NEW YORK LAW SCHOOL

NYLS Law Review
Vols. 22-63 (1976-2019)

Volume 54
Issue 1 *New York Law School Law Journal Alumni Issue*

Article 10

January 2009

An Improved Analytical Framework for the Official Acknowledgment Doctrine: A Broader Interpretation of "Through an Official and Documented Disclosure"

Jessica Fisher
New York Law School Class of 2009

VOLUME 54 | 2009/10

JESSICA FISHER

An Improved Analytical Framework for the Official Acknowledgment Doctrine: A Broader Interpretation of "Through an Official and Documented Disclosure"

ABOUT THE AUTHOR: Jessica Fisher received her J.D. from New York Law School in June of 2009.

I. INTRODUCTION

Maintaining transparency in governmental institutions is an integral component of a successful democracy.[1] To achieve transparency, citizens need information about elected officials, agency activities, societal issues, and ideas that may stimulate personal intellectual development.[2] This information is necessary in order to enlighten the citizenry, and promote justice and liberty through public participation in the political process.[3]

Safety and order are equally important to the success of democratic institutions.[4] While safety and order do not immediately conflict with transparency, tensions may arise when governing officials withhold information from the public for the stated purpose of protecting national security.[5] This Note will assess the tension between national security and the public's right to access information. It will argue that, in at least one area of jurisprudence, the balance is tipped in the wrong direction—toward censorship—which, among other things, impedes transparency. This area of jurisprudence concerns situations in which an individual seeks to compel a government agency to formally disclose information that the agency would otherwise withhold from the public, even though the information is already available in the public domain.[6] When these situations are litigated, courts rely upon what is known as the "official acknowledgment doctrine" to determine whether to compel the government to produce the information at issue.[7] In general, the official acknowledgment doctrine

---

1. *See generally* Alexis De Tocqueville, Democracy in America 224–63 (Arthur Goldhammer trans., Library of Am. 2004) (1835).

2. Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 16 (Alfred A. Knopf 2005) (explaining that people and their representatives need to have the capacity to exercise their democratic responsibilities, which requires access to information and education in order to participate and govern effectively). Political Philosopher Benjamin Constant described liberty to include the citizens' right to examine the actions or accounts of those who administer government to hold them responsible for their misdeeds. *Id.* at 4.

3. *Id.* at 3. Liberty means the ability and freedom to participate in the government itself. As expressed by the founding fathers of the United States, there must be freedom of the individual citizen to participate in the government and share with others the right to make and control the nation's public acts. *Id.*

4. *See* De Tocqueville, *supra* note 1, at 208.

5. *See* Larry Berman & Bruce Allen Murphy, Approaching Democracy 19 (1996).

6. Disclosure of information is sought for various reasons, but one example where an individual may seek disclosure of information that is already available in the public domain is when that individual needs the information to be officially acknowledged in order to publish the information without legal consequence. This example is demonstrated in *Wilson v. McConnell*, 501 F. Supp. 2d 545 (S.D.N.Y. 2007), discussed *infra* notes 116–29 and accompanying text.

7. The official acknowledgment doctrine is used to free information from government censorship because the government is not entitled to censor information that it has already officially acknowledged. James T. O'Reilly, Federal Information Disclosure §9:50 (3d ed. 2008). To establish that information is officially acknowledged, thus warranting disclosure, a plaintiff must prove three elements. Plaintiffs must demonstrate that the information requested: (1) is "as specific" as the information previously released; (2) "matches" the information previously disclosed; and (3) was previously made public "through an official and documented disclosure." *Id.* This Note will focus solely on the third element of

is a common law doctrine intended to facilitate formal disclosure of information that would otherwise be censored by the government if the information had not already been publicly disclosed through some informal means.[8]

Part II of this Note will trace how government officials throughout American history used informal means to disclose information, such as "leaks," as a systematic and deliberate method of communicating sensitive information to the public. Additionally, Part II will argue that using leaks to disclose information to the public has become an accepted tool in governing. The framework created in Part II supports the proposition that disseminating information through informal means of communication has been, and currently is, a crucial means by which the American public receives necessary information about government activities.

Part III of this Note will demonstrate that courts are interpreting one element of the official acknowledgment doctrine—the requirement that the information requested be previously made public "through an official and documented disclosure"—in an unduly narrow manner. Lastly, Part IV will argue that courts should look to the fair report privilege for a broader interpretation of an "official" disclosure. If courts apply a broader interpretation, the public will be provided with the necessary information to enable government institutions to become more transparent.[9]

II. THE PERVASIVE AND SYSTEMATIC USE OF INFORMAL METHODS OF COMMUNICATION IN UNITED STATES HISTORY

Access to information about government activities is vital to the health of a democratic society.[10] While modern communication technology, such as the Internet, has allowed for public access to *official* information about government activities on a scale unparalleled in history, the "leak" remains the source of *unofficial*, but equally important, information about government activities. These "unofficial" or "informal"

---

this doctrine, namely that the information requested "was previously made public through an official and documented disclosure." *Id*.

8. *See* Hudson River Sloop Clearwater, Inc. v. Dep't of Navy, 891 F.2d 414, 420 (2d Cir. 1989). The doctrine may be invoked in two realms: in Freedom of Information Act ("FOIA") cases it operates as a waiver to the government's right to withhold information, and in First Amendment cases it serves to negate or override the government's interest in restricting the dissemination of information already known by person(s) seeking to disseminate that information. McGehee v. Casey, 718 F.2d 1137, 1139 (D.C. Cir. 1983). Most often the government argues that information requested pursuant to FOIA should not be disclosed because it will endanger national security. National security jurisprudence demonstrates the judiciary's willingness to accept this argument, and exemplifies the judiciary's great deference to the executive branch. *Id.* at 1143.

9. *See* Berman & Murphy, *supra* note 5, at 19 (asserting that citizens must have access to information and an open exchange of information).

10. *See* Kristine A. Oswald, *Mass Media and the Transformation of American Politics*, 77 Marq. L. Rev. 385, 392 (1994) ("[A] 'marketplace of ideas' . . . theory asserts that truth can be discovered only through a process of conflicting views and public debate. Therefore, free expression is justified because of its benefit to society."); *see also* Erwin Chemerinsky, Constitutional Law: Principles and Policies 1209 (Vicki Been et al. eds., 3d ed. 2006).

leaks provide the public with information to which it has a right to know, regardless of whether the leaks are authorized by government officials.[11] This section demonstrates the importance of leaks in American history as a means of revealing important information about the government to the public.[12] Information, irrespective of the form in which it is disclosed, increases transparency in governance and provides the electorate with the essential information it needs to monitor and evaluate government officials.[13]

A. The Birth of Informal Disclosures in American Political History

A "leak" can be an unauthorized or deliberate disclosure of secret or confidential information.[14] Leaks have long played an integral role in American politics. Most often, public officials use leaks to advance personal or political agendas, or to thwart the goals of political opponents. Leaks have also served as catalysts for numerous high-profile investigations with lasting repercussions throughout American history.[15]

The earliest leaks and leak investigations in American history commenced with partisan maneuvering in Congress, when an already leak-prone Senate discovered that these disclosures provided the ability to communicate with constituents in the senators' home districts.[16] The first significant leak can be traced back to 1795. Amid fierce partisan struggles between Federalists and Jeffersonian Republicans, senators violated orders mandating members to secrecy by giving a journalist information about the first treaty after the adoption of the Constitution.[17] Five years later, in 1780, a newspaper published a story regarding a politically sensitive bill based on information divulged from secret Senate sessions.[18] The frequent, unauthorized

11. *See* ABA Standing Committee on Law and National Security, The Media and Government Leaks 4 (Patricia Garvin Cathcart & Deborah Fletcher, eds. 1984).

12. *See* Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists' Confidentiality*, 43 San Diego L. Rev. 425 (2006).

13. Berman & Murphy, *supra* note 5, at 18–19.

14. The American Heritage College Dictionary 772 (3d ed. 2000). A leak is also defined as the "disclosure of secret, [especially] official, information, as to the news media, by an unnamed source." Dictionary.com, Leak, http://dictionary.reference.com/browse/leak (last visited Oct. 31, 2009).

15. *See* Kielbowicz, *supra* note 12, at 426 (discussing the impact of informal disclosures in American history). Kielbowicz states that "[l]eaks have considerable utility in launching and advancing policies as well as crippling them, in enhancing the political status of the leaker and the leak's patron on undercutting enemies, and in cultivating favorable relations with reporters for long-term gain. Of course, a single leak can serve multiple purposes." *Id.* at 432.

