NOTES

PROSECUTING LEAKERS THE EASY WAY: 18 U.S.C. § 641

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18 U.S.C. § 641 prohibits the theft or misuse of federal government "things of value." The federal government has used this statute to prosecute leakers of information: The government considers disclosure to be a type of theft or conversion, and government-produced or government-held information to be government property. The circuits disagree about whether § 641 applies to information, and, if it does, what its scope is: What information constitutes a "thing of value"? The Fourth Circuit construes § 641 to include all government-produced information and some privately created information, while the Ninth Circuit holds that no information can be a "thing of value." Other circuits limit the reach of § 641 to certain types of information due to First Amendment concerns arising from the potentially broad restriction on information dissemination that comes from criminalization of disclosure. This Note identifies and analyzes these approaches, and argues that a broad reading of § 641 is problematic. It concludes that Congress should clarify § 641's scope, and, if Congress does not act, that all courts should take First Amendment considerations into account when determining whether the government can criminalize the disclosure of information.

INTRODUCTION

Leaks are a "routine daily occurrence" for the government.[1] Leakers were responsible for the public revelation of warrantless wiretapping by the National Security Administration (NSA),[2] NSA collection of

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1. Report of the Interdepartmental Group on Unauthorized Disclosures of Classified Information (Mar. 31, 1982), reprinted in Presidential Directive on the Use of Polygraphs and Prepublication Review: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 98th Cong. 166, 169 (1985) [hereinafter Willard Report]; cf. James B. Bruce, The Consequences of Permissive Neglect: Laws and Leaks of Classified Intelligence, CIA (Apr. 14, 2007), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol47no1/article04.html (on file with the *Columbia Law Review*) ("The US press is an open vault of classified information . . . .").

2. James Risen & Eric Lichtblau, Bush Lets U.S. Spy on Callers Without Courts, N.Y. Times (Dec. 16, 2005), http://www.nytimes.com/2005/12/16/politics/16program.html (on file with the *Columbia Law Review*).

Americans' phone records,[3] and information regarding the 2011 attack on the U.S. diplomatic mission in Benghazi.[4] From Daniel Ellsberg to Bradley Manning and Edward Snowden, leakers have frustrated the government and fascinated the public for decades. The government appears increasingly concerned about this type of unauthorized information disclosure: Congress has held multiple hearings in the last two years alone to discuss how to handle leaking,[5] and the executive has criminally prosecuted multiple leakers. In fact, the Obama Administration has prosecuted more leakers than all previous administrations combined.[6]

While no law explicitly criminalizes all disclosure of confidential information,[7] certain circuits have read that prohibition into 18 U.S.C.

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3. Glenn Greenwald, NSA Collecting Phone Records of Millions of Verizon Customers Daily, Guardian (June 5, 2013), http://www.guardian.co.uk/world/2013/jun/06/nsa-phone-records-verizon-court-order (on file with the *Columbia Law Review*).

4. Ed Pilkington, White House Under Renewed Criticism After Leaked Benghazi Emails, Guardian (May 10, 2013), http://www.theguardian.com/world/2013/may/10/white-house-criticism-benghazi-leak (on file with the *Columbia Law Review*) (describing political backlash following leaked State Department emails).

5. E.g., Disclosures of National Security Information and Impact on Military Operations: Hearing Before the H. Comm. on Armed Servs., 112th Cong. (2012); National Security Leaks and the Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 112th Cong. (2012).

6. The standard view is that President Obama's administration has prosecuted six cases (the addition of Edward Snowden makes seven), while all previous administrations combined have prosecuted three. Charlie Savage, Nine Leak-Related Cases, N.Y. Times (June 20, 2012), http://www.nytimes.com/2012/06/20/us/nine-leak-related-cases.html (on file with the *Columbia Law Review*). But see David E. Pozen, The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information, 127 Harv. L. Rev. 512, 534 & n.114 (2013) [hereinafter Pozen, Leaky Leviathan] (discussing variations in what cases qualify as leak prosecutions). This Note discusses a number of leak prosecutions not commonly discussed in the academic literature on leaking. See infra Part II (analyzing prosecutions of information disclosure under property theft statute).

There are relatively few prosecutions compared to the amount of leaking that occurs; even known leakers are often not punished. Cf. Jane Mayer, The Secret Sharer: Is Thomas Drake an Enemy of the State?, New Yorker (May 23, 2011), http://www.newyorker.com/reporting/2011/05/23/110523fa_fact_mayer (on file with the *Columbia Law Review*) ("'The selectivity of the prosecutions here is nightmarish. It's a broken system.'").

7. There are administrative sanctions for violating regulations governing access to and distribution of classified information. Classified National Security Information, Exec. Order No. 13,526 § 4, 3 C.F.R. 298 (2009) [hereinafter Executive Order 13,526], available at http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information (on file with the *Columbia Law Review*). The government can also employ civil remedies to protect secrecy, including enforcing nondisclosure agreements signed by government employees. See Willard Report, supra note 1, at 173–74 (discussing statutory and common law civil remedies for disclosure by government employees); see also, e.g., Snepp v. United States, 444 U.S. 507, 508, 514–25 (1980) (per curiam) (upholding enforcement of nondisclosure agreement of former Central Intelligence Agency employee). Noncriminal remedies are outside the scope of this Note.

§ 641.[8] Section 641 criminalizes the theft and misuse of government "thing[s] of value."[9] Depending on what constitutes a "thing of value," § 641 potentially applies to the disclosure of any confidential government information, regardless of the disclosure's expected impact on national security, the intent of the leaker, or the leaker's status as a government employee. The espionage statutes,[10] World War I-era laws created to prosecute classic spying, have received the vast majority of the attention surrounding leak prosecutions.[11] While comparatively less discussed, § 641 may forbid a much broader range of information disclosure and thus have a much larger impact.

A broad construction of "thing of value" that includes all government information serves as a restriction on information dissemination and brings § 641 into conflict with the guarantees of free speech and the press in the First Amendment. In history's most famous leak case, the Supreme Court ruled that the government had no authority to order the prior restraint of the *New York Times*'s publication of the Pentagon Papers due to First Amendment protections for the press.[12] However, the Supreme Court did not insulate the newspaper from any criminal liability arising after the *Times* printed the same material.[13] The Court also left

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8. See infra Part II.A (explaining some circuits interpret § 641 broadly to cover all government information).

9. "Whoever embezzles, steals, purloins, or knowingly converts to his use . . . or without authority, sells, conveys or disposes of any record . . . or thing of value of the United States" shall be subject to fines or imprisonment. 18 U.S.C. § 641 (2012).

10. Id. §§ 793–798.

11. See, e.g., Cora Currier, Charting Obama's Crackdown on National Security Leaks, ProPublica (July 30, 2013, 2:40 PM), https://www.propublica.org/special/sealing-loose-lips-charting-obamas-crackdown-on-national-security-leaks (on file with the *Columbia Law Review*) (discussing only leak prosecutions brought under Espionage Act); Caitlin Dewey, Manning Was Charged Under the Espionage Act. It Doesn't Have a Proud History, Wash. Post: Switch (July 31, 2013, 4:33 PM), http://www.washingtonpost.com/blogs/the-switch/wp/2013/07/31/manning-was-charged-under-the-espionage-act-it-doesnt-have-a-proud-history/ (on file with the *Columbia Law Review*) (discussing history of Espionage Act prosecutions); Jesselyn Radack, Op-Ed., Why Edward Snowden Wouldn't Get a Fair Trial, Wall St. J. (Jan. 21, 2014, 7:46 PM), http://online.wsj.com/news/articles/SB10001424052702303595404579318884005698684 (on file with the *Columbia Law Review*) (discussing only Espionage Act charge of Snowden's indictment).

12. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam); id. at 728–30 (Stewart, J., concurring) (stating "press that is alert, aware, and free" serves purpose of First Amendment and holding impermissible prior restraint of the *Times*). The Court did not rule out all prior restraints; according to two Justices, if publication posed "direct, immediate, and irreparable" harm to the country, the government could prevent publication. Id. at 730; see also Floyd Abrams, The Pentagon Papers After Four Decades, 1 Wake Forest J.L. & Pol'y 7, 7 (2011) (explaining opinion of Justices Stewart and White as "ultimately controlling").

13. See, e.g., *N.Y. Times Co.*, 403 U.S. at 733 (White, J., concurring) (declaring "failure by the Government to justify prior restraints does not measure its constitutional

open whether the First Amendment protected the leaker, Daniel Ellsberg; Ellsberg was later criminally prosecuted under § 641.[14]

The courts have acknowledged that permitting the government to treat information disclosure as theft raises First Amendment concerns.[15] But they have failed to undertake a more searching First Amendment analysis. Further, the courts have disagreed over what standard to apply to determine whether information is a "thing of value." Many of the courts' standards have assumed the relevance of the First Amendment without describing exactly what role it should have in analyzing criminality under § 641. As explained below, the Ninth Circuit has held that § 641 may never be used to prohibit information disclosure, while the Second, Fourth, and Sixth Circuits, as well as a magistrate judge in the First Circuit, have declared prosecutions for information disclosure permissible under § 641 at least under certain circumstances.[16]

Legal scholarship provides little clarity regarding § 641's interpretation; only a few scholars have even recognized § 641's application to information.[17] Perhaps the uncertainty regarding the

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entitlement to conviction for criminal publication" and noting government could proceed by criminal prosecution).

14. See Melville B. Nimmer, National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case, 26 Stan. L. Rev. 311, 314 (1974) (describing indictment of Ellsberg). Ellsberg was not convicted, but the court never reached the merits—the case was dismissed because of government misconduct. Id. at 311; see also id. at 315–25 (critiquing charges against Ellsberg).

15. See infra Part II.A–B (explaining courts' applications of § 641 to information and their varying levels of concern regarding First Amendment implications).

16. See infra Part II (describing various standards courts have adopted to analyze whether information falls within § 641).

17. There has not been much discussion of this statute's application to information. See Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright* Comes Home: Executive Power and National Security Secrecy, 21 Harv. C.R.-C.L. L. Rev. 349, 401–06 (1986) [hereinafter Edgar & Schmidt, Executive Power] (declaring "there is no more important question about the extent to which the courts will fashion secrecy policy with Congress in the wings than whether or not § 641 will be construed to reach" government information, but discussing § 641's reach only briefly); Nimmer, supra note 14, at 315–24 (arguing Ellsberg could not have been found guilty under § 641 for disclosing Pentagon Papers). One student Note identifies the split between the Ninth Circuit's refusal to apply § 641 to information and the Second and Fourth Circuits' willingness to apply § 641 to information. Irina Dmitrieva, Note, Stealing Information: Application of a Criminal Anti-Theft Statute to Leaks of Confidential Government Information, 55 Fla. L. Rev. 1043, 1046–52 (2003). This Note takes the analysis further by identifying the various standards applied in each of those circuits, as well as those of every other court that has dealt with § 641 in an information context. See infra Part II (explaining variations in courts' construction of phrase "thing of value of the United States"). Dmitrieva's Note highlights a number of important considerations that militate against applying § 641 to information, including the preexisting statutory scheme covering confidential information and the public interest in protecting media freedom. Dmitrieva, supra, at 1060–71. Like Dmitrieva, this Note concludes that the best approach may be for courts to reject the application of § 641 to information. See id. at 1071–72 ("In the absence of a specific congressional mandate, this

scope of § 641 plays a role in its sporadic invocation by the government: Of the last eight major leak prosecutions, only three defendants (including Bradley Manning and Edward Snowden) were charged with violating § 641, although all could have been under certain interpretations of the law.[18]

Although leak prosecutions are rare, the legal regime defined by the courts provides the boundaries of permissible disclosure of which government employees, members of the media, and the public must be aware. Even the threat of prosecution can effectively shape behavior and chill disclosure, particularly when the courts indicate that these threats are credible.[19] Section 641 poses a serious threat of chilling legitimate speech if the courts read it broadly or continue to disagree so that § 641's scope is unclear. This law could be a potent means of controlling government information.

This Note argues that the judicial approaches applying § 641 to confidential government information are more complicated and contradictory than previously acknowledged and take inadequate account of First Amendment values. This Note proceeds in three Parts. Part I provides an overview of § 641, including its text, legislative history, and

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Note urges the courts to construe the criminal anti-theft statutes narrowly by not applying them to leaks of government information."). This Note additionally proposes two alternatives: a congressional statute that precisely defines unlawful transmission of information and a more structured approach for courts to use in the interim when applying § 641 to information. See infra Part III.

18. Compare Indictment, United States v. Kiriakou, No. 1:12CR127 (E.D. Va. Apr. 5, 2012) (failing to charge § 641), Indictment, United States v. Kim, No. 1:10-cr-00225-CKK (D.D.C. Aug. 19, 2010), available at http://www.fas.org/sgp/jud/kim/indict.pdf (on file with the *Columbia Law Review*) (same), Indictment, United States v. Drake, No. ROB 10CR0181 (D. Md. Apr. 14, 2010), available at http://www.fas.org/sgp/news/2010/04/drake-indict.pdf (on file with the *Columbia Law Review*) (same), and Indictment, United States v. Franklin, No. 1:05CR225 (E.D. Va. Aug. 4, 2005), available at http://www.fas.org/irp/ops/ci/franklin0805.pdf (on file with the *Columbia Law Review*) (same), with Criminal Complaint, United States v. Snowden, No. 1:13CR265 (CMH) (E.D. Va. June 14, 2013), available at http://apps.washingtonpost.com/g/documents/world/us-vs-edward-j-snowden-criminal-complaint/496/ (on file with the *Columbia Law Review*) (charging under § 641), Charge Sheet, United States v. Manning (Mar. 1, 2011), available at http://cryptome.org/manning/maning_additional_charge_sheet_redacted_02mar11.pdf (on file with the *Columbia Law Review*) (same), and Indictment, United States v. Sterling, No. 1:10CR485 (LMB) (E.D. Va. Dec. 22, 2010), available at http://www.fas.org/sgp/jud/sterling/indict.pdf (on file with the *Columbia Law Review*) (same). The defendant in the final standard leak case, Shamai Leibowitz, pled guilty before being indicted. See Steven Aftergood, Jail Sentence Imposed in Leak Case, Fed. of Am. Scientists (May 25, 2010), http://www.fas.org/blog/secrecy/2010/05/jail_leak.html (on file with the *Columbia Law Review*).

