When the Nation Springs a [Wiki]Leak: The "National Security" Attack on Free Speech

By Kate Kovarovic*

We are willing enough to praise freedom when she is safely tucked away in the past and cannot be a nuisance. In the present, amidst dangers whose outcome we cannot foresee, we get nervous about her, and admit censorship.

-Edward Forster, 1951

I. INTRODUCTION

The free speech clause of the First Amendment is a core provision of the United States Constitution and a founding principle of our democratic nation. The drafters of the Constitution truly believed in the "public's right to receive information about government affairs"[1] and thus included in the First Amendment a general prohibition of laws abridging the freedom of speech and press.[2] As such, the First Amendment has consistently been found to "protect[] the public[']s right to access government information and to express opinions regarding the functioning of the government . . . ."[3] Yet during the drafting of the Constitution there also existed a group of dissenters who called for caution in granting the press broad access to

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[1] Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L. J. 233, 238 (2008) (hereinafter "Papandrea, *Lapdogs, Watchdogs, and Scapegoats*").

[2] U.S. CONST. amend. I (reading "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[3] JENNIFER K. ELSEA, CONG. RES. SERV., CRIMINAL PROHIBITION ON THE PUBLICATION OF CLASSIFIED DEFENSE INFORMATION 9 (2010), *available at* http://www.fas.org/sgp/crs/secrecy/R41404.pdf.

government information, arguing "not all government activities could be publicized, such as 'military operations or affairs of great consequence'."[4]

Their argument serves as the origin of the oft-cited national security exception to free speech. Under this principle, national security interests may supersede certain journalistic freedoms of the First Amendment,[5] and prior restraint can be exercised over the publication of information relating to national security. As a result, the media may be denied access to a breadth of information and data speaking to domestic national security efforts, and both media outlets and individuals may be held liable for the mass dissemination of such information. Yet while this doctrine allows for the colossal infringement of journalistic freedoms, it has remained surprisingly vague and underdeveloped since its initial conception. The final text of the Constitution provides little guidance, holding simply that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy."[6]

Looking to this text for guidance, various efforts have been made to bring a greater understanding to the national security exception to free speech, and there exists a vast body of statutory and case law speaking to the matter. To better facilitate the balance between these competing interests, our nation's leaders have for several decades established a national classification system for security information. Under President Barack Obama, information pertaining to "defense against transnational terrorism"[7] can be classified as "confidential,"[8]

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[4] Papandrea, *Lapdogs, Watchdogs and Scapegoats*, *supra* note 1 (*citing* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 170 (Jonathan Elliot ed.,1888)).
[5] Throughout this Article the phrase "journalistic freedoms" will be used to reference the freedom of speech and press provisions of the First Amendment.
[6] U.S. CONST. art. I, § 5, cl. 3.
[7] Executive Order 13526, 75 C.F.R. § 707 (2010).

"secret,"[9] or "top secret."[10] Various restrictions are thus placed on the release of information based on its classification level; for example, materials classified as "top secret" retain greater confidentiality protections than those classified as merely "secret."

Although the national security exception has played a central role in the evolution of First Amendment rights, the theory itself remains unclear and undefined. This was of particular concern during the War on Terror, as the U.S. has a long history of seriously infringing upon journalistic freedoms in the name of national security during periods of war or conflict. There are admittedly valid points to be made by both sides in this debate. Journalistic freedom is an important tool for holding the government accountable to the American people and for fostering a well-informed public debate about U.S. laws and policies. At the same time, the government might have a compelling reason to monitor the release of information that could potentially undermine national security and place lives at risk. Thus a "most vexing problem arises when the public disclosure of a government secret is both harmful to the national security and valuable to self-governance."[11] A study of national trends reveals that in these circumstances, the balance between journalistic freedom and national security is often foregone for a system of over-classification and secrecy.

This has certainly been the response of the U.S. government to the mass release of documents by whistleblower website WikiLeaks. Since June 2010, WikiLeaks has released hundreds of thousands of documents related to the War on Terror, including previously-

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[8] Under this Order, information is classified as "confidential" if its "unauthorized disclosure . . . reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe." *Id.*

[9] Under this Order, information is classified as "secret" if its "unauthorized disclosure . . . reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe." *Id.*

[10] Under this Order, information is classified as "top-secret" if its "unauthorized disclosure . . . reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe." *Id.*

[11] Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L. J. 939, 957 (2009).

confidential incident reports and embassy cables. The government's reaction to these releases has been swift and uncompromising, with U.S. officials calling for the immediate and complete termination of the documents' releases. Falling back into old habits, the government has once again taken to citing the national security exception, hoping that this ill-understood concept sounds compelling enough to override the constitutional protections of free speech. Yet the government has failed to offer credible evidence speaking to the alleged threat these documents pose to national security. Instead the government seems to imply that the information contained in nearly decade-old reports that are heavily redacted pose a genuine and current national security risk. In doing so, it has seriously undermined the value of these reports to the American people, who have a right to remain informed as to the conduct and policies of their government. As information continues to be released which implicates U.S. officials in serious abuses of power and violations of the law, one must ask which circumstances lend enough credibility to a claim of national security that restrictions on free speech might be justified.

In asking this question, it is important to note the longstanding conception that the right to free speech is not absolute.[12] Instead, a government official can merely hint at a national security threat and the most basic of free speech rights can be seemingly tossed aside. Yet while this has massive implications for the invasion of various constitutional rights, the U.S. legal system has failed to establish a definitive standard for the application of the national security exception. This has helped to place the U.S. far below other nations in its protection of freedom of speech, as a comparison of global media laws reveals that "journalistic freedom in the United States now pales in comparison with journalistic freedom"[13] in many other countries.

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[12] Doug Meier, *Changing With the Times: How the Government Must Adapt to Prevent the Publication of Its Secrets*, 28 REV. LITIG. 203, 214 (2008).
[13] Robert D. Epstein, *Balancing National Security and Free-Speech Rights: Why Congress Should Revise the Espionage Act*, 15 COMMLAW CONSPECTUS 483, 484 (2006).

For a nation that touts itself as a champion of free speech, in reality the U.S. lays claim to a disappointing record of inhibiting journalistic freedom during wartime. Thus the historic observations of political philosopher Alexis de Tocqueville still ring true: "In America the majority raises formidable barriers around the liberty of opinion; within these barriers an author may write what he pleases, but woe to him if he goes beyond them."[14] Rather than perpetuate reliance on an unclear legal doctrine, the U.S. should instead create a definitive standard for the application of the national security barriers to free speech. This would serve to validate successful government claims that the release of information might be detrimental to the nation's security, while placing much-needed boundaries on the government's capacity to block media access to information. It is only with a greater understanding of the relationship between free speech rights and the national security exception that the nation will once again exude the true democratic spirit upon which it was founded.

II. THE DOMESTIC "NATIONAL SECURITY" EXCEPTION TO FREE SPEECH

Domestic lawmakers have long struggled to balance journalistic freedom with the protection of sensitive national security information. Near the end of the 1700s the U.S. began to emerge as a major international presence, and lawmakers felt a mounting pressure to protect those state secrets that could compromise national safety. This coupled with the "introduction and expansion of new forms of media only increase[d] the tension between recognizing free expression and protecting government secrets."[15] As this tension has grown, so too has the body of law addressing the balance and protection of free speech and national security rights. However, there has yet to be formulated one definitive standard that identifies when national

[14] ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 337 (Francis Bowen ed., Henry Reeve trans., 2d ed. 1863).
[15] Meier, *supra* note 12, at 205.

security secrets can override certain journalistic freedoms. Instead, U.S. legal history is saddled with a dense but unclear body of law that reveals the nation's longstanding deference to the national security exception but provides little guidance as to when this exception applies.

