

NOTE

NATIONAL SECURITY LEAKS AND CONSTITUTIONAL DUTY

Alexander J. Kasner*

Edward Snowden's disclosure of national security information is the newest chapter in the United States' long and complicated history with government leaks. Such disclosures can help to root out illegal and unconstitutional behavior that might otherwise evade scrutiny. And yet, unlike the press, government leakers are often assumed to have no claim to constitutional protections. National security leaks are treated as an opportunity to discuss the constitutionality of underlying government conduct or the balance of federal powers, but there is little reflection on the leaker who made the discussion possible. This Note addresses that oversight by focusing our attention on the Constitution's treatment of government officials who choose to leak. In so doing, it asks us to consider the duty of executive officers to affirmatively support the Constitution, itself required by the very text of the Article VI Oath Clause.

This Note presents one of the first concentrated studies of the Article VI Oath Clause, drawing upon its text, structure, and history to draw out the obligation it places on executive officers to resist unconstitutional government behavior. It also explains how recent developments in national security, secret keeping, and the doctrine of standing render the Article VI duty even more critical. At the same time, this Note departs from other literature by recognizing that unfettered disclosures of broad swaths of information are constitutionally indefensible. I contend that the Article VI duty should generally be limited to Article II executive officers, that it endorses some but not all affirmative disclosures, and that it anticipates constitutional interpretation as a shared enterprise between the judiciary and those officers. This Note concludes by discussing the implications of the duty,

* J.D. Candidate, Stanford Law School, 2015. I would like to thank Wesley J. Campbell and Norman W. Spaulding for their advice and encouragement, as well as Aziz Huq, Michael W. McConnell, Bernadette Meyler, Michelle Wilde Anderson, Alison McQueen, Adam Adler, Rachel Bayefsky, and Conor Clarke. Many thanks to the wonderful staff of the *Stanford Law Review*, especially the incomparable Michael Mestitz, Cynthia Barmore, Rebecca Arriaga, Samantha Lefland, Tucker Page, and Chelsea Priest. This project was made possible by the generous support of the Bradley Student Fellowship for Constitutional Law and the Stephen M. Block Award. To Sue, Greg, and Matt Kasner.

both suggesting potential legal and policy solutions and reflecting on our assumptions about constitutional interpretation and enforcement.

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INTRODUCTION

In 2013, Edward Snowden leaked thousands of National Security Agency (NSA) documents to the press and public, detailing practices that he believed violated the Fourth and Fifth Amendments of the Constitution.¹ In response, the U.S. government charged him with multiple espionage-related violations, including theft of government property, unauthorized communication of national defense information, and willful communication of classified communications intelligence information to an unauthorized person.² Faced with the

1. Edward Snowden, Statement to Human Rights Groups at Moscow’s Sheremetyevo Airport (July 12, 2013) (transcript available at <https://wikileaks.org/Statement-by-Edward-Snowden-to.html>) (“The 4th and 5th Amendments to the Constitution of my country, Article 12 of the Universal Declaration of Human Rights, and numerous statutes and treaties forbid such systems of massive, pervasive surveillance.”). For a lengthier (but not disinterested) background, see generally GLENN GREENWALD, *NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA, AND THE U.S. SURVEILLANCE STATE* (2014).

2. Criminal Complaint at 1, *United States v. Snowden*, No. 1:13 CR 265 (CMH) (E.D. Va. June 14, 2013) (citing 18 U.S.C. §§ 641, 793(d), 798(a)(3)), available at <http://apps.washingtonpost.com/g/documents/world/us-vs-edward-j-snowden-criminal-complaint/496>.

prospect of a long imprisonment, Snowden fled the country and is now in exile.³ Snowden's ideas about the Constitution are not altogether unreasonable: many judges,⁴ academics,⁵ and policymakers⁶ have questioned the constitutionality of NSA surveillance programs, and the dialogue over the Constitution's treatment of privacy is at a fever pitch. And yet, despite some fervent calls for a presidential grant of clemency,⁷ it appears that Snowden will have no legal defense—statutory or constitutional—for his actions.

The Snowden disclosures are merely the “latest outbreak of leak panic,”⁸ the most recent chapter in a long line of messy disclosures and exposed secrets. As David Pozen put it succinctly, “Ours is a polity saturated with, vexed by, and dependent upon leaks.”⁹ Concern over leaks has escalated in the past decade,¹⁰ during which “[h]undreds of serious press leaks” of classified documents and information have made their way into the public eye.¹¹ At the center of the battlefield are executive officials who have taken to heart U.S. Ambassador Henry Cabot Lodge Jr.'s view that leaks are a professional “prerogative.”¹² In the 1980s, for instance, it was found that forty-two percent of senior government officials “fe[lt] it appropriate to leak information to the press.”¹³ Sometimes such high-level leaks are even deployed purposely and strategically by

3. See Ewen MacAskill, *The Long Arm of US Law: What Next for Edward Snowden?*, GUARDIAN (Dec. 2, 2013, 9:00 AM EST), <http://www.theguardian.com/world/2013/dec/02/edward-snowden-nsa-whistleblower-us-law>.

4. See, e.g., *Klayman v. Obama*, 957 F. Supp. 2d 1, 9 (D.D.C. 2013).

5. See, e.g., Randy E. Barnett, *The NSA's Surveillance Is Unconstitutional*, WALL ST. J. (July 11, 2013, 6:44 PM ET), <http://online.wsj.com/news/articles/SB10001424127887323823004578593591276402574>; Laura K. Donohue, Op-Ed., *NSA Surveillance May Be Legal—But It's Unconstitutional*, WASH. POST (June 21, 2013), <http://wapo.st/14n90zT>.

6. See, e.g., Amanda Terkel, *Rand Paul: NSA Spying 'Unconstitutional,' Can't Be Saved by More Oversight*, HUFFINGTON POST (Aug. 18, 2013, 10:32 AM EDT), http://www.huffingtonpost.com/2013/08/18/rand-paul-nsa_n_3775821.html.

7. See, e.g., Editorial, *Edward Snowden, Whistle-Blower*, N.Y. TIMES (Jan. 1, 2014), <http://www.nytimes.com/2014/01/02/opinion/edward-snowden-whistle-blower.html>.

8. David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 514 (2013) (quoting Bill Keller, Op-Ed., *The Leak Police*, N.Y. TIMES (Aug. 5, 2012), <http://www.nytimes.com/2012/08/06/opinion/keller-the-leak-police.html>) (internal quotation marks omitted).

9. *Id.* at 513.

10. See Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 454-64 (2014).

11. COMM'N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 381 (2005).

12. Pozen, *supra* note 8, at 530 (quoting LEON V. SIGAL, REPORTERS AND OFFICIALS: THE ORGANIZATION AND POLITICS OF NEWSMAKING 137 (1973)) (internal quotation marks omitted).

13. *Id.* at 528 (alteration in original) (quoting MARTIN LINSKY, IMPACT: HOW THE PRESS AFFECTS FEDERAL POLICYMAKING 238 (1986)) (internal quotation marks omitted).

presidential administrations, which then exercise their own prerogative to not prosecute the offenders ordered to carry out such leaks.¹⁴

Yet just as the number of strategic leaks for political gain has reached a high point, so has the number of prosecutions of executive employees who leak information due to private ethical concerns. The Obama Administration Department of Justice, for instance, has initiated six leak-related prosecutions—twice as many as all previous Presidents combined.¹⁵ The stories of these leakers are sobering. Most leakers are prosecuted under the Espionage Act—the same piece of legislation used to convict Aldrich Ames, a rogue CIA agent who, in the 1980s, aided the Kremlin in assassinating American informants.¹⁶ And though the typical sentence for such a breach after a guilty plea is between one and two years in federal prison, it may range upward to decades of incarceration.¹⁷

This asymmetrically severe treatment of some national security leakers becomes even more troubling if we gaze down upon it from a constitutional vantage point. The Constitution has been generally understood to endorse a bifurcated treatment of the actors involved in national security leaks: On one hand are publishers and journalists who spread the reach of the disclosed information and whose actions have been traditionally considered to be at the core of the First Amendment's protections. When done by the press, "bar[ing] the secrets of government" is both "courageous" and "serv[es] the purpose that the Founding Fathers" intended.¹⁸ On the other hand are the government employees who actually disclose the information. It is almost uncontroverted that they are constitutionally helpless, if not viewed with disdain. Yet their role is no less indispensable in catalyzing the constitutional conversation.

14. *Id.* at 559-65 (describing the history of planned presidential leaks, from President Theodore Roosevelt to President Barack Obama, and noting that such plants help administrations control the press and shape public perception); see, e.g., Uri Friedman, *Good Leak, Bad Leak*, FOREIGN POL'Y (June 8, 2012), http://www.foreignpolicy.com/articles/2012/06/07/good_leak_bad_leak (noting accusations that the Obama White House "clamps down on whistleblowing when the disclosures undermine its agenda but eagerly volunteers anonymous 'senior administration officials' for interviews when politically expedient").

15. Scott Shane & Charlie Savage, *Administration Took Accidental Path to Setting Record for Leak Cases*, N.Y. TIMES (June 19, 2012), <http://www.nytimes.com/2012/06/20/us/politics/accidental-path-to-record-leak-cases-under-obama.html>.

16. Jane Mayer, *The Secret Sharer: Is Thomas Drake an Enemy of the State?*, NEW YORKER (May 23, 2011), http://www.newyorker.com/reporting/2011/05/23/110523fa_fact_mayer.

17. Compare Scott Shane, *Leak Offers Look at Efforts by U.S. to Spy on Israel*, N.Y. TIMES (Sept. 5, 2011), <http://www.nytimes.com/2011/09/06/us/06leak.html> (detailing leaker Shamai Leibowitz's charges and twenty-month prison term), with Kimberly Dozier, *NSA Leaker Edward Snowden Risks Decades in Jail for Disclosures*, HUFFINGTON POST (June 10, 2013, 11:16 AM EDT), http://www.huffingtonpost.com/2013/06/10/nsa-leaker-edward-snowden_n_3415655.html (noting that Edward Snowden may face ten to twenty years of prison time for each count with which he is charged).

18. N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

The legal terrain of national security leaks is miry and muddled, but it is also fertile ground for a larger discussion about the role of lawbreakers and whistleblowers in our constitutional order. Should they be tolerated? *Must* they be tolerated? And if so, how do we answer affirmatively while still remaining faithful to the rule of law? Moreover, how do we separate the wheat from the chaff, the Prometheus from the conspiracy theorist with security clearance?

Legal scholars and lawyers engaged in these constitutional considerations generally take one of three routes. Some scholars debate, with little progress, whether First Amendment protections for press and publishers can be stretched to cover leakers as well.¹⁹ Others fixate the conversation on the structural issues of the unitary executive and the President's power to keep secrets and withhold information,²⁰ as well as his power to exercise unfettered control over his officers and employees.²¹ And a third group has begun to tease out, in a

19. See, e.g., Patricia L. Bellia, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 YALE L.J. 1448, 1512-14 (2012); Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 886; Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT'L SEC. L. & POL'Y 409, 411-13 (2013) [hereinafter Kitrosser, *Leaky Ship of State*]; Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 236-37, 278-98 (2007); Papandrea, *supra* note 10; Mary-Rose Papandrea, *The Publication of National Security Information in the Digital Age*, 5 J. NAT'L SEC. L. & POL'Y 119, 127-28 (2011) [hereinafter Papandrea, *Publication of National Security Information*]; Geoffrey R. Stone, *Secrecy and Self-Governance*, 56 N.Y.L. SCH. L. REV. 81, 86 (2011).

20. See, e.g., RAHUL SAGAR, *SECRETS AND LEAKS: THE DILEMMA OF STATE SECRECY* 1-15, 127-80 (2013) (sketching an overview of whistleblower and leak justification within the context of the executive's secret-keeping authority); JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 102, 176-79 (2005) (describing, respectively, the primacy of the executive in secret keeping and the unitary executive structure as pertaining to historical understanding of presidential war powers); Vicki Divoll, *The "Full Access Doctrine": Congress's Constitutional Entitlement to National Security Information from the Executive*, 34 HARV. J.L. & PUB. POL'Y 493, 513 (2011); Mark Fenster, *The Implausibility of Secrecy*, 65 HASTINGS L.J. 309, 317-21 (2014); Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1934-35 (2007); Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1051 (2008); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 522-27 (2006); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 260, 292 (2010); Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1153-69 (1999); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 916-31 (2006); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 86 (2005); John C. Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1935-2018 (2009).

21. See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 382 (2008); JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 85 (2007); CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE*

cursory manner, a contention that leaks may be best viewed as the product of some ethical obligation of government employees.²²

This Note adds a new voice to the constitutional debate by refocusing the conversation onto its most fundamental questions. Why do we celebrate certain leakers? It is not because uninhibited speech is per se good, nor because government secrecy or the unitary executive is per se intolerable, but rather because of three simple notions: government whistleblowers are in a special position of public trust, bring to light potentially unlawful behavior, and are integral to ensuring public accountability for unlawful behavior. This reconception provides a powerful middle ground, endorsing the conscientious leaker while rejecting a broad endorsement of all national security leaks regardless of the disclosure's content and the other channels of review potentially available.