19. See, e.g., Michael N. Dolich, Note, Alleging a First Amendment "Chilling Effect" to Create a Plaintiff's Standing: A Practical Approach, 43 Drake L. Rev. 175, 186 (1994) ("[R]egulation may chill the tendency to speak out due to threat of future prosecutions or . . . fear of negative societal perceptions." (footnote omitted)).

potential tension with the First Amendment. Part II examines the various approaches courts have taken when determining the application of § 641 to information. Part III proposes a congressional solution and a number of First Amendment-inspired factors that courts should consider in applying § 641 to information in the absence of a clarifying statute, including the government's interest in the information, the nature of the information, and the depth of the secret.

I. CRIMINALIZING THEFT OF GOVERNMENT "THINGS OF VALUE"

The interpretation of § 641 is complicated by textual ambiguity as well as the differences between information and other types of property. While the courts only began to struggle with § 641's application to information in the 1970s,[20] they had discussed the meaning of the statute regarding "things" other than information for decades. These early interpretations of § 641's scope and meaning, discussed in Part I.A, frame later discussions of § 641's application to information.

The remainder of Part I examines the context and language of § 641 for clues to interpretation. Part I.B looks at the statutory scheme for criminalization of information disclosure and at congressional and executive interpretations of § 641 in light of that scheme. Part I.C examines the nature of information, discussing the difference between information and tangible property and the potential tension between § 641 and the First Amendment. This Part establishes a background for understanding and evaluating the judicial approaches to § 641 discussed in Part II.

A. *18 U.S.C. § 641 Prohibits Theft and Misuse of Government "Things of Value"*

Section 641 does not explicitly criminalize information disclosure. Instead, § 641 broadly prohibits larceny-type offenses regarding government property. In relevant part, § 641 states: "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States" shall be subject to fines or imprisonment.[21] The statute also criminalizes receipt of stolen government property.[22] Section 641 applies to government employees and

20. See, e.g., United States v. Girard, 601 F.2d 69 (2d Cir. 1979) (applying § 641 to sale of names of Drug Enforcement Agency informants); United States v. Friedman, 445 F.2d 1076 (9th Cir. 1971) (construing § 641 to cover receipt of secret grand jury information).

21. 18 U.S.C. § 641 (2012).

22. The text states: "Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted" is guilty of a violation. Id.

members of the public.[23] The value of the taken property determines whether the violation is a felony or a misdemeanor.[24]

Historically, the government used § 641 to prosecute improper disposition of traditional, tangible property.[25] For example, the seminal case interpreting § 641, *Morissette v. United States*, involved the removal of bomb casings from a U.S. Air Force bombing range.[26] The government continues to use § 641 to prosecute theft and conversion of tangible items, including theft of government equipment[27] and funds,[28] and Social Security fraud.[29]

Section 641's prohibitions sweep broadly: The Supreme Court stated in *Morissette* that § 641 applies "to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions."[30] Thus, § 641 is not limited to common law theft.[31] Conversion as defined under § 641 also sweeps more broadly than common law conversion, and includes "misuse or abuse" and "use in an

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23. See, e.g., United States v. Matzkin, 14 F.3d 1014, 1016 (4th Cir. 1994) (prosecuting person not employed by government); United States v. Fowler, 932 F.2d 306, 308 (4th Cir. 1991) (prosecuting government contractor); United States v. Morison, 844 F.2d 1057, 1060 (4th Cir. 1988) (prosecuting government employee).

24. 18 U.S.C. § 641 (declaring thefts of property valued at over $1,000 are felonies and thefts of anything less than this amount are misdemeanors). The value required for felony status increased to $1,000 from $100 in 1996. Economic Espionage Act of 1996, Pub. L. No. 104-294, § 606(a), 110 Stat. 3488, 3511 (codified at 18 U.S.C. § 641).

25. While § 641's text does not use the term "property," see 18 U.S.C. § 641, the courts have not suggested that something other than a property interest is at issue. See, e.g., Morissette v. United States, 342 U.S. 246, 248 (1952) (explaining § 641 covers "government property"); United States v. Tobias, 836 F.2d 449, 449 (9th Cir. 1988) (noting defendant convicted of "theft of government property").

26. 342 U.S. at 247.

27. See, e.g., United States v. Alvarez, 472 F. App'x 880, 880–81 (11th Cir. 2012) (affirming sentence for individual who pled guilty to theft of computers, scanners, and other electronic equipment belonging to U.S. military).

28. See, e.g., United States v. Norman, 416 F. App'x 540, 541 (6th Cir. 2011) (upholding guilty plea for theft of emergency aid after Hurricane Katrina).

29. See, e.g., United States v. Shirley, 720 F.3d 659, 661 (8th Cir. 2013) (upholding § 641 convictions for fraud in Social Security disability payments); United States v. Townsend, 515 F. App'x 869, 869–70 (11th Cir. 2013) (per curiam) (same).

30. *Morissette*, 342 U.S. at 266 n.28. The Court noted that such a broad reading of the statute prevented the technical distinctions present in common law larceny-type offenses from providing loopholes to escape prosecution. Id. at 271 ("What has concerned codifiers of the larceny-type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches . . . . The codifiers wanted to reach all such instances.").

31. See id. at 272 (listing types of conversion not considered theft); accord United States v. Girard, 601 F.2d 69, 71 (2d Cir. 1979) ("[T]heft is not a requisite element of the proscribed statutory offense . . . .").

unauthorized manner" of government property.[32] Neither theft nor conversion is necessary if the defendant "sells, conveys or disposes" of government property "without authority."[33] This includes unauthorized disposition of lawfully obtained property.[34] While the mens rea for these actions is not explicit in the statute's text, the Supreme Court has confirmed that some mental culpability is required.[35]

If § 641 were read to apply to government information in a manner similar to how it applies to tangible property, § 641 would prohibit a wide range of conduct: theft, embezzlement, unauthorized sale, disposal and conveyance, misuse, and more.

B. *Congressional Actions Provide Little Guidance on the Meaning of § 641*

This section highlights the ambiguity over whether Congress intended to prohibit theft and misuse of government information through § 641. There is only minimal legislative history on § 641 to look to for guidance, discussed in Part I.B.1, and acts taken by subsequent Congresses and executive actors, discussed in Part I.B.2 and Part I.B.3, respectively, indicate conflicting understandings of the statute.

1. *Legislative History Does Not Reveal Congressional Intent.* — The Revisor's Notes to the adoption of § 641 indicate that Congress enacted the law in 1948 as a consolidation of scattered provisions of the federal criminal code related to the criminal disposition of government property.[36] There is no other congressional discussion over § 641's enactment.

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32. *Morissette*, 342 U.S. at 272; see also United States v. Collins, 56 F.3d 1416, 1419 (D.C. Cir. 1995) (per curiam) (arguing statute's language and Supreme Court's interpretation lead to broader definition than common law tort of conversion); United States v. Lambert, 446 F. Supp. 890, 895 (D. Conn. 1978) (arguing crimes under § 641 are "independent of the constraints, and the vagaries, of particular common-law doctrines" such as conversion), aff'd sub nom. *Girard*, 601 F.2d 69. Contra Chappell v. United States, 270 F.2d 274, 277 (9th Cir. 1959) (presuming enacting Congress understood and intended existing meaning of "conversion").

33. See, e.g., United States v. Caba, No. 96-1069(L), 1996 WL 685764, at *2 (2d Cir. Nov. 29, 1996) (noting, in case not involving information, "takings" has no significance for "without authority" clause); United States v. Zettl, 889 F.2d 51, 53 (4th Cir. 1989) (deciding charges under § 641 do not necessarily involve conversion); United States v. Jeter, 775 F.2d 670, 680–81 (6th Cir. 1985) (noting taking "thing of value" is distinct from conveying "without authority").

34. See, e.g., United States v. Jones, 677 F. Supp. 238, 240 (S.D.N.Y. 1988) (noting legality of acquisition of information is "irrelevant" to whether transfer was without authority).

35. *Morissette*, 342 U.S. at 260–63 (noting larceny is ancient offense consistently construed to have intent element, so congressional silence on intent incorporates common law requirements).

36. 18 U.S.C. § 641 (2012) (Historical and Revision Notes); see also *Morissette*, 342 U.S. at 265 (referencing consolidation of earlier statutes). The term "converts" did not appear in either the predecessor sections of § 641 from the 1940 code or the provisions

The courts have determined that § 641 did not substantively change § 641's predecessor statutes, some of which date back to 1875.[37] The courts have also acknowledged that, while there is no hard evidence of congressional debates from that time, it is unlikely that the Congress of a century ago, enacting the original property theft statutes, contemplated their application to information.[38] One scholar notes that § 641 "has been on the books since 1875 in much the same form it has today; its legislative history gives no hint that Congress intended it to apply to theft of government information."[39] Courts have also noted, however, that the use of the broad term "thing of value" may indicate congressional intent to reach a wide array of property.[40] Congressional debates over subsequent amendments of § 641—which have focused only on how to draw the line between misdemeanor and felony—have not shed any additional light on the scope of § 641.[41]

2. *Statutory Scheme Criminalizing Information Disclosure.* — Congress has created a detailed scheme for criminalizing information disclosure. These laws provide criminal penalties for unauthorized disclosure of classified information[42] in two narrowly proscribed categories: (1) disclosures

predating that revision, but the Supreme Court asserted that the addition of this term did not add new prohibitions to § 641. Id. at 266–68 & n.28.

37. See, e.g., *Morissette*, 342 U.S. at 260, 266–67 (noting purpose of § 641 was simply to collect like crimes); United States v. Truong Dinh Hung, 629 F.2d 908, 923 (4th Cir. 1980) (opinion of Winter, J.) (discussing legislative history of § 641).

38. See, e.g., *Truong Dinh Hung*, 629 F.2d at 923 (opinion of Winter, J.) ("Congress[es] of [the 1800s] would not foresee this issue."); United States v. Lambert, 446 F. Supp. 890, 893 (D. Conn. 1978) (noting lack of recent legislative history and failure of original 1875 enactment debates to delineate § 641's scope), aff'd sub nom. United States v. Girard, 601 F.2d 69 (2d Cir. 1979).

39. Michael E. Tigar, The Right of Property and the Law of Theft, 62 Tex. L. Rev. 1443, 1463 (1984).

40. United States v. Collins, 56 F.3d 1416, 1419 (D.C. Cir. 1995) (per curiam) ("[W]e note the language chosen by Congress could not have been broader."); *Truong Dinh Hung*, 629 F.2d at 924 (opinion of Winter, J.) ("By appending 'thing of value' onto the list of 'any record, voucher, [or] money,' Congress certainly did not evince an intent to restrict the reach of § 641." (alteration in original)).

41. One amendment clarified that multiple incidents may be aggregated in a single prosecution for the purpose of reaching the $1,000 threshold for a felony offense. Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, § 4, 118 Stat. 831, 833 (2004) (codified at 18 U.S.C. § 641) (inserting phrase "in the aggregate"). This change was made to ensure that fraudulent receipt of federal money or benefits, like Social Security, could be felony offenses. H.R. Rep. No. 108-528, at 11, 49 (2004). Another amendment raised the minimum value of implicated property required for a felony. Economic Espionage Act of 1996, Pub. L. No. 104-294, § 606(a), 110 Stat. 3488, 3511 (codified at 18 U.S.C. § 641).

42. Information is classified when the executive determines that unauthorized disclosure of the information "could reasonably be expected to cause identifiable or describable damage to the national security." Executive Order 13,526, supra note 7, § 1.4. A number of works have discussed the legal framework regarding classified information and leaks in more detail. See generally Jennifer K. Elsea, Cong. Research Serv., R41404, Criminal Prohibitions on the Publication of Classified Defense Information (2013)

relating to certain subject areas, generally intelligence and national defense,[43] and (2) disclosures made to a limited class of recipients, generally foreign governments.[44] For example, 18 U.S.C. § 793(e) prohibits an individual from communicating "information relating to the national defense" to "any person not entitled to receive it" if that individual "has reason to believe [the information] could be used to the injury of the United States."[45] A number of these statutes are limited to actions by government employees.[46]

Section 641 is not similarly limited to information related to "national defense" and has no requirement that the transmitter believe the information could hurt the United States.[47] It is thus much broader than the other information-disclosure statutes. If courts construe § 641's application to information broadly, the statute would prohibit the actions proscribed by § 793(e), and more. And § 641 would prohibit those actions without the subject-matter and scienter restrictions that Congress wrote into the other information-disclosure laws. Congress's creation of a detailed system for criminalizing disclosure may indicate that § 641 was not intended to indiscriminately reach all government information.[48] It

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[hereinafter Elsea, Criminal Prohibitions], available at https://www.fas.org/sgp/crs/secrecy/R41404.pdf (on file with the *Columbia Law Review*); Pozen, Leaky Leviathan, supra note 6, at 522–27.