A. Statutory Law

Hints of the national security exception to free speech can be traced in U.S. legal history as far back as 1798, when the nation was engaged in the undeclared naval "Quasi-War" with France. Though this war was fought entirely at sea, the U.S. simultaneously sought to fortify its power on land. Thus Congress, with the intent of protecting the U.S. from both enemy non-nationals and seditious attacks that could weaken the government, passed the Sedition Act of 1798.[16] Among its provisions the Sedition Act criminalized the act of publishing "false, scandalous and malicious writing"[17] against the government or its representatives by those who acted with the intent "to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government."[18] According to this language, the government now had the capacity to limit wartime speech based on both content and the speaker's intent. Opponents of the Sedition Act attacked its unconstitutionality, with then-Vice President Thomas Jefferson branding it a clear attempt on behalf of the government to exercise unjust powers in limiting free speech.[19] The debate was curtailed by the Sedition Act's sunset clause, which called for its natural expiration in March 1801.[20]

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[16] An Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596-597, 596 (1798) (expired 1801) [hereinafter "Sedition Act of 1798"].
[17] *Id.*
[18] *Id.* at 597.
[19] Jefferson's position was drafted into the Kentucky Resolutions of 1798, which was affirmed in 2010. The text provides "that it is true as a general principle, and is also expressly declared by one of the amendments to the Constitutions, that 'the powers not delegated to the United States by the Constitution, our prohibited by it to the States, are reserved to the States respectively, or to the people'; and that no power over the freedom of religion, freedom of speech, or freedom of the press being delegated to the United States by the Constitution, nor prohibited

However, the notion that freedom of speech could be curtailed during periods of conflict did not expire alongside the Sedition Act of 1798. Instead the theory reemerged shortly after the official U.S. entry into World War I in April 1917. Within weeks the Wilson administration had drafted a new bill known as the Espionage Act of 1917, with the "declared purpose of protecting the rights and property of American citizens, while punishing crimes 'that endangered the peace, welfare, and honor of the United States'."[21] The draft text first presented to Congress included a "'press censorship' provision, which would have made it unlawful for any person in time of war to publish any information that the President had declared to be 'of such character that it is or might be useful to the enemy'."[22]

This provision sparked a vigorous debate about the seeming fluidity of the First Amendment, as the draft text implied that the right to free speech could be restricted in times of war. The American Newspaper Publishers' Association claimed the provision "'[struck] at the fundamental rights of the people, not only assailing their freedom of speech but also seeking to deprive them of the means of forming intelligent opinion'."[23] Instead the group claimed "'[i]n war, especially, the press should be free, vigilant, and unfettered'."[24] President Wilson attempted to bypass these concerns by arguing that the "'authority to exercise censorship over the press . . .

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by it to the States, all lawful powers respecting the same did of right remain, and were reserved to the States or the people: that thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use should be tolerated, rather than the use be destroyed." H.R. 11, 2010 Gen. Assemb., Reg. Sess. (Ky. 2010).

[20] Sedition Act of 1798, *supra* note 16, at 597.

[21] Epstein, *supra* note 13, at 483.

[22] Stone, *supra* note 11, at 955-56.

[23] *Id.* at 956 (*citing* 55 CONG. REC. 1695 (1917) (discussing H.R. 291, 65th Cong. Tit. I § 4 (1917)).

[24] *Id.*

is absolutely necessary to the public safety'."[25] However, Congress voted to remove the provision[26] in the official Espionage Act[27] as enacted on June 15, 1917.

Although the press censorship provision was deleted from its adopted text, the Espionage Act of 1917 still allowed for certain journalistic freedoms to be inhibited during wartime. As such, the Act provided that:

> Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.[28]

As with the Sedition Act of 1798, the Espionage Act thus allowed for the restriction of speech based on both content and the speaker's intent. Yet although Congress adopted this version of the text, many members criticized the Espionage Act for being unconstitutional and overbroad. Little guidance was given to the interpretation and applicability of the text, which allowed the government to launch attacks against a vast array of speech while providing for little judicial restrictions or oversight. Accordingly, the Espionage Act quickly earned a reputation as one of the "most confusing and ambiguous federal criminal statutes"[29] to date.

The U.S. used the textual ambiguity of the Espionage Act to its advantage in drafting the Sedition Act of 1918.[30] This Sedition Act consisted of a series of amendments that extended the

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[25] *Id.* (*citing Wilson Demands Press Censorship*, N.Y. TIMES, May 23, 1917, at 1 (quoting letter from Woodrow Wilson to Representative Webb)).
[26] *Id.*
[27] Espionage Act, ch. 30, tit. XII, § 1, 40 Stat. 217 (1917) (current version at 18 U.S.C. §§ 791-799 (2004)) [hereinafter "Espionage Act"].
[28] *Id.* § 3.
[29] Papandrea, *Lapdogs, Watchdogs and Scapegoats*, *supra* note 1, at 263.
[30] Espionage Act, ch. 30, § 3, 40 Stat. 217 (1917), *amended by* Sedition Act of 1918, ch. 75, § 1, 40 Stat. 553 (repealed 1921) [hereinafter Sedition Act of 1918].

provisions of the Espionage Act to include a broader range of offenses. Once again, the capacity of the government to limit journalistic freedom during wartime was expanded as § 3 of the Sedition Act criminalized the conduct of

> whoever, when the United States is at war, shall willfully utter, print, write or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States or the Constitution . . . or the military or naval forces of the United States, or the flag . . . or shall willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States . . . or shall willfully by utterance, writing, printing, publication, or language spoken, urge . . . any curtailment of production in this country of any thing . . . necessary . . . to the prosecution of the war . . . .[31]

Proponents of the Sedition Act of 1918 claimed that none of the amendments within posed a genuine risk to First Amendment rights; instead, the Act was intended only to curb damaging propaganda during wartime.[32] This contention was met with great skepticism, as many argued that the desire to inhibit negative propaganda should not override the right to free speech. As argued by Senator Hiram Warren Johnston at the time,

> If this bill to suppress sedition is necessary it is also necessary that we preserve, at the same time, the right of honest, decent, legitimate, loyal expression, so that a man, with honest motive, may speak the truth. What a travesty it is for us today to refuse to permit the people of the Union to speak what is true with good motive and for justifiable end . . . [I hope that] the right of honest men to speak plainly and truthfully shall not be stifled.[33]

Congress seemed to agree, and in December 1920 the Sedition Act was repealed.[34]

However, the Espionage Act was again updated when Congress passed the Internal Security Act of 1950[35] in response to the perceived threat of communism against national security. Rather than emphasize content and intent, the 1950 amendments made the

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[31] *Id.* § 3.
[32] *Fears Speech Curb in Sedition Bill*, N.Y. TIMES, April 24, 1918, at 12, *available at* http://query.nytimes.com/mem/archive-free/pdf?res=9405E7DA1031E03ABC4D51DFB2668383609EDE.
[33] *Id.*
[34] Sedition Act of 1918, *supra* note 30 (repealed 1921).
[35] Pub. L. No. 81-831, § 1, 64 Stat. 987 (1950).

unprecedented move of criminalizing certain channels by which reporters might access their information. Accordingly, the amendments prohibited both "the retention of classified information by someone who does not have lawful possession of such information" and the "transmission of such information by someone with lawful possession to someone without such entitlement."[36] This marked a break from Congress' prior commitment to making "such prohibitions conditional on actual intent to injure the United States or give aid to a foreign government,"[37] which would ultimately spark years of debate in U.S. courts. As such, the decisions in several cases stemming from the Internal Securities Act would establish some of the most groundbreaking precedent regarding journalistic freedom to date.

B. Case Law

U.S. courts have long been asked to interpret the full scope and limitations of the First Amendment during wartime. The first of such cases is *Schenck v. United States,*[38] a 1919 case in which the Supreme Court decided that the First Amendment did not protect wartime speech that presented a "clear and present danger." Defendant Charles Schenck served as general secretary to the Socialist party and supervised the printing of 15,000 leaflets advocating opposition to the draft.[39] In determining whether Schenck had violated the Espionage Act of 1917, the Court said "[w]e admit that in many places and in ordinary times the defendants in saying all that was said . . . would have been within their constitutional rights."[40] However, the Court also noted that "the character of every act depends upon the circumstances in which it is done."[41] As a result,

[36] Epstein, *supra* note 13, at 494.
[37] Laura Barandes, *A Helping Hand: Addressing New Implications of the Espionage Act on Freedom of Press*, 29 CARDOZO L. REV. 371, 384 (2007-2008).
[38] *Schenck v. United States*, 249 U.S. 47 (1919).
[39] *Id.* at 49.
[40] *Id.* at 52.
[41] *Id.*

the Court found no constitutional protection for wartime speech that posed a clear and present danger:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that heir utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.[42]

Here the Court highlighted its belief that the context of wartime allowed for greater First Amendment restrictions than would be permissible during peacetime. It also held that liability could be imposed upon a speaker regardless of his or her success in inciting action. Indeed, liability could be imposed simply if "the act (speaking, or circulating a paper,) [and] its tendency and the intent with which it is done are the same . . . ."[43] Schenck was thus found guilty because his intent to provoke opposition to the draft and his leaflets' capacity to provoke such opposition created a clear and present danger.

