Government, Whistleblowers and the Press:
An Analysis of the Faults of the United States Classification System

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INTRODUCTION

The United States of America has an interesting and complex history of creating what is considered to be one of the freest countries on earth. These freedoms that are engrained into the American ideology are envied in countries around the world. In a world where press freedoms vary greatly, the United States continues to be the leader in valuing and protecting the rights of their press (Freedom of the Press, 2007). Journalism has broken down the wall between a country’s government and the people governed. The press has been given and accepted the responsibility to inform the public about issues that will affect the public’s lives. However, where the press has found their strongest hold in society is in being the “watchdog”, of the government (Comegys, 1983). The people of the United States rely on their journalists to investigate, criticize and monitor the dealings of government and to inform the public if the government has acted in a way that deviates from their purpose. Since the creation of the United States this has been the role of the press, whether it is in the form of a newspaper, television broadcast or online article. But within the past several decades, the job of journalists to be the watchdog of the government has become increasingly difficult with the growth of the United States classification system.

This paper will focus on the classification system in the United States. The system lays out guidelines for the handling of intelligence, whether it should be made public or kept private. It is the process by which information becomes classified that raises concern. It is true that without secrecy, the security and effectiveness of a government is weakened (Good, 2010). However, the United States has fallen into a pattern of over classification. Classified material is kept solely between the originator of the document and the authority responsible for classifying the document. The information in that document is not seen by any other person and therefore
room for negotiation is void. By law, information cannot be classified simply because it is embarrassing and illegal activity cannot be covered up (Executive order 13526). But who is there to stop government officials from classifying information that should be made public? This paper will analyze the classification system and how it can be altered to balance both government transparency and national safety with the free flow of information. This paper will also look into how classified documents have become increasingly important in the last decade with the emergence of Wikileaks and whistleblowers like Bradely Manning and Edward Snowden. These whistleblowers are facing harsh penalties for exposing classified information, but who is really at fault, the whistleblowers or the classification system?

THE CLASSIFICATION SYSTEM

The concept of classifying information was established during the Franklin D. Roosevelt presidency. Since then, presidents have passed executive orders redefining the guidelines and rules of the classification system. The United States currently operates under President Obama’s Executive Order 13526: Classified National Security Information. This order defines the guidelines under which people responsible for classifying information should perform their job. The order also defines how information should become declassified after a considerable period of time. The introduction of President Obama’s executive order acknowledges the importance of informing the American people stating, “Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information both within the Government and to the American people”, (Executive order 13526). However, the order continues to state that in order for the government to protect the citizens of the United States it is necessary, “that certain information be maintained in confidence” (Executive order 13526).
Executive Order 13526 defines specific, step-by-step guidelines to which a document can be classified. The first condition that must be met to classify a document is “a classification authority is classifying the information”, secondly the information is owned by the United States government. Furthermore, the information must fall within one of the statutes for classifying information and finally, disclosure of the information will directly result in harming the U.S national security or defense. If there is any doubt that the information meets any of these terms, the information cannot be classified (Executive order 13526). In regards to what information can be classified, many assume it is anything that has to do with national security. However, the executive order gives descriptive and straightforward examples of what can be considered to be classified. The information must pertain to one of the following:

(a) military plans, weapons systems, or operations;
(b) foreign government information;
(c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;
(d) foreign relations or foreign activities of the United States, including confidential sources;
(e) scientific, technological, or economic matters relating to the national security;
(f) United States Government programs for safeguarding nuclear materials or facilities;
(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or
(h) the development, production, or use of weapons of mass destruction.

Information cannot be classified if it is embarrassing or covers up illegal activity. President Obama’s order specifically states that information cannot be classified to cover, “violations of law or administrative error”, “prevent embarrassment of a person or organization”, or interfere
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with the release of other information that does not need to be classified in interest of national security (Executive order 13526).

As stated, classification of a document must be done by a classification authority. This title however, is not a typical job that any person can apply for. So who is qualified to evaluate whether or not a document meets all the criteria previously stated? Executive Oder 13526 says that the authorization to classify a document can be determined only by: 1) the president and vice president. 2) Officials appointed by the president. 3) Government officials delegated to do so.

Finally, Executive Order 13526 which defines our classification system encourages holders of classified information to object to the status of information if they feel it is improperly classified. The order protects individuals who challenge classified documents stating, “Individuals are not subject to retribution for bringing such actions”. If a classification authority wants to challenge classified information they are directed to take their appeal to be reviewed by the Interagency Security Classification Appeals Panel (Executive order 13526).