16. *Id.* at 443. The leaks that involved Congress in the nineteenth century served at least four purposes. They armed minority factions with the power of publicity, gave lawmakers leverage in battles with the White House, exposed congressional corruption, and prompted investigations of executive departments. *Id.* at 432.

17. *Id.* at 433.

18. *Id.* at 434. This bill proposed to revise the procedure for deciding the outcome of close presidential races. *Id.*

disclosures concerning the Senate's secret review of treaties led to three incidents between 1844 and 1848 in which newspapers published entire documents from secret proceedings rather than merely reporting on the events that took place.[19] These incidents culminated with the New York Herald publishing a "Statistical Table of the Leaks of the United States Senate," which highlighted the flagrant hypocrisy of the senators' actions and how leaks had become a common tool of political communication.[20]

In 1905, the first agency press office was established.[21] Since that time, government officials have used the media to leak information as part of covert publicity strategies.[22] The government uses the media because the media is a central mouthpiece for disseminating information to the general public.[23] This process, however, leads to an inherent tension; the media often serves the dual function of being both a mouthpiece to disseminate official government information, and a watchdog to protect the public interest by investigating illegal, scandalous, or other government misconduct.[24] The media's intimate relationship with the government and the media's role in disseminating official information naturally runs counter to the view that the media is supposed to function as a check on government and expose official injustice.[25] It is for this latter view that the media is often thought of as the fourth branch of government.[26]

While leaks can and have been used for political maneuvering or to covertly promote or undermine potential policy initiatives, leaks have virtue where traditional

19. *Id.* at 436. Most notable of which was the New York Herald's publication of the still secret 1848 treaty that ended the war with Mexico. *Id.*

20. *Id.* The table's first column listed newspapers in five leading cities, the second named the correspondent for each, and the third identified senators who favored each reporter with confidential information. *Id.* at 436–37.

21. Jodie Morse, *Managing the News: The History and Constitutionality of the Government Spin Machine*, 81 N.Y.U. L. Rev. 843, 845 (2006) (discussing elected officials, primarily the United States President, and his administration's use of the media).

22. *Id.*

23. *See* Berman & Murphy, *supra* note 5, at 442–43, 452; Oswald, *supra* note 10, at 401 ("Journalists influence government policy-making in the following ways: (1) by creating the reality in which government leaders act, (2) by playing the role of public opinion representatives, (3) by giving attention to particular issues, and (4) by acting as a link between governmental bureaucracies.").

24. *See* Berman & Murphy, *supra* note 5, at 451–52 ("Social scientists are in general agreement that the mass media perform three basic functions: (1) surveillance of world events, (2) interpretation of events, and (3) socialization of individuals into cultural settings."); Oswald, *supra* note 10, at 389–91 (comparing the media to a fourth branch of government because it acts as a check on the other three branches).

25. Oswald, *supra* note 10, at 389. Supreme Court Justice Hugo Black remarked that "the Government's power to censor the press was abolished so that the press would remain forever free to censure the Government." *Id.* (quoting N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring)). "Former US Senator Robert Kasten said that the free flow of information ensures that our citizens are fully informed about the issues of the day . . . and it ensures that misrepresentation can be uncovered in the give and take of full and robust debate." *Id.*

26. *See* Douglass Cater, The Fourth Branch of Government (1959).

methods of communicating official information fall short.[27] Government officials may employ leaks to gauge public acceptance of particular policy options (to help formulate more popular policies), or to slowly introduce novel ideas to a skeptical public and thus indirectly sway congressional opinion.[28] Leaks can also be said to improve government efficiency by enabling the government to issue statements outside the rigid bureaucratic framework in which it is forced to operate.[29] In this way, leaks can signal a government's intentions without committing the government to any particular proposal, provide insight on informal government negotiations to both the public and other interested governments who may not be privy to the discussion, substitute for formal negotiations when parties are deadlocked or prevented from meeting formally, and carry messages between governments that do not have formal diplomatic relations.[30] As further discussed below, the important functions leaks serve are also highlighted during times of war and threatened international conflict, when a government is apprehensive to issue formal directives for fear of triggering catastrophic consequences.[31]

B. Leaks Become a Fixture in American Politics

While the legislative branch was the first to use leaks, the executive branch, including U.S. presidents and appointed individuals in the administration, quickly followed suit by skillfully using unauthorized disclosures to advance political agendas.[32] President Theodore Roosevelt was known for using "trial balloons" to test public reaction to policy options.[33] If public response to the leaked "balloon" was positive, Roosevelt would proceed with the initiative. If feedback was negative, Roosevelt would deny the veracity of the report, which would typically be based on unnamed sources.[34] President Roosevelt also used leaks to alienate political allies so that he would not be held responsible for the negative information released.[35] The use of leaks in both national and international spheres was also apparent during the administration of President Woodrow Wilson.[36] Use of leaks in the international

27. Kielbowicz, *supra* note 12, at 469–70. In addition to its "role in political maneuvering and policymaking, leaks facilitate governance by supplementing the formal channels of organizational and inter-organizational communication." *Id.* at 476. Furthermore, "most scholars, along with journalists, regard leaks as primarily a form of news management by sources for political gain." *Id.* at 468.

28. *Id.* at 469–70.

29. *Id.* at 482.

30. *Id.*

31. *Id.*

32. *Id.* at 444–46.

33. *Id.* at 444.

34. *Id.*

35. *Id.* at 482.

36. *Id.* at 445.

arena was particularly helpful to President Franklin Roosevelt because his administration coincided with the explosive growth of the federal government during the New Deal era and World War II. President Roosevelt used leaks to inform and persuade public opinion about complex issues and sensitive public affairs.[37] Leaks were an active component of Roosevelt's well-orchestrated, multi-channel communication campaigns.[38] Leaks pervaded foreign relations long after FDR, as illustrated by the Kennedy administration's negotiations with the Soviet Union during the Cuban Missile Crisis.[39] President Kennedy supplemented direct formal contacts with Moscow with indirect leaks to the press in order to prevent discussions that could trigger nuclear exchange.[40] Immediately after Kennedy's use of leaks, President Lyndon Johnson directed an aide to secretly disclose a story to the press concerning the administration's plans to cut support for domestic rice growers even though no such plans were in place. President Johnson used this fictitious plan as a negotiating tactic to gain the support of rice growers and lawmakers on a different proposal.[41]

The Watergate scandal during the Nixon administration was blown wide open by probably the most prominent series of leaks in American history. Watergate also marked a pivotal turning point in the way leaks were generated; it marked the point when exposing governmental activities became a more central aspect in the media's investigative reporting. Due to a government official's unauthorized disclosure to the Washington Post, the public learned of the Nixon administration's criminal behavior.[42] The government official behind these unauthorized disclosures, long known only as "Deep Throat,"[43] was recently revealed to be Mark Felt, a high-ranking FBI

37. *Id.* at 446. According to historian Bruce Catton, leaks were "essential to the operation of the democracy in these complex times." Furthermore:

> [I]t is through the leak that the people are kept in touch with their government . . . . It is the leak which enables them to know whether the fine boasts and pretensions of an appointed person are really justified. It is the leak—telling them what may happen, what is being planned, what the carefully hidden facts actually are, which makes it possible for them to react while there is still time and thus exert an influence on the handling of affairs. Although leaking was frequently misused by self-seekers and schemers and often made officials look inefficient, our particular form of government wouldn't work without it.

Id. (quoting Bruce Catton, The War Lords of Washington 87–89 (1948)).

38. Kielbowicz, *supra* note 12, at 446.

39. *Id.* at 482–83.

40. *Id.*

41. *Id.* at 471.

42. *Id.* at 479–80; Samuel Dash, *Morality in American Politics: Is It Possible?*, 39 Brandeis L.J. 773, 774 (2001).