43. See, e.g., 18 U.S.C. § 795 (prohibiting creation of visual depictions of defense installations or equipment); id. § 797 (prohibiting publication and sale of visual depictions of defense installations); id. § 798 (banning disclosure of classified information regarding communications intelligence and cryptographic activities); id. § 952 (prohibiting disclosure of diplomatic codes and correspondence); 42 U.S.C. § 2277 (2006) (prohibiting government employees from unauthorized communication of classified information relating to atomic weapons and nuclear material); 50 U.S.C.A. §§ 3121–3122 (West 2014) (banning disclosure of covert intelligence officers' identities by anyone with authorized access to that information).

44. See, e.g., 18 U.S.C. § 794 (prohibiting gathering or delivering defense information to aid foreign government); 50 U.S.C. § 783(a) (2006) (prohibiting government employees from passing classified information to persons they have reason to believe are agents of foreign government). The Uniform Code of Military Justice also prohibits members of the military from passing information related to the national defense to foreign governments or their agents. 10 U.S.C. § 906a (2012).

45. 18 U.S.C. § 793(e). This is one of the espionage statutes found in 18 U.S.C. §§ 793 to 798. The rest of the espionage statutes are likewise limited to information related to national defense, and require either intent to harm the United States or use in a manner that harms the United States. See id. §§ 794–798. For an in-depth discussion of the espionage statutes, see generally Harold Edgar & Benno C. Schmidt, Jr., The Espionage Statutes and Publication of Defense Information, 73 Colum. L. Rev. 929 (1973).

46. See Elsea, Criminal Prohibitions, supra note 42, at 8–9 & n.65 (observing some criminal prohibitions regarding information disclosure apply exclusively to government employees).

47. 18 U.S.C. § 641.

48. In the Fourth Circuit, Judge Winter argued that inconsistency with the rest of the statutory scheme indicated that § 641 should not be applied to classified information. United States v. Truong Dinh Hung, 629 F.2d 908, 927–28 & nn.21–22 (4th Cir. 1980)

may also indicate that Congress did not think that § 641 reached information, since any later-enacted prohibitions would have been duplicative.[49] However, it is also possible that subsequent Congresses simply wished to provide more explicit prohibitions on disclosure for particularly important subject matters, while intending § 641 to serve as a catchall. Therefore, the current statutory scheme is not conclusive as to § 641's interpretation.

Congress has also attempted, unsuccessfully, to pass legislation that would criminalize all information disclosure—something that would be unnecessary if abstract information falls within § 641's prohibitions.[50] The Intelligence Authorization Act for Fiscal Year 2001, for example, would have made any unauthorized disclosure of classified information by government employees a felony.[51] Introduction of this bill may

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(opinion of Winter, J.) ("It would greatly disrupt the network of carefully confined criminal prohibitions Congress thought it had enacted in 1950 . . . if the courts permitted § 641 to serve as a criminal prohibition against the merely willful unauthorized disclosure of any classified information."). No court has adopted this reasoning, although it has been raised in scholarship. See Dmitrieva, supra note 17, at 1060–67 (arguing statutory scheme and failure to enact blanket prohibition on information disclosure means § 641 should not be applicable to information).

One reason for the government to invoke a statute other than § 641 would be to apply a harsher punishment to the defendant. Section 641 provides a maximum sentence of ten years if the value of the property at issue is over $1,000. 18 U.S.C. § 641. Only some of the other relevant statutes provide more severe punishment. Compare id. § 794 (providing for punishment by death or imprisonment for any term of years), and 50 U.S.C.A. § 3121 (providing for imprisonment of not more than fifteen years), with 18 U.S.C. § 793 (providing for fine or imprisonment of not more than ten years), id. § 798 (same), and id. §§ 795–797 (providing for maximum imprisonment of one year).

49. The presumption that Congress does not legislate in a duplicative manner underlies the statutory-construction canon against redundancy. This is commonly applied in the context of a single statute, but also applies across the entire statutory code. William N. Eskridge, Jr. et al., Cases and Materials on Legislation: Statutes and the Creation of Public Policy 865–66 (4th ed. 2007) (collecting cases applying rule to avoid redundancy).

50. The Supreme Court has occasionally endorsed the use of subsequent legislative history to illuminate a statute's original meaning, although its use can be controversial. See, e.g., FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000) ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings."); Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980) (noting views of subsequent Congresses can illuminate statute, especially when "precise intent of the enacting Congress is obscure"). But see, e.g., Rapanos v. United States, 547 U.S. 715, 749–52 (2006) (rejecting broad construction of jurisdiction of Army Corps even though Congress had repeatedly failed to narrow it); Eskridge et al., supra note 49, at 1041–42 (noting new textualists would not rely on subsequent legislative history).

51. Intelligence Authorization Act for Fiscal Year 2001, H.R. 4392, 106th Cong. § 303 (2001). There have been numerous other unsuccessful bills that would have criminalized leaks of classified information by government employees, including H.R. 319, 104th Cong. § 2 (1995), H.R. 271, 103d Cong. § 2 (1993), H.R. 363, 102d Cong. § 2 (1991), H.R. 279, 101st Cong. § 2 (1989), and H.R. 3066, 100th Cong. (1987). There have also been unsuccessful attempts to criminalize disclosure of more limited types of information. See

indicate Congress's belief that such conduct was not already criminalized. This understanding is reflected in President Clinton's veto statement, in which he declared that the proposed law was overbroad and would discourage government officials from engaging in public discussion.[52] On the other hand it may reflect nothing more than congressional desire to demonstrate action in the face of the growing leak problem or to codify certain prohibitions more explicitly.[53]

3. *Conflicting Executive Interpretations.* — Numerous government actors have advocated leak prosecutions or explained the legal regime governing leaks in a way that demonstrates narrow application of § 641, often discussing the prosecution of leaks as though § 641 does not reach information.[54] Past administrations have interpreted § 641 to not apply to information.[55] The most recent United States Attorneys' Manual does not list § 641 in its discussion of "Key National Defense and National Security Provisions."[56] However, in the individual section on § 641, the manual asserts that § 641 prohibits theft of government information in both

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Securing Human Intelligence and Enforcing Lawful Dissemination Act, H.R. 6506, 111th Cong. (2010) (introducing provision criminalizing disclosures of classified information related to human-intelligence activities); Espionage Statutes Modernization Act of 2010, S. 4051, 111th Cong. (2010) (amending espionage statutes to cover information related to "national security" and criminalizing disclosures in violation of government nondisclosure agreements). Both of these bills died in committee.

52. Message on Returning Without Approval to the House of Representatives Intelligence Authorization Legislation for Fiscal Year 2001, 3 Pub. Papers 2466–67 (Nov. 4, 2000) [hereinafter Clinton Veto Message] (encouraging adoption of more-narrowly-drawn prohibitions). Courts have treated veto statements as relevant to interpretation. See, e.g., Langraf v. USI Film Prods., 511 U.S. 244, 255–56 (1994) (explaining presidential veto of civil rights bill due to retroactivity concerns, in addition to subsequent enactment of bill without retroactivity language, leads to inference of no retroactivity).

53. See supra note 1 and accompanying text (describing frequency of leaks).

54. See, e.g., Elsea, Criminal Prohibitions, supra note 42, at 11 (explaining prosecution of Wikileaks would require proof of potential damage to national security, indicating focus only on espionage statutes); Letter from Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, to Jennifer Robinson, Att'y for Julian Assange, Wikileaks (Nov. 27, 2010), available at http://documents.nytimes.com/letters-between-wikileaks-and-gov (on file with the *Columbia Law Review*) (noting Wikileaks's publication of documents was in violation of U.S. law only if documents "were provided by any government officials, or any intermediary without proper authorization").

55. See, e.g., Paul Hoffman & Kate Martin, Safeguarding Liberty: National Security, Freedom of Expression and Access to Information: United States of America, *in* Secrecy and Liberty: National Security, Freedom of Expression and Access to Information 477, 495 (Sandra Coliver et al. eds., 1999) (citing Dep't of Justice, United States Attorneys' Manual, Title 9, at 3 (1978)) (noting Carter administration said § 641 does not apply to leaks to press).

56. Dep't of Justice, United States Attorneys' Manual, Title 9: Criminal Resource Manual § 2057, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02057.htm (on file with the *Columbia Law Review*) (last visited Feb. 5, 2014).

corporeal and incorporeal form.[57] This interpretation reflects current practice, as well, as the government has recently prosecuted individuals under § 641 for unauthorized disclosure of information.[58] This confusion across government entities regarding § 641's scope highlights the ambiguity around the statute's interpretation.

C. *Is Information Different?*

Information has unique qualities that may justify treating it differently from traditional, tangible property. Part I.C.1 examines the nature of information and the conceptual difficulty inherent in treating information as property subject to theft or conversion. Part I.C.2 discusses the history of treating information as property, noting that courts and legislatures have recognized property interests in secret information only recently, and only in the context of information held by private actors. Finally, Part I.C.3 highlights the potential tension between a broad interpretation of § 641 and the First Amendment.

1. *Information Has Unique Qualities.* — Discussing § 641's application to information is not the same as discussing its application to information embodied in a government-owned physical item. Section 641 covers blank paper owned by the government, and it includes government documents or photographs regardless of whether there is information contained within.[59] For example, in *United States v. Morison*, a well-known leak prosecution, a Navy employee took classified, defense-related photographs and mailed them to a magazine.[60] In upholding Morison's conviction under § 641, the Ninth Circuit declared that the photographs were "specific, identifiable tangible property" that would "qualify as such for larceny or embezzlement under any possible definition of the crime of theft."[61] The court, therefore, did not have to reach the question of § 641's application to *information*, separate from a tangible medium.

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57. Id. § 1664, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01664.htm (on file with the *Columbia Law Review*) (last visited Feb. 24, 2014). The manual promotes a policy of nonprosecution for disclosure of intangible information obtained primarily for dissemination to the public as long as it was not obtained through trespass or wiretapping. Id.

58. See supra note 18 and accompanying text (highlighting indictments of Manning, Snowden, and Sterling).

59. See supra notes 25–35 and accompanying text (describing application of § 641 to tangible property). Because the value of what is taken affects punishment, see supra note 24 and accompanying text (discussing statutory punishment provision), cases of corporeal acquisition or retention likely turn on how to value the property—whether it is limited to the value of the documents themselves (for example, the cost of the paper and production), or whether it may take into account the information in the document. This question is beyond the scope of this Note.

60. 844 F.2d 1057, 1061 (4th Cir. 1988).

61. Id. at 1077.

Information itself, however, can be acquired, transmitted, or retained in incorporeal as well as corporeal form.[62] In addition, more than one person can use information simultaneously, so that one person's use does not interfere with the right of others to use it. Exclusive possession, long considered essential to the nature of property,[63] is thus not necessarily present with information.

In thinking of theft or conversion of something with these qualities, it seems clear that, as noted above, theft occurs if a physical document is removed from the government's possession.[64] However, if the document is copied and then replaced, what has the government lost? Not the document and not the information, which the government still possesses.[65] If the information was previously public, the government lost nothing.[66] However, if the government had kept the information secret,

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62. For a description of the distinctions between these types of information use, see Eli Lederman, Criminal Liability for Breach of Confidential Commercial Information, 38 Emory L.J. 921, 944–66 (1989) (discussing models of transmission of information in context of trade secrets).

63. See, e.g., Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it."); Hanoch Dagan, Pluralism and Perfectionism in Private Law, 112 Colum. L. Rev. 1409, 1413–15 (2012) (describing theories of property for which exclusion is one core feature).

64. See supra notes 60–61 and accompanying text (discussing *Morison* case, which upholds application of § 641 to tangible photographs).

65. One court held that making copies on government paper using government copiers is sufficient to give the government a property interest in the copy. United States v. DiGilio, 538 F.2d 972, 977 (3d Cir. 1976). This approach has been applied in just one other case. See United States v. Hubbard, 474 F. Supp. 64, 79–80 (D.D.C. 1979) (upholding indictment against leaders of Church of Scientology who copied documents from Departments of Justice and Treasury because use of government resources to make copies created government property interest (citing *DiGilio*, 538 F.2d at 977–88)). For a critique of this approach, see Edgar & Schmidt, Executive Power, supra note 17, at 403, which argues that fundamental principles of criminal law are inconsistent with the discretionary punishment of behavior in which everyone engages, like photocopying.

66. Because there could be no "taking," publicly available information does not seem to fall within § 641's prohibition on "steal[ing]" or "purloin[ing]." 18 U.S.C. § 641 (2012). However, disposition of publicly available information could conceivably be "without authority." Id. For example, when classified information is reported in the media, it is not automatically declassified. See generally Jennifer K. Elsea, Cong. Research Serv., RS21900, The Protection of Classified Information: The Legal Framework 11–14 (2012), available at http://www.fas.org/sgp/crs/secrecy/RS21900.pdf (on file with the *Columbia Law Review*) (discussing possibility of "instant declassification"); Pozen, Leaky Leviathan, supra note 6, at 566–67 & nn.273 & 276 (analyzing ambiguity in procedure for declassification in Executive Order 13,526). Thus, someone might violate the law if she conveys public but classified information—in a case of incorporeal transmission, by simply discussing it with another—because acting in violation of the classification system could be acting "without authority" according to § 641. This analysis is complicated by the possibility of "authorized" leaks by high-level government officials. See id. at 565–73 (discussing plants and "pleaks," and difficulty of determining whether leak was authorized). The courts have not yet dealt with this issue.

the government has lost the confidentiality of the information.[67] To label this a larceny-type offense assumes that the government is entitled to keep the information secret.[68] It also assumes that the government has a property interest in informational secrecy, as opposed to (or in addition to) an interest in the information itself.