More critically, however, conceptualizing whistleblowers as standing as the vanguard against unlawfulness is faithful to the Constitution's very text. Specifically, it is in concert with the Article VI Oath Clause, which provides that "all executive . . . Officers . . . shall be bound by Oath or Affirmation, to support this Constitution."²³ While this language is seemingly innocuous, when its constitutional context, history, and accepted understanding are closely scrutinized, it reveals a great deal of meaning and structural importance. This Note provides one of the first concentrated studies of these aspects of the Oath Clause. And it discovers a constitutional duty—emanating from the Article VI Oath Clause and buttressed by various constitutional provisions and structures—of executive officials to actively resist violations of the Constitution.

SUBVERSION OF AMERICAN DEMOCRACY 281-82 (2007) (detailing the rise of unitary executive theory and practice and the undercutting of officer independence during the presidency of George W. Bush); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 593-99 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1186-208 (1992); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1022 (2007); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1348 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 4 (1994); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 967-69 (2001); Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 992 (1993).

22. See, e.g., David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 84-86 (2009); Abner S. Greene, *What Is Constitutional Obligation?*, 93 B.U. L. REV. 1239, 1241-42 (2013); W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 FORDHAM L. REV. 1333, 1335 (2009); cf. Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 EMP. RTS. & EMP. POL'Y J. 51, 133-34 (2012) (providing a brief account of the various oaths taken by intelligence community employees that may necessitate a duty to blow the whistle).

23. U.S. CONST. art. VI, cl. 3.

But this duty does not always necessitate an unfettered right to leak privileged information: supporting the Constitution can take many forms, and unbounded disclosures of broad swaths of information is likely indefensible. Accordingly, this Note explains the extent of the duty. It questions whether its protections are limited to executive “officers,” suggests an interpretation of supporting the Constitution that is informed by congressional liquidation of constitutional meaning through whistleblower statutes, and discusses whether “this Constitution” being defended reaches only those questions previously settled by the judiciary.

Part I discusses the relevant First Amendment arguments that scholars have offered in favor of constitutional leaker protections. While they take many forms, the free speech defenses track two general categories: an employee’s right to speak and a utility-driven defense of the public right to know. While threads of these arguments are valuable to our discussion, they run into overwhelming difficulties. Namely, they are inconsistent with current doctrine and are particularly ill suited to the special case of national security leaks.

This Note presents the alternative constitutional argument—a duty of executive officials to support the Constitution—in Part II. After identifying the textual, historical, and structural support for this principle in the Constitution, I turn to why the duty framework might be particularly justifiable in the present controversies regarding national security, secret keeping, and standing doctrine.

Part III explores the bounds of the constitutional duty. In particular, it resolves three issues: First, when the Constitution speaks of executive “officers,” this should be understood to generally encompass the same group of actors as those considered in Article II for structural, if not textual or historical, reasons. Second, the constitutional requirement that these officers “support” the Constitution broadly encompasses both a negative duty to support, which includes conscientious objection and resignation, and a more limited positive duty to support—particularly, a duty to disclose such information to other government officials of all three branches covered under the Article VI Oath Clause and the Speech or Debate Clause. Third, “this Constitution” being protected is the Constitution’s text in concert with principles of judicial supremacy; in respect of this relationship, I propose a tripartite model that limits but allows constitutional interpretation by executive officers.

This Note concludes with some thoughts on how we might grapple with the implications of an officer acting in accord with her constitutional duty. In its most powerful form, the duty may counsel for the development of a formal legal defense for leakers when whistleblower statutes are not coterminous with constitutional fidelity. More moderately, however, the existence of the executive officer duty should give us reason to revisit our assumptions about constitutional interpretation and enforcement, to explore the separation of powers in the national security state, to find better statutory solutions, and to respect the conscientious leaker who risks his liberty in putting the Constitution before complicity.

I. THE FIRST AMENDMENT CASE

Generally, battles over leaker protection are portrayed as struggles over the First Amendment. The impulse to turn to free speech justifications is understandable: the First Amendment is a powerful protector for publishers,²⁴ and what is good enough for one half of the leak equation is perhaps good enough for the other. But this appeal to symmetry has gained little traction, and the First Amendment is generally considered a supremely weak haven for leaker protection.²⁵ Nonetheless, a few recent commentators have soldiered on, studying and struggling with the potential use of the First Amendment to protect leakers.²⁶ I will retread this ground only lightly, laying out the general terrain of the First Amendment case for leaker protection and explaining why it falls short.

A. *An Employee's Right to Speak and Publish*

Disclosures are a form of speech by public employees. The question then becomes whether the First Amendment has anything to say in defense of such expression, especially in light of its potentially sensitive content. The Supreme Court has not addressed the specific question of whether a public employee's right to speak includes the right to disclose certain information to the press and public.²⁷ But the terrain of current First Amendment doctrine seems to presume against such constitutional protection.

First, the Fourth Circuit explicitly addressed the topic in *United States v. Morison*.²⁸ Though the court fractured somewhat on the First Amendment issue, it was not particularly receptive to the constitutional argument. Consider, for example, Judge Russell's opinion for the majority: "[A] recreant intelligence department employee who had abstracted from the government files secret intelligence information and had wilfully [sic] transmitted . . . it . . . is not entitled to invoke the First Amendment as a shield to immunize his act of thievery."²⁹ The court made unambiguous that it "d[id] not perceive any First

24. The most paradigmatic example of this view is found in *New York Times Co. v. United States*, 403 U.S. 713, 714-15 (1971) (Black, J., concurring).

25. See, e.g., 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, 363-64 (2011); Papandrea, *Publication of National Security Information*, *supra* note 19, at 127-28; Geoffrey R. Stone, *Wikileaks, the Proposed SHIELD Act, and the First Amendment*, 5 J. NAT'L SEC. L. & POL'Y 105, 111-14 (2011).

26. Two recent works stand as the most prominent attempts. See Kitrosser, *Leaky Ship of State*, *supra* note 19; Papandrea, *supra* note 10.

27. Kitrosser, *Leaky Ship of State*, *supra* note 19, at 415.

28. 844 F.2d 1057 (4th Cir. 1988).

29. *Id.* at 1069.

Amendment rights to be implicated here.”³⁰ Judge Wilkinson’s concurrence, on the other hand, hedged, admitting that the First Amendment issues were not “insignificant.”³¹ He ultimately rejected any blanket prohibition on leak prosecution, however, and was particularly swayed by the disclosures’ national security implications.³²

The *Morison* decision seems to accord with the more general principle that the federal government may, within the confines of the First Amendment, limit the release of confidential information by persons in positions of trust. In *United States v. Aguilar*, the Supreme Court noted that “[g]overnment officials in sensitive confidential positions may have special duties of nondisclosure.”³³ Accordingly, because individuals who bring themselves within the government-secrecy sphere do so voluntarily, “governmental restrictions on disclosure are not subject to the same stringent [constitutional] standards that would apply to efforts to impose restrictions on unwilling members of the public.”³⁴ This relaxation of the First Amendment becomes even looser when the leaker has signed an explicit confidentiality agreement.³⁵

The other primary First Amendment case for leakers—protection for public employees against retaliation for their speech and expression³⁶—also runs into fatal hurdles. The doctrine, recently reaffirmed by the Court in *Lane v. Franks*,³⁷ holds that an employee’s speech is protected so long as³⁸: (1) the government employee is not speaking “pursuant to the employee’s official duties,”³⁹ (2) the subject of the speech is a matter of public concern,⁴⁰ and (3) the

30. *Id.* at 1068.

31. *Id.* at 1081 (Wilkinson, J., concurring).

32. *Id.* at 1085.

33. 515 U.S. 593, 606 (1995) (rejecting a district judge’s claim that the First Amendment allowed disclosure of an expired wiretap order’s information); *see also* *Boehner v. McDermott*, 484 F.3d 573, 579 (D.C. Cir. 2007) (en banc).

34. *Aguilar*, 515 U.S. at 606.

35. *See* *Snepp v. United States*, 444 U.S. 507, 509-10, 513 (1980) (per curiam) (upholding an injunction against future violations of a nondisclosure agreement regarding unclassified information); *United States v. Marchetti*, 466 F.2d 1309, 1316-17 (4th Cir. 1972) (enforcing a confidentiality agreement regarding classified information).

36. *See, e.g.*, Kitrosser, *Leaky Ship of State*, *supra* note 19, at 420; Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL’Y REV. 185, 195 (2007); Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM. U. L. REV. 1531, 1537-42 (2008). This area of doctrine has been referred to as the “*Pickering* line of cases” or the “*Pickering-Connick* test.”

37. 134 S. Ct. 2369 (2014).

38. *Id.* at 2377-78 (articulating the general framework of the test to follow).

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

40. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

employee's interest in commenting on the issue outweighs the interest of the state as the employer.⁴¹

Leakers do not have much difficulty proving that the content of their disclosures is of public concern; as the Court pointed out last year in *Lane*, "There is considerable value . . . in encouraging, rather than inhibiting, speech by public employees. For '[g]overnment employees are often in the best position to know what ails the agencies for which they work.'"⁴²

But the other requirements of the three-part test prove *quite* difficult to meet. First, because the very substance of the disclosure is a product of the leaker's employment, it is hard to disentangle the speech act from the employee's official duties: "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."⁴³ *Lane* notes, in slightly contradictory terms, that the First Amendment does indeed protect "speech concern[ing] information related to or learned through public employment."⁴⁴ In *Lane*, however, the Court was clear that this issue turned on the fact that the public employee's statements were made under oath, which renders such testimony "speech as a citizen" and not as an employee.⁴⁵

Second, it would be difficult for a government employee to demonstrate that the content of the leaked information is of such importance as to outweigh the government's general interest in enforcing employee confidentiality agreements.⁴⁶ It may not always be impossible to satisfy this balancing test,⁴⁷ but the combination of the entanglement concern with the balancing concern and

41. *Id.*; see also *Connick v. Myers*, 461 U.S. 138, 140 (1983) (setting the 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" (alteration in original) (quoting *Pickering*, 391 U.S. at 568) (internal quotation mark omitted)).

42. *Lane*, 134 S. Ct. at 2377 (second alteration in original) (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion)); see also *Snyder v. Phelps*, 131 S. Ct. 1207, 1211 (2011) (defining speech on matters of public interest as merely "relating to any matter of political, social, or other concern to the community" (quoting *Connick*, 461 U.S. at 146) (internal quotation mark omitted)). *Lane*, being such a recent case, has not yet been considered by scholars who connect the First Amendment to national security leaks.

43. *Garcetti*, 547 U.S. at 421-22; see also Stone, *supra* note 36, at 190; Vladeck, *supra* note 36, at 1540.

44. *Lane*, 134 S. Ct. at 2377.

45. *Id.* at 2378.

46. Such an interest is both broad and powerful; it includes the government's need to "promot[e] efficiency and integrity in the discharge of official duties, and [to] maintain[] proper discipline in the public service." *Connick*, 461 U.S. at 150-51 (quoting *Ex parte Curtis*, 106 U.S. 371, 373 (1882) (internal quotation marks omitted)).

47. Stone has argued that this balancing test always cuts in favor of the employee when he is exposing "unlawful government conduct." Stone, *supra* note 36, at 195 (emphasis omitted).

the stretching of the *Pickering-Connick* test to an utterly new domain⁴⁸ makes this a fairly thin reed of jurisprudence on which to hang leaker protection.

B. *A Public Right to Know*

Embracing a more structuralist approach to the Constitution, the First Amendment may “serve[] in part to contain executive power” by protecting the public’s right to know information indispensable to the exercise of its democratic prerogative.⁴⁹ The genesis of this argument stems from Madison’s admonishment that “[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance”⁵⁰ Fair enough. A democracy in which citizens cast votes for representatives without knowing the terrain of the issues these trustees will confront is no democracy at all.⁵¹ The Court has recognized the value of the public right to know as indispensable to the marketplace of ideas, especially when the substance of that information is political in nature.⁵²

But however appealing a public right to know may be, it is unclear that it can be derived from the Constitution.⁵³ The text of the Constitution discusses secrecy in only one instance: the Journal Clause, which affirmatively grants some power to Congress to keep secrets.⁵⁴ The Founders spoke passionately

48. The *Pickering-Connick* test is, at its core, about retaliatory practices in the workplace, such as firing and demotion, not about criminal prosecution.

49. Kitrosser, *Leaky Ship of State*, *supra* note 19, at 423.

50. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON 103, 103 (Gaillard Hunt ed., 1910). See generally David S. Cohen, *Public’s Right of Access to Government Information Under the First Amendment*, 51 CHI.-KENT L. REV. 164 (1974) (working from Madison’s comments to analyze a public right to know); Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1 (same).

51. Alexander Hamilton viewed the unitary executive as importantly guaranteeing to “the people . . . the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it.” THE FEDERALIST NO. 70, at 428-29 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in 12 THE WORKS OF THOMAS JEFFERSON 161, 163 (Paul Leicester Ford ed., 1905).

52. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. ‘[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.’” (alteration in original) (citations omitted) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964))).

53. For an intensive study on this point that informs the remainder of this Subpart, see Pozen, *supra* note 20, at 292-305.

54. U.S. CONST. art. I, § 5, cl. 3 (“Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment re-

about the need for the President to be able to provide “[d]ecision, activity, secrecy, and dispatch.”⁵⁵ In a structural Constitution, the executive’s unique primacy in areas of international relations and military affairs also necessitates a unique ability to control and keep secret sensitive information.⁵⁶ And, of course, the Court has found an executive right to confidentiality and secrecy as a matter of prudence.⁵⁷

Accordingly, at the very least, “[i]f there is a generalized ‘right to know,’ it cannot be a right for everyone to know everything at all times, and it may be trumped by other rights or responsibilities vested in a particular branch of government.”⁵⁸ But while the public right to know does not give rise to absolute First Amendment protection, it may still prove important for two reasons examined further below. First, the great deal of importance placed upon the free flow of information is part of a broader fabric of solicitude paid in American history and governance to those who would expose instances of political corruption otherwise kept secret.⁵⁹ Second, while the public right to know may be checked at the door of executive action in the realm of national security, the elemental core should not die with it. Accordingly, other intrabranch and interbranch checks become indispensable, as does a serious commitment to executive constitutionalism.

II. LEAKING AS CONSTITUTIONAL DUTY

A hypothetical to begin our discussion: Imagine that the Assistant Attorney General for National Security comes across evidence that the United States is carrying out drone strikes against U.S. citizens in foreign countries. The targets are placed on a list due to nothing more than a single, translated report dictated and transcribed on the battlefield. The Assistant Attorney General brings this to the attention of the Attorney General, who tells him that it is of no constitutional concern to the Departments of Justice or State and that he is required to accept this determination. The strikes will be carried out in secret without judicial

quire Secrecy . . .”). My thanks to Michael W. McConnell for his identification of this issue. *See also* Pozen, *supra* note 20, at 293.

55. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 51, at 424; *see also* THE FEDERALIST NO. 64 (John Jay), *supra* note 51, at 392.

56. Pozen, *supra* note 20, at 301; *see also* Akhil Reed Amar, *America’s Constitution and the Yale School of Constitutional Interpretation*, 115 *YALE L.J.* 1997, 2005 (2006) (“The evident constitutional design here is thus to enable one part of the government to act quickly and decisively, with unity, energy, vigor, dispatch, and, if need be, secrecy.”).

57. *United States v. Nixon*, 418 U.S. 683, 711 (1974) (“Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.”).

58. Pozen, *supra* note 20, at 305.

59. *See infra* Part III.B.2.

review or public notice. Acting because he perceives a violation of the Fifth Amendment, the Assistant Attorney General leaks the information to a member of the Senate Select Committee on Intelligence in violation of various security statutes.

How might we be able to justify his actions? Instinctively, we might argue that complicity in seemingly unconstitutional behavior, especially from high-ranking executive officers, is deeply suspect, whether in an ethical, moral, or legal manner. This justification is, in its rawest form, the guiding principle behind a theory of constitutional duty. A person in a place of public trust, who has sworn an oath to support the Constitution, should not merely uphold the oath where it is convenient. And he should be especially vigilant in circumstances in which the judiciary, the legislature, and the public will not be able to adjudicate the executive's action.

The theory of constitutional duty is impulsively acceptable, but more importantly, it is *constitutionally required*. In what follows, I draw out the constitutional basis for the obligation to support the Constitution, rigorously focusing upon text, history, structure, and prudence.

A. *The Case for Constitutional Duty*

As a functional matter, the idea of a constitutional duty of executive officers to affirmatively support the Constitution above and beyond mere obedience to their superiors has a firm footing in a separation of powers analysis. In particular, it stems from recognition of a constitutionally designed fragmentation within the executive in matters of constitutional interpretation and enforcement, which acts as “our assurance against threatening concentrations of government power.”⁶⁰ It draws upon the original design of the executive that envisioned executive officers as beholden to the rule of law and not the rule of the President.

Most compelling, however, is that these structural arguments for an officer's duty to support the Constitution are tied intimately to constitutional text and history. And it is with text and history that we begin. The wellspring of constitutional duty is the oath of office required of all executive officers in Article VI to affirmatively support not the President or the United States, but the Constitution.

60. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 651 (2001); see also Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316-17 (2006).

1. *The Article VI oath of office*

Article VI provides that “[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.”⁶¹ The oath was later codified into language that calls upon executive officers to “support *and defend* the Constitution of the United States” and “bear true faith and allegiance to the same.”⁶²

Traditionally, the Oath Clause has been viewed as a statement about the balance of power between federal and state government⁶³; it requires state officials to swear allegiance to the Federal Constitution above their loyalties to their native states. The easiest defense of this interpretation is textual. The Oath Clause is immediately preceded in the constitutional text by the Supremacy Clause, which designates the Constitution as “the supreme Law of the Land; and the Judges in every State shall be bound thereby.”⁶⁴

There is not much in the way of evidence of the Oath Clause’s original understanding,⁶⁵ though a broadly construed look at the Framing sheds some general support on the federalist reading. For instance, in proposing that officers within the several states be bound by an oath, Edmund Randolph defended its inclusion as “necessary to prevent that competition between the National Constitution & laws & those of the particular States, which had already been felt.”⁶⁶ Alexander Hamilton noted that through the “sanctity of [the] oath . . . respective [state] members will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*.”⁶⁷ James Madison took a similarly federalist view of the oath, though he rested its justification on more pragmatic grounds. Because the execution of federal elections would be the province of various state officials and legislatures, it would

61. U.S. CONST. art. VI, cl. 3.

62. 5 U.S.C. § 3331 (2013) (emphasis added). Regulations also provide that government employees are held responsible by the public for upholding “loyalty to the Constitution.” 5 C.F.R. § 2635.101 (2014).

63. See Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1133-39 (2013) (“Today we think of this Clause as requiring federal and state officers to swear allegiance to the United States.”).

64. U.S. CONST. art. VI, cl. 2.

65. James Madison himself wrote that the conversations on the Oath Clause were largely “short” and “uninteresting.” 2 JOHN R. VILE, *THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA’S FOUNDING* 539 (2005).

66. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 203 (Max Farrand ed., 1911).

67. THE FEDERALIST NO. 27 (Alexander Hamilton), *supra* note 51, at 177; see also CONG. RESEARCH SERV., S. DOC. NO. 108-17, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 986-88 (Johnny H. Killian et al. eds., 2004).

be imperative that the various state actors pay fidelity to the Federal Constitution.⁶⁸

But this reading has shortcomings. First, Randolph's interpretation of the Oath Clause as a bulwark for supremacy was based on an earlier draft in which federal officers were explicitly absent. This particular draft read, "Res[olve]d. that the Legislative, Executive & Judiciary powers within the several States ought to be bound by oath to support the articles of Union."⁶⁹ If the Oath Clause were truly an expression of federal supremacy, it would have no reason to bind federal employees (i.e., senators, representatives, executive and judicial officers) as well as state employees (i.e., the members of the several state legislatures, executive and judicial officers). Second, this reading of the Oath Clause renders it merely a formalistic appendage of the Supremacy Clause. The latter, after all, already "makes federal law paramount over the contrary positions of state officials" and grants federal officials "authority to order state officials to comply" with the Constitution and federal statutes.⁷⁰ It would be a constitutional oddity to write in the Oath Clause to merely repeat the gravamen of the preceding Supremacy Clause. Indeed, the majority in *Printz v. United States* shied away from this interpretation, focusing on the Supremacy Clause as the primary mechanism for demanding the fealty of the states to the Federal Constitution and noting that the Oath Clause was independent of this purpose.⁷¹

There is room, accordingly, for a second reading of the Oath Clause that reads the requirement of executive officers to "support th[e] Constitution" as more than concededly empty language. Instead, it may impose on certain government employees not simply the right but the duty to consider the constitutionality of their directives before acting.⁷² And, in its strongest form, it may even "require[] federal officials to disobey the President when he orders them to violate[] the [Constitution]."⁷³

A broader view of the original understanding of the Oath Clause hints at the independent duty of executive officers to support and defend the Constitution detached from the dictates and interpretation of the President. At the time of the Framing, principal officers of government were well used to taking an oath of office. But that oath explicitly called for principal officers of government to "solemnly promise . . . to bear faith and true allegiance to his sacred

68. THE FEDERALIST NO. 44 (James Madison), *supra* note 49, at 287 ("The members and officers of the State governments . . . will have an essential agency in giving effect to the federal Constitution.").

69. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 66, at 22.

70. *New York v. United States*, 505 U.S. 144, 179 (1992).

71. *Printz v. United States*, 521 U.S. 898, 924-25 (1997).

72. *See* sources cited *supra* note 22.

73. Driesen, *supra* note 22, at 85 (emphasis omitted).

Majesty George the [Third].”⁷⁴ The fealty to a specified executive was abandoned quite early by the colonists; in the midst of the Revolutionary War, the Continental Congress required General George Washington to order all military officers to place country over sovereign in an oath that rejected “Allegiance . . . to George the Third” in favor of “said United States.”⁷⁵

The Constitution codified this allegiance, but once again, it shifted the focus: the fealty to the “United States” in the Revolutionary oath was explicitly replaced with allegiance to the “Constitution.” The total result was an utter “break with the monarchial tradition of fealty to an individual head of government,” and the installation of officers duty-bound to support the Constitution.⁷⁶ The Article VI oath placed the “ritual of allegiance” on the Constitution as a “substitute” for fealty to a King or a state-sanctioned church.⁷⁷

This is bolstered by the Constitution’s explicit creation of two oaths of office: one for government officers and one for the President. It has been powerfully posited that the President’s oath of office—his duty to “preserve, protect and defend” the Constitution⁷⁸—“forbids him from executing unconstitutional laws.”⁷⁹ Interestingly, the presidential oath was designed to replicate, in large part, the Article VI Oath Clause, imposing generally similar duties on the President and executive officials.⁸⁰ In regard to constitutional obedience, the text of

74. *Oath of Allegiance to the King George III, 11/1775*, NAT’L ARCHIVES, <http://research.archives.gov/description/2441294> (last visited Jan. 7, 2015); see also *Oath of Allegiance to George III, King of Great Britain*, COLONIAL & ST. RECS. N.C., <http://docsouth.unc.edu/csr/index.html/document/csr07-0340> (last visited Jan. 7, 2015) (“I, A. B., do sincerely promise and swear that I will bear true allegiance to His Majesty King George the Third.”). See generally SOME OF THE EARLIEST OATHS OF ALLEGIANCE TO THE UNITED STATES OF AMERICA (Nellie Protsman Waldenmaier ed., 1944); Enid Campbell, *Oaths and Affirmations of Public Office Under English Law: An Historical Retrospect*, J. LEGAL HIST., Dec. 2000, at 1.

75. George Washington, General Orders (May 7, 1778), in 11 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799, at 360, 360-63 (John C. Fitzpatrick ed., 1934).

76. Driesen, *supra* note 22, at 84-85.

77. Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 18 (1984) (emphasis omitted).

78. U.S. CONST. art. II, § 1, cl. 7.

79. Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 521-22 (2012). But see Stacy Pepper, *The Defenseless Marriage Act: The Legitimacy of President Obama’s Refusal to Defend DOMA § 3*, 24 STAN. L. & POL’Y REV. 1, 2 (2013); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 674-80 (2014).

80. See 1 DAVID K. WATSON, THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY APPLICATION AND CONSTRUCTION 910 (1910) (unearthing evidence from statements by Thomas Jefferson that the presidential oath substantially mirrored the Article VI Oath Clause). But cf. Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1632 (2008) (arguing that the President alone takes the oath “to preserve, protect and defend the Constitution,” in support of a larger argument re-

the Constitution situates both the President and executive officials on a similar level.⁸¹ The duty of government officers to support the Constitution is explicitly severed from the President's independent oath to do so as well, on equal terms.⁸² The Oath Clauses were intended to serve a unifying function in promoting allegiance to the Constitution above all else.⁸³ And if the President's allegiance included a duty to resist enforcement of unconstitutional laws, then why not so too with the executive officers' oath?

Lending further persuasive power is the extent to which the duty-based theory has found its way into judicial and popular interpretation. The beginnings of this shift come through in a passage of *Marbury v. Madison* in which Justice Marshall used the Article VI oath of office as a justification for judicial review:

Why . . . does [the Constitution] direct the judges to take an oath to support it? . . . How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?

. . . .