43. Kielbowicz, *supra* note 12, at 428. Deep Throat was the secret source who provided information to the Washington Post in connection with the Watergate scandal. The source remained anonymous for more than thirty years until it was revealed to be W. Mark Felt in an article published in Vanity Fair. John D. O'Connor, *The Deep Throat Revelation: "I'm The Guy They Called Deep Throat,"* Vanity Fair, July 2005, *available at* http://www.vanityfair.com/politics/features/2005/07/deepthroat200507.

official during the 1970s. Deep Throat's leaks helped the Washington Post uncover enough evidence of executive wrongdoing to spark a congressional investigation that revealed the president's role in criminal behavior, including burglary, illegal wiretapping, perjury, suborning of perjury, and conspiracy.[44] As a result of the disclosures to the Washington Post, an investigation ensued that enabled action to be taken to end the criminal behavior, prevent any further negative repercussions, and restore a sense of constitutional democracy and legitimacy to the U.S. government.[45]

Official and unofficial leaks were also frequent during the Reagan administration,[46] as were the scandals they helped uncover. In 1983, the State Department established the Office of Public Diplomacy for Latin America and the Caribbean for the ostensible purpose of educating the public about the Reagan administration's policies concerning the Nicaraguan conflict.[47] The Office, however, also engaged in covert operations known as "white propaganda," in which the Office awarded contracts to journalists and academics who would secretly prepare op-ed columns on behalf of the government that criticized the Nicaraguan government's weapons programs.[48] These disclosures were so intertwined with the Reagan administration that Alexander Haig, Secretary of State during the Reagan administration, noted that despite the problems caused by some leaks, "in the end I concluded that they were a way of governing. Leaks constituted policy; they were the authentic voice of the government."[49]

---

44. Dash, *supra* note 42, at 774.

45. *See generally id.*

46. *See* William E. Lee, *Left out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America*, 57 Am. U. L. Rev. 1453, 1468 (2008). Max Frankel, a New York Times reporter, submitted an affidavit in connection with the Pentagon Papers litigation recounting the numerous occasions during the 1960s when presidents and cabinet officials provided him with secret information. Frankel's affidavit stated:

> I know how strange all this must sound. We have been taught, particularly in the past generation of spy scares and Cold War, to think of secrets as secrets—varying in their "sensitivity" but uniformly essential to the private conduct of diplomatic and military affairs and somehow detrimental to the national interest if prematurely disclosed. By the standards of official Washington—government and press alike—this is an antiquated, quaint and romantic view. For practically everything that our Government does, plans, thinks, hears and contemplates in the realms of foreign policy is treated as secret—and then unravelled by that same Government, by Congress and by the press in one continuing round of professional and social contacts and cooperative and competitive exchanges of information.

Id. at 1468–70 (citation omitted).

47. Morse, *supra* note 21, at 854.

48. *Id.* Even though the Office was created by the State Department, the "white propaganda" initiatives remained a secret from the State Department press office. *Id.*

49. Kielbowicz, *supra* note 12, at 472 (quoting Alexander M. Haig, Jr., Caveat: Realism, Reagan, and Foreign Policy 17 (1984)).

C. Examples of Informal Disclosures in Contemporary American Politics

The enduring importance of leaks and their prevalence in American society is exemplified by a string of recent leaks that began in 2004.[50] Information concerning these events is still being exposed today.[51] In January of 2004, a military investigator received an anonymous letter and photographs documenting pervasive abuse occurring at the Abu Ghraib prison in Iraq.[52] The public outcry in response to this divulgence spurred heightened attention to the government's actions in pursuing the war in Iraq, and in the area of national security.[53]

In 2005, journalist Robert Novak reported that Valerie Wilson Plame was a covert Central Intelligence Agency operative.[54] Subsequent investigation suggested that this information was leaked by the Bush administration in retaliation for an op-ed piece that Plame's husband, Ambassador Joseph Wilson, published in the New York Times.[55] The article reported that the White House had twisted intelligence about Iraq's nuclear weapons program—a claim featured in President Bush's State of the Union address to justify the 2003 Iraq invasion.[56] The source of the leak was later identified as the Vice President's Chief of Staff Lewis "Scooter" Libby.[57]

Also in 2005, the New York Times revealed that the National Security Agency (NSA) had been monitoring the domestic telecommunications of American citizens without warrants since the terrorist attacks on September 11, 2001.[58] Further disclosure uncovered President Bush's involvement and secret approval of domestic wiretapping.[59] In addition, a 2005 Washington Post story reported on the secret overseas U.S. prisons for terrorists run by the Central Intelligence Agency, where it

---

50. *See* Lee, *supra* note 46, at 1464. Leaking classified information to the public is so pervasive in current politics "that it is often described as a routine method of communication about government." *Id.* at 1467.

51. *See id.*

52. Laura Barandes, *A Helping Hand: Addressing New Implications of the Espionage Act on Freedom of the Press*, 29 Cardozo L. Rev. 371, 376 (2007) ("The information was leaked to CBS News, which delayed airing the photographs at the behest of the government until April 29, 2004.").

53. *Id.*

54. Kielbowicz, *supra* note 12, at 464.

55. *See id.* It should be noted that the Bush administration contended that President Bush was exercising his authority to declassify documents as explanation for the disclosure of certain information. Democrats, however, asserted that "the selective disclosure was for partisan political reasons and labeled the President 'the leaker in chief.'" Lee, *supra* note 46, at 1458.

56. Kielbowicz, *supra* note 12, at 464. In President Bush's State of the Union address, which occurred on January 28, 2003, President Bush stated that "[t]he British government has learned that Saddam Hussein recently sought significant qualities of uranium from Africa." *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 965, 965 (D.C. Cir. 2005).

57. Kielbowicz, *supra* note 12, at 465.

58. Ames Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1, *available at* http:www.nytimes.com/2005/12/16/politics/16program.html.

59. Barandes, *supra* note 52, at 377.

was alleged that torture was rampant.[60] Again, further development of the story linked President Bush to the secret prisons and, to the surprise of those inside and outside the White House, prompted the official acknowledgement of the existence of the prisons by President Bush himself.[61] The integral role that informal disclosures serve in disseminating information to the public, and as a tool for governing, is apparent. Without these leaks, and the opportunities they create to expose and remedy government wrongdoing, American democratic institutions at home and U.S. prominence abroad would suffer.

III. THE UNDULY NARROW INTERPRETATION OF "THROUGH AN OFFICIAL AND DOCUMENTED DISCLOSURE"

The "official acknowledgment" doctrine is a common law doctrine wrought from an amalgamation of cases pertaining to situations in which plaintiffs argue that certain information, which the government seeks to censor, must be officially acknowledged because the information is available in the public domain.[62] Specifically, the doctrine is used to assess whether information that is available in the public domain, but which has not been categorized as officially acknowledged by the government, should be identified as "officially disclosed" by a court.[63] Pursuant to this doctrine, information that would otherwise be withheld from the public is disclosed because the government is prohibited from censoring information that it has already officially acknowledged.[64] In order for the disclosure to be deemed "official," it must have resulted from a disclosure made by the agency responsible for protecting the specific information at issue.[65] From a policy standpoint, the interest

60. Kielbowicz, *supra* note 12, at 427.

61. Barandes, *supra* note 52, at 376.

62. *See generally* Hudson River Sloop Clearwater, Inc. v. Dep't of Navy, 891 F.2d 414 (2d Cir. 1989). The doctrine operates both within First Amendment matters and FOIA claims. While the same requirements must be met regardless of this distinction, courts have recognized the diverging burdens and interests of each claim. This distinction was identified in *McGehee v. Casey*, another case concerning a former CIA officer who sought disclosure of information to publish in a manuscript. 718 F.2d 1137 (D.C. Cir. 1983). The *McGehee* court explicitly noted the distinction when it stated, "in a FOIA case, an individual seeks to compel release of documents in the government's possession. Here, by contrast, [the plaintiff] wishes publicly to disclose information that he already possesses, and that the government has ruled that his secrecy agreement forbids disclosure." *Id.* at 1147. The court raised another significant factor establishing that the "difference between seeking to obtain information and seeking to disclose information already obtained raises [the plaintiff's] constitutional interests in [the] case above the constitutional interests held by FOIA claimant[s]." *Id.* Furthermore, the *McGehee* court established another crucial distinction. In contrast to FOIA cases, in First Amendment cases both parties know the information in question. When this is the situation, it is recommended that courts would benefit from critique and illumination by the party claiming that the information should not be disclosed. *Id.* at 1149.

63. *Hudson River Sloop*, 891 F.2d at 421.

64. O'Reilly, *supra* note 7.

65. *Id.*

in preventing further dissemination of identical information is outweighed by an individual's competing First Amendment rights.[66]

To establish that information has been "officially acknowledged," a plaintiff must prove three elements.[67] The information requested must (1) be "as specific" as the information previously released; (2) "match" the information previously disclosed; and (3) have already been made public "through an official and documented disclosure."[68] The third element, "through an official and documented disclosure," will be the focus of this analysis because it is one of the elements on which courts have based decisions to support withholding information.[69] Specifically, this section will address how courts interpret and apply the third element of the official acknowledgment doctrine in an unduly narrow manner, resulting in unwarranted censorship.