The Supreme Court revised the "clear and present danger" test for its 1925 decision in *Gitlow v. New York*.[44] Defendant Benjamin Gitlow was a member of the Socialist party who organized the printing and distribution of some 16,000 copies of "The Left Wing Manifesto,"[45] which called for the necessity of "accomplishing the 'Communist Revolution' by a militant and 'revolutionary Socialism'."[46] Gitlow was subsequently charged with the New York statutory crime of criminal anarchy.[47]

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[42] *Id.*
[43] *Id.*
[44] *Gitlow v. New York*, 268 U.S. 652 (1925).
[45] *Id.* at 655-56.
[46] *Id.* at 657.
[47] The statute defined "advocacy of criminal anarchy" as:

> Any person who:
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> 1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or

The *Gitlow* Court began its analysis by examining the limitations of the First Amendment: "It is a fundamental principle, long established, that the freedom of speech and of the press . . . does not confer an absolute right to speak or publish . . . ."[48] Instead it was found that states had sufficient policing powers to "punish those who abuse [free speech] by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace,"[49] as such speech clearly "involve[s] danger to the public peace and to the security of the State."[50] In modifying the "clear and present danger" test of *Schenck*, the Court here settled on the "bad tendency" test by holding that "the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect [i]s to bring about the substantive evil which the legislative body might prevent."[51] Given that the Court deemed the New York statute to be constitutional, Gitlow's conviction was affirmed.[52]

Although the *Gitlow* case modified the standard for restricting First Amendment rights, the 1931 case of *Near v. Minnesota*[53] confirmed the validity of the Court's reasoning in *Schenck*. Charges were brought against J.M. Near for his publication of *The Saturday Press*, a periodical that often accused local politicians and police officers of conspiring with local Jewish gangs.[54] Near was charged under a Minnesota statute that "provide[d] for the abatement, as a public

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> by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,
> 2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means . . . .

Id. at 654-55 (*citing* N.Y. CRIM. LAW § 160, 161 (Consol. 1909)).
[48] *Id.* at 666.
[49] *Id.* at 667.
[50] *Gitlow*, 268 U.S. at 669.
[51] *Id.* at 671.
[52] *Id.* at 654.
[53] *Near v. Minnesota*, 283 U.S. 697 (1931).
[54] *Id.* at 704.

nuisance, of a 'malicious, scandalous and defamatory newspaper, magazine or other periodical'."[55] The Court first defended the right to free speech and argued the limited circumstances under which prior restraint may be exercised:

> It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government.[56]

The Court then referenced its decision in *Schenck* by acknowledging that prior restraint is appropriate in limited circumstances when the security of a community is at risk: "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops . . . the security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government."[57] Yet the Court also cautioned against the excessive exercise of prior restraint, as "[t]here is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency [does] not alter the determination to protect the press against censorship and restrain upon publication."[58] The state statute was thus deemed unconstitutional and Near's conviction was reversed.[59]

Although the *Near* Court asserted that inflammatory speech received constitutional protection, the Court later established in *Brandenburg v. Ohio*[60] that the restriction of inflammatory speech was permissible under limited circumstances. Appellant Clarence

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[55] *Id.* at 701.
[56] *Id.* at 733.
[57] *Id.* at 716.
[58] *Id.* at 722.
[59] *Near*, 283 U.S. at 723.
[60] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Brandenburg was convicted under the Ohio Criminal Syndicalism statute after he contacted a local news reporter and invited him to a Ku Klux Klan [KKK] rally, a portion of which was later broadcast.[61] During this rally, hooded members of the KKK stood around a burning cross while Brandenburg delivered a speech in which he made several derogatory comments towards both African Americans and Jews.[62] Brandenburg was later charged under the statute for "'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism'."[63]

The Supreme Court ruled that the Ohio statute was unconstitutional, as no law could forbid the mere advocacy of action or the assembly of people to advocate for such action.[64] Instead, the advocacy of action could only be forbidden if it was certain to incite "imminent lawless action," as

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[65]

The three distinct factors of the imminent lawless action test were thus identified as (1) intent; (2) imminence; and (3) likelihood. In applying this test to Brandenburg's case, the Supreme Court found that his speech constituted mere advocacy and not incitement, and his conviction was reversed.[66]

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[61] *Id.* at 444-45.
[62] *Id.* at 446.
[63] *Id.* at 444 (*citing* OHIO REV. CODE ANN. § 2923.13 (West 1969)).
[64] *Id.* at 449.
[65] *Id.* at 447.
[66] *Brandenburg*, 395 U.S. at 449.

The particular issue of journalistic freedom was more directly addressed in the 1971 case of *New York Times Co. v. United States*[67] [Pentagon Papers case]. In this case, the U.S. sought to permanently enjoin both the *New York Times* and the *Washington Post* from publishing the contents of a classified study on domestic policies in Vietnam.[68] At the time President Nixon cited to § 793 of the Espionage Act[69] and argued an Executive need to maintain secrecy of the information included in the report.[70] The Supreme Court struggled to articulate a standard in this case, and the *per curiam* opinion noted only that "'[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity'."[71] In further defining this "heavy presumption," the Court held that First Amendment rights are to prevail over the government's national security claim if journalistic freedom is at stake and the information to be revealed does not threaten "'grave and irreparable' injury to the public

[67] *New York Times Co. v. United States*, 403 U.S. 713 (1971).
[68] *Id.* at 712.
[69] The Espionage Act provides:

> Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it.

Espionage Act, *supra* note 27, at § 793.
[70] The court stated further:

> And the Government argues in its brief that in spite of the First Amendment, '(t)he authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief.

Brandenburg, 395 U.S. at 718.
[71] *Id.* at 719 (*citing Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

interest."[72] Here the government was found to have failed to meet its burden, and the stays entered by a lower court against the newspapers were vacated.[73]

Although the Pentagon Papers case established little legal precedent, the concurring opinions provided significant insight into the applicability of the national security exception. Although the Justices agreed that such an exception existed, they also noted that national security concerns could rarely override the critical role of journalistic freedom in fortifying the U.S. system of checks and balances. As stated by Justice Stewart,

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry-in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.[74]

Justice Black agreed, noting that the First Amendment was intended to have almost limitless protection:

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.[75]

Justice Brennan also noted that the mere publication of documents did not allow for any national security restrictions absent "governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a

[72] *Id.* at 723.
[73] *Id.* at 714, 719.
[74] *Id.* at 728.
[75] *Id.* at 717.

transport already at sea can support even the issuance of an interim restraining order."[76] However, several Justices also implied that even if the government was unable to enjoin the publication of documents, it might still be able to prosecute the newspapers after the fact for violating the Espionage Act.[77]

The question of prior restraint based on national security secrets was again raised before a U.S. court in 1979 with the *United States v. Progressive*[78] case. The U.S. was granted a temporary injunction against a magazine called *The Progressive,* which was planning to publish an article that allegedly revealed the secret of the hydrogen bomb.[79] Although the article was drafted largely from sources in the public domain, the U.S. argued that it fell under the purview of the "born secret" clause of the Atomic Energy Act of 1954.[80] The case was later dropped and the article published after an independent foreign source printed an article containing similar information.[81]

In granting the preliminary injunction, the U.S. District Court discussed the delicate balancing of rights needed when applying the national security exception: "[F]ew things, save grave national security concerns, are sufficient to override First Amendment interests . . . [and yet, we are also] convinced that the government has a right to classify certain sensitive documents to protect its national security. The problem is with the scope of the classification system."[82] Thus courts faced with this question were instructed to balance the "disparity of risk" in either limiting free speech rights or granting access to potentially sensitive national security information. The Court ultimately ruled that the "publication of the technical information on the

[76] *Brandenburg,* 395 U.S. at 726-27.
[77] As noted by Justice White, who was joined in his opinion by Justice Stewart, "failure by the government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication." *Id.* at 735.
[78] *United States v. Progressive, Inc.*, 467 F. Supp. 990 (1979).
[79] *Id.* at 991.
[80] *Id.* at 991, 993.
[81] *United States v. Progressive, Inc.*, 610 F.2d 819 (7th Cir. 1979).
[82] *Progressive,* 467 F. Supp. at 992-93.

hydrogen bomb contained in the article is analagous [sic] to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint."[83] Given that the information could potentially pose a "grave, direct, immediate and irreparable harm to the United States,"[84] the Court granted the injunction.