2. *There May Be No Property Interest in Government Information.* — Other than traditional copyright and patent protections,[69] the trend toward protecting information and other intangibles as property is quite recent.[70] Starting in the 1960s, an increasing number of states have protected confidential commercial information through trade secret laws.[71] Additionally, in 1987, the Supreme Court in *Carpenter v. United States* recognized confidential commercial information as property under the federal mail fraud statute.[72]

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67. The government could keep information confidential, yet still not have exclusive possession of the information. For example, companies may submit confidential procurement bids to the government. See infra Part II.C.

68. Whether the government is entitled to keep information secret is not independent of whether the use of government information is "without authority." 18 U.S.C. § 641. Courts have struggled with this concept—one court noted that the phrase "'without authority'" is "virtually devoid of meaning" in the context of information. United States v. Vicenzi, No. 87-222-N, 1988 WL 98634, at *9 (D. Mass. Feb. 16, 1988) (quoting § 641); cf. United States v. Truong Dinh Hung, 629 F.2d 908, 925 (4th Cir. 1980) (opinion of Winter, J.) (noting there is "no precise standard" government employees must follow in deciding whether to permit or forbid disclosure). This Note focuses on whether information may be covered under the statute at all, which is a distinct (although related) question.

69. These protections have not proven entirely effective. Copyright only protects "expression," not the "idea[s]" or "process[es]" described in a work. 17 U.S.C. § 102 (2012) (describing subject matter of copyright). Further, not all commercial information will meet the novelty requirements of patent law. 35 U.S.C. §§ 101–102 (2006) (requiring patentable inventions be "new and useful" and not previously patented). Patenting may also be too expensive, or alternatively reveal too much information to competitors, to be effective protection. See Lederman, supra note 62, at 927 (describing difficulties of protecting confidential commercial information through intellectual property law).

70. See generally, e.g., Lederman, supra note 62 (discussing increasing criminal liability for actions involving confidential commercial information, including passage of federal statutes and state trade secret laws). This parallels the late recognition of other intangible property rights. See Brette M. Tannenbaum, Note, Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud After *Skilling*, 112 Colum. L. Rev. 359, 373–78 (2012) (describing various intangible rights theories accepted by courts in 1980s and 1990s).

71. Lederman, supra note 62, at 930 (noting trend in protecting information as property). By the 1990s, more than half of the states prohibited theft of trade secrets. Id. at 931.

72. 484 U.S. 19, 28 (1987). The Supreme Court had previously recognized a "*quasi* property" interest in information in the form of news, based on a theory of unfair competition. Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918).

Courts have relied on *Carpenter*'s recognition of information as property to justify § 641's application to information. However, the courts have not examined the differences

These informational property rights are not absolute. For example, trade secret laws protect information created by corporations that has economic value only when secret.[73] A corporation must have measures in place to keep the information secret; protection lapses once the information is public.[74] Even with such limitations, the shift toward recognizing intangible property rights has been controversial.[75]

Furthermore, these changes have focused on information generated and held by private actors. As Cass Sunstein theorizes, "[T]he government is an abstraction. It need not have [property] rights in information akin to those of a private citizen."[76] First, there are no First Amendment concerns when private companies restrict the flow of business information they produce, whereas the government holds information critical to public affairs.[77] Second, Congress has explicitly rejected copyright protection for government work.[78] This may indicate Congress

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between the mail fraud statute and § 641, nor the differences between private and public information. See, e.g., United States v. Morison, 844 F.2d 1057, 1077 (4th Cir. 1988) (noting "[w]hether pure 'information' constitutes property which may be the subject of statutory protection under section 641" is "matter which has largely been clarified" by *Carpenter*); *Vicenzi*, 1988 WL 98634, at *6 (noting *Carpenter*'s holding that intangible information can constitute "property" supports deciding conversion of "certain 'confidential' government information" is prohibited by § 641).

73. I. Neel Chatterjee, Should Trade Secret Appropriation Be Criminalized?, 19 Hastings Comm. & Ent. L.J. 853, 857 (1997). Legislatures have defined trade secrets in many different ways, although unification has occurred since 1979 with the gradual adoption of the Uniform Trade Secrets Act (UTSA) in all but three states, one of which is considering adoption this year. Legislative Fact Sheet—Trade Secrets Act, Unif. Law Comm'n, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=TradeSecretsAct (on file with the *Columbia Law Review*) (last visited Mar. 15, 2014) (listing enacting states). The UTSA defines a trade secret as information that "derives independent economic value . . . from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure" and "is the subject of efforts . . . to maintain its secrecy." Unif. Trade Secrets Act, § 1(4), 14 U.L.A. 433 (1985). Other common definitions are found in the Restatement of Torts and the Restatement (Third) of Unfair Competition. Chatterjee, supra, at 857; see also Restatement of Torts § 757 cmt. b (1939) (defining trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it").

74. Dmitrieva, supra note 17, at 1056.

75. For a critical discussion regarding the shift toward treating information as property, see generally Pamela Samuelson, Information as Property: Do *Ruckelshaus* and *Carpenter* Signal a Changing Direction in Intellectual Property Law?, 38 Cath. U. L. Rev. 365 (1989) (arguing Supreme Court cases recognizing "information as property" relied on flawed reasoning).

76. Cass R. Sunstein, Government Control of Information, 74 Calif. L. Rev. 889, 916 (1986) (describing Jeffersonian model of free expression).

77. See infra Part I.C.3 (discussing First Amendment concerns associated with broad construction of § 641).

78. See 17 U.S.C. § 105 (2012) ("Copyright protection under this title is not available for any work of the United States Government . . . .").

did not intend for the government to "own" information the same way a private actor does.[79] Third, protection of commercial information in cases between private parties may be alternatively described as penalizing the breach of a fiduciary duty, for example that which an employee owes an employer.[80] Therefore, this trend of treating intangibles as protectable property may not be recognizing a general property right at all. At the least, it provides a questionable basis for enforcing a government property right, particularly against a member of the public.

3. *First Amendment Issues Regarding Restrictions on Information Dissemination.* — Because the traditional use of § 641 to control government paper, supplies, and weaponry poses no First Amendment problems, before the 1970s no one would have linked § 641 to the First Amendment. Issues began to arise only with § 641's application to information, because penalties for information disclosure serve as a restriction on speech.

The First Amendment declares that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[81] This Amendment was crafted to "safeguard certain basic freedoms," like those of the press and speech;[82] to "prohibit the widespread practice of governmental suppression of embarrassing information";[83] and to promote an enlightened and informed people.[84] Information about government activity, particularly, "lies at the very core of the freedoms of speech and press."[85] While the government can best ensure secrecy through strictly controlled access to confidential information and harsh punishment for its disclo-

79. Reproduction and distribution are two of the exclusive rights that copyright law grants to copyright owners. Id. § 106(1), (3). If the government can label as theft the unauthorized use of its information, it effectively gains the right to control distribution and reproduction of that work, irrespective of the copyright statute. For discussion of the copyright issues related to § 641's application to information, see Nimmer, supra note 14, at 319–22.

80. For example, the *Carpenter* case revolved around an insider-trading scheme where an employee defrauded his employer. Carpenter v. United States, 484 U.S. 19, 23–24 (1987).

81. U.S. Const. amend. I.

82. N.Y. Times Co. v. United States, 403 U.S. 713, 715–16 (1971) (Black, J., concurring).

83. Id. at 723–24 (Douglas, J., concurring).

84. Id. at 728 (Stewart, J., concurring). Particular values are emphasized to agreater or lesser degree in the many theories on the First Amendment. As Robert Post has described, free speech jurisprudence has "flagrantly proliferating and contradictory rules" and a "profoundly chaotic collection of methods and theories." Robert Post, Reconciling Theory and Doctrine in First Amendment Jurisprudence, 88 Calif. L. Rev. 2353, 2355 (2000). Thus, First Amendment doctrine may not embody any particular theory. Cf. id. at 2369–71 (noting inconsistency between two major First Amendment theories and free speech doctrine).

85. Nimmer, supra note 14, at 322.

sure, this regime can deprive citizens of the information they require to participate in self-governance.

If § 641 applies to information, it has the potential to subject people to criminal sanction because of their expression. As noted previously, § 641 is an extremely broad statute that prohibits a wide range of behavior.[86] Not only could this type of prohibition on disclosure restrain transfer of government information, but even the threat of prosecution could chill the exercise of First Amendment rights.[87] This affects potential whistleblowers, reporters, and reporters' sources[88]—all parties that play an important role in ensuring government accountability and an informed citizenry.[89] Without clear guidance regarding statutory meaning, government officials, prosecutors, and juries are determining what disclosures are permissible, and, thus, the scope of speech rights.[90] These concerns permeate the discussions of many courts deciding whether or not to apply § 641 to information.[91]

II. APPLICATION OF § 641 TO GOVERNMENT INFORMATION

As described in Part I, § 641 is a wide-reaching and yet ambiguous statute that may have important First Amendment consequences if it is read to cover information. The Supreme Court has not yet provided

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86. See supra Part I.A (discussing scope of § 641 outside of information context).

87. See, e.g., Dombrowski v. Pfister, 380 U.S. 479, 487 (1965) ("The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."). Similarly, President Clinton argued that a bill making the unauthorized disclosure of classified information by government employees a felony was "overbroad and may unnecessarily chill legitimate activities that are at the heart of a democracy," including by "discourag[ing] Government officials from engaging even in appropriate public discussion, press briefings, or other legitimate official activities." Clinton Veto Message, supra note 52, at 2466–67 (encouraging adoption of more-narrowly-drawn prohibitions).

88. See Scott Shane, Former N.S.A. Official Is Charged in Leaks Case, N.Y. Times (Apr. 15, 2010), http://www.nytimes.com/2010/04/16/us/16indict.html (on file with the *Columbia Law Review*) (discussing concerns of press advocacy group regarding chilling of speech). Likely for this reason, the media industry has actively followed cases involving § 641, including by filing amicus briefs. See, e.g., Brief of the Washington Post et al. as Amici Curiae Supporting Respondents, United States v. McAusland, 979 F.2d 970 (4th Cir. 1992) (No. 91-5874), 1991 WL 11248250.

89. Thomas Jefferson emphasized the importance of free expression in enabling citizens to make informed decisions; under this view, public deliberation is key to self-government. See Sunstein, supra note 76, at 890–91 (describing Jeffersonian model of free expression).

90. Nimmer argues that unbounded discretion regarding § 641's meaning makes the statute unconstitutional due to overbreadth. See Nimmer, supra note 14, at 322 (comparing lack of standards for § 641 to parade ordinances struck down by Supreme Court as overbroad).

91. See infra Part II.A.2, II.B (discussing efforts of some courts to limit breadth of § 641).

guidance on the applicability of § 641 to information.[92] The courts of appeals have split on this question, with the majority determining that § 641 reaches information at least in certain circumstances. There are also splits within two circuits, with the Fourth Circuit using different standards in different types of cases[93] and a district court in the Second Circuit taking a different approach than the circuit court.[94] The standards that these courts have articulated can be conceptually divided by the apparent focus of the courts in defining what constitutes a "thing of value of the United States": on "thing," "value," or "of the United States."[95]

The broadest approach, which focuses on "value," is discussed in Part II.A. This section examines a number of related standards for determining whether government information has "value," and thus whether disclosure should be prohibited by § 641. It explains the approaches of the Second, Fourth, and Sixth Circuits, as well as that of a magistrate judge in the First Circuit. These courts all agree that § 641 should apply to information; they disagree on exactly when. Part II.B examines the narrowest approach, that of the Ninth Circuit, which focuses on "thing." The Ninth Circuit declared that § 641 never applies to information, because information is not a "thing." Part II.C analyzes the "of the United States" standard, which arises in a narrow class of cases (generally related to procurement information) where the government has never had exclusive possession of the information that was disclosed. The Fourth Circuit applies this approach in certain cases, without discussion of the "value" standard that the circuit has applied in other circumstances.

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92. The Supreme Court has consistently declined to hear cases that consider whether to construe § 641 to reach information. See, e.g., United States v. McAusland, 979 F.2d 970 (4th Cir. 1992), cert. denied, 507 U.S. 1003 (1993); United States v. Tobias, 836 F.2d 449 (9th Cir.), cert. denied, 485 U.S. 991 (1988); United States v. Jeter, 775 F.2d 670 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986); United States v. Girard, 601 F.2d 69 (2d Cir.), cert. denied, 444 U.S. 871 (1979); United States v. DiGilio, 538 F.2d 972 (2d Cir. 1976), cert. denied sub nom. Lupo v. United States, 429 U.S. 1038 (1977).

93. Compare infra Part II.A.1 (describing Fourth Circuit's use of "value" standard in cases where United States' interest is clear), with infra Part II.C (describing Fourth Circuit's use of "supervision and control" standard in cases where United States' interest is questionable).

94. Compare infra notes 110–120 and accompanying text (discussing Second Circuit standard in *Girard*, where § 641's application depends on existence of external prohibitions on information disclosure), with infra notes 128–137 (describing district court approach in *Jones*, where § 641 is applied to information after balancing test).

95. The names of these standards are shorthands created by this Note; the courts have not acknowledged or addressed the variety of standards that have proliferated that permit the application of § 641 to information.

A. *Focus on "Value": Information May Be Covered*

A majority of the courts of appeals that have considered this question have held that § 641 applies to information. However, they are divided into two camps over what type of information is of "value." The Fourth Circuit takes the broadest approach to value, seeming to suggest that all confidential government information has inherent value and thus § 641 applies to all such information. The Second and Sixth Circuits, as well as a magistrate in the First Circuit, acknowledge the value of government information but limit § 641's reach due to First Amendment concerns. Part II.A.1 and Part II.A.2 analyze these approaches respectively.