A. Creation of the Official Acknowledgment Doctrine and the Narrow Interpretation Employed by Courts

The following cases exemplify the courts' narrow interpretation of the third element of the official acknowledgement doctrine, and demonstrate the courts' refusal to find that officially acknowledged information warranting disclosure has been disclosed through an official and documented disclosure. The official acknowledgement doctrine first appeared in *Hudson River Sloop v. Dep't of Navy*. In that case, the Navy announced its preferred site for the homeport of an American battleship and its accompanying six-ship, surface-action group. Several of the ships in the group were capable of carrying nuclear weapons.[70] There was serious public concern regarding the risks of U.S. Navy warships carrying nuclear weapons because the homeport was to be located in New York City's harbor.[71] Even though the Navy issued a Final Environmental Impact Statement, the plaintiffs brought suit asserting that the Navy failed to comply with the National Environmental Policy Act public disclosure requirement by failing to discuss the environmental impact of stationing nuclear weapons at the homeport.[72] Plaintiffs sought disclosure of this environmental impact information. The Navy, however, argued that the information was exempt from disclosure on national security grounds.[73] Plaintiffs contended that the

66. *Id.* ("The First Amendment precludes censorship of official disclosed information.").

67. Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990).

68. *Id.*

69. *See, e.g.*, Wilson v. McConnell, 501 F. Supp. 2d 545 (S.D.N.Y. 2007) (discussed *infra* notes 116–29 and accompanying text). Courts render decisions that prevent disclosure of information pursuant to other elements of the official acknowledgement doctrine, but the third element appears to be the most problematic in light of the government's use of leak-style disclosures when governing, as demonstrated *supra* in Part II.

70. Hudson River Sloop Clearwater, Inc. v. Dep't of Navy, 891 F.2d 414, 416 (2d Cir. 1989).

71. *Id.*

72. *Id.* at 416–17.

73. *Id.* at 417, 421.

information had already been disclosed in an affidavit of a retired navy admiral.[74] The court, relying on a series of prior cases, stated that:

> These cases hold that the recited exemptions may not be invoked to prevent public disclosure when the government has officially disclosed the specific information being sought. Plaintiff bears the burden of showing specific information in the public domain that duplicated the information withheld . . . . plaintiff must show that information in the public domain is as specific as that which is being sought, relates to the same time period, and has been the result of an official disclosure.[75]

The court, however, found that the disclosure in the affidavit was not sufficient because the admiral's statements could not be an official disclosure since the admiral was *no longer an active* naval officer.[76] The court inferred that "officials no longer serving with an executive branch department cannot continue to disclose official agency policy through speculation, no matter how reasonable it may appear to be."[77] Therefore, even though the court recognized the official acknowledgment doctrine, it imposed an unduly narrow interpretation on the third element of the doctrine, ignoring the fact that the former official's statements were credible not because of who he was, but because of where he had disclosed them—in a sworn affidavit.[78]

The court rejected the plaintiffs' argument that the information sought was disclosed through an official and documented disclosure even though this information was included within an affidavit from an experienced and high-ranking Navy officer.[79] This reasoning, and subsequent narrow interpretations, gives enhanced and unfounded protections to the government. The court approved the government censorship on what can be viewed as a mere technicality: the employment status of a military official. It capitalized on the admiral being retired, rather than focusing on the fact that this information gained credibility because the admiral disclosed the information in an accredited document—an affidavit. The court even conceded that the officer's statements "perhaps deserve credit beyond that afforded," but concluded that irrespective of how credible the officer's insights were, his disclosures "did not translate into *official* disclosures."[80] This reasoning is easily subject to manipulation. Furthermore, government employees are inherently more willing to disclose truthful information subsequent to their employment because they no longer face the fear of being fired.[81] Information revealed by these individuals may provide crucial insight

74. *Id.* at 421.

75. *Id.*

76. *Id.*

77. *Id.* at 422.

78. *Id.* at 421–22.

79. *Id.* at 421.

80. *Id.* at 421–22.

81. Employees of intelligence agencies, such as the CIA and NSA, are not provided protection under the Whistleblower Protection Act. If an employee discloses classified information to an unauthorized

into activities that the public has a right to know about. Importantly, this type of disclosure is strikingly similar to the way in which information was leaked by government officials throughout history as discussed in Part II, which bolsters the argument that the court in *Hudson River Sloop* erred in finding that the information did not satisfy the third element of the official acknowledgement doctrine.[82]

Afshar v. Dep't of State and *Military Audit Project v. Casey* are additional demonstrations of the courts' narrow interpretation of the official acknowledgment doctrine, and their refusal to recognize that information was sufficiently disclosed through an official and documented disclosure.[83] Furthermore, these cases underscore the inherent problems in interpreting the third element too narrowly.[84] In *Afshar*, the plaintiff sought information under FOIA pertaining to the defendant and his activities.[85] The plaintiff pointed to three public documents to support his position: a 1974 CIA dispatch from its headquarters to a CIA office, a cable and memorandum generated by the State Department, and a number of books written by former CIA agents and officials that were cleared by the agency's prepublication review department.[86] Central to the plaintiff's argument was that the release of the information requested could not result in damage to national security or disclose unknown intelligence sources or methods because the information was already available to the public.[87] In regard to the books written by former CIA agents and officials that were pre-approved by the CIA for publication, the court rejected the plaintiffs' arguments that the CIA's screening and approval of the books rendered them official and made the disclosure "tantamount to official executive acknowledgments, rather than unauthorized comments by former government officials."[88] In furtherance of its narrow interpretation, the court reasoned that such books are not generally treated as official disclosures by foreign governments or by the public in the same way that a CIA cable would be, and furthermore, most of the books did not mention that the CIA had cleared them.[89]

This conclusory analysis contradicts established principles that require disclosure of such information, which the court itself referenced. Specifically, in its analysis the

individual, they may be removed from any position of trust, have their security clearances revoked, be terminated, and in some instances face criminal prosecution. Lee, *supra* note 46, at 1466 (referencing 5 U.S.C. § 2303(a)(ii) (2006)).

82. *See supra* Part II.

83. *Afshar*, 702 F.2d at 1125; Military Audit Project v. Casey, 656 F.2d 724 (D.C. Cir. 1981).

84. *Military Audit Project*, 656 F.2d at 724; *Afshar,* 702 F.2d at 1130–35.

85. *Afshar*, 702 F.2d at 1128. Plaintiff objected to information being withheld under exemptions 1 and 3 of the Act because information fitting the defendant's descriptions of the withheld information had already been released in the public. This may not directly go to the third prong, but it nevertheless implicates the same arguments that spurred this doctrine, i.e., information in the public domain. *Id.* at 1128–30.

86. *Id.* at 1132–33.

87. *Id.* at 1130.

88. *Id.* at 1133–34.

89. *Id.* at 1134.

court recognized that the argument that publicly known information may not be withheld has garnered support from other courts.[90] The court then cited cases identifying the principle—at least in regard to FOIA requests—that the statute's central purpose would be thwarted if information remained classified after being revealed to the public.[91] Despite explicitly acknowledging the reasons to support disclosure of the information at issue, the court rejected the plaintiff's argument using a factually specific analysis to prohibit disclosure, and as a result, added additional precedent for a narrow interpretation of the third element of the official acknowledgment doctrine.[92]

Like the court's holding in *Hudson River Sloop*, the narrow interpretation in *Afshar* prevented disclosure of information that is similar to types of information that has historically been leaked to the public by the government. The historical landscape suggests that it is unnecessary and arbitrarily narrow to draw a stringent dividing line between communications disseminated from what is an "official source" and communications that come from an informal source. If government officials do not abide by these distinctions when governing, then the judiciary cannot logically employ such distinctions when interpreting and enforcing the governing law. As Supreme Court Justice Stewart noted in *New York Times Co. v. United States*:

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.[93]

In order to create and sustain an informed electorate, information must be disclosed to the public. To achieve even this first step, the court cannot employ an unduly narrow interpretation of the third element of the official acknowledgement doctrine, and thus prohibit a wide spectrum of disclosures based on unfounded categorical distinctions. The holding in *Afshar*, in connection with much of the court's sweeping statements about prohibiting disclosure when there are countervailing national security concerns, establishes a foundation on which future opinions can base even narrower interpretations of the official acknowledgment doctrine to prevent disclosure.[94]

---

90. *Id.* at 1130.

91. *Id.* (citing Lamont v. Dep't of Justice, 475 F. Supp. 761, 772 (S.D.N.Y. 1979) ("The 'sunshine' purposes of the FOIA would be thwarted if information remained classified after it became part of the public domain.")).

92. *Afshar,* 702 F.2d at 1132–35.

