosecutions, it is possible that one day the Supreme Court will have to consider whether government insiders have any First Amendment rights to engage in the unauthorized disclosure of national security information. As discussed above in Part I, the prevailing assumption that government insiders have no such rights is inconsistent with the Court's jurisprudence regarding public employees generally. But if the Court embraces the *Pickering* balancing test for government employees who leak sensitive national security information, the concerns that Professor Fenster raises in his article will potentially come to a head.

If the Court does decide to embrace a balancing test for public employees who disclose national security information without authorization, however, I am not as concerned as Professor Fenster is with the ability of courts to engage in that analysis. I recognize that the Court has frequently displayed deference to the political branches,⁹⁷ and that courts deciding FOIA challenges have not always been willing to question the government's assertions regarding the need for secrecy. But judges are not incapable of engaging in this analysis. Indeed, the judicial process can provide an important mechanism for making sure the government justifies the need for secrecy. In criminal prosecutions, the horse is out of the barn, and the ramifications of the disclosures are easier to see. If the government still cannot demonstrate any harm, there is no reason to accept their assertions that the harm will come. Judges are also in a good position to determine whether the disclosure of information serves the public interest. In defamation and privacy cases, as well as employment cases, courts frequently have to determine whether the disclosure of information is "newsworthy" or serves the public interest.⁹⁸ This is not to suggest that the public-concern inquiry is easy or unproblematic. It is neither. But it is certainly the sort of inquiry with which courts are familiar. At the very least, one would hope that

97. See, e.g., *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988) ("[T]he protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it."); *CIA v. Sims*, 471 U.S. 159, 176 (1985) ("We seriously doubt whether a potential intelligence source will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering, will order his identity revealed only after examining the facts of the case to determine whether the Agency actually needed to promise confidentiality in order to obtain the information."); *Cole v. Young*, 351 U.S. 536, 546 (1956) (stating in dicta that "there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information").

98. Clay Calvert, *Defining "Public Concern" After Snyder v. Phelps: A Pliable Standard Mingles with News Media Complicity*, 19 VILL. SPORTS & ENT. L.J. 39, 39-46 (2012) (outlining the various areas of free-speech jurisprudence requiring courts to engage in a public-concern inquiry).

courts would conclude that any interest the government has in controlling the dissemination of national security information would give way in cases involving the disclosure of criminal wrongdoing, waste, or fraud.

CONCLUSION

An essential underlying assumption of Professor Fenster's article is that a court evaluating the prosecution of a government outsider like Julian Assange must balance the competing societal interests at stake in each particular case. This Response has attempted to demonstrate that this assumption rests on a very weak foundation. When it comes to the disclosure of national security information—whether in the context of the government's affirmative duty to disclose information or the law governing government insiders and outsiders who disclose national security information without authorization—the relevant statutory provisions do not require courts to conduct this balancing test. In addition, it is hardly obvious that the First Amendment requires such an inquiry. Nevertheless, because Professor Fenster is correct that striking the balance between the competing societal interests is difficult on a case-by-case basis, this Response urges Congress to reform the Espionage Act and related statutes to reflect a careful consideration of these interests with respect to disclosures by both government insiders and outsiders.