1. *All Information Has Value.* — The Fourth Circuit appears ready to apply § 641 to any government information, regardless of its content or mode of transmission. In *United States v. Fowler*, the Fourth Circuit dealt with a former employee of the Department of Defense (DOD).[96] The defendant, employed by a defense contractor, obtained classified documents from the DOD and delivered them to his new employer, both by transferring copies and by extracting information from the documents and putting it into unclassified reports.[97] In upholding the application of § 641 to these activities, the Fourth Circuit pointed to the Supreme Court's decision in *Carpenter* and declared that "information is a species of property and a thing of value."[98] The court further held that the actual contents of the information transferred were irrelevant.[99] This means

96. 932 F.2d 306, 308 (4th Cir. 1991).

97. This demonstrates both corporeal acquisition and corporeal and incorporeal transmission.

98. *Fowler*, 932 F.2d at 310. But see supra notes 75–80 and accompanying text (questioning applicability of *Carpenter* to government information). The Fourth Circuit also noted that it would have upheld the application of § 641 to copies of documents, because copies are things of value and tangible government property. *Fowler*, 932 F.2d at 310. Under that view, there is no distinction between the original government document and the information it contains. Applying § 641 directly to the information obtained from government documents, however, is a broader holding, since it would allow conviction for unauthorized memorization or oral transmission.

99. *Fowler*, 932 F.2d at 309–10. The government would still need to prove that the monetary value of the disclosed information was over $1,000 in order to get a felony conviction. 18 U.S.C. § 641 (2012). In *Fowler*, the government promised to show this value through the cost of preparing the information (rather than, for example, the amount that the information could sell for on a thieves' market), so the subject matter of the information was irrelevant to this question as well. *Fowler*, 932 F.2d at 309–10.

The courts have not dealt with a situation where the information at issue was already public—for example, if someone transmitted classified information that had been reported in the news media but not yet declassified. See supra note 66 (discussing prohibition on disposition of publicly available information). One court indicated that the government could abandon its property interest in information if the information became public; the court further declared that this was a question for the jury. United States v. Jones, 677 F. Supp. 238, 241 n.3 (S.D.N.Y. 1988). Another court indicated in dicta that

that the mere confidentiality of the information renders it valuable in and of itself, independent of its relevance to national defense or any other government interest. The Fourth Circuit did not address the implications of this broad reading for the First Amendment or for the statutory scheme regarding disclosure, or provide any other potential limitations on § 641's applicability to information.[100]

A district court within the Fourth Circuit previously had adopted this approach in dicta, indicating it would consider all information generated by the government to be "clearly [the government's] property" and thus subject to § 641.[101] The *Fowler* court adopted that viewpoint,[102] and the Fourth Circuit later reaffirmed it in *United States v. McAusland*.[103] The two defendants in *McAusland* also worked for a defense contractor, and were convicted of converting government information related to three defense procurements.[104] In *McAusland*, the Fourth Circuit simply declared in a footnote that "information, such as that involved in this case, is a 'thing of value.'"[105] While the Fourth Circuit considered a vagueness challenge as to whether the transmission at issue was "without authority," the court did not look to the First Amendment in deciding whether the information was a "thing of value."[106] Furthermore, there

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procurement information was protected under § 641 only until the contract was awarded. See United States v. Matzkin, 14 F.3d 1014, 1020–21 (4th Cir. 1994) ("The information submitted to the Navy Department by bidders for contracts is to be kept confidential until the award of the contract has been announced."). The court fails to explain this assertion: It could be because the information is made public with the contract, because the information is returned to the company and the government no longer has custody, or because the government no longer has an interest in secrecy since the proposed bids could no longer be affected by the information.

100. An early Fourth Circuit case included a detailed discussion of potential First Amendment concerns, although the majority did not reach the merits of the § 641 claim. United States v. Truong Dinh Hung, 629 F.2d 908, 925 (4th Cir. 1980) (opinion of Winter, J.). The part of Judge Winter's opinion joined by no other judge stated that § 641 must exclude types of information whose disclosure is already prohibited by other statutes, or else it would render those statutes meaningless. Id. at 926 (noting it is "apparent that § 641 cannot, consistent with the congressional framework of criminal statutes explicitly directed at classified information, be applied to punish these defendants for the unauthorized disclosure of classified information"). No court majority has adopted this approach.

101. United States v. Berlin, 707 F. Supp. 832, 839 (E.D. Va. 1989) (noting other § 641 information cases have not involved information generated by private party, as *Berlin* does).

102. See *Fowler*, 932 F.2d at 309–10 (holding abstract information can be government property within meaning of § 641).

103. 979 F.2d 970 (4th Cir. 1992).

104. Id. at 971–72. This included information on competitors' cost proposals. Id.

105. Id. at 974 n.2 (citing *Fowler*, 932 F.2d 306).

106. Id. at 974–76 (discussing claim of unconstitutional vagueness).

was no discussion of the value of the information at hand or the need for its confidentiality.[107]

This is the broadest approach available to the courts because it permits conviction for any unauthorized transmission of any kind of government information, within the limits of the Constitution.[108] On the one hand, it creates a fairly clear rule: Expect any disclosure of government information to fall within § 641. On the other hand, it is overinclusive and picks up information that the government may have no interest in keeping secret, such as internal birthday calendars or department guidelines. It also frees the government from having to advance any justification for the secrecy of the information at issue in a specific case. This broad approach is likely to drive the development of § 641, because the government has brought most of its recent prosecutions for information disclosure in the Fourth Circuit.[109]

2. *Information Has Value, Subject to First Amendment Limitations.* — The other courts that construe § 641 to apply to information have not adopted such a far-reaching view. These courts' jurisprudence is animated by overarching First Amendment values, and the courts acknowledge that the First Amendment limits the reach of § 641. These courts disagree, however, over how to account for their First Amendment concerns. One set of courts weighs the First Amendment concerns by setting up a general standard: Section 641 covers information only if another law or regulation already prohibits its disclosure. Another set of courts adopts a case-by-case approach that balances the First Amendment interest of the particular defendant with the government interest in the

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107. In a later case regarding procurement information, the Fourth Circuit notes that "[t]here can be no argument that the amount of a confidential, competitive bid is not a thing of value. The amount of a competitor's bid would be the most valuable information that could be obtained by another bidder." United States v. Matzkin, 14 F.3d 1014, 1020 (4th Cir. 1994). The court points out that the loss of confidentiality of procurement information would allow companies to alter their bid proposals, costing the government millions of dollars. Id. at 1021. The *Matzkin* case turned on a somewhat different question, however, discussed infra Part II.C (discussing cases of non-government-generated information).

108. The Fourth Circuit did not consider the First Amendment when determining whether § 641 applies to information and rejected facial challenges to the law. See supra notes 100, 106 and accompanying text (discussing Fourth Circuit's lack of engagement with First Amendment in deciding whether information has "value"). The circuit would have to consider an as-applied First Amendment challenge to the application of § 641. For example, if the specific speech at issue in the case were constitutionally protected, it would be impermissible to convict the defendant under § 641. Compare this to the approach of courts in the First, Second, and Sixth Circuits, discussed infra Part II.A.2, where First Amendment values are considered in analyzing whether something is a "thing of value" in the first place.

109. See supra note 18 (noting five of seven most recent prosecutions arose in Fourth Circuit). Section 641 has been charged in only some of these prosecutions.

confidentiality of the information. These approaches are examined in the following two subsections.

a. *Information Is Covered if Disclosure Is Prohibited by Another Source.* — Two courts, the Second Circuit and a lower court in the First Circuit, determined that information disclosure could permissibly be prosecuted under § 641 if and only if its disclosure was already prohibited by another statute. Thus, under this view, § 641 serves as an alternative means of enforcing other secrecy laws.

The Second Circuit in *United States v. Girard* dealt with a Drug Enforcement Agency (DEA) official who sold information from DEA files that revealed whether potential associates in an illegal drug venture were DEA informants.[110] The circuit court wholly endorsed the view of the district court in the case,[111] which had declared, "[T]he government's interest in secrecy must in every case be carefully balanced against the First Amendment interest in disclosure."[112] The district court case, decided under the name *United States v. Lambert*, recognized the government's general interest in information. It acknowledged that "the content of a document may be more important than its original four corners,"[113] and quoted directly from the government's brief to describe how the DEA information, while in the government's exclusive possession, was "'capable of saving lives.'"[114] However, the district court expressed disapproval of "a government pocket veto on disclosure unrelated to the significance of the information."[115] The court emphasized that the First Amendment was enacted to ensure that the government did not suppress embarrassing information, and continued: "Discussion of government affairs is the creative force of a pluralistic republic, and it constitutes the core activity protected by the First Amendment."[116]

In order to strike an appropriate balance, the *Lambert* court focused on how the "without authority" clause could help define "thing of value."[117] The court proposed a narrowing interpretation of § 641: The law neither authorizes nor prohibits transfer of particular types of information, but instead establishes a penalty for the violation of preexisting

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110. 601 F.2d 69, 70 (2d Cir. 1979). This is a case of incorporeal transmission, as there were no documents or copies of documents transferred.

111. Id. ("We agree with the District Judge's decision and can do little more than harrow the ground he has already plowed.").

112. United States v. Lambert, 446 F. Supp. 890, 898 (D. Conn. 1978), aff'd sub nom. *Girard*, 601 F.2d 69.

113. Id. at 895 (noting "government documents have little value apart from the information contained in them").

114. Id.

115. Id. at 899 (noting further disapproval for provision of criminal sanctions for disclosure of information that "government had no reason to keep secret").

116. Id. at 898.

117. Id. at 898–99.

prohibitions on disclosure.[118] Therefore, to violate § 641, disclosure of the information at issue must be affirmatively prohibited by other statutes, regulations, or longstanding government practices.[119] The *Girard* court noted that DEA regulations forbid disclosure of agent names and determined that misuse of that information may therefore be prosecuted under § 641.[120]

This need to balance secrecy with First Amendment concerns was later endorsed by a magistrate in the First Circuit in *United States v. Vicenzi*.[121] In *Vicenzi*, a current employee and a former employee of a defense contractor were charged with transmitting confidential procurement information related to military defense contracts.[122] Echoing *Lambert* and *Girard*, the court concluded that disclosure of procurement information fell within § 641 because other regulations prohibited disclosure of that type of information.[123]

These courts set up a systemic limitation on what falls within § 641. While the courts attempted to achieve consistency with the First Amendment, their solution raises the question of why the enforcement regime for confidentiality laws would come not from those laws, but from a property theft statute. If a prohibition on disclosure already exists, the need to provide an additional criminal penalty, particularly through judicial interpretation, is questionable. Further, while the rule seems straightforward, that a "longstanding government practice" of maintaining secrecy may constitute a preexisting prohibition creates uncertainty and the potential for overinclusiveness.

b. *Information Is Covered if It Passes a Case-by-Case Balancing Test.* — The Sixth Circuit and a district court in the Second Circuit recognized

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118. Id. at 899.

119. Id.

120. United States v. Girard, 601 F.2d 69, 71 (2d Cir. 1979). To be clear, the court is not considering the phrase "without authority" as an independent requirement for § 641's application. Instead, the court uses "without authority" to define what information constitutes a "thing of value." The court contemplates a balancing of First Amendment concerns in determining what constitutes a "thing of value," and notes that the government only has a property interest "in certain of its private records." Id. at 71. Therefore, the court views only certain pieces of information as "things of value."

121. See United States v. Vicenzi, No. 87-222-N, 1988 WL 98634, at *9–*11 (D. Mass. Feb. 16, 1988) (citing *Lambert*, 446 F. Supp. at 897–99) (discussing favorably *Lambert*'s limited construction of § 641 in light of competing secrecy and First Amendment concerns).

122. Id. at *1.

123. Id. at *11. Concerns of statutory superfluity, discussed above, see supra Part I.B.2, were also recognized by the *Vicenzi* court, which noted that § 641 may not apply when Congress has "specifically balanced competing interests to criminalize the disclosure" of one type of information. *Vicenzi*, 1988 WL 98634, at *7. However, this discussion is dicta because the prohibition on disclosure in *Vicenzi* came from regulations and not a congressional statute.

the same First Amendment concerns discussed by the *Girard*, *Lambert*, and *Vicenzi* courts. However, these courts did not draw the same sharp line limiting § 641's application to information whose disclosure is already prohibited. Their standard for what constitutes a "thing of value" is more vague, and requires a case-by-case approach.

The Sixth Circuit in *United States v. Jeter* interpreted § 641 to apply to information when the defendant transmitted carbon papers of grand jury testimony and copies of those papers to the person under investigation.[124] The court rejected the idea that alternate prohibitions on disclosure should form the exclusive source of punishment for that disclosure.[125] The court also rejected a searching First Amendment analysis, noting that the defendant engaged in de minimis speech activity.[126] The court declared, "Jeter is undoubtedly guilty of selling something that the United States rightfully desired to keep in its exclusive possession, a 'thing of value.' We find no difficulty in holding that such conduct in this kind of limited circumstances violates Section 641."[127]

In *United States v. Jones*, a district court case within the Second Circuit, the defendant, while visiting a U.S. Attorney's office, overheard a conversation between members of that office and U.S. Postal Inspectors about an ongoing criminal investigation of a bank employee.[128] The defendant subsequently offered to sell that information to the bank.[129] The court pointed to the government's "obvious interest" in maintaining confidentiality in criminal investigations, and noted that allowing such disclosures would hinder the government's effort to combat crime.[130] It

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124. United States v. Jeter, 775 F.2d 670, 673 (6th Cir. 1985). This is a case of corporeal transmission, so it could have been treated without controversy as concerning a theft of tangible property. The government, however, prosecuted Jeter under a theory that the information was the "thing of value" at issue; this allowed for a felony conviction, as the monetary value of carbon paper alone would not be worth enough to sustain a felony conviction. Id. at 680.