Thus, . . . a law repugnant to the constitution is void; and . . . courts, as well as other departments, are bound by that instrument.⁸⁴

Both legal academics and judges have argued that this reference to the Oath Clause applies equally well to executive officials and judges.⁸⁵ Justice Gibson of the Supreme Court of Pennsylvania, for instance, wrote in his famous dissent in *Eakin v. Raub* that “[t]he oath to support the constitution is not peculiar to the judges, but is taken . . . by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty.”⁸⁶

It was Justice Story, in his *Commentaries on the Constitution*, who breathed perhaps the strongest life into this theory. Story began with the principle that the purpose of the oath is an obligation to reflect on the manners of the

garding the President's power to disregard unconstitutional laws (quoting U.S. CONST. art. II, § 1) (internal quotation mark omitted)).

81. See Driesen, *supra* note 22, at 85; cf. Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 687 (2005) (grouping together the Article II oath required of the President and the Article VI oath required of all executive officers to create a duty to “abide by the Constitution”).

82. Cf. 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 223-24 (1922) (articulating Chief Justice Taney's position that the unique language of the President's oath does not create any special or new obligations).

83. See Grey, *supra* note 77, at 18.

84. 5 U.S. (1 Cranch) 137, 180 (1803) (second emphasis added).

85. See William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 26.

86. 12 Serg. & Rawle 330, 353 (Pa. 1825) (opinion of Gibson, J.).

“due execution of the trusts reposed in them, and to support the constitution.”⁸⁷ This support of the Constitution, Story noted, makes such officials who take the oath legitimate “interpreter[s] in constitutional controversies”⁸⁸:

The officers of each of these departments are equally bound by their oaths of office to support the constitution of the United States, and are therefore conscientiously bound to abstain from all acts, which are inconsistent with it. . . . [T]hese functionaries must . . . decide, each for himself, whether, consistently with the constitution, the act can be done.⁸⁹

Justice Story’s support for conscientious abstention has materialized in two particular sets of instances, one retrospective and one prospective.⁹⁰ First, Story, Marshall, and Gibson were writing during a time in which leaks of government secrets were quite commonplace. Such prominent disclosures began during the Revolutionary War. In 1777, for instance, American soldiers leaked information to Congress incriminating their superior officer’s brutal mistreatment of captured enemy combatants.⁹¹ In 1778, Thomas Paine—then secretary of Congress’s Foreign Relations Committee—disclosed details of French financial support of the American effort to the public.⁹² Paine justified the release under his obligation to the “trust [he owed] to the public good” incident to his position; he was expelled from Congress but suffered no further civil or criminal sanctions.⁹³

Unpunished leaks by government officers only accelerated after the enactment of the Constitution. Private correspondence between the French Ambassador to the United States and the American Secretary of State was disclosed in 1796 to demonstrate government corruption, with no prosecution pursued against the offending officer.⁹⁴ Edmund Randolph, as Secretary of State, “jettisoned every consideration of secrecy,” publishing private diplomatic correspondence with France to demonstrate his innocence during a smear campaign. No liability followed.⁹⁵ Moreover, Ambassador James Monroe himself made similar disclosures of Franco-American secrets without repercussion.⁹⁶

87. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 702 (Boston, Hilliard, Gray & Co. 1833).

88. 1 STORY, *supra* note 87, at 344 (capitalization altered).

89. *Id.* at 345.

90. *See infra* Part III.B.2 (discussing liquidation theory).

91. Stephen M. Kohn, Op-Ed., *The Whistle-Blowers of 1777*, N.Y. TIMES (June 12, 2011), <http://www.nytimes.com/2011/06/13/opinion/13kohn.html>.

92. GABRIEL SCHOENFELD, NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW 73-74 (2010).

93. *Id.* at 74.

94. *See id.*; *see also* DANIEL N. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS 181, 182 & 297 n.15 (1981).

95. SCHOENFELD, *supra* note 92, at 75.

96. *Id.* at 75-76.

At the heart of these incidents was a “de facto recognition” by the Founders “that in a democracy some secret information would inevitably make its way into the public domain” and that sanctions were therefore inappropriate.⁹⁷ Particularly, the understanding of free speech protections during the Founding period permitted only prosecution of the “dissemination of ‘false facts’”⁹⁸—libel statutes were considered the primary regulation of free speech and free press at the time.⁹⁹ A law permitting prosecution for leaks of true facts would have been considered “unconstitutional.”¹⁰⁰

The second materialization of Story’s conscientious abstention theory has been a more modern occurrence. Executive officials have recently begun to explicitly invoke their constitutional oath in support of affirmative frustration of potentially unconstitutional behavior. A former head of the Office of Legal Counsel (OLC) invoked the oath to subvert and impede executive administration efforts to authorize torture.¹⁰¹ A Department of Justice attorney blew the whistle on warrantless NSA surveillance in 2008, explaining that he “had taken an oath to uphold the Constitution.”¹⁰² And, of course, Edward Snowden has noted in support of his actions that “[t]he oath of allegiance is not an oath of secrecy [but rather] an oath to the Constitution.”¹⁰³

These incidents, should we care about either original understanding or developed popular understanding, help to shed light on the principles underlying the separate requirements that executive officers support the Constitution. In mandating the oath, the Framers were encoding deep value judgments—certainly about federalism, but also about separation of powers and constitutional fidelity. Contested and pluralist interpretations are inevitable and not altogether unwelcome. A duty-based theory for executive officers simply views the Article VI Oath Clause as making a few key recognitions: that government officers have the affirmative, or “positive,” obligation and duty to support the Constitution, that such an obligation inevitably permits constitutional interpretation, and that such an obligation is severable from presidential directives.

97. *Id.* at 77.

98. *Id.*

99. *Id.* at 71-72 (quoting LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 110 (1999)) (discussing, inter alia, Thomas Jefferson’s support for libel statutes and his proposed protection for the freedoms of speech and press only insofar as they concerned “anything but false facts”).

100. *Id.* (quoting HOFFMAN, *supra* note 94, at 209) (internal quotation marks omitted).

101. GOLDSMITH, *supra* note 21, at 11.

102. Michael Isikoff, *The Whistleblower Who Exposed Warrantless Wiretaps*, NEWSWEEK (Dec. 12, 2008, 7:00 PM), <http://www.newsweek.com/whistleblower-who-exposed-warrantless-wiretaps-82805>.

103. Barton Gellman, *Edward Snowden, After Months of NSA Revelations, Says His Mission’s Accomplished*, WASH. POST (Dec. 23, 2013), <http://wapo.st/K0zB1H>.

2. *The Take Care Clause*

The Take Care Clause may work in concert with the Article VI Oath Clause, in that it can be read to place on the President *as well as executive officers* the positive obligation to faithfully execute the law and resist execution of unconstitutional laws. The clause requires that the President “shall take Care that the Laws be faithfully executed.”¹⁰⁴ Here is the logical syllogism: The Take Care Clause embeds a power and obligation of the President to not enforce unconstitutional laws. Moreover, the Take Care Clause imposes the same obligations on executive officers as on the President. Therefore, the clause requires executive officers to resist enforcing unconstitutional laws.

We can start by unpacking the first premise, that the Take Care Clause allows, and perhaps requires, Presidents to faithfully *not* execute unconstitutional laws. First, unconstitutional laws may have no force of law at all and therefore are not the “laws” that must be faithfully executed. Resistance, then, is entirely within the executive’s constitutional discretion.¹⁰⁵ Second, and necessarily following from the first point, the Take Care Clause when viewed in concert with the President’s oath of office requires him to refuse to enforce laws he believes to be unconstitutional.¹⁰⁶ Such a move requires independent constitutional interpretation by the President himself, a view that has found support in theories of executive constitutionalism.¹⁰⁷

Next, the executive’s obligation to take care not to enforce unconstitutional laws extends to officers as well as the President. The Take Care Clause’s passive construction anticipates that the President alone cannot enforce all federal law.¹⁰⁸ Instead, the clause “admits the possibility that the laws are to be exe-

104. U.S. CONST. art. II, § 3.

105. This position has found its most famous and forceful advocate in Judge Easterbrook. *See, e.g.*, Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 919-20 (1990) (noting, at bottom, that unconstitutional laws are “no law[s] at all” (quoting *Norton v. Shelby Cnty.*, 118 U.S. 425, 442 (1886)) (internal quotation marks omitted)); *see also* John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 370 (1998).

106. For a general indexing, see Devins & Prakash, *supra* note 79, at 521 n.76. *See also* Letter from Thomas Jefferson to Wilson Cary Nicholas (June 13, 1809), in 11 THE WORKS OF THOMAS JEFFERSON, *supra* note 51, at 108, 111 (noting Jefferson’s refusal to enforce the Sedition Act because “the sedition law was unconstitutional and null, and . . . my obligation to execute what was law, involved that of not suffering rights secured by valid laws, to be prostrated by what was no law”); *cf.* Pepper, *supra* note 79, at 2 (“I conclude that a President must reject an unconstitutional law, but may not constitutionally decline to defend it without also refusing to enforce it.”).

107. *See, e.g.*, SCOTT M. MATHESON, JR., PRESIDENTIAL CONSTITUTIONALISM IN PERILOUS TIMES 161 (2009); Pillard, *supra* note 81, at 677 (“The executive, in my view, has failed fully to meet the challenges of interpreting and applying the Constitution on its own.”).

108. *See* HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 455 (2006).

cuted by someone other than the President and his immediate staff.”¹⁰⁹ William Wirt, Attorney General to James Monroe, noted that in this system of delegated powers,

[i]f the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.¹¹⁰

This principle was reiterated by the D.C. Circuit in *United States ex rel. Stokes v. Kendall*, which recognized that an officer “is bound to execute [his duties] according to his own judgment” and free from presidential control of those duties.¹¹¹ “He is the officer of the United States, and so called in the constitution, . . . responsible to the United States, and not to the president . . .”¹¹² Accordingly, the Take Care Clause envisions that an officer will faithfully execute the law and Constitution and “judge for himself, and upon his own responsibility, not to the president.”¹¹³

B. *Constitutional Duty in the National Security Context*

The constitutional duty of executive officers reaches its zenith in areas of national security concern. The present jurisprudence on national security secrets and their justiciability has been, to borrow from the political science parlance, a tale of “ungoverned spaces.” The normal channels of constitutional reviewability have ceded extensive ground, leaving a splintered executive branch to make constitutional judgment calls. Given this system, which encourages a lack of constitutional oversight not just from the judiciary but also from the presidency itself, it might be particularly imperative that executive officers stand as the vanguard against unconstitutional behavior in the shadowed spaces of the executive bureaucracy.

While it normally is the province of the judiciary “to say what the law is,”¹¹⁴ the judicial branch has thrown up its hands and erected a wall between itself and national security controversies by way of a separation of powers heu-

109. Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 465-66 (1987); see also *The President & Accounting Officers*, 1 Op. Att’y Gen. 624, 625 (1823) (“[I]t could never have been the intention of the constitution, in assigning this general power to the President to take care that the laws be executed, that he should in person execute the laws himself.”); Driesen, *supra* note 22, at 83-84.

110. CALABRESI & YOO, *supra* note 21, at 89 (quoting *The President & Accounting Officers*, 1 Op. Att’y Gen. at 625).

111. 26 F. Cas. 702, 752 (C.C.D.C. 1837) (No. 15,517).

112. *Id.*

113. *Id.*

114. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

ristic.¹¹⁵ Accordingly, the judiciary “approaches executive counterterrorism initiatives in a deferential spirit,” not asking whether a national security action is itself constitutional but rather opining on “the abstract question of the executive’s institutional capacity in national security matters.”¹¹⁶ Perhaps nowhere has this become more pronounced than in standing doctrine. A case such as *Clapper v. Amnesty International USA* demonstrates precisely this issue: “[S]tanding, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.”¹¹⁷ To the Court, it therefore follows that the standing bar is higher in cases challenging the actions of the political branches as unconstitutional, particularly where those actions concern “the fields of intelligence gathering and foreign affairs.”¹¹⁸

In these admissions, the Court has found a subtle manner in which to shift constitutional adjudication in matters of national security onto the executive branch. This move has stoked some criticism: In a case like *Clapper*, the Constitution “cannot count on the executive branch’s sense of self-restraint to ensure that constitutional limits are respected.”¹¹⁹ If the courts truly leave the scene, “unconstitutional actions will proceed apace, and fully constitutional ones will remain under a pall of doubt.”¹²⁰ Such critiques have given way to proposed solutions: perhaps standing doctrine’s “speculative” prong should be rethought,¹²¹ or the courts should “look directly to the factual and legal merits of the decision without structural constitutional blinders.”¹²² And greater judicial oversight and scrutiny would certainly go a long way toward resolving our most pressing national security controversies and, for reasons explained below,

115. Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 889-90 (2012); see Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1029 (2013) (“[C]ourts often decline to review counterterrorism practices challenged as violations of constitutional rights out of concern for state secrets or institutional competence.”); see also Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 9 (D.D.C. 2010); ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 52-54 (2010); Stephen Reinhardt, *The Judicial Role in National Security*, 86 B.U. L. REV. 1309, 1309, 1311 (2006).

116. Huq, *supra* note 115, at 897.

117. 133 S. Ct. 1138, 1146 (2013); cf. Note, *Standing—Challenges to Government Surveillance—Clapper v. Amnesty International USA*, 127 HARV. L. REV. 298, 307 (2013) (providing a technical overview of the Court’s evolution of standing doctrine in *Clapper*).