C. Access to Information During the War on Terror

As seen in the *Progressive* case, U.S. courts most recently settled on the "grave, direct, immediate and irreparable harm" standard when allowing national security interests to override First Amendment rights. However, First Amendment specialist Floyd Abrams has acknowledged that "'[h]ard times for the First Amendment tend to come at very hard times for the country . . . When we feel threatened, when we feel at peril, the First Amendment or First Amendment values are sometimes subordinated to other interests'."[85] Abrams' theory proved particularly true during the War on Terror, during which former White House Press Secretary Ari Fleischer once cryptically warned that "'[p]eople need to watch what they say and watch what they do'."[86]

Yet evolving methods of mass communication and forums for public expression have allowed for a number of leaks during the War on Terror. It was the *Washington Post* in 2005 that first revealed the Central Intelligence Agency's [CIA] operation of a covert prison system that spanned several countries and was used for hiding and interrogating top al Qaeda operatives.[87] That same year, a *New York Times* article profiled the government's secret

[83] *Id.* at 996.
[84] *Id.*
[85] Bill Carter & Felicity Barringer, *In Patriotic Time, Dissent is Muted*, N.Y. TIMES, Sept. 28, 2001, *available at* http://query.nytimes.com/gst/fullpage.html?res=9B0CE4D91F3AF93BA1575AC0A9679C8B63.
[86] *Id.*
[87] Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH POST., Nov. 2, 2005, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html.

wiretapping program which enabled the National Security Agency [NSA] to hear certain international calls placed within the U.S.[88] The government reacted severely to the leaks, charging the *New York Times* with alerting "would-be terrorists to the possibility that they were being watched."[89] Until publication of the article, the government claimed that the existence of CIA black sites was only known to "a handful of officials in the United States and, usually, only to the President and a few top intelligence officers in each host country."[90] A number of existing and newly drafted laws would later become critical tools in the battle between government and media for access to information relating to national security.

One of these was the Freedom of Information Act[91] [FOIA], which was first signed in 1966 and became a central theme in the discussion of journalistic freedom during the War on Terror. Given that FOIA allows for the full or partial disclosure of previously unreleased government information and documents, its "passage . . . revolutionized the public's ability to force the government to release information."[92] Under this law, the public need not "demonstrate a 'need to know' to gain access to government documents; instead, FOIA creates a statutory 'right to know'."[93] However, recognizing "the need to strike a balance between the right to know and the often compelling need to keep information private,"[94] Congress also included in the Act nine exemptions to its mandatory reporting provisions. The first of these exemptions addresses national security, and holds that FOIA does not apply to matters that are "(1)(A) specifically authorized under criteria established by an Executive order to be kept secret

[88] James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, *available at* http://www.nytimes.com/2005/12/16/politics/16program.html.
[89] *Id.*
[90] Priest, *supra* note 87.
[91] Freedom of Information Act, 5 U.S.C. § 552 (2000), *amended by* Pub. L. No. 107-306, 110 Stat. 3048 (2003) (original version at Pub. L. No. 89-554 (1966)) [hereinafter "FOIA"].
[92] Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35, 48 (2005) (hereinafter "Papandrea, *Under Attack*").
[93] *Id.* at 50.
[94] *Id.*

in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order . . . ."[95]

These Exemption 1 claims are subject to the judicial oversight of U.S. courts. In the 1973 case of *Environmental Protection Agency v. Mink*,[96] the Supreme Court ruled that the government must only prove "that the document was in fact classified pursuant to an Executive order that protected national defense or foreign policy information."[97] This places an alarmingly minor burden on the government, as academic Mary-Rose Papandrea notes that "courts have long been extremely reluctant to question government assertions that national security demands the continued confidentiality of the requested information."[98] The attacks of September 11 have only reinforced this reluctance, and courts continue to show extraordinary deference to Executive claims that national security requires that the requested information be kept private.

Despite President Obama's early pledge to create "an unprecedented level of openness in Government,"[99] little has changed under his administration with regards to access to information. Those changes that have been implemented establish new hurdles to accessing potentially sensitive information, as seen with Executive Order 13525[100] of December 29, 2009. This Order allows "[i]nformation that has not previously been disclosed to the public under proper authority may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act."[101] As such, requests for access to information that meets the criteria for availability under FOIA can still be denied if the government determines that the information should have initially been classified.

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[95] FOIA § 552(b)(1).
[96] *Envtl. Prot. Agency v. Mink*, 410 U.S. 73 (1973).
[97] Papandrea, *Under Attack*, *supra* note 92, at 51(*citing Envtl. Prot. Agency*, 410 U.S. at 84).
[98] *Id.* at 48.
[99] Memorandum from President Barack Obama to the Heads of Exec. Dep'ts and Agencies (Jan. 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/.
[100] Exec. Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009).
[101] *Id.* § 1.7(d).

The domestic body of law addressing the national security exception provides little guidance as to the theory's applicability and limitations. It can reasonably be argued that such an exception exists under both statutory and case law. Yet U.S. courts and lawmakers have failed in their duty to clearly identify what information constitutes a sufficient threat to national security as to allow for the restriction of First Amendment rights. Instead the theory is marked by its seeming fluidity, allowing the government to use "the pretext of 'national security' to regard as suspicious any journalist who question[s] the 'war on terrorism'."[102] The function of judicial oversight has repeatedly failed to protect the provisions of the First Amendment when faced with a national security challenge. This has empowered a vague and overbroad theory to consistently override the most basic of constitutional rights.

III. PLACING U.S. STANDARDS IN AN INTERNATIONAL CONTEXT

The erosion of journalistic freedom in the U.S. is apparent not only in an overview of our domestic legal history, but also in a comparison to the universal laws of free speech. Both the Universal Declaration of Human Rights [UDHR][103] and the International Covenant on Civil and Political Rights [ICCPR][104] highlight freedom of speech as a fundamental human right; the right to free speech is also widely hailed as a principle of customary international law. Yet the U.S. has neglected its duties under international law in recent years, as domestic protection of free speech has steadily declined and U.S. officials cite the War on Terror as a valid excuse for placing overbroad restrictions on journalistic freedom. Evidence of such has been annually tracked by Reporters Without Borders, which reported that in 2002 the U.S. ranked seventeenth

[102] Epstein, *supra* note 13, at 484.
[103] Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter "UDHR"].
[104] International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967) [hereinafter "ICCPR"].

on the Worldwide Press Freedom Index; by 2006, the U.S. had dropped to fifty-third.[105] Although the U.S. has ranked twentieth since 2009, the nation still scores below almost every Northern European country.[106]

The first international covenant to address freedom of speech was the UDHR. Compelled by the violence of World War II, the United Nations [U.N.] sought to draft a global expression of rights to which all people are entitled. The final version of the UDHR consists of 30 articles and was adopted by the General Assembly on December 10, 1948. Although the UDHR is not in itself a binding legal treaty, it was adopted for the purpose of defining the terms "fundamental freedoms" and "human rights" as they appear in the U.N. Charter, which is binding upon all member states.[107] The UDHR is also widely considered to be an embodiment of customary international law, which is binding upon all states regardless of their U.N. member status.

The preamble of the UDHR identifies freedom of speech to be a leading aspiration for all people:

> Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people . . . .[108]

Article 19 further articulates that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[109] Although the UDHR

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[105] *Press Freedom Index,* REPORTERS WITHOUT BORDERS (Oct. 31, 2010), http://en.rsf.org/spip.php?page=recherche&lang=en&recherche=%22worldwide+press+freedom+index%22+%222010%22&image.x=0&image.y=0&image=%3E%3E.
[106] *Id.*
[107] "Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms . . . ." UDHR, *supra* note 103, pmbl.
[108] *Id.*
[109] *Id.* art. 19.

does not specifically carve out a national security exception to free speech, Article 29(2) sets forth that various social or governmental interests may circumvent the right to free speech: "[E]veryone shall be subject to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[110]

Although the UDHR and ICCPR stem from the same drafting process, the ICCPR more directly addresses the freedom of speech and its permissible derogations. The ICCPR is a multilateral treaty adopted by the General Assembly on December 16, 1966, and which entered into force on March 23, 1976. This covenant commits its parties to respect the civil and political rights of individuals, including the freedom of speech. As of November 2010, the ICCPR had 167 state parties and 72 state signatories, including the U.S.[111]

Article 19 of the ICCPR encompasses both the right to free speech and the possible restrictions of this right. Article 19(1) and 19(2) provide for the actual right in holding that

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[112]

Yet Article 19(3) provides for the restriction of free speech under limited circumstances:

> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.[113]

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[110] *Id.* art. 29(2).
[111] International Covenant on Civil and Political Rights, UNITED NATIONS TREATY COLLECTION (Nov. 28, 2010), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.
[112] ICCPR, *supra* note 104, art. 19(1)-(2).
[113] *Id.* art. 19(3).