93. N.Y. Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

94. *Afshar*, 702 F.2d at 1130–31. In looking at the documents that the plaintiff used for support, the court stated:

> [E]ven if a fact—such as the existence of such a liaison—is the subject of widespread media and public speculation, its official acknowledgement by an authoritative source might well be new information that could cause damage to the national security.

Military Audit Project v. Casey, is yet another example of this unduly narrow interpretation.[95] Application of the narrow interpretation resulted in prohibiting disclosure of information that was both widely available in the public domain, and which was disclosed in authoritative and credible documents.[96] In that case, the plaintiff argued that the documents sought pursuant to a FOIA request should be disclosed due to the government's prior official disclosures concerning the information, in addition to the widespread media attention of an event that included the information sought.[97] The government responded, asserting that despite the presence of information in the public domain, the public may still not know certain truths about its operations relating to this information, and thus disclosure could still pose a serious threat to national security.[98] The event and the media coverage to which the plaintiff pointed concerned a Soviet submarine that was alleged to have been carrying nuclear missiles, and which allegedly sank near Hawaii.[99] Due to the fact that the sunken submarine included nuclear missiles, codes and code machines, communication gear and other equipment, American military and intelligence agencies had a significant interest in recovering the information.[100] To that end, the CIA and the Navy constructed an elaborate cover story to retrieve the submarine, but somehow the media discovered the truth of the expedition.[101] When the CIA learned that the media was aware of the events, the CIA tried to suppress the story and persuaded major media outlets to "hold" the story.[102] *Time* magazine, however, decided to "break" the story, publishing the truth of the cover up and reporting on the government's attempt to prevent the story from being published.[103] The plaintiff contended that because the event was previously revealed by both official and unofficial disclosures, the government should be prevented from withholding this

> Unofficial leaks and public surmise can often be ignored by foreign governments that might perceive themselves to be harmed by disclosure of their cooperation with the CIA, but official acknowledgement may force a government to retaliate.

Id.

95. 656 F.2d 724 (D.C. Cir. 1981).

96. *Id.*

97. *Id.* at 728. The plaintiff sought access to documents concerning the Glomar Explorer Project, a project allegedly undertaken by the CIA with the objective of raising a sunken Russian submarine that was on the floor of the Pacific Ocean. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 729. The directors of the CIA and other CIA officials met with the *New York Times*, the *Los Angeles Times*, the *Washington Post*, the *Washington Star*, major television networks, the National Broadcasting System, *Time*, and *Newsweek*. All agreed to "hold" the story at least until another outlet published the information. They agreed to this in exchange for briefings on the submarine raising efforts. *Id.*

103. *Id.*

information.[104] The argument follows that, because all of this information was disclosed, the government had nothing left to hide and should not be able to refuse disclosing the information.[105]

In addition to pointing to the pervasive media coverage, the plaintiffs—similarly to the *Afshar* plaintiff—identified three official or semiofficial publications to buttress their argument that the information was officially acknowledged.[106] The specified documents included the publication of a report by the Senate Committee on Interior and Insular Affairs, a National Science Foundation "Memorandum to Science Writers and Editors," and the French edition of a book written by former CIA director William Colby.[107] The court, however, relied on conclusory and legally baseless reasoning, asserting that it could not assume that the CIA had nothing left to hide, but rather that the record suggested that the CIA had something to hide or that the CIA may want to hide the fact that it has nothing to hide.[108] Based solely on motion papers and affidavits, the court affirmed the district court's decision to grant summary judgment to the government, holding that the government had the right to withhold the documents.[109] This opinion is precedent to categorically exclude the following documents from satisfying the third element of the official acknowledgment doctrine: a senate committee report, a Time magazine article, a memorandum issued by an accredited national foundation, and a book written by a former CIA director. Such a narrow interpretation of "through an official and documented disclosure" results in the implicit approval of blanket government censorship in the precise situations where the official acknowledgment doctrine is intended to free information from censorship.

B. The Narrow Interpretation Persists

Recent case law provides further support for the proposition that courts are construing "through an official and documented disclosure" too narrowly. Beyond the immediate implications that these cases have in respect to preventing the disclosure of information, each case provides additional judicial precedent against the disclosure of information to which the public has a constitutional right to know.[110] This creates the potential for censorship to become the starting point, rather than the limited exception. Censorship cannot be the starting point in a democracy where access to information and transparency are paramount.

---

104. *Id.* at 742.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 744–45.

109. *Id.* at 736.

110. *See, e.g.*, Hudson River Sloop Clearwater, Inc. v. Dep't of Navy, 891 F.2d 414, 416 (2d Cir. 1989); *see generally* U.S. Const. amend. I.

In *Public Citizen v. Dep't of State*, the plaintiffs identified information reported in congressional testimony to establish the government's waiver of its right to prevent disclosure under FOIA.[111] Specifically, the plaintiffs contended that an ambassador officially acknowledged content within classified documents during his public congressional testimony by discussing many of the issues set forth in the documents.[112] The court, however, was not persuaded by this argument, and reasoned that even though much of the information in the documents was publicly acknowledged, the context of the information was different.[113] Furthermore, it found that even though some of the information had been revealed, this fact did not negate the confidentiality of the documents.[114] In reaching this decision, the court explicitly recognized that "in making this determination, the Court has deferred to the agency's expertise on issues of national security."[115] While this case is not directly on point because the court does not explicitly base its decision to prohibit disclosure on the third element of the official acknowledgement doctrine, the opinion is instructive because it demonstrates how blanket deference, coupled with an increasingly narrow interpretation, can result in the censorship of copious amounts of information. Furthermore, it establishes precedent for rejecting congressional testimony as sufficient evidence to satisfy "through an official and documented disclosure."

The next example, *Wilson v. McConnell,* is a paradigm case demonstrating the narrow interpretation and application of the third element of the official acknowledgment doctrine.[116] The information at issue was disclosed in the Congressional Record, and concerned former CIA agent Valerie Wilson's pre-2002 dates of employment for the CIA, which plaintiff Wilson sought to include in her forthcoming memoir.[117] Prior to resigning from her position at the CIA, Wilson received a letter on February 10, 2006 ("the letter") from the chief of the CIA's Retirement and Insurance Services in response to an inquiry regarding Wilson's retirement benefits.[118] Included in this letter were plaintiff's purported dates of employment with the agency.[119] The letter was sent on CIA letterhead, by first class

111. Pub. Citizen v. Dep't of State, 782 F. Supp. 144, 145 (D.C. Cir. 1992).

112. *Id.* at 145.

113. *Id.* at 145–46.

114. *Id.* at 146.

115. *Id.*

116. 501 F. Supp. 2d 545 (S.D.N.Y. 2007); *see* Wolf. v. CIA, 473 F.3d 370, 378 (D.C. Cir. 2007) (quoting Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990)). Wilson was recently affirmed by the Second Circuit Court of Appeals. Wilson v. CIA, No. 17-4244-CV (2d Cir. 2009).

117. *Wilson*, 501 F. Supp. 2d at 548–50.

118. *Id.* at 550.

119. *Id.* Prior to resigning from the CIA, plaintiff had requested that the CIA waive the minimum age requirement so that she could receive her deferred annuity. The CIA sent this letter explaining that the minimum age requirement could not be waived because it was statutory law. *Id.*

mail, and without any indicia that the information contained was classified.[120] Almost a year after receiving the letter, a materially identical version of the letter, including plaintiff Wilson's dates of employment, was admitted into the Congressional Record.[121] Furthermore, since the letter was admitted into the Congressional Record, it has been available on the Internet through the Library of Congress's website.[122] Subsequent to the disclosure into the Congressional Record, plaintiff received another letter from the chief of the CIA's Retirement and Insurance Services, informing the plaintiff that the information contained in the letter was classified, and that the absence of a security stamp on the letter was the product of "administrative error."[123]

The plaintiffs sought a permanent injunction against the U.S. government and the CIA, requesting that the government be prohibited from preventing Wilson from publishing the information at issue, and other related information in her memoir.[124] The government argued that the letter sent to the plaintiff was a result of administrative error, and that the remarks in the Congressional Record were insufficient to waive the CIA's right and duty to protect national security information.[125] The court accepted the government's position, holding that the information was not made public through an official and documented disclosure because it was the plaintiff and/or the member of congress who disclosed the information, not the CIA.[126] In accordance with an unduly narrow interpretation, the court reasoned that since the information was disseminated in this manner, it could not bind the CIA.[127] The court then imposed its typical categorical distinctions to distinguish the information at issue so as to prohibit disclosure. The court stated that there is a distinction between "official" and "unofficial" disclosure, and that for information to be "official" it must be made public "through" an official disclosure, and that the mere presence of information in the public domain is not sufficient.[128] It reasoned that the communication was sent to plaintiff in a private letter not for public disclosure, and as such, her transmittal of the letter to Congress was not official because to be official, the action needed to be authorized or approved by a proper authority.[129]

---

120. *Id*. In fact, official CIA protocol forbids classified documents from being sent via first-class mail. *Id.*

121. *Id.* In light of Wilson's inability to obtain her deferred annuity, House Representative Jay Inslee introduced a private bill in Congress to make Wilson's annuity available to her earlier than under the existing statutory scheme. Wilson provided a copy of the letter to Representative Inslee, who introduced a materially identical version of the letter into the Congressional Record. *Id.*

122. *Id.*

123. *Id.*

124. *Wilson*, 501 F. Supp. 2d at 555.