118. *Clapper*, 133 S. Ct. at 1147.

119. Michael W. McConnell, *2013 Supreme Court Roundup*, FIRST THINGS, Oct. 2013, at 33, 35.

120. *Id.*

121. *Id.*; see also Sean J. Wright, Case Comment, *No Leg to Stand On: Clapper v. Amnesty International USA and the Dawn of an Increasingly Strict Standing Doctrine*, 74 OHIO ST. L.J. FURTHERMORE 41, 43 (2012), <http://moritzlaw.osu.edu/students/groups/oslj/files/2013/04/Furthermore.Wright.pdf>.

122. Huq, *supra* note 115, at 949.

shrink the scope of executive officer duty. But the Court has not adopted these suggestions, leaving constitutional rumination in the hands of the executive branch.

Such a concession might be acceptable if the President and other executive branch leadership truly exercised strong, hierarchical oversight over constitutional questions. But this is far from the case. The courts have left the “enforcement of constitutional norms” in cases of national security to the executive branch;¹²³ in practice, such executive constitutional analysis “is centralized in . . . the Office of the Solicitor General and the Office of Legal Counsel.”¹²⁴ But these departments often fail to engage in real constitutional rigor; they may give in to political pressures, either failing to “supply fully effective internal constitutional brakes on executive conduct”¹²⁵ or, worse yet, engaging in “opportunistic, situational constitutionalism.”¹²⁶

And even if the executive did take up the call for thoughtful executive constitutionalism, the national security bureaucracy frustrates the executive’s ability to enforce such constitutional interpretation throughout the executive branch. First, national security agencies and agents are less subject to White House control than government actors in other policy areas.¹²⁷ This fractured structure, made reality partly through congressional preference,¹²⁸ leaves national security agents free to frustrate presidential objectives¹²⁹ and, accordingly, to sign off on actions that the President may otherwise deem unconstitutional. Second, the President may not wish to actually centralize authority to interpret—and act upon—the Constitution in the realm of national security. There is a powerful incentive for the President to maintain plausible deniability of national security action;¹³⁰ accordingly, the individuals making the policy

123. Pillard, *supra* note 81, at 692.

124. *Id.* at 703.

125. *Id.* at 722.

126. *Id.* at 717.

127. Huq, *supra* note 115, at 913 & n.135 (citing Exec. Order No. 12,866 §§ 2(b), 3(d)(2), 3 C.F.R. 638 (1993) (stating that review by the Office of Management and Budget does not extend to “military or foreign affairs”), *reprinted as amended in* 5 U.S.C. § 601 note (2013)).

128. *See, e.g.*, AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC* 8, 42 (1999) (describing the formation of national security agencies as the result of congressional bargains that leave such agencies free from clear executive oversight); Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006).

129. *Cf.* TIM WEINER, *LEGACY OF ASHES: THE HISTORY OF THE CIA* 357 (2007) (describing difficulties of presidential control and oversight over the national security agencies, especially the CIA).

130. Huq, *supra* note 115, at 914; *see* FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* 37-43 (2007) (providing an index of historical uses of plausible deniability by Presidents); *see also* M. KENT BOLTON, *U.S. NATIONAL SECURITY AND FOREIGN POLICYMAKING AFTER 9/11: PRESENT*

and constitutional judgment calls are, in practice, often going to be executive officials and employees.¹³¹

Compounding this problem is the lack of mechanisms internal to the executive that could help ensure that such unconstitutional behavior is uncovered and corrected. Inspectors General (IGs), an often-overlooked investigative mechanism, are well suited for discovering corruption and mismanagement in the executive. Moreover, there is, at present, at least one in every significant national security agency.¹³² Even though one of the initial hopes of IGs was to “monitor constitutional concerns,”¹³³ they have proven relatively inefficacious at determining and remedying such violations of constitutional rights.¹³⁴ Another alternative might be the Office of Special Counsel (OSC), whose province it is to protect government employees—especially whistleblowers—against corrupt and unlawful government practices.¹³⁵ But the OSC’s legitimacy has been tested as of late, with a host of internal scandals marring its ability to uncover unconstitutional conduct.¹³⁶

III. THE CONTOURS OF CONSTITUTIONAL DUTY

Determining that the Oath Clause and other provisions give rise to a duty of some degree of constitutional interpretation and support does not end the matter. The Oath Clause, to return to the text, provides that “all executive . . . Officers . . . shall be bound by Oath or Affirmation, to support this Constitution.”¹³⁷ However simple a phrase this may seem, its details harbor a multitude of choices made about the extent of the duty.

Drawing from text, history, structure, and prudence, this Part contends that the constitutional duty applies to persons in positions of trust, which generally tracks the Article II officer-employee distinction. This Part then argues that the duty includes a positive obligation that necessitates occasional unlawful behav-

AT THE RE-CREATION 69 (2008) (discussing the rise of the strategic use of plausible deniability).

131. This might also be seen as an intrabranched version of David Pozen’s recent writing on constitutional self-help. See David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2 (2014).

132. Sinnar, *supra* note 115, at 1032; see also Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, *reprinted as amended in* 5 U.S.C. app. (2013).

133. Sinnar, *supra* note 115, at 1033.

134. *Id.* at 1076 (“[I]t appears that IGs do not typically evaluate violations of constitutional rights [I]f one believes that constitutional law ought to constrain executive national security conduct, IGs do not fill the gap in constitutional compliance.”).

135. See 5 U.S.C. §§ 1213, 1214 (2013).

136. See David Ingram, *Special Counsel Office Struggles in Wake of Scandal*, NAT’L L.J. (Sept. 14, 2009), <http://www.nationallawjournal.com/id=1202433829412/Special-Counsel-Office-Struggles-in-Wake-of-Scandal>.

137. U.S. CONST. art. VI, cl. 3.

ior, though very rarely national security leaks to the public. And this Part concludes by positing that the duty must support constitutional principles emanating from constitutional text, determined either by judicial review or, in its absence, a reasonable interpretation by officers.

A. *Who? Principals, “Officers,” and Employees*

Let us return to our drone strike hypothetical for a moment, fleshed out with a few more details. Imagine that there is a document on the servers of the Department of Defense (DOD) that describes an imminent drone strike to be carried out by the U.S. military on an American citizen in Pakistan. Three people, independent of one another, simultaneously come across the evidence: the Secretary of Defense, the DOD’s General Counsel, and a newly hired analyst specializing in South American security. Each raises their concerns to no avail; each considers leaking to Congress or the *New York Times* in hopes that the strike will be called off.¹³⁸ Which of these actors is “bound . . . to support this Constitution”?

The Oath Clause answers executive “officers,” but it does not pinpoint the bounds of this group. What the text of the clause *does* mention are senators, representatives, state legislators, and federal and state executive and judicial officers. The canons of construction provide little help, as they flow both directions on this point: On one hand, the large number of actors mentioned might tell us that the term “officer” should be read in an expansive light. On the other, if we were to read “officer” in light of the other elements of the list, it would seem strange to include a civil service executive employee on the same list as U.S. senators and Article III judges.¹³⁹

But constitutional text is not entirely unhelpful. Particularly, the Appointments Clause also makes mention of “officers,” whom the President may nominate “by and with the Advice and Consent of the Senate.”¹⁴⁰ In the context of the Appointments Clause, much has been said about who is an officer; perhaps the most helpful summary is that an officer is “[a]n appointee (1) to a position of employment (2) within the federal government (3) that carries significant authority pursuant to the laws of the United States,” with the latter authority usu-

138. The facts of this hypothetical come partly from the 2011 killing of Anwar al-Awlaki, recently put before D.C. District Court Judge Rosemary Collyer. Pete Yost, *Judge Dismisses Lawsuit over Drone Strikes in Yemen That Killed American Anwar al-Awlaki*, WASH. POST (Apr. 4, 2014), <http://wapo.st/17mXEDx>.

139. This draws on the canons of *noscitur a sociis* and *eiusdem generis*. See, e.g., WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 823 (3d ed. 2001); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 199-200 (2012).

140. U.S. CONST. art. II, § 2, cl. 2.

ally entailing the ability to exercise independent discretion.¹⁴¹ What's more, "officers" includes both "principal officers"—those subject to nomination and consent—and "inferior officers"—those whose appointment may be delegated to the President, courts of law, or heads of departments.¹⁴²

The relevance of these distinctions—between principal officers, inferior officers, and employees—is made clear if we return to our hypothetical. If "officer" in Article VI means the same as in Article II, then the newly hired analyst is *not* an officer—most such "government employees are not officers," and analysts almost certainly do not exercise "significant authority"¹⁴³—and therefore is outside the scope of constitutional duty. Edward Snowden and Chelsea Manning, an Army private, are excluded as well.¹⁴⁴ And if inferior officers are likewise excluded, then the DOD's General Counsel is outside the scope, as is an independent prosecutor or the head of the OLC.

This cross-constitutional reading of "officer" serves as a helpful starting point from which to test other pieces of evidence. A look at historical documents complicates the parallelism between Article VI and Article II. The pre-Constitution state constitutions, when they did require an oath, would mandate it of "[e]very person . . . appointed to any office *or place of trust*,"¹⁴⁵ and of

141. The Constitutional Separation of Powers Between the President & Cong., 20 Op. O.L.C. 124, 145-48 (1996); see *Buckley v. Valeo*, 424 U.S. 1, 131 (1976) (per curiam) (explaining that officers are "all appointed officials exercising responsibility under the public laws"); *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868) ("An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.").

142. The line between principal and inferior officers is admittedly blurred, though the Court has provided some nondispositive guidance factors. See *Morrison v. Olson*, 487 U.S. 654, 671-72 (1988) (discussing inferiority, limits on jurisdiction, and tenure); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 804-09 (1999) (describing inferior officers as "subordinate to a superior officer or entity" (emphasis omitted)).

143. Douglas Cox, *Inferior Officers*, HERITAGE FOUND., <http://www.heritage.org/constitution/#!/articles/2/essays/92/inferior-officers> (last visited Jan. 7, 2015) (quoting *Buckley*, 424 U.S. at 126).

144. At the time of his leaks, Snowden was actually an employee of Booz Allen Hamilton, which was privately contracted to work with the NSA. Accordingly, he stands well outside any plausible interpretation of "officers" (though he had previously served as an employee in the CIA and may have even been trained in espionage). See Andy Greenberg, *NSA Implementing 'Two-Person' Rule to Stop the Next Edward Snowden*, FORBES (June 18, 2013, 2:23 PM), <http://www.forbes.com/sites/andygreenberg/2013/06/18/nsa-director-says-agency-implementing-two-person-rule-to-stop-the-next-edward-snowden>.

145. DEL. CONST. of 1776, art. 22 (emphasis added), reprinted in 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 562, 566 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

“every person chosen or appointed to any office, civil or military.”¹⁴⁶ *The Federalist* similarly interpreted the Oath Clause to cover federal and state magistrates,¹⁴⁷ who are typically characterized as inferior officers.¹⁴⁸ Early constitutional commentators argued that the oath applies even more broadly, to “all those, who are entrusted with the execution of the powers of the national government.”¹⁴⁹

What the drafters of the Oath Clause likely meant by “executive officers” was persons in a position of trust within the executive. Their intent failed to coincide neatly with the Article II framework because the term “officer” was not used in precisely the same manner. It is also important to keep in mind, however, that the expansive national security apparatuses and bureaucracy of the federal government are recent innovations utterly foreign to the Founders.¹⁵⁰ Accordingly, while Article VI may have contemplated a constitutional duty going beyond formal Article II officers, it is doubtful that it was meant to extend to every employee of a sprawling national security state.

A more structural argument favors equating Article VI and Article II officers. Principal and inferior officers are selected by two masters: the President and Congress.¹⁵¹ Such officers were never intended to be the unthinking appendages of a unitary executive,¹⁵² nor do the ethics of their professions allow them to be so.¹⁵³

146. MASS. CONST. amend. VI, reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 145, at 1888, 1912.

147. THE FEDERALIST NO. 27 (Alexander Hamilton), *supra* note 51, at 176-77.

148. Congress vests, through statute, the power to appoint federal magistrate judges with district court judges, which is only possible if magistrates are inferior officers. See 28 U.S.C. § 636 (2013). See generally Ira P. Robbins, *Magistrate Judges, Article III, and the Power to Preside over Federal Prisoner Section 2255 Proceedings*, 2002 FED. CTS. L. REV., no. 2, at 1.

149. 3 STORY, *supra* note 87, at 702.

150. See generally Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST (July 19, 2010, 4:50 PM), <http://wapo.st/1mBCrsn> (finding that at least 263 government organizations have been created or reorganized as a response to the September 11, 2001, terrorist attacks).

151. In the case of principal officers, “Congress” includes only the Senate through advice and consent. The Constitutional Separation of Powers Between the President & Cong., 20 Op. O.L.C. 124, 139 (1996). In the case of inferior officers, Congress may choose, by law, to vest appointment power with the President alone, with heads of departments, or with the courts. *Id.* at 151-53; see also *Freytag v. Comm’r*, 501 U.S. 868, 878 (1991) (“[T]he Constitution limits congressional discretion to vest power to appoint ‘inferior Officers’ to three sources . . .”).