In its General Comment to Article 19, the U.N. Human Rights Committee provides little insight into the balance of free speech rights and national security interests, noting only that Paragraph 3 "expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole."[114] While a state may impose certain restrictions on the freedom of expression, those restrictions must not place the actual right in jeopardy.[115] As a result, the restrictions are subject to various guidelines: (1) they must be provided for under domestic law; (2) they may only be imposed for the reasons established in Article 19(3); and (3) they must be deemed "necessary" by the state to accomplish one of these purposes.[116] However, this commentary provides no insight in how to best balance these sometime conflicting interests.

While the right to free speech is considered to be customary law, it has not achieved the status of a *jus cogen* norm from which no derogation is permitted. As a result, the national security exception is also considered a valid principle under customary international law. The U.N. Secretariat for the Convention on the Rights of Persons with Disabilities has acknowledged that the "enjoyment of some human rights may be restricted during times of war or public emergency,"[117] where a public emergency is defined as that which "threatens the life of a nation."[118] Under this definition "the emergency must be actual, affect the whole population and the threat must be to the very existence of the nation."[119] Several regional treaties have adopted

[114] Office of the High Commissioner for Human Rights, General Comment No. 10: Freedom of Expression (art. 19) (June 29, 1983).
[115] *Id.*
[116] *Id.*
[117] Rep. of the Secretariat for the Convention on the Rights of Persons with Disabilities, *Resource on International Norms and Standards Relating to Disability,* Part II § 10.2 (October 2003), *available at* http://www.un.org/esa/socdev/enable/comp001.htm.
[118] *Id.*
[119] *Id.*

this exception including the European Convention on Human Rights, which allows for the limitation of free speech: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety . . . ."[120] While similar exceptions can also be seen in the American Convention on Human Rights,[121] the drafters of other treaties such as the African [Banjul] Charter on Human and Peoples' Rights[122] opted to exclude an explicit national security exception.

In examining these instruments of international law, it is clear that the freedom of speech and expression is considered to be a basic human right. In recent years this body of law has also consistently acknowledged the existence of a national security exception to these rights. However, international laws have remained silent on how best to balance these principles, instead holding only that the exception must be applied during a time of war or public emergency, and in such a way as to not sacrifice the fundamental right to free speech. Should a state infringe upon the right to free speech, even in the name of national security, it could thus be found to have violated international laws and standards.

IV. THE WIKILEAKS CASE STUDY

There is no denying that the national security exception to free speech is a valid principle under both domestic and international law. However, the U.S. too often declares threats to

[120] European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(2), Nov. 4, 1950, 213 U.N.T.S. 221.
[121] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.
[122] Organization of African Unity, African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

national security to divert citizens' attentions from the fact that their constitutional rights have been subverted. Yet "[s]imply invoking the need for secrecy to protect national security interests does not eliminate the need for constitutional scrutiny."[123] What was once a valid legal principle is now a mere tool for our government's "obsessive secrecy [and need to] effectively and intentionally constrain[] the meaningful oversight by Congress, the press, and the public . . . ."[124] The government's behavior during the War on Terror reveals an alarming need to better ensure public transparency and accountability; its tendency to ignore civil liberties has been well-documented during the War on Terror,[125] and its "high level of secrecy is disconcerting . . . ."[126] Ultimately, "[s]uch an approach to self-governance weakens our democratic institutions and 'renders the country less secure in the long-run'."[127]

This is not to say that the national security exception is wholly invalid. However, the government has exploited this principle and thus stripped it of any validity. By not calling attention to this issue, we are perpetuating a culture whereby we are only exposed to that which government officials have "'knowingly and deliberately disseminated . . . in order to advance the interests of a particular person, [or] policy'."[128] The few methods that are in place to protect journalistic freedoms "serve[] as poor tools for ensuring the public's ability to obtain information about the government's detention of individuals as part of its counterterrorism efforts."[129] As a result, modern American culture has been infiltrated by overwhelming government hostility to

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[123] Papandrea, *Lapdogs, Watchdogs, and Scapegoats*, *supra* note 1, at 278 (*citing United States v. Rosen*, 445 F. Supp. 2d 602, 630-34 (E.D. Va. 2006)).
[124] Stone, *supra* note 11, at 962.
[125] Papandrea, *Under Attack*, *supra* note 92, at 72.
[126] *Id.* at 53.
[127] Stone, *supra* note 11, at 962 (*citing* John Podesta, *Need to Know: Governing in Secret*, THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 220, 255 (Richard C. Leone and Greg Anrig, Jr., eds., 2003)).
[128] Papandrea, *Under Attack*, *supra* note 92, at 76 (*citing Note: Keeping Secrets: Congress, the Courts, and National Security Information*, 103 Harv. L. Rev. 906, 912 (1990)).
[129] *Id*. at 79.

the "very existence of a right of access [to information] during a time of crisis."[130] Although the War on Terror has officially come to an end, the Obama administration has carried on this disappointing legacy, as has been exemplified by the recent WikiLeaks[131] case.

A. Case Profile

WikiLeaks founder Julian Assange has stated that, "The attack on truth by war begins long before the war starts and continues long after a war ends."[132] The WikiLeaks website was founded in an effort "to correct some of that attack."[133] The whistleblower website, first launched in 2006, gained international notoriety in July 2010 with the launch of its internal, searchable archive known as the "Afghan War Logs." At that time more than 70,000 documents were released which consisted of previously-classified, "internal records of actions by the U.S. military in Afghanistan between January 2004 and December 2009."[134] WikiLeaks quickly followed up with the release of an additional 15,000 documents that had previously been withheld until "technicians could redact the names of individuals in the reports whose safety could be jeopardized."[135] By the end of this first wave of releases, WikiLeaks had posted some 92,201 records.[136] As reported by the *New York Times*, "The documents illustrate in mosaic detail why, after the United States has spent almost $300 billion on the war in Afghanistan, the Taliban are stronger than at any time since 2001."[137]

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[130] *Id.* at 80.
[131] The WikiLeaks homepage can be found at http://wikileaks.org/.
[132] *Wikileaks Iraq War Documents: The Key Issues*, BBC NEWS, Oct. 25, 2010, *available at* http://www.bbc.co.uk/news/world-us-canada-11617892 (hereinafter "Wikileaks Iraq War Documents").
[133] *Id.*
[134] Sarah C. Sullivan, *A Closer Look at WikiLeaks' Past, Future*, PBS NEWSHOUR, July 27, 2010, *available at* http://www.pbs.org/newshour/updates/military/july-dec10/wikileaks_07-26.html.
[135] *Id.*
[136] *Id.*
[137] C.J. Chivers, et al., *View Is Bleaker Than Official Portrayal of War in Afghanistan*, N.Y. TIMES, July 25, 2010, *available at* http://www.nytimes.com/2010/07/26/world/asia/26warlogs.html.