125. Brief for the Government at 17–18, 21, Wilson v. McConnell, 501 F. Supp. 2d 545 (S.D.N.Y. 2007) (No. 1:07-CV-04595-BSJ), 2007 WL 5018036.

126. *Wilson,* 501 F. Supp. 2d at 558–59.

127. *Id*.

128. *Id*. at 556.

129. *Id*. at 558.

Not only does this decision demonstrate the persistent application of an unduly narrow interpretation of the third prong of the official acknowledgment doctrine, the opinion also implicitly establishes that even statements made by congressional representatives and published in the Congressional Record are not necessarily "official." This narrow interpretation, as exhibited in the numerous cases discussed throughout this analysis, enables the government to put forth successful arguments in favor of blanket censorship of any information that the government deems unfit for disclosure. This is censorship for the sake of censorship, and creates a rationale for explicitly withholding information where no legitimate rationale exists.

Azmy v. U.S. Dep't of Defense is the most recent demonstration of the narrow interpretation of the third element and its detrimental implications.[130] In *Azmy*, the plaintiff, a law professor, filed a FOIA request seeking information concerning his client, Murat Kurnaz, who was a Turkish citizen and permanent resident of Germany. Kurnaz was captured in Afghanistan and detained by the United States at the United States naval base at Guantanamo Bay from 2002 to 2006.[131] The request sought disclosure of all records relating to all proceedings involving Kurnaz before the Guantanamo Combatant Status Review Tribunal ("CSRT") and the Guantanamo Administrative Review Board ("ARB"), and any information otherwise related to the reasons for Kurnaz's capture, detention, or release.[132] When the government rejected plaintiffs FOIA request, plaintiff commenced litigation seeking to compel disclosure of the requested materials.[133] The plaintiff argued that disclosure was required because much of the information at issue had been leaked to and discussed in the media, and therefore there was no national security interest in withholding information that was widely known to the public.[134] The plaintiff advanced the quintessential policy argument supporting disclosure pursuant to the official acknowledgement doctrine: if the public is already apprised of information, the government should not be allowed to withhold documents that merely confirm the veracity of the information requested. Despite recognizing the effect of the official acknowledged doctrine in permitting disclosure where the government has officially disclosed the information, the court rejected plaintiff's argument that it was applicable to the information at issue.[135] Once again, the court offered a conclusory analysis, simply stating that "[i]n this case, subject to the exceptions discussed below, plaintiff is not requesting information that has previously been made public through an official and documented disclosure."[136]

130. Azmy v. U.S. Dep't of Def., 562 F. Supp. 2d 590 (S.D.N.Y. 2008).

131. *Id.* at 596.

132. *Id.*

133. *Id.* In general, the government contended that the disputed information was withheld pursuant to FOIA exemptions one, two, five, and/or seven. *Id.*

134. *See id.* at 598.

135. *Id.*

136. *Id.* at 599 (quoting Wolf v. CIA, 473 F.3d 370, 378 (D.C. Cir. 2007)). The court was aware of its conclusory analysis, which is demonstrated in the opinion when the court states, "although it would be

As a result, the court held that the information at issue was not made public through an official and documented disclosure, and therefore it was properly withheld pursuant to Exemption 1 of the FOIA statutes.[137] Similar to the cases discussed *supra—Hudson River Sloop*, *Afshar*, *Military Audit Project*, and *Wilson*—the unduly narrow interpretation of the third prong of the official acknowledgement doctrine prohibited disclosure of information warranting disclosure.

IV. A BROADER INTERPRETATION IS NECESSARY AND THE FAIR REPORT PRIVILEGE IS AN APPROPRIATE MODEL

Courts must refrain from employing a narrow interpretation and application of the third prong of the official acknowledgement doctrine. Courts construe "official" and "through" too narrowly, which is evidenced by case law that essentially equates "official" with government documents released by individuals in the "appropriate" position. This practice imposes an unduly stringent standard on the way in which official information must be released to the public. The solution is a broader interpretation and application of "through an official and documented disclosure" whenever a plaintiff asserts the quintessential public domain argument.[138] To accomplish this objective, courts should look to a similar common law doctrine, the fair report privilege, for guidance in discerning whether information is "official" and how official information may be released into the public domain. This section asserts that courts should interpret the third prong of the official acknowledgement doctrine less narrowly, and that there is precedent on which courts can rely to reach this interpretation. In addition, this section will assess case law that establishes the definition of "official action and proceeding" in the context of the fair report privilege. Analysis of fair report privilege case law is included as a model for how courts should construe "through an official and documented disclosure" under the official acknowledgement doctrine.

A. Precedent for a Broader Interpretation

Case law analysis supports the argument that the third element of the official acknowledgment doctrine is being interpreted and applied in an unduly narrow manner. There is precedent for interpreting the third element less narrowly. In *Fitzgibbons v. CIA*, the court implicitly established that information disclosed in a congressional report constitutes a previous disclosure "through an official and documented disclosure."[139] The plaintiff, a historian studying the disappearance of a Basque exile and FBI informant who lived in New York City, filed a FOIA request seeking government records from the CIA and the FBI in connection with the

inappropriate to provide more specifics in a public opinion, suffice it to say that the security implications are evident on their face." *Azmy*, 562 F. Supp. 2d at 599.

137. *Id.*

138. *See supra* Part III.

139. *See* 911 F.2d 755, 765 (D.C. Cir. 1990).

disappearance.[140] When the CIA withheld documents based on FOIA exemptions, the plaintiff commenced litigation seeking disclosure of the withheld documents.[141] The district court found that the information was officially acknowledged because it was revealed in a 1975 congressional committee report, and therefore, the CIA waived its right to exempt that information from disclosure under FOIA.[142]

On appeal, the plaintiff argued that disclosure of the information at issue was warranted because the information was already in the public domain due to an official disclosure, thus requiring disclosure pursuant to the official acknowledgment doctrine.[143] The court of appeals, however, reversed the district court ruling solely because the information that the district court ordered the defendant to disclose pertained to events earlier than those that the plaintiff argued were officially acknowledged.[144] Specifically, the court relied on *Afshar v. Dep't of State,* concluding that the "rationale of *Afshar's* prohibition against extending any waiver of protection to items concerning events later than the requested materials is equally applicable to items concerning events earlier than the requested materials."[145]

This reasoning results in the *Fitzgibbons* court implicitly establishing an exception for information concerning events at the specific time in question. Importantly, the *Fitzgibbons* court, in identifying the parameters of the official acknowledgment doctrine, created a rule that if the specific information at issue exists within a congressional report, it should be deemed officially acknowledged. Even though the court did not find that the information satisfied the third element of the official acknowledgment doctrine, this case demonstrates the ability by which a court may construe the third element less narrowly, at least to include statements existing within the congressional record, which has otherwise been rejected.[146] While it may be argued that this opinion is not sufficient to encompass all information worthy of disclosure under the official acknowledgment doctrine, it is at least precedent for a broader interpretation of the doctrine's third element.

Analysis of the *Wilson* opinion discussed *supra*, however, demonstrates how courts are engaging in an unduly narrow interpretation, rather than construing the doctrine less narrowly, as evidenced by *Fitzgibbons*. In fact, the *Wilson* court improperly characterized precedent to reach its decision and disregarded a less-narrow interpretation that was available. The *Wilson* court's mischaracterization of precedent is apparent in the court's use of *Wolf v. Central Intelligence Agency*.[147] In *Wolf*, the

140. *See id.* at 757.

141. *Id.*

142. *See id.* at 765–66.

143. *See id.* at 760.

144. *Id*. at 766.

145. *Id*.