152. In the Declaration of Independence, one of the chief grievances was that King George III had “erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.” THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776).

153. One of the most interesting instances of this tension is in the Department of Justice, with its ranks of attorneys who are bound to be public sentinels and to “resolutely ob-

In a sense, executive officers are trustees of Congress within the opaque executive, most especially in those areas in which executive action is otherwise unreviewable. Given the present realities of executive action, it is known that executive officers will likely take part in developing constitutional interpretation incident to the offices they occupy. Congress knows, for instance, that the head of the OLC will be responsible for developing the executive's constitutional interpretation. Accordingly, the Appointments and Removal Clauses help ensure that executive officers undertake their critical roles free from both the unyielding obligation to the President's patronage in appointment and the coercive power of his removal discretion.¹⁵⁴ But a rank-and-file agency employee or outside contractor, such as Edward Snowden, stands well outside Article VI's duty under either a textual or structural theory.

B. *How? The Meaning of Constitutional "Support"*

Granting license for executive officers to "support" the Constitution can give rise to a panoply of possible actions. In common parlance, an officer supports the Constitution by refusing to enforce unconstitutional action. And he also does so if he resigns rather than be complicit in the action. But what about sending his concerns to members of Congress if his superiors refuse to review their actions? Or leaking narrowly tailored documentation of such illegality to highly respected journalistic outfits?

The former two options represent what we might call a *negative obligation to support*—a duty to refrain from supporting unconstitutional action. The latter two are iterations of a *positive obligation to support*—a duty to actively frustrate unconstitutional behavior. Our task, then, is twofold. First, does the Constitution mandate negative, positive, or both obligations to support? To answer this question, we turn to evidence of originalist meaning before settling on the interpretations implicit in developed practice. Second, does the substantive nature of the potential unconstitutionality—for instance, national security concerns—alter the range of permissible action?

struct[] . . . any attempted domination of the legal apparatus by executive tyrants, populist mobs, or powerful private factions." Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 14 (1988); see also Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1968-76 (2008).

154. Compare *Morrison v. Olson*, 487 U.S. 654, 691-92 (1988) (determining that the President's proper execution of his Article II powers does not require that he have absolute discretion to terminate executive officers such as an independent counsel), and Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 25 (1995) (arguing that, at least theoretically, the President ultimately may not force the decisions of agency heads), with *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting) (arguing that the Vesting Clause grants the President all executive power), and Calabresi & Prakash, *supra* note 21, at 593 (same).

1. *Inherent meaning*

Our starting point is constitutional text, which ostensibly tells us what “support” does not mean: it does not entail the power or obligation to “preserve,” “protect,” or “defend.”¹⁵⁵ These constitutional obligations were explicitly given to the President; while, as we discussed earlier, the two Oath Clauses were modeled on each other, the asymmetry in the verb usage seems fairly deliberate. Attempts to parse the oaths’ different word choices sprang up in early nineteenth-century state court decisions.¹⁵⁶ What follows from this distinction, however, is unclear. The Constitutional Convention contains no record of why these particular word choices were made.¹⁵⁷ State constitutions had mixed the words around in their own oaths of office, calling, for example, for officers “to *protect, defend and support* the constitution.”¹⁵⁸ A perusal of early American dictionaries is a similarly unhelpful endeavor.¹⁵⁹ All that can truly be gleaned from the text is a relativist definition: “support” is weaker—less affirmative and less forceful—than “protect” and “defend.” But given that the President has the entirety of the “executive Power” at his disposal,¹⁶⁰ including the power to direct the armed forces, the use of relative terms parallels the relative power of each actor.¹⁶¹

A general move from textualism to historicism and intentionalism is instructive but not dispositive. The idea of supporting the Constitution during the Revolutionary period may have meant something quite powerful. As Larry Kramer notes of the Founding period, “In American eyes, an unconstitutional law was void, ‘a mere nullity.’ Public officials who sought to enforce such laws

155. U.S. CONST. art. II, § 1, cl. 7 (setting out the presidential oath of office).

156. *See, e.g., State ex rel. M’Cready v. Hunt*, 20 S.C.L. (2 Hill) 1, 161 (1834).

157. *See Records of the Federal Convention*, FOUNDERS’ CONST., http://press-pubs.uchicago.edu/founders/documents/a2_1_8s1.html (last visited Jan. 7, 2015).

158. *Hunt*, 20 S.C.L. (2 Hill) at 109 (emphases added).

159. Noah Webster’s dictionary from 1828, for instance, defines “support” as “[t]o bear; to sustain; to uphold . . .” 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

160. U.S. CONST. art. II, § 1, cl. 1.

161. There is some historical support for the view that constitutional “support” encompasses relatively less than preserving, protecting, and defending the Constitution by nature of the comparative imbalance of powers between the President and executive officers. One Civil War-era essay in support of the Union cause and the extraconstitutional powers of the Lincoln presidency, for instance, noted,

Other officers are sworn simply to *support* the Constitution—[the President] is sworn to *preserve, protect, and defend* it. To support the Constitution is to uphold it by our ordinary influence and not oppose it; to preserve, protect, and defend it to the best of one’s ability, is to seek out its enemies who make war upon it, and their aids and comforters, and put them down.

J. HEERMANS, WAR POWER OF THE PRESIDENT 3 (New York, Loyal Publ’n Soc’y 1863), available at <https://archive.org/details/warpowerofpresid00heer>.

were themselves outlaws who ‘ought to be deemed no better than a highwayman, and should be proceeded against in due course of law.’”¹⁶²

This historical account gestures toward a more powerful resistance to possibly unlawful behavior. And it may hint that the drafters sought to distill in a notion of “support” an affirmative obligation instead of passive resistance. But the text countervails with its more restrained position, and neither historical practice nor text is convincingly dispositive. It is therefore worth considering another tool of constitutional interpretation at our disposal.

2. *Liquidation*

Adopting the Madisonian theory of constitutional liquidation provides a more promising resolution of the term’s ambiguity.¹⁶³ Defending this framework, James Madison argued that ambiguous constitutional terms would find their “meaning . . . liquidated and ascertained by a series of particular discussions and adjudications.”¹⁶⁴ In short, Congress, the courts, and the general public would all, by original design, play a part in determining constitutional meaning.¹⁶⁵

Our task, then, is to determine whether these institutions have recognized a negative obligation to support or a positive one, and, if the latter, how far that positive obligation might extend. In particular, we might want to know whether the political branches have codified and normalized support for whistleblower and leaker protection in the constitutional order.

Whistleblower protection and solicitude has doubtlessly become an integral part of American law and policy. America passed its first whistleblower protection law in 1778, to protect the U.S. soldiers who wished to report inhumane treatment of prisoners of war.¹⁶⁶ Congress declared it “the *duty* of all persons in the service of the United States . . . to give the earliest information to

162. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 28 (2004) (emphasis omitted) (footnote omitted) (quoting Petition of the Selectmen of the Town of Abington, March 19, 1770, BOS. GAZETTE, Apr. 2, 1770, at 3, available at <http://www.masshist.org/dorr/volume/3/sequence/116>).

163. See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525-53 (2003); see also *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559-60 (2014) (presenting powerful reliance on liquidation theory). But see *Noel Canning*, 134 S. Ct. at 2605, 2614-18 (Scalia, J., concurring) (rejecting liquidation as constitutionalism through “adverse possession”).

164. THE FEDERALIST NO. 37 (James Madison), *supra* note 51, at 229.

165. Peter J. Smith, *The Marshall Court and the Originalist’s Dilemma*, 90 MINN. L. REV. 612, 624 (2006); see, e.g., Nelson, *supra* note 163, at 544-45 (applying liquidation theory to the Eighth Amendment).

166. Kohn, *supra* note 91.

Congress . . . of any misconduct” and paid for the soldiers’ legal fees.¹⁶⁷ This early legislation became the benchmark for later congressional action, beginning with the Civil Service Reform Act of 1978¹⁶⁸—which President Carter noted would “assure[] that whistleblowers will be heard, and that they will be protected from reprisal”¹⁶⁹—and culminating in the Whistleblower Protection Act of 1989¹⁷⁰ and the creation of the OSC. In crafting these reforms, Congress noted that federal whistleblowers “serve the public interest by assisting in the elimination of fraud” and that “protecting employees who disclose Government illegality . . . is a major step toward a more effective civil service.”¹⁷¹

More recent actions exhibit further solicitude for a positive obligation to support. In the late 1980s, President Bush signed an executive order making it an ethical obligation of federal employees to actively disclose potential instances of fraud, abuse, and corruption.¹⁷² Moreover, practically every piece of new major legislation has built-in whistleblower protections, from the Dodd-Frank Wall Street Reform and Consumer Protection Act,¹⁷³ to the American Recovery and Reinvestment Act of 2009,¹⁷⁴ to the Patient Protection and Affordable Care Act,¹⁷⁵ which allow federal employees to make their allegations in open federal court. In addition, the liquidation seems to have occurred among employees themselves. As we explored earlier, multiple government officials have come to explicitly interpret their oath to support the Constitution as mandating whistleblowing.¹⁷⁶ At bottom, the political branches and the people have encouraged, incentivized, cajoled, and defended the positive obligation to support.

167. 11 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 732 (Worthington Chauncey Ford ed., 1908) (emphasis added).

168. Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

169. Presidential Statement on Signing Civil Service Reform Act of 1978 into Law, 2 PUB. PAPERS 1765, 1765 (Oct. 13, 1978).

170. Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 and 22 U.S.C.).

171. *Id.* § 2(a)(1)-(2), 103 Stat. at 16, reprinted in 5 U.S.C. § 1201 note (2013). For further background, see generally Robert J. McCarthy, *Blowing in the Wind: Answers for Federal Whistleblowers*, 3 WM. & MARY POL’Y REV. 184 (2012).

172. Exec. Order No. 12,674, 3 C.F.R. 215 (1989), reprinted as amended in 5 U.S.C. § 7301 note.

173. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 922(a), § 21F, 124 Stat. 1376, 1841-48 (2010) (codified at 15 U.S.C. § 78u-6 (2013)).

174. Pub. L. No. 111-5, § 1553(a), 123 Stat. 115, 297.

175. Pub. L. No. 111-148, sec. 1558, § 18C, 124 Stat. 119, 261 (2010) (codified at 29 U.S.C. § 218c (2013)).

176. See *supra* text accompanying notes 101-03; see also Mayer, *supra* note 16.

3. *The “great exception”*

It has been argued, however, that national security is the “great exception” to our liquidated solicitude for leakers.¹⁷⁷ The Whistleblower Protection Act explicitly exempts members of the national security and intelligence community from its coverage.¹⁷⁸ The Espionage Act, whatever its original intention, has come to stand for a general indictment of national security leaks.¹⁷⁹ And, as at least one commentator has pointed out, “the founders, as well as many modern administrations . . . , have strongly insisted that the media, the citizenry, and even Congress are presumptively not privy to most wartime secrets and intelligence activities.”¹⁸⁰

The best way to think about these concerns is not to assume that the positive obligation to support somehow dies in the national security context. Rather, these concerns are a reminder that the Oath Clause will sometimes run into other constitutional concerns. In this case, the Commander in Chief and Executive Power Clauses are implicated,¹⁸¹ leaking national security information to the general public will frustrate the executive’s responsibility to uphold the trust imposed by these clauses.¹⁸² The Snowden incident demonstrates this in full.

But with the present, massive expansion of the classification system and the perpetual state of war, matters of national security should not fully consume the Article VI positive obligation to support. There are two ways out of the constitutional bind. First, if leaks of classified information are made to the general public that, while embarrassing in their exposition of corruption, do not actually implicate immediate national security concerns, then the positive obligation to support may well survive Article II concerns.¹⁸³ Second, the positive obligation to support includes a right to leak unlawful behavior *to members of Congress*, even when national security concerns are implicated. The fight over congressional disclosures by executive officers has been waged for decades,

177. Moberly, *supra* note 22, at 72 (capitalization altered).

178. See 5 U.S.C. § 2302(a)(2)(C)(ii) (2013).

179. See 18 U.S.C. §§ 793-799 (2013).

180. Glenn M. Sulmasy, *Untitled Essay*, in *Symposium Transcripts: Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America*, 57 AM. U. L. REV. 1203, 1229, 1233 (2008).

181. Op-Ed., *The Absent Commander in Chief*, WALL ST. J. (June 17, 2013, 7:19 PM ET), <http://www.wsj.com/articles/SB10001424127887324188604578545233232040760> (contending that the NSA leaks may result in a threat to the “war powers of the Commander in Chief” and traditional executive power).

182. *Cf.* *United States v. Nixon*, 418 U.S. 683, 705 (1974) (justifying executive privilege as being indispensable given the President’s Article II powers and responsibilities and noting, particularly, that “[c]ertain powers and privileges flow from the nature of enumerated powers”).