125. Secrecy of grand jury proceedings is protected by the court's criminal contempt power under the Federal Rules of Criminal Procedure. At the time, Rule 6(e)(2) provided that certain persons "'shall not disclose matters occurring before the grand jury,'" and made the violation punishable by contempt of court. Id. at 674. Although Jeter was not one of those persons explicitly prohibited from disclosing grand jury information, the court decided that Rule 6 did not foreclose punishment under other statutory rules. Id. at 675. But see id. at 683 (Merritt, J., dissenting) (arguing § 641 should not include information covered by traditional contempt proceedings). This duplication of prohibitions highlights the potential redundancy of the statutory scheme for information disclosure, should § 641 receive a broad construction. See supra Part I.B.2 (discussing statutory scheme relating to information disclosure).

126. *Jeter*, 775 F.3d at 682.

127. Id.

128. United States v. Jones, 677 F. Supp. 238, 239 (S.D.N.Y. 1988).

129. Id. at 239.

130. Id. at 241.

concluded that information about an ongoing criminal investigation was a "thing of value."[131]

The *Jeter* and *Jones* courts refrained from making sweeping proclamations about the applicability of § 641 to information, and noted that the First Amendment places limits on when information disclosure may be criminalized under § 641.[132] The court in *Jones* explained that "[g]overnment information . . . is often at the very core of discussion of pressing public issues" and that "[g]overnment secrecy is essentially autocratic, can perpetrate bureaucratic errors, and inhibits the robust and wide open discussion essential to the American form of government."[133] The *Jones* court also distinguished the case at hand from a "Pentagon Papers" situation.[134] This echoes the *Jeter* court, which declared, "We do not attempt to determine the constitutionality of Section 641 in a 'Pentagon Papers' kind of situation."[135] Neither court explained this assertion, and it is all the more unclear because the person who leaked the Pentagon Papers to the press *was* indicted under § 641, and his case was dismissed because of prosecutorial misconduct, not on the merits.[136] The courts could have meant a Pentagon Papers situation was one where the information released was critical to a nationally important issue, where a media outlet was prosecuted, or something else entirely. Regardless, these courts rejected more rigorous First Amendment scrutiny in the cases at hand.[137]

That is the extent of the reasoning articulated by these two courts. However, both courts clearly recognized the role that First Amendment principles play at the front end in determining what constitutes a "thing of value," although they did not define more precisely the balance of interests involved. The benefit of the case-by-case approach of the majori-

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131. Id. at 240. This court did not construe the statute in the same way as the Second Circuit in *Girard*, which held that information is a "thing of value" only when its disclosure is already prohibited. See United States v. Girard, 601 F.2d 69, 71 (2d Cir. 1979) (noting government's rules regarding disclosure both limit and clarify § 641). The *Jones* court did not address this difference in approach, and appears not to have taken *Girard*'s guidance to be an exclusive standard.

132. *Jeter*, 775 F.2d at 680 (noting First Amendment concerns and acknowledging unique constitutional position of defendant compared to defendants in previous information cases).

133. *Jones*, 677 F. Supp. at 241 (citations omitted).

134. Id. at 242 n.5. For a brief discussion of the Pentagon Papers case, see supra notes 12–14 and accompanying text.

135. *Jeter*, 775 F.2d at 682.

136. Nimmer, supra note 14, at 311.

137. The *Jones* court rejected the invitation to search for further First Amendment deficiencies since there were no constitutional concerns with applying § 641 in the instant case. *Jones*, 677 F. Supp. at 242. Similarly, the *Jeter* court emphasized that its defendant had engaged in de minimis activity under the First Amendment, and therefore more detailed scrutiny was unnecessary. *Jeter*, 775 F.2d at 682.

ties in *Jeter* and *Jones* is that the courts can determine in each situation whether the application of § 641 is justified. The drawback is that, without more guidance, it is difficult to predict the result in a particular case. This creates confusion for future courts, and such uncertainty may chill citizens who wish to be law-abiding. It also may lead to absurd results: The dissent in *Jeter* pointed out that without a specific limiting principle, the majority's approach could lead to the conviction of a lawyer or newspaper reporter for finding out in advance when an opinion by a court will be released.[138]

B. *Focus on "Thing": Information Is Never Covered*

The Ninth Circuit approach disregards the value of the information at issue. Instead, the Ninth Circuit has adopted a blanket approach that construes § 641 as inapplicable to all information. The Ninth Circuit has determined that § 641 is applicable only to tangible items, which were traditionally considered "things."

The Ninth Circuit first dealt with this issue in *Chappell v. United States*, a case of intangible services: The defendant was an army officer who used an on-duty serviceman to paint his private residence, and the court held that misuse of intangible government labor does not violate § 641.[139] The *Chappell* court noted that at common law, property had to be tangible to be subject to larceny or related crimes.[140] Further, the court explained that conversion has its origins in the law of torts, which covers goods or personal chattels and not intangible things.[141] The *Chappell* court recognized that when Congress uses a word that already exists in the law, such as "conversion," Congress is assumed to intend the existing meaning.[142] The Ninth Circuit then examined the legislative history of § 641, concluded that Congress did not evince a purpose to

138. *Jeter*, 775 F.2d at 685 (Merritt, J., dissenting).

139. Chappell v. United States, 270 F.2d 274, 276, 278 (9th Cir. 1959). Some circuits that have not yet determined whether § 641 reaches information have accepted its applicability to intangible services. See, e.g., United States v. Collins, 56 F.3d 1416, 1417 (D.C. Cir. 1995) (per curiam) (applying § 641 to individual's computer time and storage); United States v. Croft, 750 F.2d 1354, 1361 (7th Cir. 1984) (applying § 641 to government-employee labor); United States v. May, 625 F.2d 186, 189 (8th Cir. 1980) (applying § 641 to use of military aircraft for personal use, if use meets conversion definition). One court analogized to decisions involving intangible services in that deciding that abstract information also fell within § 641's prohibitions. See *Jeter*, 775 F.2d at 680 (citing Burnett v. United States, 222 F.2d 426 (6th Cir. 1955)). It is unclear whether the rest of these courts would do the same.

140. *Chappell*, 270 F.2d at 276–77.

141. Id. at 277.

142. Id. at 277–78 (discussing history of conversion and likely congressional intent).

change the common law, and determined intangibles were not "things of value."[143]

While the Second, Fourth, and Sixth Circuits addressed the possibility of a tangibility bar, each held that the word "thing" includes tangibles and intangibles.[144] The Second Circuit's rejection of the tangibility bar is the most influential statement on the issue.[145] The Second Circuit argued in *Girard* that the Supreme Court's earlier, broad interpretation of § 641 in *Morissette* meant that the statute should not be limited to its common law origins.[146] Therefore, common law limitations like tangibility should be abandoned.[147] The Second Circuit also noted that "thing of value"—notwithstanding the word "thing"—has been construed broadly in other criminal statutes to include intangibles.[148] This indicates the Ninth Circuit's approach is not horizontally consistent with other developments in criminal law. The Second Circuit further argued that a document's contents can be valuable and that information can be property.[149]

When the Ninth Circuit next heard an information-leak case, *United States v. Tobias*, it affirmed its view that § 641 does not reach intangibles.[150] The *Tobias* court cursorily dismissed the Second Circuit's

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143. Id. at 267–77 (noting enactment of § 641 simply consolidated preexisting crimes).

144. See United States v. Fowler, 932 F.2d 306, 310 (4th Cir. 1991) (holding § 641 did apply to intangibles); *Jeter*, 775 F.2d at 680 (same); United States v. Girard, 601 F.2d 69, 71 (2d Cir. 1979) (same); see also Dmitrieva, supra note 17, at 1046–52 (describing circuit split). The *Lambert* court explicitly rejected the Ninth Circuit's justification of the tangibility bar in *Chappell*. United States v. Lambert, 446 F. Supp. 890, 893–95 (D. Conn. 1978), aff'd sub nom. *Girard*, 601 F.2d 69.

145. Many of the other circuits simply cite to *Girard* as the conclusive decision on tangibility. See, e.g., United States v. Matzkin, 14 F.3d 1014, 1020 (4th Cir. 1994) (citing *Girard* for proposition § 641 "covers both tangible and intangible property"); *Fowler*, 932 F.2d at 310 (citing *Girard* for proposition conversion and conveyance of government information can violate § 641); United States v. Berlin, 707 F. Supp. 832, 839 (E.D. Va. 1989) (citing *Girard* to demonstrate courts apply § 641 to information); United States v. Jones, 677 F. Supp. 238, 240 (S.D.N.Y. 1988) (citing *Girard* for precedent that "information . . . , despite its intangible nature, is a thing of value").

146. *Girard*, 601 F.2d at 71. For a discussion of *Morissette*, see supra notes 26, 30–32 and accompanying text.

147. See *Girard*, 601 F.2d at 71 ("Section 641 is not simply a codification of the common law of larceny.").

148. See id. (noting amusement, sexual intercourse, and witness testimony have all been considered "things of value" under different criminal statutes, indicating phrase is term of art including intangibles).

149. Id.

150. 836 F.2d 449, 451 (9th Cir. 1988). While the discussion of tangibility in *Tobias* is dicta because the court decided that the "thing of value" at issue was tangible and thus covered by § 641, see infra text accompanying note 154, the *Tobias* court was adamant that it continued to see § 641 as limited to tangible things. The court distinguished a different Ninth Circuit case, United States v. Schwartz, 785 F.2d 673 (9th Cir. 1986), that had

reasoning in *Girard* as insufficiently persuasive.[151] The Ninth Circuit noted that limiting § 641 to tangible "things" allowed the court to avoid potential First Amendment problems that might be caused by applying § 641 to information.[152]

Under the Ninth Circuit's approach, § 641 no longer directly restricts information, although the government could still prohibit transmission of a physical document. It is a test that is predictable and administrable. However, it may be both under- and overinclusive. It captures all information contained in a document regardless of the need for secrecy—for example, it would capture an employee removing an internal manual describing everyday interagency meeting protocols.[153] Of course, a document may also contain significant information. In *Tobias*, the defendant was attempting to sell cryptographic cards used by the Navy for encoding classified information; the court ruled that these cards were tangible property and affirmed his conviction under § 641.[154]

The tangibility test also misses information people may think the government has good reason to keep secret. For example, if the Navy officer in *Tobias* had photocopied or memorized a document listing encryption codes, he could not have been convicted under the Ninth Circuit test. This seems like a distinction without a difference. Because information is only classified if its disclosure is reasonably believed to harm the national defense,[155] allowing disclosure merely because the defendant made a photocopy or memorized the information may undermine national security unjustifiably. Recall, however, that § 641 is not the only criminal prohibition at play; there are alternative statutes that Congress clearly intended to prohibit that type of disclosure.[156]

C. *Focus on "of the United States"*

The previous cases involved no dispute that the information at issue belonged to the United States. However, it is crucial that the information at issue be a "thing of value *of the United States*."[157] The government

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questioned the continued validity of *Chappell*. *Tobias*, 836 F.2d at 451 n.2 (explaining *Schwartz* interpreted different statute with different legislative history).

151. *Tobias*, 836 F.2d at 451.

152. Id. See supra Part I.C.3 for background on potential First Amendment concerns.

153. The court would still have to decide whether such a removal fit within the "takings" part of § 641, or alternatively was conveyed "without authority." See supra Part I.A (discussing text of § 641).

154. *Tobias*, 836 F.2d at 452 (noting cryptographic cards are devices for handling information, but do not contain any information).

155. See supra note 42 (describing requirements for classification).

156. See supra Part I.B.2 (describing statutes criminalizing classified-information disclosure).

157. 18 U.S.C. § 641 (2012) (emphasis added).

cannot claim complete confidentiality of information that private parties either produced or have access to, which may reduce the strength of the government's claim to a property interest.[158] This section explores the Fourth Circuit approach to questions of privately created information.

In *United States v. Matzkin*, the Fourth Circuit examined whether the cost proposal of a private company, submitted to the government as a procurement proposal, could appropriately be considered a "thing of value of the United States."[159] The defendant pointed out that the bidding company had marked the cost proposal as proprietary, and that the government's use of the information was limited.[160] This, the defendant argued, was insufficient ownership to qualify the information as "a thing of value of the United States."[161] The Fourth Circuit, however, held that there was sufficient interest in the proposal for it to be U.S. property under § 641, noting that the government had custody of the information and that government employees were prohibited by regulation from disclosing the information.[162] The court noted, "It is not necessary that the government have the sole interest in the property or that it have sole knowledge of the bid information. The bidder will always know the amount of his bid, but this does not prevent the Navy Department, which has custody . . . , from using § 641 . . . ."[163]

United States v. Berlin, a district court case out of the Fourth Circuit, recognized that the government must have "supervision and control" over information for it to constitute property under § 641.[164] In *Berlin*, the court noted that regulations require the government to keep bid information confidential until public disclosure of the contract.[165] There-

158. See supra Part I.C (discussing peculiar qualities of information vis-à-vis tangible items and evolution of consideration of information as property).

159. United States v. Matzkin, 14 F.3d 1014, 1020–21 (4th Cir. 1994). The Fourth Circuit dealt differently with other cases of privately created procurement information where the interest of the United States government went unquestioned. See supra Part II.A.1 (describing Fourth Circuit's approach to these cases).

160. *Matzkin*, 14 F.3d at 1019.