LEGAL HISTORY OF PRESS, U.S CLASSIFICATION SYSTEM AND WHISTLEBLOWERS

The United States government and the press have a drawn out history over the rights of the press to classified intelligence and the right of the government to secrecy. The U.S Supreme Court has reviewed two instances regarding the press’ access to classified information.

The first instance the U.S Supreme Court reviewed a matter of the press publishing classified information was in the landmark case New York Times Co. v. United States (1971). In what is more popularly known as the Pentagon Papers, the case was regarding the Nixon administration’s attempt to stop the New York Times from publishing classified information
about the history of the U.S’s involvement in Vietnam. The U.S government argued that they could enact prior restraint regarding the classified information because exposure of the information could result in harming the country. However, prior restraint is generally disfavored and found to be unconstitutional. The U.S Supreme Court held that the U.S would have to show overwhelming evidence of “justification for the imposition of such a restraint” (New York Times Co. v. United States). In its historic decision the Supreme Court voted six to three in favor of the New York Times. The conclusion was that, “the Government had not met its burden of showing justification for imposition of restraint on publication of the contents of the study” (New York Times Co. v. United States). The six justices who consented agreed that continuing the injunction on the New York Times was a direct violation of the first amendment. In his concurring statement, Justice Black argued, “that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment”, (Justice Black in concurring statement, New York Times Co. v. United States). Justice Brennan argued that because publication of the classified information would not cause immediate harm to Americans, prior restraint could not be enforced (New York Times Co. v. United States). This case was also important in establishing when the government could legitimately use prior restraint. From the ruling in the Pentagon Papers it was made clear that in order to invoke prior restraint the government must show overwhelming evidence that disclosure of the information would cause immediate and irreversible harm.

The effects of the decision in the case of the Pentagon Papers were monumental in the relationship between the government and the media, as well as the media and the public. Never before had the media exposed, in such detail, that the public was being lied to by their government. It solidified the role of the press in society to expose lies and abuses of power by
the government, regardless if the information being exposed is deemed classified. However, where this ruling did not provide any protection was to Daniel Ellsberg, the whistleblower of the classified Pentagon papers (Swaine, 2011).

Another U.S Supreme Court decision that has set precedent over how journalists come upon information was the case of Bartnicki v. Vopper. This case involves a recorded phone conversation between a union negotiator and a union president. An anonymous person leaked the phone call to a radio station who then broadcasted the conversation. The radio station was sued because the phone conversation was illegally recorded. The question faced by the court was does the first amendment protect a press agency for publishing true information that was given to them, even if it was illegally obtained by the source. Once again in a six to three ruling the Supreme Court ruled that the press could not be punished for publishing truthful information that they legally obtained (Bartnicki v. Vopper).

The impact of Bartnicki was once again strengthening the rights of the press to publish truthful, yet controversial information. The court established that the press was protected by the first amendment to publish information, even if their source illegally obtained it. This however, leaves no protection for the whistleblowers giving the press the information. In the case of Bartnicki v. Vopper, the original source was unidentified (Bartnicki v. Vopper). However, whistleblowers such as Daniel Ellsberg, Bradley Manning and Edward Snowden have been subjected to harsh punishments for leaking classified information to the press.

These two cases solidify the constitutional groundwork that protects journalists to publish classified information given to them by whistleblowers. The government cannot take action against press agencies that expose unlawful or deceitful activities of the government. However,
whistleblowers do not share the same first amendment protection and their fate is left to the courts.

Although whistleblowers have no protection under the first amendment, Congress has passed other legislation to protect whistleblowers from retaliation. The Civil Service Reform Act of 1978 first established legal protections for federal employees who exposed government wrongdoings. The law was meant to encourage federal employees to expose government illegitimacy and abuse. The Merit Systems and Protection Board and the Office of Special Council were established to hear the cases of federal whistleblowers however, these committees proved insufficient and many whistleblowers did not win their cases (Whistling while you work, 2008). This led to the passing of a whistleblower protection law. In 1989 Congress passed the Whistleblower Protection Act (WPA). The law provided statutes which protect federal employees who make disclosures of illegal government activity. Under the law current employees, former employees and applicants to positions in the executive branch of government are covered employees. However, under the 1989 act the President has the right to exempt certain employees from protection. Furthermore, coverage was not granted to many employees of the intelligence community (Whitaker, 2007). Over the last three decades Congress has extended the protections of the Whistleblower Protection Act. The most recent form of the law was passed in 2012 called the Whistleblower Protection Enhancement Act of 2012. The 2012 act sought to strengthen the original laws and create whistleblower protection for intelligence employees. These whistleblower laws have gaps however, that leave whistleblowers exposed to retaliation and legal prosecution (Whistleblower protection enhancement act, 2012). Most of the protection provided by the whistleblower laws is only effective involving work-place related retaliation, not outside impacts such as receiving criminal charges.
In the trial against Daniel Elsberg, the whistleblower who leaked the Pentagon Papers, prosecutors tried to convict Elsberg of theft and violations of the Espionage Act. Had Elsberg been convicted of all charges brought against him he would have faced a prison sentence of 105 years. Ellsberg leaked confidential information to the *New York Times* about the way the United States conducted its operations during the years in Vietnam. Despite the prosecutions irrefutable evidence, it was further deceptive actions by the government that ultimately led to Ellsberg’s freedom. The judge presiding over Ellsberg’s case granted a mistral and dismissed all charges because of the government’s gross misconduct in stealing documents from Ellsberg psychiatrist (Linder, 2011).