183. While this is theoretically sensible, it obviously raises a great many practical questions. See *infra* Part III.D.1.

with the legislative branch repeatedly granting such employees the right to leak information to Congress.¹⁸⁴ In its statement on the Intelligence Community Whistleblower Protection Act, for example, Congress made clear that the Constitution requires the legislature to “serve as a check on the executive branch,” especially in matters of national security, and that the executive could not require its employees to preclear leaks to Congress with their immediate superiors.¹⁸⁵

Two particular constitutional justifications for protection of leaks to Congress stand out. First, unlike the general public, members of Congress are subject to the same constitutional oath of office as executive officers;¹⁸⁶ their oath makes them constitutionally approved avenues for questions of unconstitutional behavior. Since the days of the Revolutionary War, the Continental Congress encouraged affirmative leaks on matters of warmaking to the legislative branch,¹⁸⁷ that view has persisted, and its interpretation of the positive obligation to support should endure.¹⁸⁸

Second, the Constitution grants immunity to members of Congress to receive, debate, and enter into the congressional and public record national security secrets under the Speech or Debate Clause.¹⁸⁹ In 1971, Senator Mike Gravel read extensively from the Pentagon Papers during a subcommittee meeting and entered all forty-seven volumes of the study into the public record.¹⁹⁰ In the landmark case of *Gravel v. United States*, the Supreme Court determined that Senator Gravel could “not be made to answer” for his actions, “either in terms of questions or in terms of defending himself from prosecution.”¹⁹¹ Rather, the Speech or Debate Clause was meant to be construed broadly to effectuate a structural desire to allow Congress to check the executive.¹⁹²

Modern legislators have used this immunity to consider deeper congressional intertwinement with national security concerns. Senator Ron Wyden, for instance, considered entering NSA surveillance information into the public rec-

184. *See, e.g.*, 50 U.S.C. § 403-3h(k)(5) (2012); Intelligence Community Whistleblower Protection Act of 1998, Pub. L. No. 105-272, § 701(b), 112 Stat. 2413, 2413-14, *reprinted as amended in* 5 U.S.C. app. § 8H note (2013).

185. § 701(b)(3)-(4), 112 Stat. at 2413-14.

186. U.S. CONST. art. VI, cl. 3 (including “Senators and Representatives before mentioned”).

187. *See supra* text accompanying note 166.

188. *But see* Thomas Jefferson, Opinion on the Powers of the Senate (1790), in *THE JEFFERSONIAN CYCLOPEDIA* ¶ 6890, at 713 (John P. Foley ed., 1900) (“The Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive department. It was not intended that these should be communicated to them.” (footnote omitted)).

189. U.S. CONST. art. I, § 6, cl. 1. My thanks to Wesley J. Campbell for pointing out this constitutional argument.

190. *Gravel v. United States*, 408 U.S. 606, 609 (1972).

191. *Id.* at 616.

192. *Id.* at 624 (citing *United States v. Johnson*, 383 U.S. 169, 180 (1966)).

ord in 2013, with some commentators noting the explicit support of the Speech or Debate Clause for such action.¹⁹³ In support of this behavior, constitutional scholar Bruce Ackerman noted that under that clause, “[m]embers [of Congress] should certainly have the right to tell the truth when administration officials have lost their credibility. This not only serves the cause of democracy, but it will deter further fabrications and distortions.”¹⁹⁴

Accordingly, the Article VI oath and the Speech or Debate Clause protection make Congress the proper vehicle for national security leaks. The alliance of executive officers and members of Congress ensures that a positive duty to support has the profound potential to check executive action while constraining that duty to mitigate the risk of harm to national security.

C. *What? “This Constitution” and Open Constitutional Questions*

Even if we accept that certain executive officers have a positive obligation to support the Constitution against unlawful behavior, the question remains: What is unlawful? After all, officers cannot be assumed to be infallible or disinterested in their ability to judge unconstitutionality, and many executive programs pose extremely difficult constitutional questions. Moreover, it would be dangerous to allow officers to have broad license to support the Constitution in instances in which the judiciary has already endorsed the particular executive conduct as constitutional.

It is fortunate, then, that the drafters of Article VI helped to answer this question. In particular, an executive officer is bound to support “this Constitution.”¹⁹⁵ It is a seemingly innocuous phrase that, when parsed in its constitutional context, is full of potency.

Two things stand out as particularly salient when parsing the textual hook of “this Constitution.” First, there is Article VI’s use of the specific, definite article “this” to describe the source of constitutional fidelity, instead of a more general reference to “the Constitution.” The use of definite articles in the Constitution’s text has been the subject of some study, and it usually denotes a more narrow and confined interpretation of the ambiguous term in question.¹⁹⁶

Second, the term “this Constitution” is repeated throughout the document and particularly in Article VI. “*This Constitution . . . shall be the supreme Law*

193. Brendan Sasso, *Wyden Considered Disclosing National Security Agency Secrets on Senate Floor*, HILL (Aug. 15, 2013, 9:01 PM EDT), <http://thehill.com/policy/technology/317319-wyden-considered-disclosing-nsa-secrets-on-senate-floor>.

194. Bruce Ackerman, *Breach or Debate*, FOREIGN POL’Y (Aug. 1, 2013), http://www.foreignpolicy.com/articles/2013/08/1/breach_or_debate_congress_snowden_prism%20.

195. U.S. CONST. art. VI, cl. 3.

196. See, e.g., John Paul Stevens, Assoc. Justice, U.S. Supreme Court, *The Freedom of Speech* (Oct. 27, 1992), in 102 YALE L.J. 1293, 1296 (1993).

of the Land,” the Supremacy Clause tells us.¹⁹⁷ The first clause of Article VI instructs further that “[a]ll Debts contracted and Engagements entered into, before the Adoption of *this Constitution*, shall be . . . valid.”¹⁹⁸ Furthermore, the document is bookended by references to “this Constitution.”¹⁹⁹

The best explanation of these textual insights belongs to Michael Paulsen, who writes that “this Constitution” means, “each time it is invoked, *the written document*” of the Constitution.²⁰⁰ “The document specifies the document as authoritative,” Paulsen continues. “By very strong linguistic implication, if not quite by explicit language, the document’s specification of the document as supreme and binding would appear to exclude anything outside the document as authoritative.”²⁰¹ Accordingly, when the Oath Clause—as well as the Supremacy Clause, the Preamble, and so on—speaks of an obligation to support “this Constitution,” it means supporting the text itself. As Paulsen helpfully notes, such textualism “must be employed by those whom the Constitution charges with interpreting and applying it,” including “those persons who, having agreed to exercise power under ‘this Constitution,’ have sworn an oath to ‘support’ it.”²⁰²

This is not to say that Paulsen’s interpretation is utterly unimpeachable. What he is tapping into is a textualism versus “everything else” debate that has produced more consternation than answers, and he is, of course, using textualism to justify textualism. But it is helpful to remember as a textual guide that both “executive and judicial Officers” of the United States are equally bound to support “this Constitution.”²⁰³

One lingering question on this point is whether the obligation to support “this Constitution” refers to each and every textual provision standing alone or to the Constitution as a holistic document and constitutional order. The latter construction is expressed most lucidly in Abraham Lincoln’s speech to Congress defending the executive’s suspension of habeas corpus, in which he claimed his “oath” might require him to “disregard[] the single law . . . to pre-

197. U.S. CONST. art. VI, cl. 3 (emphasis added).

198. *Id.* art. VI, cl. 1 (emphasis added).

199. *Id.* pmb. (“We the People . . . do ordain and establish *this Constitution* . . .”) (emphasis added); *id.* art. VII (discussing the ratification of “this Constitution”).

200. Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 869 (2009).

201. *Id.* (emphasis omitted).

202. *Id.* at 870.

203. U.S. CONST. art. VI, cl. 3. This argument reflects the divide that Sanford Levinson has noted between the “catholic” and “protestant” views on reading the Constitution as text. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 29-30, 43-53 (1988). The catholic view promotes textual interpretation as performed by skilled, elite readers whose views are dispositive. *Id.* at 29. The protestant view, conversely, emphasizes that it is the text, and only the text, that matters and that interpretive authority is diffuse. *Id.*

serve [the government].”²⁰⁴ Or, to put it in the language of Thomas Jefferson upon the Louisiana Purchase, “[S]trict observance of the written law is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation.”²⁰⁵ Accordingly, executive officers might be instructed to defend constitutional democracy, not individual provisions, which would implicitly grant deference to executive actions in times of national security concerns and “dangerous emergenc[ies].”²⁰⁶

Yet, as pragmatic as this may sound, there are reasons to prefer the textualist approach. First, the Article VI Oath Clause explicitly rejected language that would have required fidelity to the “United States”—which would have supported the holistic view—and specifically singled out the Constitution’s very text.²⁰⁷ Second, Lincoln’s and Jefferson’s actions were taken in clear view of the public; the issues were debated in public and subject to congressional and judicial scrutiny over whether they were constitutionally sound.²⁰⁸ In the case of national security secrets, the violation of constitutional provisions to save the constitutional order would otherwise be at the discretion of the executive alone. Third, there is generally a presumption against violating the letter of the Constitution in order to preserve the general idea of the constitutional order.²⁰⁹

At their *most* extreme, Paulsen’s textualist insights help justify a view of the Oath Clause that protects leakers even when the controversy in question has already been settled by the judiciary. Defense of “this Constitution” is defense of the text, not what the courts say that it is.²¹⁰ On this view, an executive officer who comes across controversial behavior may interpret it as unconstitutional and act accordingly even if the judiciary has weighed in somewhat to the contrary.

204. President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 594, 601 (Roy P. Basler ed., 1946). See generally DANIEL FARBER, LINCOLN’S CONSTITUTION (2003) (discussing constitutional tension in greater detail).

205. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810) (emphases omitted), in 9 THE WRITINGS OF THOMAS JEFFERSON 279, 279 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1898).

206. Lincoln, *supra* note 204, at 601.

207. See *supra* Part II.A.

208. See, e.g., *Ex parte Merryman*, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9487) (rejecting the President’s authority to suspend the writ of habeas corpus).

209. Cf. Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907, 911 (1994) (“It is not sufficient to satisfy the perceived ‘spirit’ of a constitutional provision. The letter of the law must be observed as well.”).

210. See *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring) (“[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.”); LEVINSON, *supra* note 203, at 43.

The criticism of this position is well and famously advanced by Larry Alexander and Frederick Schauer: when the courts and executive officials can reach different, equally binding conclusions on the same legal questions, the finality and consistency created by a single constitutional interpreter are upset.²¹¹ Executive officer obedience to imperfect law and judicial interpretation is superior to constantly contested meanings.²¹² The extreme view may evade this criticism, however, in that executive officers are not seeking to create constitutional meaning or establish precedent in their interpretation; they interpret the Constitution only to determine whether it poses a substantial constitutional question requiring further resolution. They simply bring a constitutional controversy to the public's—and judiciary's—attention, where the law may once again be settled by a single arbiter. It should also be noted that in the absence of executive disclosure, constitutional meaning will be just as unsettled, as the executive could be secretly interpreting the Constitution contrary to judicial understanding or in the void of judicial nonresolution.

Nonetheless, Alexander and Schauer's criticisms provide reasons for an alternative version of the theory, based in part on the work of Ronald Dworkin. Dworkin agrees with Paulsen insofar as “[a] citizen's allegiance is to the law, not to any particular person's view of what the law is.”²¹³ Accordingly, a citizen “does not behave unfairly so long as he proceeds on his own considered and reasonable view of what the law requires.”²¹⁴ But Dworkin crucially backtracks with a concession that his position “is not the same as saying that an individual may disregard what the courts have said.”²¹⁵ In short, the weaker theory holds that judicial supremacy is valid in interpreting “this Constitution” but that an executive officer's reasonable interpretation of constitutional text in matters that have eluded the courts is also valid.

Another way of describing the weaker theory is as a “*Youngstown* model” of constitutional interpretation by executive officers, stemming from Justice Jackson's tripartite model in that case.²¹⁶ By analogy, an executive officer's license to interpret “this Constitution” is at its highest point when it accords with a clear decision by the courts. Just as the President is at his most powerful when he takes action with the authorization of Congress, an executive officer has the most interpretive freedom to support the Constitution “pursuant to an

211. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371-81 (1997).

212. *See id.* at 1380.

213. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 214 (1977).

214. *Id.*

215. *Id.*

216. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

express or implied” interpretation by the judiciary.²¹⁷ For instance, an executive officer has broad license to affirmatively act when he comes across evidence of indefinite executive detention of U.S. citizens without due process procedures. This conduct would be unlawful under *Hamdi v. Rumsfeld*,²¹⁸ he is simply ensuring the faithful execution of “this Constitution” and preserving the balance of powers.

By “courts,” I do not mean to restrict the judiciary to the Supreme Court. The benefit of a Supreme Court decision is that it provides clear and express guidance in a way that a fractured set of lower court decisions may not. But a general agreement by the lower courts will likely evade a Supreme Court affirmation while still providing clear resolution and guidance on a particular legal question.