The government's response to the leaks was both swift and damning, with White House Press Secretary Robert Gibbs stating

> Whenever you have the potential for names and for operations and for programs to be out there in the public domain, that it, besides being against the law, has the potential to be very harmful to those that are in our military, those that are cooperating with our military and those that are working to keep us safe.[138]

Despite Gibbs' assertion that the leak was illegal, no charges were brought against the website or Assange at that time. However, Pfc. Bradley Manning was arrested and charged with leaking classified videos and diplomatic cables to the website.[139] Other government officials concurred with Gibbs, as White House National Security Chief Jim Jones condemned WikiLeaks for placing "the lives of Americans and our partners at risk."[140] Still others fell in the middle of the spectrum, as Daniel Ellsberg, the man behind the famed 1971 leak of the Pentagon Papers, argued that Assange "is doing very good work for our democracy"[141] while acknowledging that "[y]es, there are things that should be kept secret for some period of time."[142]

These public condemnations were ineffective in preventing the WikiLeaks site from publishing some 400,000 new documents in October 2010, which gave a "never-before-seen, uncensored view of the Iraq War."[143] The Pentagon was better prepared for this second release, and quickly assembled a team of 120 experts to review the documents for security threats.[144] Upon their initial review, Pentagon Press Secretary Geoff Morrell stated that

> [t]his is all classified secret information never designed to be exposed to the public. Our greatest fear is that it puts our troops in even greater danger than they inherently are on these battlefields. That it will expose tactics, techniques and procedures—how they operate on the battlefield, how they respond under attack,

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[138] Sullivan, *supra* note 134.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] Ashley Fantz, *New Massive Release to Put Iraq War and WikiLeaks in Spotlight*, CNN, Oct. 22, 2010, *available at* http://edition.cnn.com/2010/US/10/22/wikileaks.iraq.documents/index.html?iref=mpstoryview.
[144] *Id.*

> the capabilities of our equipment . . . how we cultivate sources [and] how we work with Iraqis.[145]

In light of the new releases, the government identified the name of at least 300 Iraqis who were believed to be "particularly vulnerable in light of this exposure . . . [and we must] take measures to try to safeguard them . . . ."[146]

Yet amidst the criticism and conjecture, few took note of the *lack* of an impact the releases had. After its initial review of the original documents posted to the site, the Department of Defense concluded that "the online leak . . . did not disclose any sensitive intelligence sources or methods."[147] Instead the reports consisted primarily of "initial, raw observations by tactical units . . . [which are] essentially snapshots of events, both tragic and mundane . . . ."[148] Given the nature of these documents, it was acknowledged that the government "know[s] of no case where anyone in Afghanistan has been harmed because their name was in the leaked documents . . . ."[149] Assange himself confirmed this, stating that the Pentagon "cannot find a single person who has been harmed" due to the releases.[150]

However, the information revealed in the leaks is of paramount importance, as it revealed significant problems with U.S. action in Iraq. The Afghan War Diary alone "revealed infighting among Afghan security forces, including attacks on one another, as well as heavy drug use among Afghan soldiers. The leak also implicated Pakistan in providing aid to the Afghan

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[145] *WikiLeaks Website Publishes Classified Military Documents from Iraq*, CNN, Oct. 22, 2010, *available at* http://edition.cnn.com/2010/US/10/22/wikileaks.iraq/ (hereinafter "WikiLeaks Website Publishes Classified Military Documents").
[146] *Id.*
[147] Adam Levine, *Gates: Leaked Documents Don't Reveal Key Intel, But Risks Remain*, CNN, Oct. 16, 2010, *available at* http://articles.cnn.com/2010-10-16/us/wikileaks.assessment_1_julian-assange-wikileaks-documents?_s=PM:US.
[148] *Wikileaks Iraq War Documents*, *supra* note 132.
[149] *WikiLeaks Website Publishes Classified Military Documents from Iraq*, *supra* note 145.
[150] *Id.*

Taliban . . . and gave fleeting glimpses of Osama bin Laden's whereabouts."[151] The reports also exposed the deplorable treatment of Iraqi civilians, telling "stories about civilians killed by 'friendly action.' One U.S. military report detailing the killings of six Afghans, including a child, suggested the information should stay under wraps lest it 'create negative media'."[152] Indeed, the reports tell of significant misconduct on the part of U.S. troops, who "killed civilians [and] witnessed their Iraqi partners abuse detainees . . . ."[153] And although Donald Rumsfeld famously said that "we don't do body counts on other people,"[154] the leaks convey that the U.S. was in fact tracking, and publicly underreporting, the Iraqi civilian death toll by an average of 15,000—raising the total civilian body count during the War on Terror to over 66,000 lives lost.[155]

In November 2010 WikiLeaks announced its intent to release a third wave of documents that would be "7x the size of the Iraq War Logs."[156] However, the nature of these documents was rumored to be highly dissimilar to those of the Iraq War Logs as this third release was to be primarily composed of diplomatic cables and directives. Even prior to the release, U.S. officials claimed that the leak of these documents would be "be far more damaging than the first two [leaks] combined"[157] as the information contained in the documents could "drastically alter U.S.

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[151] Fantz, *supra* note 143.
[152] *Id.*
[153] Spencer Ackerman & Noah Shachtman, *Chemical Weapons, Iranian Agents and Massive Death Tolls Exposed in WikiLeaks' Iraq Docs*, WIRED.COM, Oct. 22, 2010, *available at* http://www.wired.com/dangerroom/2010/10/chemical-weapons-iranian-agents-and-massive-death-tolls-exposed-in-wikileaks-iraq-docs/.
[154] Secretary of Defense Donald Rumsfeld, Interview with FOX News Sunday (Nov. 2, 2003), *available at* http://www.foxnews.com/story/0,2933,101956,00.html.
[155] Ackerman & Shachtman, *supra* note 153.
[156] McClatchy Tribune News Service, *Secretary of State Clinton Contacts Countries Ahead of WikiLeaks Release*, SEATTLE TIMES, Nov. 27, 2010, *available at* http://seattletimes.nwsource.com/html/nationworld/2013540252_wikileaks28.html [hereinafter "*Clinton Contacts Countries*"].
[157] Nancy A. Youssef, *U.S. Officials Say Latest Planned WikiLeaks Release Will do Most Damage Yet*, TORONTO STAR, Nov. 27, 2010, *available at* http://www.thestar.com/news/world/article/897915--u-s-officials-say-latest-planned-wikileaks-release-will-do-most-damage-yet?bn=1.

relations with top allies and reveal embarrassing secrets about U.S. foreign policy."[158] In an effort to minimize potential damage to foreign relations, Secretary of State Hillary Clinton embarked on a global "apology tour,"[159] reaching out to leaders in Germany, Saudi Arabia, the United Arab Emirates, France, Afghanistan, Australia, Britain, Canada, Denmark, Israel, and Norway.[160] Although spokesperson PJ Crowley acknowledged that the State Department "'has known all along' that WikiLeaks obtained the diplomatic cables and was bracing for the publication," government agencies continued to make last-minute appeals that the release be halted as it could be "'harmful to the United States and our interests' and . . . 'create tension in relationships between our diplomats and our friends around the world."[161]

Unsurprisingly, WikiLeaks was unmoved by the government's appeals and on November 29, 2010, began its gradual leak of the new documents. The site partnered with global media outlets including the *New York Times*, *The Guardian*, and *Der Spiegel* for the release which included a "cache of a quarter-million confidential American diplomatic cables, most of them from the past three years, provid[ing] an unprecedented look at back-room bargaining by embassies around the world, brutally candid views of foreign leaders and frank assessments of nuclear and terrorist threats."[162] That same day the site announced via its Twitter page that it was "currently under a mass distributed denial of service attack."[163] As such, "remote computers commandeered by rogue programs bombard [the] website with so many data packets that it

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[158] *Id.*
[159] Daniel Marcus, Washington College of Law, Panel at the Washington College of Law: WikiLeaks, the Espionage Act, and the First Amendment: The Law, Politics, and Policy of Prosecuting Julian Assange (Jan. 11, 2011), *available at* http://media.wcl.american.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=4c53b688a42c4ed18d7f55ec00c548641d.
[160] *Clinton Contacts Countries*, *supra* note 156.
[161] *Id.*
[162] Scott Shane & Andrew W. Lehren, *Leaked Cables Offer Raw Look at U.S. Diplomacy*, N.Y. TIMES, Nov. 28, 2010, *available at* http://www.nytimes.com/2010/11/29/world/29cables.html?_r=1&hp.
[163] *WikiLeaks Claims Cyber Attack*, CBS NEWS, Nov. 29, 2010, *available at* http://www.cbsnews.com/stories/2010/11/29/world/main7099028.shtml.