161. Id.

162. Id. at 1020–21.

163. Id. at 1020.

164. United States v. Berlin, 707 F. Supp. 832, 839 (E.D. Va. 1989) (internal quotation marks omitted). The "supervision and control" test has been used in cases dealing with intangibles other than information. For example, in *United States v. Tana* the defendants converted materials and production equipment of one company to found another company. 618 F. Supp. 1393, 1395 (S.D.N.Y. 1985). The first company had previously pledged its assets (now stolen) as security for loans from the federal government. Id. The court held that the government did not have sufficient control over the stolen assets, through the security interest, for them to constitute government property: "The federal government never had title in, or possession of, or control over [the assets underlying the security interest]." Id. at 1396 (noting government would have substantial control only if company defaulted on loan).

165. *Berlin*, 707 F. Supp. at 840.

fore, even though the government did not have sole interest in the property, it had sufficient custody to prosecute someone for taking the information.[166] This approach indicates that information is a "thing of value of the United States" if the government has custody of the information—likely, this requires corporeal form—and is required to keep the information confidential.[167]

The *Berlin* and *Matzkin* decisions are quite broad. Because the "supervision and control" test allows the government to control information produced and accessed by private parties, it dramatically increases the government's ability to interfere with the dissemination of information. This approach indicates the government could control information in which it has a nonexclusive interest. If one is concerned about the First Amendment guarantee of free flow of speech, this expansive approach is troubling. The courts, however, did not consider First Amendment issues.

Because custody is established immediately if the government generates the information, this standard could also be interpreted to cover all information generated by the government regardless of its value or contents. However, the courts have thus far used this standard only in cases where there was a serious question of whether the information was "of the United States." The courts have not acknowledged the existence of an alternate "value" standard; for example, the Fourth Circuit has not determined that information is "of the United States" and then moved on to examine whether the information has "value." This may be because the Fourth Circuit takes such a broad approach to "value,"[168] or may be because the circuit sees the cases as distinct. Until another circuit is faced with a similar situation of questionable U.S. ownership, the ultimate impact of this standard will remain unclear.

D. *Comparing the Judicial Approaches*

If an employee comes across improperly classified information in the scope of his employment and discusses it with a spouse, is that a violation under § 641? If an unauthorized employee accidentally accesses classified information and memorizes it because he is curious, is he guilty of converting the information to his own use? If a whistleblower discovers corruption at an agency and discloses confidential information related to

166. Id.

167. The Fourth Circuit noted cursorily that information in or about a bid was property until the contract becomes public. *Matzkin*, 14 F.3d at 1020. This raises the issue of the status of the information if someone—perhaps even the bidding company—makes the information public before the contract is awarded. The analysis is complicated by the fact that the bidding company is also authorized to possess the information.

168. See supra Part II.A.1 (describing Fourth Circuit's construction of "value").

that corruption to the media, has she conveyed the information "without authority" in violation of § 641?

Under the tangibility bar in the Ninth Circuit, none of these hypothetical individuals could be prosecuted.[169] In the Fourth Circuit, all of them could.[170] The "otherwise prohibited" solution adopted by the Second Circuit and a magistrate judge in the First Circuit leads to similar results, because the "classified" or "confidential" label—even if improperly affixed—would serve as an affirmative prohibition against disclosure.[171] The supervision and control test also likely leads to conviction in every case, because each of these hypotheticals discusses government-generated information over which the government has custody.[172]

None of these blunt approaches is satisfying, particularly since prosecution in these hypotheticals may appear unjustified on their faces. The public likely accepts that the government may have cause to protect some information, but it does not automatically follow that the government may protect all information. It also does not follow that judicial interpretation of an ambiguous statute is the appropriate means to protect information. The flexibility of the *Jeter* and *Jones* case-by-case balancing approach[173] means that it is likely to align more closely with public norms. However, it is unclear how these hypotheticals would fare under that approach. Each case depends on the government interest asserted in the particular information at issue, as well as the weight of undefined First Amendment interests. A clearer framework is necessary for both legal consistency and public understanding.

III. LIMITING HOW § 641 APPLIES TO INFORMATION

An unbounded reading of § 641 is overbroad and problematic. Part III.A asserts that Congress should clarify the scope of § 641. In the absence of congressional action, Part III.B offers a number of factors that should be salient when determining whether information is covered under § 641, including the nature of the information, the nature of the government interest, and the depth of the information's secrecy.

A. *Congress Should Clarify the Scope of § 641*

In an age where information is critical to national defense and economic security, few probably doubt that the government should have

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169. See supra Part II.B (describing tangibility test of Ninth Circuit).

170. See supra Part II.A.1 (describing Fourth Circuit's application of § 641 to information).

171. See supra Part II.A.2.a (explaining view of courts requiring affirmative prohibition on disclosure).

172. See supra Part II.C (discussing supervision and control test).

173. See supra Part II.A.2.b (describing balancing approach).

the ability to keep some information secret.[174] The question is how best to structure that ability. Because § 641 was not explicitly constructed for this purpose,[175] and because other statutes exist criminalizing information disclosure,[176] scrutiny of whether § 641 should cover information should be particularly searching.

1. *The Majority Interpretation of § 641 Is Unacceptably Broad.* — Because the text of § 641 could be read to cover all types of information disclosed to any party by any means of transmission, it could make the statutory scheme regulating information disclosure superfluous. This interpretation would expose millions of actions to criminal liability through judicial interpretation rather than clear congressional legislation.

One may argue that the hypotheticals presented in Part II.D will always be just that—hypothetical—due to prosecutorial discretion and political checks. The political consequences of prosecuting a media outlet or a seemingly mundane leak of information not related to national security might outweigh any benefits in prosecuting the disclosure.[177] Indeed, the Department of Justice does limit its discretion somewhat, adopting a policy of not prosecuting the disclosure of intangible property if it is obtained primarily for the purpose of disseminating the information to the public and is obtained lawfully through means other than trespass, wiretapping, or interception of correspondence.[178] Since the Pentagon Papers, no member of the media has been prosecuted for publishing confidential information obtained from unauthorized disclosure. These internal limits indicate, however, that § 641 is problematic. Future prosecutors, either because of ideological differences or political pressure, could change or decline to follow the current guidelines. A clearer and narrower standard would eliminate the need to rely on prosecutorial discretion. While that

174. See Sunstein, supra note 76, at 895–96 (describing reasons for suppressing disclosure).

175. See supra Part I.B.1 (discussing enactment of § 641).

176. See supra Part I.B.2 (describing statutory scheme).

177. In fact, limited enforcement of leaks may benefit the executive. See Pozen, Leaky Leviathan, supra note 6, at 559–62 (noting existence of real leaks gives government plants credibility). On the other hand, one could argue that criminal sanctions are not required to control harmful leaks by government employees, who are bound to protect government secrets by ethical obligations and the threat of termination. Sunstein, supra note 76, at 921.

178. Dep't of Justice, United States Attorneys' Manual, Title 9: Criminal Resource Manual § 1664, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01664.htm (on file with the *Columbia Law Review*) (last visited Apr. 2, 2014) (describing policy regarding § 641 prosecutions). This policy does not provide for consistent application, however, and may depend on how the Justice Department decides whether someone is acting "primarily" to inform the public. This type of internal policy is also subject to change with each presidential administration. Cf. Hoffman & Martin, supra note 55, at 495 (noting Carter administration did not consider § 641 applicable to information).

standard, in turn, would limit the flexibility of prosecutors, it is particularly important to have clear lines when speech is involved in order to limit the potential chilling effect.

The court decisions discussed above demonstrate how broadly § 641 has already been applied: The government has prosecuted government employees,[179] government contractors,[180] and members of the public.[181] The government has applied criminal sanctions to disclosure of information related to procurement,[182] grand jury proceedings,[183] criminal investigations,[184] customs impoundments,[185] and DEA agent identities.[186] This statute criminalizes many different dispositions of information, including disclosure, transmission, acquisition, and retention.[187] Those who receive improperly disclosed information are also criminally liable.[188] Finally, it allows prosecution of those who disclose information without any intent to harm the United States or its interests.[189]

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179. E.g., United States v. Morison, 844 F.2d 1057, 1060 (4th Cir. 1988); United States v. Nichols, 820 F.2d 508, 509 (1st Cir. 1987); United States v. Girard, 601 F.2d 69, 70 (2d Cir. 1979).

180. E.g., United States v. Fowler, 932 F.2d 306, 309 (4th Cir. 1991); United States v. Vicenzi, No. 87-222-N, 1988 WL 98634, at *1 (D. Mass. Feb 16, 1988).

181. E.g., United States v. Matzkin, 14 F.3d 1014, 1016 (4th Cir. 1994); United States v. Jeter, 775 F.2d 670, 673 (6th Cir. 1985); United States v. Friedman, 445 F.2d 1076, 1078–79 (9th Cir. 1971).

182. See, e.g, *Matzkin*, 14 F.3d at 1016 (prosecuting disclosure of pricing information of competitor bidder); United States v. McAusland, 979 F.2d 970, 971–73 (4th Cir. 1992) (prosecuting disclosure of bid information and government evaluations); *Vicenzi*, 1988 WL 98634, at *2 (prosecuting disclosure of government cost estimates and other procurement information).

183. E.g., *Jeter*, 775 F.2d at 673; *Friedman*, 445 F.2d at 1078–79.

184. E.g., United States v. Jones, 677 F. Supp. 238, 239 (S.D.N.Y. 1988).

185. E.g., United States v. Nichols, 820 F.2d 508, 509 (1st Cir. 1987).

186. United States v. Girard, 601 F.2d 69, 70 (2d Cir. 1979).

187. No court has mentioned a distinction between incorporeal transmission, acquisition, and retention.

188. E.g., United States v. Matzkin, 14 F.3d 1014, 1016 (4th Cir. 1994) (upholding conviction of defense-contractor consultant who received information from government employee). The government has never attempted to prosecute a journalist or media organization under this statute for receiving or publishing information. Even so, leak prosecutions may indirectly affect journalists; for example, leak prosecutions may involve the subpoena of the journalist who published the information in an attempt to get that journalist to reveal her source. This may turn prosecutions of nonmedia figures into tangential attacks on media freedoms. See Jesselyn Radack & Kathleen McClellan, The Criminalization of Whistleblowing, 2 Am. U. Lab. & Emp. L.F. 57, 73–74 (2011) (discussing government's attempts to subpoena journalist James Risen in Jeffery Sterling leak case and potential chilling effect on press freedoms).

189. Compare this to the espionage statutes, 18 U.S.C. §§ 793–794 (2012), which require "intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation."

It is unclear whether this breadth of potential criminality serves any legitimate prosecutorial interest that is not already covered by the other statutes criminalizing information disclosure. Section 641 sweeps in a lot of conduct that many would not consider deserving of criminal punishment. Disclosure of information related to national defense, where the discloser knows or has reason to know that the information could hurt the United States, is already prohibited.[190] Disclosure of particularly sensitive information, such as cryptographic activity or diplomatic correspondence, is also already prohibited.[191] It is unclear whether the creation of an unbounded, catchall provision adds anything to that statutory scheme besides drawing in conduct that has not been considered by Congress to be damaging to national security.[192] It does not appear that a construction of § 641 that reaches information is necessary to protect national security.

2. *Congress Has the Competence to Act.* — Congress demonstrated its competence in the information-disclosure field with the passage of other information-disclosure laws[193] and is better equipped than the judiciary to design a comprehensive regulatory scheme. Further, a model for legislation already exists in state trade secret laws. Trade secret laws represent the other major area of law where information disclosure is explicitly criminalized. Trade secret laws, additionally, developed primarily through state legislative action rather than the courts.[194] There are a few main points about existing trade secret laws that may be particularly helpful to Congress.

First, state laws criminalize different modes of transmission. For example, New York prohibits the unauthorized making of "a tangible reproduction or representation of such secret scientific material by means of writing, photographing, drawing, mechanically or electronically reproducing or recording."[195] Three more states have prohibited

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190. See supra Part I.B.2 (describing other statutes criminalizing information disclosure).

191. See supra Part I.B.2.

192. Cf. supra Part I.B.1 (discussing absence of legislative history supporting catchall interpretation).

193. See supra Part I.B.2 (describing statutory scheme criminalizing information disclosure).

194. Trade secrets are primarily protected through state law; Congress enacted federal criminal protections in 1996. See Economic Espionage Act of 1996, 18 U.S.C. §§ 1831–1839 (making theft or misappropriation of trade secrets federal offense). The use of criminal sanctions to punish trade secrets is not uncontroversial, with some arguing that trade secrets should be protected only through civil tort actions. See Chatterjee, supra note 73, at 887–93 (arguing criminal prosecution can be abused for anticompetitive purposes).

195. N.Y. Penal Law § 165.07 (McKinney 2010); see also Lederman, supra note 62, at 951–54 (noting Georgia, Michigan, New Mexico, Florida, Minnesota, Oklahoma, and Tennessee prohibit making reproductions of secret scientific material).

incorporeal transmission, including unauthorized exhibition, disclosure, or communication.[196] It appears that at least two states go even further, prohibiting even the incorporeal acquisition and retention of information.[197] This demonstrates that Congress can decide what types of transmission deserve to be criminalized and legislate accordingly.

Second, trade secret laws highlight issues that state legislatures found important in determining what kinds of information should be protected. For example, many states have limited the subject matter of a trade secret to include only technical or scientific data.[198] Such subject-matter restrictions would be consistent with the other federal information-disclosure laws.[199] The active maintenance of secrecy is also a core element of trade secret laws; this may require measures that prevent unauthorized individuals from getting access to the information.[200] Congress could write a statute that likewise only prohibits the disclosure of information that has been actively kept secret.[201] In addition, once information is released or discussed in the public sphere, it should no longer qualify for further protection.