More recently, the country has seen the prosecution of the whistleblower responsible for the greatest breach of classified American material in history, Bradley Manning. Manning is responsible for leaking a quarter of a million U.S military documents from Iraq and Afghanistan and diplomatic cables to the site WikiLeaks. The most noteworthy leak from this was a video known as “*Collateral Murder*”. The video depicted a U.S helicopter firing upon men in Baghdad. It turned out that the Americans had fired on journalists carrying cameras, which the soldiers mistook for weapons. The video also shows the soldiers firing on a van that stopped to help the wounded men. Inside the van were two children who were wounded and their father was killed. Furthermore, the audio from the video shows the vulgar and disrespectful language used by the soldiers during the attack. He was indicted on various accounts of violating the Espionage Act, including the most serious crime of adding the enemy. All together, Manning faced a prison sentence of 136 years, or the death penalty if convicted of aiding the enemy. In August, Manning was convicted on six counts of violating the Espionage Act, but was acquitted on the charge of aiding the enemy. He has been sentenced to 35 years in prison (Gerstein, 2013).
Finally, Edward Snowden is the most recent whistleblower to leak substantial information from the intelligence community. Snowden began working for the NSA in 2009 under a private contractor. After spending only three months on the job Snowden began collecting confidential documents about the NSA’s domestic surveillance tactics which he found to be disturbing (Biography, Edward Snowden). In May of 2013, The Guardian published documents obtained from Snowden about the Foreign Intelligence Surveillance Court demands for Verizon to release call logs of their customers daily. The next day, The Guardian and The Washington Times published documents obtained from Snowden on an NSA program called PRISM, which allows for real time information collection on American citizens (Biography, Edward Snowden). Following this, a flood of information was published revealing the NSA’s tactics on spying on American citizens. While the information was being published, Snowden fled to Hong Kong, China. He has since been charged under the Espionage Act and remains in exile in Russia (Biography, Edward Snowden).

ANALYSIS: WHAT ARE THE PROBLEMS WITH THE U.S CLASSIFICATION SYSTEM?

It seems today that despite the many protections and rights granted to the press when it comes to classified information, the government has found a way around the press finding controversial material. First, the press is limited when it comes to discovering controversial and hidden information. The press works within a journalistic framework, which means they must follow traditional laws like the Freedom of Information Act, when gathering and publishing information (What is FOIA?). The Freedom of Information Act is a law that gives the public access to information on the federal government. It was established to promote the free flow of information and solidify the presumption of openness the public has toward the government.
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However there are exceptions to when a FOIA request can be used. One of those exceptions is when the material involves national security. The national security exception has made it increasingly easy for the government to keep certain information out of the hands of journalists. By citing the national security exception the government can keep material hidden without the press even getting a chance to analyze it. Therefore, whistleblowers have become the press’ eyes into the classified system of the United States.

The government has begun to skirt around the press’ availability to government information by engaging in a practice called over-classification. The major problem of the United States classification system is over-classifying, meaning information that has no business being locked away in the government vaults under the title classified are being tucked away into the system (Burgess, 2012). One way over-classification has become increasingly common is due to what is known as the mosaic theory. The mosaic theory describes the system used by the classification system in that if one part of a document is classified the entire document becomes classified. For example, if one sentence out of a one-hundred page document was considered confidential, then the entire one-hundred pages would go into the classification system. Each year government agencies pump petabytes of intelligence into the classification system. A petabyte is equal to 20-million four drawer filing cabinets (Burgess, 2012). Government officials commonly cite national security as the reason for classifying these documents. The question that comes to the minds of journalists is how can 20-million four drawer filing cabinets all be filled with information that would be a direct threat to national security? The answer is, they’re not. Through years of experience government authorities have come forward making statements about the classification system, saying that although the system does protect genuine national security secrets and military operations, it has also been abused to cover up bureaucratic wrong
doings (Aftergood, 2008). Over the last decade government information has become increasingly restrictive to the press, and information is being added to the system that has been inaccurately or inappropriately deemed classified (Burgess, 2012).