[became] overwhelmed and unavailable to visitors."[164] Although the website was inaccessible from some locations for a period of time, several hundred diplomatic cables were posted to the site later that afternoon.[165]

In total, the November leaks consisted of some 251,287 diplomatic dispatches spanning 1966 to 2009.[166] Of these, 97,070 documents were classified as confidential and 28,760 were tagged as "PTER" documents, "which stands for prevention of terrorism."[167] While none of the documents were marked as top secret, a further 11,000 were classified as secret, 9,000 were labeled as "noforn", "shorthand for material considered too delicate to be shared with any foreign government," and 4,000 were marked as both secret and noforn.[168] Despite their staggering privacy classifications and "[e]ven when they recount events that are already known, the cables [all] offer remarkable details"[169] that unarguably challenge national security in a way that earlier releases did not. Of particular concern was the release of a cable identifying locations considered vital to U.S. national security, in which the State Department asked American diplomats to identify overseas locations "'whose loss could critically impact the public health, economic security, and/or national and homeland security of the United States'."[170] The release was widely denounced as an invitation for further terrorist attacks on U.S. sites, particularly by such international diplomats as Malcolm Rifkind, chairman of the Parliamentary

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[164] *Id.*
[165] *Id.*
[166] *WikiLeaks Embassy Cables: Download the Key Data and See How It Breaks Down*, THE GUARDIAN, Nov. 29, 2010, *available at* http://www.guardian.co.uk/news/datablog/2010/nov/29/wikileaks-cables-data.
[167] *Id.*
[168] *See* Shane & Lehren, *supra* note 162.
[169] *Id.*
[170] *WikiLeaks Lists Sites Key to U.S. Security*, CNN, Dec. 6, 2010, *available at* *http://articles.cnn.com/2010-12-06/us/wikileaks_1_wikileaks-founder-julian-assange-diplomats-homeland-security?_s=PM:US*.

Intelligence and Security Committee in Britain, who called the documents "'a gift to any terrorist [group] trying to work out what are the ways in which it can damage the United States'."[171]

Although Assange is currently battling legal charges unrelated to his efforts with WikiLeaks,[172] his employees have vowed to carry on their work in his absence. While there is no set schedule for any further releases, Assange himself has revealed the existence of what has been called "The Poison Pill," "The Doomsday Files," or "The Insurance," a file that will be released if Assange is imprisoned or dies, or if WikiLeaks is somehow destroyed.[173] The file is said to be impossible to destroy or stop, as it is protected by a 256-bit key encryption code that only a small number of of Assange's associates know. Computer security professional Hemu Nigam explained the significance of Assange's security measures: "'He's saying don't even bother trying. It will take you so long to succeed that by that time, it will be too late . . . Most of the time, you see a 56-[bit]key encryption. That's considered secure. When you are using 256, you are sending a message: 'I'm smart enough to know that you will try to get in'.'"[174] However, the threat that this file be released has done little to dissuade the government from considering criminal charges against both Assange and WikiLeaks.[175]

B. The Legality of WikiLeaks

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[171] *Id.*

[172] As of January 2011, Assange was under investigation for sex crimes charges in Sweden. A hearing was scheduled for February 7, 2011 to determine whether the United Kingdom would extradite Assange to Sweden. Until that time, Assange remains under house arrest in London. *Julian Assange's House Arrest Upgraded From Country Manor to London Journalists' Club*, NY MAGAZINE, Jan. 11, 2011, *available at* http://nymag.com/daily/intel/2011/01/julian_assanges_house_arrest_u.html.

[173] *Assange's 'Poison Pill' File Impossible to Stop, Expert Says*, CNN, Dec. 8, 2010, *available at* http://articles.cnn.com/2010-12-08/us/wikileaks.poison.pill_1_julian-assange-wikileaks-key-encryption?_s=PM:US.

[174] *Id.*

[175] Raphael G. Satter, *U.S. Court Demands WikiLeaks' Twitter Account Info,* WASH POST., Jan. 8, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/08/AR2010120805435.html.

The principle argument used to oppose the WikiLeaks site is that it poses a threat to national security. Although the national security exception to free speech is an established principle under domestic and international law, few have taken the time to truly apply the relevant standards to the WikiLeaks case. Instead, opponents of the leaks appear to hide behind the label of a "national security threat" without showing deference to relevant legal precedent. In applying a proper legal analysis to the WikiLeaks case, it becomes clear that the website largely constitutes a permissible exercise of journalistic freedom under both domestic and international law. Although WikiLeaks certainly retreated from the purview of its First Amendment protections with its November 2010 leak, there still exists no evidence tying the release of those documents to a national security breach as required under domestic law.

1. Domestic Legality

The principles related to the freedoms of speech and press likely insulates WikiLeaks from domestic liability. In an effort to minimize constitutional protection of the website, some have argued that WikiLeaks does not constitute a traditional form of journalism and thus falls outside the standard First Amendment protections extended to media. Yet as a practical matter, lawyer Bruce Brown notes that while "Assange is really something of a source for journalists . . . now he's a source with a website, and a source with a website in this era makes him a publisher."[176] Fellow attorney Victoria Toensing agrees, stating "In this modern media . . . any of us can be a journalist, any of us can write . . . and put it out on the internet . . . ."[177] Indeed,

[176] Bruce Brown, Baker and Hostetler LLP, Panel at the Washington College of Law: WikiLeaks, the Espionage Act, and the First Amendment: The Law, Politics, and Policy of Prosecuting Julian Assange (Jan. 11, 2011), *available at* http://media.wcl.american.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=4c53b688a42c4ed18d7f55ec00c548641d.

[177] Victoria Toensing, diGenova & Toensing LLP, Panel at the Washington College of Law: WikiLeaks, the Espionage Act, and the First Amendment: The Law, Politics, and Policy of Prosecuting Julian Assange (Jan. 11,

given the manner in which First Amendment rights have evolved in recent decades, there is little question that established legal principles relating to the freedom of the press are applicable to the WikiLeaks site.

As the site constitutes a form of modern journalism, WikiLeaks is subject to an unspoken agreement between the government and media arising from the Pentagon Papers era. Professor Daniel Marcus of the Washington College of Law explains:

> In the wake of the Pentagon Papers case . . . there has never been an official agreement between the government and the mainstream press . . . but I think it's fair to say that [a deal has emerged] between the government and the mainstream press that in cases of leaks [involving] sensitive government information, the government will prosecute the leaker but not the leakee . . . and particularly not the mainstream press. In return for that understanding, the mainstream press agrees to "behave responsibly."[178]

A recent report issued by the Congressional Research Service supports this assertion, noting that "[l]eaks or classified information to the press have only rarely been punished as crimes, and we are aware of no case in which a publisher of information obtained through unauthorized disclosure by a government employee has been prosecuted for publishing it."[179] Yet WikiLeaks' opponents are now attempting to supersede established policy and impose liability upon the site for its role as the publisher of leaked information. Their efforts will be unsuccessful, however, as U.S. laws have long protected journalists who serve as the mere innocent recipients and publishers of such materials.

Attorney Abbe Lowell challenges the wisdom in changing this policy, asking that the legal community "[t]hink about the problem of starting to charge the press as being involved in

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2011), *available at* http://media.wcl.american.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=4c53b688a42c4ed18d7f55ec00c548641d.

[178] *See* Marcus, *supra* note 159.

[179] ELSEA, *supra* note 3, at Summary.

the original leak. Where's the line?"[180] A significant aspect of responsible reporting is speaking to reliable sources to determine the existence of relevant news stories, and there is a fine line between the active collaboration of a reporter and a leak in securing confidential information, and the mere cajoling of a hesitant source. However, this distinction is an important one to make as illustrated by the *Bartnicki v. Vopper*[181] case, in which the Supreme Court offered legal protection to the publisher of leaked materials if: 1) the leaked materials addressed a matter of public concern; 2) the defendant played no role in the illegal interception of the materials; or 3) the defendant had otherwise gained lawful access to the materials.[182] As the WikiLeaks case is devoid of any evidence suggesting illicit conduct in its receipt of government documents, it cannot be penalized simply for its role as an innocent publisher.