146. *See, e.g.*, Wilson v. McConnell, 501 F. Supp. 2d 545 (S.D.N.Y. 2007) (rejecting that information disclosed in the Congressional Record satisfies "through an official and documented disclosure").

147. *See id.;* Wolf v. CIA, 473 F.3d 370 (D.C. Cir. 2007).

appellant sought disclosure of CIA records pertaining to a former Colombian politician.[148] Plaintiff Wolf argued that the CIA had officially acknowledged the records at issue in a 1948 congressional hearing.[149] The CIA director delivered what appeared to be a prepared statement, and also read from official CIA dispatches.[150] The *Wolf* court held that the information included in his testimony was in fact "officially acknowledged by the CIA."[151] The *Wolf* court recognized that congressional testimony is an official acknowledgement, and when such information is disseminated in this manner the government cannot otherwise prevent its disclosure. *Wolf* is therefore another demonstration of a court construing "though an official and documented disclosure" in a broader fashion to at least include congressional testimony.

The *Wilson* court, however, distinguished *Wolf*, resulting in a narrow interpretation and application of the third element. The court reasoned that in *Wolf* the CIA director testified directly before Congress, while in *Wilson* the CIA's communication was a private letter sent to plaintiff Wilson.[152] While there is a distinction between the letter being sent to plaintiff Wilson and the oral disclosures made in *Wolf*, the *Wilson* court drew the wrong parallel. The relationship between *Wolf* and *Wilson* does not stem from the communication between the plaintiff and the CIA. The cases are analogous because in both cases information was "officially disclosed" in the Congressional Record. Therefore, the information at issue in *Wilson* should have also been held officially acknowledged, just as in *Wolf* and *Fitzgibbons*. Yet, the imposition of a narrow interpretation and application of the third prong resulted in the censorship of information that is legally eligible for disclosure.

A policy rationale can be advanced to support the argument that there is a need to withhold certain information by delineating between what is and is not deemed "officially acknowledged." This is because the third element of the official acknowledgement doctrine is supported by the theory that when a disclosure is unofficial, the public is left to surmise as to whether the disclosed information is accurate.[153] This is argued to be beneficial because in leaving the public to guess about what may be true, a degree of protection and confidentiality is created around the subject matter, which may be lost when information is officially disclosed or acknowledged by a governmental authority.[154] This argument is increasingly persuasive in modern society, in which national security interests are paramount and the dissemination of information occurs at a rapid and unpredictable pace. Concededly, it is therefore important to preserve confidential information in order to adequately protect national interests.

---

148. *Wolf*, 473 F.3d at 372.

149. *Id.*

150. *Id.* at 379.

151. *Id.* at 380.

152. *Wilson*, 501 F. Supp. 2d at 557.

153. O'Reilly, *supra* note 7.

154. *Id.*

While it is arguably necessary to distinguish between official and unofficial disclosures, the line need not be drawn as tightly as case law establishes. It is conceivable for a court to create distinctions that adequately address national security concerns while simultaneously recognizing the marked difference between that which appears in an anonymous Internet blog, for example, and that which makes the cover of the Washington Post, or even more so, that which is given credence by a congressional committee. The way in which the official acknowledgement doctrine is being applied and interpreted fails to account for the countervailing interest of an informed citizenry. Furthermore, the narrow interpretation employed undermines the very purpose of the official acknowledgement doctrine. The doctrine is supposed to facilitate the disclosure of information, but the narrow approach causes the doctrine to inhibit, rather than facilitate, disclosure. Courts must not equate the phrase "through an official and documented" disclosure with "only information that is stamped 'disclosed' by a government agency." Interpretation of "official action and proceeding" under a similar common law doctrine, the Fair Report Privilege, provides an appropriate model of a broader interpretation.

B. The Fair Report Privilege Model

Under the fair report privilege, courts give broader meaning to what is "official" when compared with how the term has been construed in the context of the official acknowledgment doctrine. The fair report privilege provides protection to the press when it publishes accounts of official proceedings or reports, even when the published material contains defamatory statements.[155] The fair report privilege is an appropriate analytical framework to model in crafting a broader interpretation of the third element of the official acknowledgment doctrine because both doctrines hinge on the "official" nature of the information or situation at issue. Furthermore, there are similar policy rationales that support both doctrines.

The fair report privilege provides that the publication of defamatory matter concerning another in a report of an official action or proceeding, or of a meeting open to the public that deals with a matter of public concern, is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.[156] In order to qualify for the privilege, the press has the burden of showing that the report was (1) an accurate and complete or a fair abridgment of such proceeding, and (2) not made solely for the purpose of causing harm to the person defamed.[157]

The comments and illustrations included in the Restatement give insight to the meaning of the doctrine's text. "Official proceedings" include any "report of any official proceeding, or any action taken by any officer or agency of the government of

155. Medico v. Time, Inc., 643 F.2d 134, 137 (3d Cir. 1981). The Fair Report Privilege is typically used as a defense in defamation suits. *Id.* at 136.

156. Restatement (Second) of Torts § 611 (1977).

157. *Medico*, 643 F.2d at 138.

the United States, or of any State or of any of its subdivisions."[158] This also includes "the report of any official hearing or meeting, even though no other action is taken . . . [and] any official proceeding or action of either the house of the Congress of the United States or the legislative body of a State or the municipal council of a city, town or village."[159] The comments are not clear as to whether the privilege applies to official proceedings that are not public or available to the public under the law, but at least one circuit court has extended the privilege to reach such proceedings.[160]

The fair report privilege should be looked to for guidance by analogy because it is supported by similar policy rationales as the official acknowledgment doctrine. One policy rationale is the agency theory, which provides that "one who reports what happens in a public official proceeding acts as an agent for persons who had a right to attend, and informs them of what they might have seen for themselves."[161] This theory rests on the presumption that when a member of the public could have witnessed the incident, he has a right to be informed of it.[162] A second policy rationale is that of public supervision. Justice Holmes provided insight into this concept, stating that:

> [T]he privilege is justified by the security which publicity gives for the proper administration of justice . . . it is desirable that the trial of causes should take place under the public eye . . . because it is of the highest moment that those who administer justice should always act under the sense of public responsibility and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.[163]

These policies are closely aligned with the policies supporting increased disclosure under the official acknowledgement doctrine because in many ways the official acknowledgment doctrine serves as a check on the government. This was demonstrated in the aforementioned cases pertaining to plaintiffs trying to use or obtain information that conveyed information of public interest, but that was censored by the government.[164] This policy is rooted in the fact that elected officials obtain their authority to govern from the public. Therefore, the public has an obligation to ensure that the government is working effectively.[165]

---

158. Restatement (Second) of Torts § 611 cmt. d, illus. 2 (1977).

159. *Id.*

160. *Medico*, 643 F.2d 134 (extending to official proceedings that are not public or available to the public); *see also* Wynn v. Smith, 16 P.3d 424 (2001) (not extending to confidential reports). The issue of whether this privilege reaches confidential information is not relevant to the official acknowledgement doctrine because the privilege does not need to extend to this area in order to apply the fair report privilege meaning of "official action and proceeding" to the official acknowledgement doctrine to reach an equitable result. *See id.* at 429.

161. *Medico*, 643 F.2d at 140–41.

162. *Id.* at 141.

163. *Id.*

164. *See supra* Part III.

165. *See Medico*, 643 F.2d at 141.

Lastly, the third policy rationale of the Fair Report Privilege rests on the public's interest in learning of important matters.[166] This rationale has been used to extend this privilege to accounts of private, nongovernmental organizations dealing with matters of legitimate public concern.[167] This is also aligned with goals supporting the official acknowledgment doctrine because the information at issue is most often of legitimate public concern.[168]

Conversely, it can be argued that the fair report privilege and the official acknowledgment doctrine are distinct, which challenges the argument that courts should construe the requirements similarly. Unlike the official acknowledgment doctrine, the fair report privilege is relegated to those situations in which defamatory statements were allegedly made, and the privilege may only be invoked by the media.[169] These distinctions can be argued to support the proposition that it is acceptable to employ a broader interpretation of "official action and proceeding" under the Fair Report Privilege because it operates within limited situations and can only be used by certain individuals, which is unlike the official acknowledgment doctrine, which, in theory, may be advanced by any individual seeking disclosure of information.

