

Contents

Preface	vii
1 The Fundamental Tension: An Introduction	1
<i>Paul Rosenzweig, Timothy J. McNulty, and Ellen Shearer</i>	
I. A Constitutional Perspective	3
II. James Rosen and the Response of Government	4
Part I: Prosecuting Leaks	11
2 History of Leaks in the United States from the Pentagon Papers through WikiLeaks to Rosen	13
<i>Gregg P. Leslie and Emily Grannis</i>	
3 Prosecuting Leaks under U.S. Law	29
<i>Stephen J. Vladeck</i>	
I. The Espionage Act	30
II. The Federal Conversion Statute	35
III. Other Prohibitions on Unauthorized Disclosure	36
IV. Potential First Amendment Defenses	38
Resources	41
4 U.S. Efforts to Change Leak Laws	43
<i>Edward R. McNicholas</i>	
I. Defining the Problem	44
II. The Willard Report	46
III. President Clinton’s Constitutional Concerns	49
IV. The Ashcroft Report	51
V. The Plame Hearings	53
VI. President Obama’s Response to Leaks	54
VII. Obama-Era Congressional Efforts	56
VIII. Conclusion	58
Resources	58

Part II: The Constitution and Other Applicable Laws	61
5 First Amendment Considerations on National Security Issues: From Zenger to Snowden	63
<i>Gene Policinski</i>	
I. Setting the Stage: A Bit of History	65
II. Yes, No, or Maybe: Pursuing and Prosecuting Journalists for National Security Leaks	69
III. Why Is It “Journalism” in This Case, “Treason” in That One?	73
IV. The Free Flow of Information Act: A Shield for Some, Not for All?	75
Experts	79
Resources	79
6 The National Security Whistleblower’s Tightrope: Legal Rights of Government Employees and Contractors	81
<i>Thomas M. Devine and Steven L. Katz</i>	
I. Setting the Stage: A Changing Government in the Changing World	81
II. When Does Whistleblowing Begin?	88
III. Whistleblower Laws and Regulations	88
IV. Navigating the Whistleblower Legal Framework from Inside Government	97
V. What’s a Federal Employee to Do?	101
VI. What Is a Federal Contractor to Do?	103
VII. Conclusion	104
7 Regulating Classified and Controlled Unclassified Information	107
<i>Andrew D. Fausett and Steven G. Stransky</i>	
I. Introduction	107
II. The Legal Authority to Classify and Regulate Access to Information	108
III. Classifying Information: The Process	112
IV. Classification Related to Intelligence Activities and Controlled Access Programs	115
V. Declassifying and Downgrading Information	118
VI. Controlled Unclassified Information	123
Appendix I ISSO Classification Example	127
Appendix II Example of Classification, SCI, and Control Markings	129
8 The Classified Information Procedures Act	133
<i>S. Elisa Poteat</i>	
I. Introduction	133
II. History of Protecting Classified Information in Criminal Cases	135
III. CIPA’s Procedures: A Review of CIPA’s Comprehensive Scope from Filing to Appeal	140
IV. Conclusion	150

Part III: A Changing World of Leak Investigations	151
9 International Perspectives on National Security, Leaks, and Whistleblowers	153
<i>Judith K. Boyd</i>	
I. International Trends and Standards	154
II. In-Depth Country Study: The United Kingdom	159
III. Conclusion: Trends for the Future	170
10 Law Enforcement Investigations Involving Journalists	173
<i>Jack Lerner and Rom Bar-Nissim</i>	173
I. Introduction	173
II. Going after the Source: Compelling Disclosure through Warrants and Subpoenas	174
III. Surveillance: Contemporaneous Interception of Information	178
IV. Retrieving Information from Others: Subpoenas Directed at Third Parties	180
V. A Brief Discussion of FISA and USA PATRIOT Act	182
VI. The Department of Justice's Policy Regarding Obtaining Information from the Press	184
Resources	187
11 Keeping Secrets: How the Government and the Press Adapt in a World Awash in Information	189
<i>Dina Temple-Raston and Harvey Rishikof</i>	
I. Smart Data and Governance	193
II. Smart Data and Microtargeting	195
III. Predicting the Future	196
IV. Excuse Me—Your Metadata Is Showing	199
V. A Tentative Conclusion	204
12 Holding Leakers Accountable: Considering a Comprehensive Leaks Approach	207
<i>W. George Jameson</i>	
I. Introduction	207
II. Setting the Stage: The Leaks Dilemma	208
III. Characterizing Leaks, Their Nature, and Impact	211
IV. Basic Legal Considerations in the Leaks Debates	213
V. Considerations for Those Reviewing Leaks Options	230
VI. Conclusion	234

CONTENTS

13 The Consequences of Leaks: The Erosion of Security	235
<i>Jill D. Rhodes</i>	
I. Why Collect Intelligence?	237
II. Ultra—What If It Had Been Leaked?	239
III. The U.S. Intelligence Community	241
IV. Leaks in the News	242
V. WikiLeaks	243
VI. Snowden	244
VII. Conclusion	246
14 The Consequences of Leaks: Greater Transparency	249
<i>Sophia Cope</i>	
I. Excessive Government Secrecy Is Antithetical to a Free and Democratic Society	249
II. The Government Should Engage More Often with the Public and the Press	250
III. The Government Should Respect the Reporter-Source Relationship	257
IV. Efforts Are Underway to Strengthen Laws to Protect Confidential Sources	259
V. Conclusion	273
About the Editors	275
About the Contributors	279
Index	287