At the other end of the spectrum, the leaker does not have license to interpret the Constitution’s text utterly contrary to the judiciary’s interpretation. To “take[] measures incompatible with the express or implied” interpretation of the courts would be to jeopardize judicial supremacy,²¹⁹ a hallmark of the pragmatic weaker theory. If, for instance, the Court had reached the merits in *Clapper* and found the government’s surveillance program constitutional under the Fourth Amendment, then an executive officer would not be permitted to leak or otherwise affirmatively act upon related national security secrets, because his power to interpret “this Constitution” would be at its “lowest ebb.”²²⁰

The middle of the spectrum includes those instances in which the courts have not dealt with the matter in question or have not agreed in their interpretation. There, the constitutional text moves to the fore. In this “zone of twilight,” the executive officer and the courts have “concurrent authority” of uncertain distribution;²²¹ they both are bound equally to the text under Article VI. This is where Dworkin, Levinson, and Paulsen speak loudest, urging that officers must reasonably interpret the text and must act upon any resulting unlawfulness within the executive.

It is worth noting the practical upshot of the *Youngstown* model—namely, that it provides an incentive for the executive to subject its policies to judicial review. If the executive wins its case before the courts, as it is likely to do in national security matters, then the meaning of “this Constitution” moves from the zone of twilight to the leaker’s lowest ebb. The “pall of doubt” that falls

217. *Cf. id.* at 635 (setting up the express or implied grant of power model as between Congress and the President).

218. 542 U.S. 507, 533 (2004).

219. *Cf. Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (describing, in the context of presidential power, the executive’s lowest ebb of power occurring where the action is adverse to the clear and express intent of Congress).

220. *See id.*

221. *See id.*

over fully constitutional action by the executive will be lifted.²²² And the constitutional duty and defense for executive officers to affirmatively support and leak information will recede.

D. *Accordingly? Defenses, Obligations, and Policy Fixes*

I end by drawing out three particular practical implications of the positive duty to support the Constitution. First, the duty provides the basis for constitutional defenses against criminal or civil sanctions, much as in cases of necessity or speech retaliation. Second, it places constitutional obligations on government actors to refrain from the base, blunt instrument of criminal sanctions. Third, it encourages legislative fixes that would supplant executive officers as the means of constitutional oversight and thus constitutionally allow the executive to defang leaker empowerment.

1. *Defenses*

We will begin with the most drastic, most concrete situation, in which the executive officer faces sanctions—criminal or civil—for his affirmative action in the form of some type of disclosure. In what ways can the constitutional argument be employed as a defense? A few in particular stand out: an as-applied challenge to criminal sanctions (best employed for intragovernmental leaks or nonpublicized frustration of unconstitutional conduct), and a revitalization of the necessity defense (most powerfully employed for drastic leaks to the public).

As-Applied Challenge to Criminal Sanctions. First, if the leaker truly meets the bounds of constitutional duty, she may challenge any government action against her as unconstitutional. She can contend that the application of, for instance, the Espionage Act to her actions violates Article VI. And so, while the Espionage Act may itself not be unconstitutional, its application to “a particular set of circumstances”—the leaker’s demonstrated constitutional duty—may be unlawful.²²³

The leaker would, of course, have to prove that she was within the purview of constitutional duty, demonstrating her place within the executive, the rationale for the particular affirmative steps taken, and the constitutional considerations key to her decision. The standard would be something approaching reasonableness (like a searching form of appellate deference): if the executive officer’s interpretation of the unlawfulness or unconstitutionality was reason-

222. McConnell, *supra* note 119, at 35.

223. See Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994).

ble on the basis of applicable law, the defendant may succeed on her challenge.²²⁴

The Necessity Defense. Necessity is a traditional common law defense²²⁵ used where an actor “rationally chose an illegal course of action that is the lesser of two evils.”²²⁶ In more specific terms, it allows an otherwise guilty defendant to demonstrate that his conduct was necessary and appropriate to avoid the greatest harm, which was created by no fault of the defendant.²²⁷

The specific requirements of the necessity defense vary based upon the court and jurisdiction, but generally a defendant must demonstrate that he acted to avoid imminent harm, that no reasonable legal alternatives existed, that the harm of his act was not disproportionate to the harm avoided, and that there was a direct causal relationship between his act and the harm avoided.²²⁸ In short: imminence, exhaustion, proportionality, and causality.²²⁹

The necessity defense works particularly well because it forces leakers to present factual evidence to combat our most common concerns with their behavior. Leaking millions of state cables, most of which demonstrate no impropriety, is by no means proportionate; the leak of one potential drone strike may well be. Leaking as a first impulse, without working through the normal channels—or where the normal channels are not effectively closed because they are themselves corrupted or retaliatory—is by no means exhaustive; leaking as a functional last resort certainly is.

An executive officer who leaked to Congress would almost certainly win on a necessity defense—secrecy is preserved, so little harm is done—while the public leaker might still prevail if he is extremely conscientious in his disclosures. The duty to support requires nothing less.

2. *Obligations*

The Moral Duty of an Executive Officer. Another possible consequence of the Oath Clause for persons in positions of trust is that it places on them a *mor-*

224. Of course, this is not to say that the federal court would be in any way endorsing this constitutional interpretation as a matter of law or providing any precedent on the question.

225. Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 291 (1974).

226. Stephen S. Schwartz, *Is There a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259, 1264 (2008).

227. Arnolds & Garland, *supra* note 225, at 289 n.3.

228. *See* United States v. Bailey, 444 U.S. 394, 409-15 (1980); United States v. Schoon, 971 F.2d 193, 195-97 (9th Cir. 1991).

229. The applicability of the necessity defense has not been analyzed in any detail, but the relationship between *civil disobedience* and necessity certainly has. *See, e.g.*, William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 5 (2003).

al obligation. On this view, the only just action in these cases is to disobey the law and affirmatively support the Constitution, but this does not mean that those who do so will subsequently be shielded by the Constitution against legal repercussions. In short, the Oath Clause may place a limited obligation on officers to commit acts of civil disobedience.²³⁰

The point of conceptual difficulty with the civil disobedience reading is that it means that executive officers will be sent to jail for doing precisely what the Constitution requires of them. But this has always been a hallmark of a proper act of civil disobedience, and supporting the Constitution means accepting the legitimacy of democracy and its system of justice. And it is not inconceivable that the drafters of the Constitution, engaged at their time in the ultimate act of civil disobedience, would require of persons placed in great trust this manner of sacrifice.

Executive Nonenforcement. If we accept that criminal prosecution via secrecy laws would be unconstitutional as applied to executive officers exercising their constitutional duty, then perhaps we should think about moving the obligation upstream. In other words, if we take seriously the idea that a President may not, under the Take Care Clause and his oath of office, enforce unconstitutional laws,²³¹ then he may have a positive obligation himself to support the Constitution by not prosecuting the officer. And because the executive has wide discretion in choosing not to prosecute criminal offenders, and so often does just that for politically strategic leaks, this proposal is not far afield of present practice.

But perhaps the President wishes to at least signal *some* disagreement with the actions of one of his officers and allow the justice system to punish him accordingly. In that case, he may choose to allow prosecution to move forward and then subsequently pardon the leaker after he is found guilty. This is the proposal put forward by many commentators, who argue in part that the President has an obligation to pardon when “the leak reveals behavior deemed unconstitutional by multiple federal judges.”²³² While it does not make a great

230. For an introductory discussion of the theoretical background for civil disobedience, see JOHN RAWLS, *A THEORY OF JUSTICE* 363-68, 371-77, 382-91 (1971) (proffering a theory of civil disobedience “concern[ing] the role and the appropriateness of civil disobedience to legitimately established democratic authority”). For a survey of technical definitions of civil disobedience, see Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. (forthcoming May 2015) (manuscript at 3 n.6), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532245 (citing RAWLS, *supra*, at 364; JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 263 (1979); Hugo A. Bedau, *On Civil Disobedience*, 58 J. PHIL. 653, 661 (1961); and Kimberley Brownlee, *Civil Disobedience*, STAN. ENCYCLOPEDIA PHIL. (Dec. 20, 2013), <http://plato.stanford.edu/entries/civil-disobedience>).

231. See Aziz Z. Huq, *Enforcing (but Not Defending) ‘Unconstitutional’ Laws*, 98 VA. L. REV. 1001, 1012 (2012); see also *supra* note 106 and accompanying text.

232. Conor Friedersdorf, *Clemency for Edward Snowden Would Not Set a Dangerous Precedent*, ATLANTIC (Jan. 2, 2014, 6:31 AM ET), <http://www.theatlantic.com/politics>

deal of sense to use ex post constitutionality determinations as the key standard to adjudicate ex ante reasonableness, the general sentiment of their argument is correct and supports much of this examination. Moreover, the pardon route is attractive because it validates the wisdom and constitutionality of confidentiality laws by endorsing their enforcement and then making sentencing adjudications on a highly specialized basis.

Judicial Review. Finally, this discussion lends greater credence to the argument that the judiciary needs to abandon its abdication in matters of national security.²³³ One of the primary reasons that a constitutional duty exists in such a powerful form for executive officers is because the normal constitutional dialogue between the courts, the executive, and Congress has collapsed. This is not a call for the judiciary to begin invalidating executive action but rather one discouraging the use of the artifice of justiciability. If the executive has power to conduct mass surveillance, detain prisoners of war, or violate due process in certain circumstances, it should be a power legitimately earned through judicial determination.

3. Policy

Finally, the Constitution's solicitude for those in positions of trust who take seriously the duty to support might impose something of an informal obligation on the American people themselves. In particular, it might force us to consider whether we—and Congress, acting as our trustee—should fight for a more coherent strategy with regard to both executive oversight and whistleblower protection. If we want to undercut the justification for leakers, we need to officially empower oversight mechanisms.

This might mean more forceful IGs,²³⁴ a more robust OSC, and reforms to the Foreign Intelligence Surveillance Court.²³⁵ And it might also mean getting rid of the carve-outs in whistleblower protection statutes for matters of national

/archive/2014/01/clemency-for-edward-snowden-would-not-set-a-dangerous-precedent/282759.

233. See *supra* note 115 and accompanying text.

234. See Sinnar, *supra* note 115, at 1078-85 (“The scope and powers of IGs should be strengthened to expand IG rights oversight and investigative authority . . .”).

235. This is a common suggestion, see, e.g., Nola K. Breglio, Note, *Leaving FISA Behind: The Need to Return to Warrantless Foreign Intelligence Surveillance*, 113 YALE L.J. 179, 181 (2003), though perhaps not as efficacious as previously thought, see Conor Clarke, Note, *Is the Foreign Intelligence Surveillance Court Really a Rubber Stamp? Ex Parte Proceedings and the FISC Win Rate*, 66 STAN. L. REV. ONLINE 125, 126 (2014), http://www.stanfordlawreview.org/sites/default/files/online/articles/66_Stan_L_Rev_Online_125_Clarke.pdf.

security,²³⁶ removing all repercussions for leaks made to Congress, and scaling back the vast (over-)classification system.²³⁷ The best way to prevent overbroad leaks from reoccurring is not to merely hope that executive officers will all carefully follow the bounds of their positive obligation but rather to open other avenues and empower other actors so that the obligation is circumvented altogether.

CONCLUSION: TAMING THE LEAKY LEVIATHAN

If there is a positive consequence of the Snowden leaks,²³⁸ it is that we—the Congress, the courts, and the people—are taking seriously the opportunity to engage in deep constitutional conversation. We should go one step further and reflect on the possibility that the Constitution requires more of persons bound to support it than mere refusal of complicity in unconstitutional behavior. Leaking is merely the new vocabulary of constitutional support, and we must begin to take its language of constitutional comportment seriously.

But as I have sought to demonstrate in this endeavor by turning our attention from the First Amendment to Article VI and the Constitution's structure, we are not required to grant constitutional solicitude to all manners of leakers. Nor is the United States helpless to tame the leaky leviathan of the government²³⁹ should it wish to appoint new sentinels within the executive or responsibly empower its officers. What is required of us, however, is to recognize that the duty to support the Constitution is, by constitutional text itself, a shared and sacred obligation of those in public trust. The Founding Fathers well knew the story of Prometheus;²⁴⁰ we should, from time to time, reread it for ourselves.

236. See Eric A. Posner, *Before You Reboot the NSA, Think About This: The Paradox of Reforming the Secrecy-Industrial Complex*, NEW REPUBLIC (Nov. 6, 2013), <http://www.newrepublic.com/article/115291/rahul-sagars-secret-leaks-reviewed-eric-posner>.

237. See Moberly, *supra* note 22, at 121-33.

238. And, as this Note has implied and now expresses, Snowden's actions were by no means constitutionally defensible under an Article VI duty.

239. A term I borrow from Pozen, *supra* note 8, at 513.

240. Immanuel Kant once even called Benjamin Franklin the "new Prometheus." WALTER ISAACSON, *BENJAMIN FRANKLIN: AN AMERICAN LIFE* 145 (2003).