Steven Aftergood is the director for the Project of Government Secrecy at the Federation of America. Through his research as both a journalist and researcher he has found information in the public domain that he finds more detrimental to national security then some classified information. For example, Aftergood has been able to find how to prepare and use improvised explosives, as well as techniques for training snipers available in the public domain (Aftergood, 2008). Aftergood has chosen not to publish information like this, as opposed to classified information he was able to obtain.

It is arguable however, that the problem with the classification system, even greater than that of over-classifying, is the lack of oversight of classifying documents. As stated in President Obama’s executive order 13526, classification authorities are responsible for deciding the secrecy level of information. Outside of the classification authority and the originators of the information there are very few hands classified information will reach (Burgess, 2012). Therefore, the question becomes how to keep information that should be available to the public from being tucked away into the classification system? It is advised in Executive Order 13526 that if a government official believes that information has been wrongly classified, they can bring it to the Intelligence Security Classification Appeals Panel for review by an impartial panel (Executive order 13526). However, in an interview with Daniel Ellsberg he explains how first he tried every diplomatic rout to publish the information, efforts which proved fruitless (Neuman, 2011). This information can reflect upon the Intelligence Security Classification Appeals Panel’s
A proposal that could address the issue of over-classification is to expand the oversight of people determining the secrecy level of a document. This would involve modifying the section of Executive Order 13526, regarding the Intelligence Security Classification Appeals Panel. There should be a panel of people overseeing documents that could possibly be considered classified. This panel would consist of government officials knowledgeable in the area the information is coming from. However, what would be new and arguably the most essential part of this panel would be experienced and renowned journalists who will also have a say in whether the information is to be classified. Journalists have an ethical obligation not to publish information that could cause harm to innocent people. Therefore, adding experienced journalists with knowledge and expertise in the area of national security would ensure that government officials are not hiding information the public deserves to know. However, these journalists would be required to retire from their positions in the news business. They would be granted a security clearance by the government and could be arrested if they leaked information that was meant to be classified. The reasoning as to why it is essential to involve journalists in the classification process is because journalists understand and have an obligation to look out for the public. Involving journalists on the panel will establish a well rounded and informative debate over whether material should be classified. Government officials will present their reasoning and
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expertise as to why the information would be detrimental if it were exposed and the journalists will be able to explain why the public has the right to know this information. Finally, the panel would have to put the information through a test, like the strict scrutiny test utilized by the U.S Supreme Court. The test would question how this information would impact the world if it were released, does this information play an essential role in informing the American electorate, and would this information impair national security. As established in the Pentagon Papers, the government would have to show overwhelming evidence that by releasing the information it would cause immediate and irreversible harm to the country’s national security.

CONCLUSION

The Supreme Court cases of New York Times v. United States and Bartnicki v. Vopper were monumental in defining the rights of the press to expose classified information. Bottom line is if the information is leaked to a press agency, they are well within their duty to the American people as well as their right in the first amendment to publish said information. These monumental cases have resulted in the exposure of various government related wrongdoings that were attempted to be covered by the classification system.

However, since these cases the government has gone to lengths to restrict press access to information by means of the classification system. The first problem is the over-classifying of information that does not warrant the status of classification. Secondly, the problem is the lack of oversight when it comes to classifying documents. A proposal to address the inappropriate classification of material would be to strengthen the authorities in charge of deciding the secrecy of information. Information would be put through a test where it would have to meet specific requirements not only addressing its sensitivity, but also its importance to the public.
The one area that the law seems to go against is when it comes to whistleblowers. People who decide to expose information they believe is essential for the American public to know are ridiculed, persecuted and exiled by government officials. The conversation becomes not about the information they have exposed but about the risks of transparency, the risks of truthfulness, instead of the risks of secrecy and lies. However, it cannot be denied that the information brought forth by these whistleblowers is important to the people in understanding their government. Without the risks and selflessness of these whistleblowers government secrets would remain in the shadows. Perhaps with deeper regulation into the classification system, journalists would be able to get the information they need to continue to be the government watchdog, and prosecutions of people trying to do the right thing by telling the truth will be a thing of the past.
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