Third, trade secret laws require that secrecy provide the information's owners a competitive advantage. The government is not in "competition" with the public[202]—instead, it is ultimately accountable to the public—so it seems ill fitting to say that the secrecy of government information provides the government some legitimate advantage over the public. It is conceivable, however, that the government is in competition with foreign nations in the national-defense sphere, or with criminals in the criminal-justice sphere. This limitation suggests that the

196. Lederman, supra note 62, at 955–56 (noting Pennsylvania, Wisconsin, and Ohio prohibit such disclosure).

197. Id. at 957–65 (discussing broad interpretations of "steal" and "property" in Texas and Alabama and potential for similar interpretations in other states).

198. Id. at 944–66.

199. See supra Part I.B.2 (describing other statutes criminalizing information disclosure, many of which prohibit disclosure only of information related to national security).

200. Chatterjee, supra note 73, at 860–61; see also Lederman, supra note 62, at 938, 940 ("Almost all statutes dealing with the theft of trade secrets explicitly require the preservation of secrecy . . . .").

201. The classification system is one example of secrecy protection in the government-information context: Access to this information is limited, documents must be clearly marked, and disclosure has administrative sanctions. See Executive Order 13,526, supra note 7, §§ 1.1–1.9, 5.5 (describing classification system, including limits on access and distribution, administrative sanctions, and marking requirements). On the other hand, internal agency manuals or documents kept "secret" merely because there does not seem to be a public need for their release would not meet the standard for the maintenance of secrecy.

202. Sunstein, supra note 76, at 917 (noting business information is asset with value arising from provision of advantage over competitors, while public is not government's competitor).

government's justification for secrecy may be important. Congress could limit the prohibition of disclosure to cases where the information at issue promotes only certain government interests. For example, if information is secret only because it embarrasses the government or one of its officials, or because various government departments are in competition with each other, the government has little justification for keeping this information secret.[203] Guidance from Congress could clearly forbid this type of action and deter prosecutions based on improper motives.

B. *A Limited Construction of § 641*

In the absence of congressional action, the courts will be left to interpret § 641 in line with current precedent. As discussed above, this precedent provides vague and conflicting guidance for what constitutes a "thing of value of the United States." The majority of circuit courts that have addressed the issue indicated that the First Amendment has a role to play in determining what constitutes a "thing of value," and therefore has a role in limiting the government's ability to restrict disclosure. This section offers a number of considerations to help frame those courts' balancing of First Amendment issues. These considerations are drawn from what individual courts, discussed in Part II above, found important, as well as from various First Amendment theories.[204] They suggest that the courts take into account the nature of the government interest, the nature of the information, and the depth of the secret.

1. *The Nature of the Government Interest.* — The courts seem to have recognized the value of examining the government's justification for keeping particular information secret. For example, the court in *Jones* explicitly pointed to the government's strong interest in criminal investigations,[205] and the district court in *Lambert* asserted that the government's interest in secrecy should be balanced against the First Amendment interest in disclosure.[206] This section asserts that the government interest in secrecy must be conceptualized not as *outweighing* the

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203. A similar standard is already in place in the classification system: Information cannot be classified in order to "conceal violations of law" or to "prevent embarrassment." Executive Order 13,526, supra note 7, § 1.7.

204. First Amendment theory is controversial and convoluted. There are many theories regarding what constitutes the "core" of the First Amendment; some may suggest different implications and details than those considered here. Considering each of the three factors discussed in this Part, however, provides a framework that accounts for what various theories find important. These factors also map roughly onto what the courts have already indicated is important, and the factors label and organize the courts' concerns.

205. See United States v. Jones, 677 F. Supp. 238, 241 (S.D.N.Y. 1988); supra notes 128–131 and accompanying text (discussing *Jones*).

206. See United States v. Lambert, 446 F. Supp. 890, 898 (D. Conn. 1978), aff'd sub nom. United States v. Girard, 601 F.2d 69 (2d Cir. 1979); supra notes 112–119 and accompanying text (discussing *Lambert*).

First Amendment interest; instead, it is *part* of the First Amendment analysis. Examining the government interest in this way ties the different levels of government control over information to the First Amendment.

Dean Robert Post has argued that controls on speech inherent to the organizational authority of the government should be analyzed differently than regulations used to govern the general public.[207] Exercise of managerial authority—for example, institutional actions like paying employees or running schools—gives the government significant latitude to restrict speech.[208] The government has less control over speech in the governance domain, which serves to protect public discourse and promote democratic self-governance.[209] The governance domain is defined by "individuals occupying widely different roles and statuses, with correspondingly divergent values and expectations," while the managerial domain includes resources "embedded in social practices that are constituted by such organizational roles."[210]

Under this view, when information falls under the government's management authority, the government has greater justification for controlling it, and thus for keeping it secret, as long as secrecy supports a legitimate government function. Additionally, the managerial domain puts the government more in the position of a business, where property rights in information have already been recognized.[211] There is thus greater justification for considering such information to be a government "thing of value."

There are certain types of information that seem to clearly fall within the managerial domain—procurement information, for example, relates directly to the ability of the government to purchase goods in a cost-effective manner. Those who submit procurement information are in similar positions, with similar expectations, as expected in a managerial domain. This supports the inclusion of procurement information as a "thing of value."

Other types of information present more arguable cases. For example, when classified information relates to national defense, the government is working toward a specific, legitimate goal: protecting the nation. However, individuals seeking to use information on national

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207. Robert C. Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L. Rev. 1713, 1767–68 (1987) [hereinafter Post, Between Governance] (describing commonly accepted actions in organizational domains that would be constitutionally suspect under traditional First Amendment doctrine).

208. Id.

209. Robert C. Post, Subsidized Speech, 106 Yale L.J. 151, 153 (1996) (arguing "First Amendment doctrine envisions a distinct realm of citizen speech, called 'public discourse,'" which is "site for the forging of an independent public opinion to which democratic legitimacy demands that the state remain perennially responsive").

210. Post, Between Governance, supra note 207, at 1793.

211. See supra Part I.C (discussing evolving recognition of information as property).

defense—most of which will be classified—come from a variety of backgrounds. They may be government employees using it in the course of their work, news reporters seeking to investigate certain aspects of the government, or rights groups looking to support litigation. Additionally, unauthorized disclosure and receipt of classified information is commonplace in practice, so expectations of the various actors may not be aligned.[212] These factors weigh in favor of the governance domain. The analysis may change at different levels of abstraction. For example, the identities of covert agents, which are classified, seem more clearly within managerial authority than the administration of the entire defense system.

To properly take account of the government interest in information, then, the courts should look at whether the government is acting in the managerial or governance domain. The courts should also examine whether the government has a legitimate justification for enforcing secrecy over this particular information, with stronger justification required for regulations governing speech in the governance domain.

2. *The Nature of the Speech.* — Some Supreme Court Justices have endorsed the view that discussion of public issues is critical to self-governance and important to the rights guaranteed by the First Amendment.[213] It is also possible that what the *Jeter* and *Jones* courts meant in referring to a "Pentagon Papers situation"[214] is that the kind of information at issue (for example, whether it relates to a public debate) can affect whether § 641 should restrict it. Cass Sunstein's Jeffersonian model of the First Amendment is one theory that analyzes how the content of information should impact the constitutional protection it deserves.

The Jeffersonian model proposes that speech closer to the core of self-governance and public deliberation deserves more constitutional protection, whereas restrictions on commercial speech are more permissible.[215] Under this view, information related to core speech should be seen more as a "thing of value" of the public, rather than the govern-

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212. See Pozen, Leaky Leviathan, supra note 6, at 528–42 (describing leaking and enforcement in practice).

213. E.g., N.Y. Times Co. v. United States, 403 U.S. 713, 724 (1971) (Douglas, J., concurring).

214. United States v. Jeter, 775 F.2d 670, 682 (6th Cir. 1985); United States v. Jones, 677 F. Supp. 238, 242 n.5 (S.D.N.Y. 1988).

215. Sunstein, supra note 76, at 892–93. This overlaps somewhat with Post's theory of managerial domains, as both provide the least leeway for government regulation when speech is related to self-governance and public deliberation. However, the theory of managerial domain focuses on the relationship of the government to the resource at issue, asking whether the restriction on speech is in an area where the government performs an essential function. The Jeffersonian model looks directly at the content of the information to question how critical it is to core political speech.

ment. The government would therefore have to provide specific and strong justifications for the inclusion of "core speech" under § 641's prohibitions.

Again, now using the Jeffersonian model as a guide, procurement information seems to fall squarely within government control. It is not political speech, nor is it crucial for citizens to know in voting for their representatives. Similar arguments relate to the identities of specific covert agents: Public deliberation on the propriety and scope of covert operations can take place without knowing the names of the agents involved. Crucially, however, much government information does relate to public discourse. For example, the bombing of Cambodia in 1969 was kept secret from the public,[216] and it is difficult to argue that the decision to go to war in a foreign country is not an issue for public deliberation. For this type of information to be protected through criminal sanction, the government must have a strong justification.

This approach instructs courts to look at the content of the information at issue and question its nature and importance to self-governance. It is another way of assessing whether the government should be able to claim a property-type interest in the secrecy of certain information. Additionally, this approach may suggest heightened protections for disclosures to the media vis-à-vis disclosures to private actors. It is difficult to promote public deliberation if the public does not receive the information.

3. *The Depth of the Secret.* — Secrets come in different types: They may be "shallow," where outside parties know a secret exists although they do not know the content; they may be "deep," where outside parties are unaware of a secret's existence at all; or they may be somewhere in the middle, depending on how many people know, what types of people know, how much those people know, and when they know about the secret.[217] The content of shallow secrets may be discovered through the efforts of outside parties; deep secrets, however, leave outside parties ignorant, as there is no amount of effort that would permit those parties to inform themselves of the secret.[218]

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216. Id. at 889 (discussing areas of arguable abuses of secrecy by government).

217. David E. Pozen, Deep Secrecy, 62 Stan. L. Rev. 257, 260–61 (2010). Pozen defines deep secrecy more specifically:

> [A] government secret is deep if a small group of similarly situated officials conceals its existence from the public and from other officials, such that the outsiders' ignorance precludes them from learning about, checking, or influencing the keepers' use of the information. A state secret is shallow if ordinary citizens understand they are being denied relevant information and have some ability to estimate its content.

Id. at 274.

218. Id. at 263.

David Pozen has argued that deep secrets are illegitimate on utilitarian, democratic, and constitutional grounds, and should be avoided whenever possible.[219] This argument suggests that the government has less persuasive justifications for claiming ownership over deep secrets than over shallow secrets. It further suggests that, because deep secrets are illegitimate and thus should not be properly kept secret, exposing the existence of a deep secret (making it more "shallow") may not be deserving of punishment.

This factor is not something actively considered by the court opinions discussed in Part II, although it does appear in practice that prosecution has focused to some extent on the exposure of shallow secrets. Everyone knows undercover DEA agents exist, but not their identities;[220] bidders on government contracts know that there are other bids without knowing the exact price of their competitors;[221] it is generally known that confidential criminal investigations occur.[222] The government prosecuted disclosure of each of those types of shallow secret. On the other hand, the journalists who disclosed the 2006 NSA warrantless surveillance program, which seems a paradigmatic deep secret, were not prosecuted. It is a useful dimension for courts to consider as they try to balance the various dimensions of the First Amendment with government secrecy.

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These factors can be read together to provide guidance for the courts, and provide theoretical support for the factors that the courts already consider important. For example, if a restriction on information is within the government's managerial authority, the information is not about political affairs, and the secrecy is relatively shallow, there could be a presumption that the information is a government "thing of value" under § 641. On the other hand, if the information is within the government's governance authority, is about political affairs necessary to self-governance, and reveals a deep secret, then there are First Amendment problems with permitting the government to control its disclosure.

CONCLUSION

Prosecutors have used § 641 to control unauthorized disclosures of confidential government information in order to fill a perceived gap in a

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219. Id. at 276–323.

220. Disclosure of this type of information led to the prosecution in United States v. Girard, 601 F.2d 69, 70 (2d Cir. 1979), discussed supra notes 110–123 and accompanying text.

221. This type of information was at issue in United States v. Matzkin, 14 F.3d 1014, 1016 (4th Cir. 1994), and United States v. Berlin, 707 F. Supp. 832, 839 (E.D. Va. 1989).

222. A secret criminal investigation was involved in United States v. Jones, 677 F. Supp. 238, 240 (S.D.N.Y. 1988).

legal system with no explicit criminal prohibition on disclosing all types of government information. Because Congress does not appear to have considered its application to information, § 641's enactment did not involve legislative balancing of the need to protect secrecy with the values of disclosure and free public discourse. While most courts have considered the First Amendment in determining whether and when § 641 should apply to information, a majority of courts have advanced overly broad or ill-defined standards for § 641's application to information, leading to inconsistent precedents that are often both under- and overinclusive.

Part III proposes that Congress clarify § 641 or pass a statute that clearly and explicitly defines the boundaries of prohibitions on information disclosure. In order to help the courts properly account for the various dimensions of the First Amendment in the absence of clearer guidance from Congress, Part III also proposes three factors that courts should consider in determining whether § 641 should apply to information in a specific case: (1) the nature of the government interest, (2) the nature of the speech, and (3) the depth of the secret. These factors suggest a clearer, more principled, and more consistent approach to determining § 641's scope.

As the current spate of leak prosecutions demonstrates, the government is eager to find a way to limit unauthorized disclosures of confidential information. The extent to which the government can use § 641 to criminalize the disposition of information will play an important role in determining the reach of government restrictions. In turn, this will help define what information is disclosed to the public. Both potential leakers and the public deserve clearer standards defining § 641's application to government property in a way that accounts for constitutional values.