While these are noteworthy distinctions, they do not surmount fundamental principles of free speech jurisprudence, such as the marketplace of ideas and an informed citizenry. The marketplace of ideas, as expressed by Justice Oliver Wendell Holmes, rests on the proposition that truth is most likely to surface from a clash of ideas.[170] Justice Holmes stated that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[171] While the marketplace of ideas typically relates to supporting free speech, it is also applicable to issues of government disclosure. When the government withholds information that citizens have a right to know, it is in effect filtering what information exists within the marketplace of ideas. If the government withholds information from the marketplace, it is less likely that the truth can rise to the surface. Moreover, the primary purposes for enacting FOIA were to ensure an informed citizenry, to provide a needed check against government corruption, and to hold those in power accountable to the governed.[172] The official acknowledgment doctrine, if given a broader interpretation, could accomplish these same objectives. To interpret the doctrine in an unduly narrow fashion contravenes the very purposes for which FOIA was enacted and, in essence, the very democratic ideals on which the United States was founded.

166. *Id.* at 142.

167. *Id.*

168. *See, e.g.*, Hudson River Sloop Clearwater, Inc. v. Dep't of Navy, 891 F.2d 414, 415 (2d Cir. 1989) (regarding serious public concern about the risks of U.S. Navy warships with nuclear weapons being located in New York City's harbor); Military Audit Project v. Casey, 656 F.2d 724, 728 (D.C. Cir. 1981) (regarding a Soviet submarine that was allegedly carrying nuclear missiles and which allegedly sank near Hawaii).

169. *Medico*, 643 F.2d at 138.

170. Chemerinsky, *supra* note 10, at 927.

171. *Id.* (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

172. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

C. Fair Report Privilege Case Law

The following cases demonstrate how the phrase "official action and proceeding" is interpreted under the fair report privilege and suggest an appropriate analytical framework that courts can apply to broaden the official acknowledgement doctrine.

In *Medico v. Time*, the Third Circuit assessed whether FBI documents that were confidential and not authorized to be released fell within the privilege.[173] Time magazine had published an article describing suspected criminal activities of a congressman and linking the congressman to an organized crime family operating under the name of Medico Industries.[174] Medico instituted a defamation action against Time, to which Time asserted the fair report privilege as a defense.[175] To support its argument, Time submitted an affidavit from a former FBI official, two FBI documents, and a FBI personal profile on Philip Medico.[176] The court held that these documents were an "official proceeding" under the privilege, reasoning by analogy to the Pennsylvania case, *Hanish v. Westinghouse Broadcasting*, in which the court held that the privilege applied to a news report summarizing a civil complaint.[177] The court found that the FBI files were at least as "official" as the pleadings in the civil cases because the FBI documents were created by government agents acting in their official capacities.[178] The court also looked to a supporting policy rationale in reaching its decision.[179] It found that the content of the Time magazine article was of legitimate public interest, which should limit press liability for its publication.[180] Furthermore, the court specifically noted that due to the difficulty in obtaining documents that would corroborate the FBI information, the press is often going to have to rely on materials created by the government in order to report on matters of public concern.[181]

The notion of difficulty in obtaining sources to corroborate a story provides further support to apply the broader interpretation of "official action and proceeding" to the official acknowledgment doctrine. One of the primary reasons that plaintiffs assert the official acknowledgment doctrine is because it is difficult to obtain certain information. For example, in the FOIA context, the plaintiffs are specifically seeking information that they cannot obtain elsewhere, but that for various reasons—including legitimate public concern—the plaintiffs argue should be disclosed.

Medico also supports the argument that information made public through non-traditional disclosures, such as leaks to the media, may be characterized as "official"

173. *Medico*, 643 F.2d at 136.

174. *Id.* at 135.

175. *See id.*

176. *Id.*

177. *Id.* at 140.

178. *Id.*

179. *Id.* at 140–43.

180. *Id.* at 142.

181. *Id.*

for the purposes of protection under the privilege. The court specifically stated that "how Time magazine obtained its knowledge of the FBI materials is irrelevant . . . . [t]he article is privileged as a fair and accurate summary of the FBI materials."[182] This reasoning displays how courts can move away from using a stringent analysis for determining how information is obtained and released, and instead focus on the information at issue.

Case law interpreting the fair report privilege extends to official interviews with police chiefs, government press releases, official conversations, district attorney press conferences, information obtained through an official government channel, legislative documents, and information provided by law enforcement authorities.[183] The extension to legislative documents and information provided by law enforcement authorities is particularly relevant because it is in these areas where courts, when interpreting the "through an official and documented disclosure" prong of the official acknowledgement doctrine, have found disclosures under these circumstances to be *not* "official."[184] In *Cresson v. Louisville Courier-Journal*, the court held the fair report privilege to apply to information included within a congressional report. And in *Mathis v. Philadelphia Newspapers, Inc.*, the court also found the Fair Report Privilege to apply to information supplied from the Philadelphia Police Department and the FBI.[185] In *Mathis*, it is noteworthy that the court accredited protection to the press even though the information was obtained in an informal report concerning an ongoing investigation, as well as from oral testimony reported to the press.[186]

In addition, in the recent case *Hudak v. Times Publishing Co.*, the court found that judicial proceedings, and reporting on the on-going nature of the proceedings concerning a plaintiff's criminal charges, fell within the ambit of the privilege.[187] More importantly, the court found that statements made by the district attorney to news reporters were a "report" or "official action" to be protected under the privilege.[188] The court explained the scope of the privilege, recognizing that even though the privilege has been interpreted to reach a multitude of situations, it is not absolute. The privilege may in fact be overcome if the party opposing the privilege can establish that the press "overtly embellished or made exaggerated additions to an account of a proceeding."[189]

182. *Id.* at 147.

183. *See* Alsop v. Cincinnati Post, 24 Fed. Appx. 296, 297 (6th Cir. 2001); Cresson v. Louisville Courier-Journal, 299 F. 487, 488 (6th Cir. 1924); Hudak v. Times Publ'g Co., 534 F. Supp. 2d 546, 572–73 (W.D. Pa. 2008) (citing Yohe v. Nugent, 321 F.3d 35, 43 (1st Cir. 2003)); Mathis v. Philadelphia Newspapers, 455 F. Supp. 407, 415 (E.D. Pa. 1978); Thomas v. Tel. Publ'g Co., 155 N.H. 314, 327 (2007); Wright v. Grove Sun Newspaper Co., 873 P.2d 983, 988 (Okla. 1994); Tilles v. Pulitzer Publ'g Co., 145 S.W. 1143, 1152 (Mo. 1912).

184. *See supra* Part III.

185. *See Cresson*, 299 F. at 491; *Mathis*, 455 F. Supp. at 416–17.

186. *Mathis*, 455 F. Supp. at 416–17.

187. *Hudak*, 534 F. Supp. 2d at 560–62.

188. *Id.* at 572.

189. *Id.* at 559.

The official acknowledgment doctrine embodies a similar limitation, which is evidenced by the elements of the doctrine that require the information to be (1) as specific as the information previously released and that (2) it must match the information previously disclosed.[190] Like in the fair report privilege, these requirements ensure that the doctrine is not abused and that it only extends to that specific information that warrants disclosure. If courts do not construe the third element of the official acknowledgment doctrine narrowly, and instead interpret it similarly to how courts assess "official action and proceeding" under the fair report privilege, information that is available in the public domain and deserving of disclosure will be officially acknowledged by courts and disclosed to the public.

V. CONCLUSION

Courts and the media are similar in at least one respect—they have the ability to be a check on government power. The judiciary serves this function through the formal structure of checks and balances, and the media serves this function through investigative reporting. Each entity must perform these functions to assist in maintaining a democratic government. The official acknowledgment doctrine provides a way by which the judiciary can do this because it is aimed at facilitating disclosure. However, courts must utilize a broader approach when interpreting and applying the third element of this doctrine.

Current case law interpreting "official action and proceeding" under the fair report privilege provides the appropriate analytical framework that courts should apply to avoid sustaining an unduly narrow interpretation of "through an official and documented disclosure" under the official acknowledgement doctrine. If the fair report privilege's analytical framework were applied to the official acknowledgment doctrine, the unduly narrow interpretation of "through an official and documented disclosure" would be replaced with a broader interpretation that appropriately reflects the purpose and policy supporting the official acknowledgment doctrine.

Furthermore, application of this broader interpretation would free a large volume of information previously censored under the current interpretation. Such information includes legislative documents, such as congressional testimony and Senate committee reports, affidavits from government agents irrespective of their employment status, news stories and media reports corroborated by public court documents, and oral and written statements from government actors who are in a position to speak authoritatively about the information at issue. Disclosure of such information will enable the citizenry to be equipped with the information often necessary to maintain democratic institutions. The lines between "official" and "unofficial" should not act as a barrier to disclosing information about government—the objective to create an informed citizenry is too important.

190. Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990).