When the principles related to freedom of press fail to impose liability upon the site, WikiLeaks' opponents most often turn to the Espionage Act for assistance. However, their efforts are misguided and tend to overlook the inherent flaws of the Act itself. Lowell explains that the language of the Espionage Act is incredibly broad and indeterminate, creating considerable confusion as to when the law applies:

> The current law is problematic because it is vague in its use of terms. It is a law that prohibits the disclosure of something called 'national defense information,' [but] people out there think that [this law] . . . prevent[s] the disclosure of classified information . . . [T]hat's not exactly right. There is no law, actually, that prevents the disclosure of classified information. [The Espionage Act] only applies if [materials are] what is called NDI. And to be NDI, classification is a beginning, but it's not an end. There are other elements [required before a document may be marked as NDI] . . . .[183]

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[180] Abbe Lowell, McDermott Will & Emery LLP, Panel at the Washington College of Law: WikiLeaks, the Espionage Act, and the First Amendment: The Law, Politics, and Policy of Prosecuting Julian Assange (Jan. 11, 2011), *available at* http://media.wcl.american.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=4c53b688a42c4ed18d7f55ec00c548641d.

[181] *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

[182] *See* Brown, *supra* note 176.

[183] *See* Lowell, *supra* note 180.

As such, the Espionage Act only extends to cases involving NDI materials, and not those possessing other stages of government classifications. Lowell further notes the struggle of U.S. courts to faithfully interpret and apply the Act, as "[y]ou have this very broad [and somewhat vague] law, and . . . courts have tried to figure out what to do with it . . . [and] have twisted themselves in . . . contortions like a pretzel to try to make it work, primarily to try to make it work in a First Amendment context."[184] In doing so, the courts have raised the "bar of the burden of proof that needs to be shown by the government . . . ."[185]

Although the burden of proof imposed upon the government has been raised, the Supreme Court has ruled that the government may regulate "the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[186] Yet courts have long recognized the need to balance constitutionally-protected rights with a showing of strict scrutiny, meaning a court "will uphold a content-based restriction only if it is necessary 'to promote a compelling interest' and is 'the least restrictive means to further the articulated interest'."[187] The protection of information relating to national security has long been held to constitute a compelling government interest, particularly in times of war or conflict.

However, in cases where constitutional rights are at stake the government bears the burden of proving its interest is "sufficiently compelling to justify enforcement."[188] While the government need not prove actual damage, it must abide by the standard of the *Progressive* case and demonstrate that the speech would have a "grave, direct, immediate and irreparable harm to

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[184] *Id.*
[185] *Id.*
[186] *Id.* at 9 (*citing Sable Commc'n of California v. Fed. Commc's Comm'n*, 492 U.S. 115, 126 (1989)).
[187] ELSEA, *supra* note 3, at 9.
[188] *Id.* at 10.

the United States."[189] In analyzing this argument, the presumption weighs against the government.

It is highly improbable that the government could successfully launch a national security claim against the WikiLeaks site while still satisfying its high burden as established by the courts. There is no doubt that the Supreme Court is "satisfied that national security is a vital interest sufficient to justify some intrusion into activities that would otherwise be protected by the First Amendment . . . ."[190] Historically courts have been rue to review the government's classification of material as damaging to national security. However, courts also acknowledge that the "government must make *some* showing that the release of specific national defense information has the potential of harming U.S. interests . . . ."[191] The fact that published information simply relates to national security is insufficient to satisfy the government's burden, as Marcus recently explained:

> Four or five years ago, in rapid succession, there were three major disclosures by the mainstream press of extremely sensitive national security information . . . [and] there was never a breath of . . . suggestion that the government would have thought to take advantage of the narrow exception in [the Pentagon Papers] case to actually try to stop the *New York Times* [or *Washington Post*] from publishing . . . articles relating to [national security programs].[192]

The articles referenced by Marcus exposed the existence of programs that were indisputably linked to national security interests, such as that of an NSA surveillance program, a terrorist financing tracking program in conjunction with European banks, and secret CIA detention facilities in foreign countries.[193] Little distinction can be made between the information

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[189] *Progressive,* 467 F. Supp. at 996.
[190] ELSEA, *supra* note 3, at 11.
[191] *Id.*
[192] *See* Marcus, *supra* note 159.
[193] *Id.*

contained in these articles and that released by WikiLeaks, and it seems unlikely that the government can now punish one media source where it previously did not.

The question of what evidence will satisfy the government's burden is unclear. The mere classification of materials as confidential is insufficient in proving that their release would be damaging to national security, although courts have long held this to be valid evidence speaking to potential impact. In contrast, courts are also unlikely to accept a defendant's mere assertion that the information poses no danger to national security absent supporting evidence or proof that the government did not closely safeguard the information in question.[194] Both government officials and Assange himself have confirmed that there is no evidence that the documents released thus far have instigated a single incident targeting the U.S., its forces, or its foreign sources and partners. Absent definitive evidence to the contrary, a court cannot merely assume that the information contained in the WikiLeaks documents is damaging to national security.

Opponents of the leaks have fiercely criticized both Assange's inability to personally review all documents before publication and the site's failure to redact the names of Afghan informants.[195] However, this should not discredit the massive redactions done by the WikiLeaks staff. The site initially withheld some 15,000 documents for review specifically because they "contain[ed] names or other sensitive information."[196] In fact, it was shown that WikiLeaks used a heavier hand than even the government in redacting the 400,000 documents released in October: "An initial comparison of a few documents redacted by WikiLeaks to the same documents released by the Department of Defense shows that WikiLeaks removed more

[194] *Id*, (*citing United States v. Dedeyan*, 594 F.2d 36, 39 (4th Cir. 1978)).
[195] Fantz, *supra* note 143.
[196] Levine, *supra* note 147.

information from the documents than the Pentagon."[197] The government has no basis to argue that the documents threaten national security when its own redactions were not nearly as thorough as those of the WikiLeaks' staff.

Furthermore, these documents receive additional legal protection due to their truthfulness, as the "publication of truthful information that is lawfully acquired enjoys considerable First Amendment protection."[198] Both WikiLeaks representatives and various government officials have authenticated the documents, with the site's new spokesman revealing that "[i]n the history of WikiLeaks, nobody has claimed that the material being put out is not authentic."[199] Although U.S. courts have yet to determine the legality of publishing information received from an illegal source, domestic case law also establishes that the process of "routine newsgathering'" carries with it the presumption of lawful acquisition.[200] The Pentagon Papers case further establishes the precedent that "recipients of unlawfully disclosed information cannot be considered to have obtained such information unlawfully based solely on their knowledge . . . that the discloser acted unlawfully."[201] Thus although Pfc. Manning was arrested for his role as the alleged leak of the WikiLeaks documents, courts will not assume that WikiLeaks engaged in any illicit behavior in soliciting or accepting the materials.

However, there is an important distinction to be made between the first two WikiLeaks releases and the November series involving diplomatic cables, the publication of which poses an unarguable challenge to national security. Indeed, it is critical to the WikiLeaks conversation that "[w]e should make a distinction between the revelations on Iraq and Afghanistan, on one

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[197] Larry Shaughnessy, *WikiLeaks Redacted More Information in Latest Documents Release*, CNN, Oct. 22, 2010, *available at* http://articles.cnn.com/2010-10-22/us/wikileaks.editing_1_wikileaks-founder-julian-assange-redacted-documents?_s=PM:US.
[198] ELSEA, *supra* note 3, at 13.
[199] Fantz, *supra* note 143.
[200] ELSEA, *supra* note 3, at 14, *referencing* 18 U.S.C. § 793(c).
[201] ELSEA, *supra* note 3, at 14.

hand, and the recent mass disclosure of all manner of diplomatic cables, on the other."[202] While the first two series of documents revealed the "systematic deceit that has marked every aspect and every phase of those two misadventures is toxic for the body politic,"[203] the release of such documents as that listing sites critical to U.S. national security "jeopardizes the conduct of foreign policy in general for relatively little public benefit."[204] It was not until these releases that WikiLeaks abandoned the free speech protections of U.S. law and made itself vulnerable to domestic liability for its actions.

Yet the challenge here is that there still exists no evidence speaking to certain grave, direct, immediate and irreparable harm caused by the release of these cables. It has largely been acknowledged that WikiLeaks and its media partners carefully redacted all documents prior to publication so that the names of informants, government operatives and the like have been largely protected. As noted by *New York Times* Executive Editor Bill Keller, the hope "'is that we've done everything in our power to minimise actual damage'."[205] As a result, there exists significant controversy amongst national security experts as to whether the cables truly imperil lives with Carne Ross, former United Kingdom ambassador to the United Nations, stating "'I don't think it has been proven that this is dangerous to US troops, for instance. I haven't seen that case made very clearly'."[206] Thus although experts seemingly agree that "the leaks will make it more difficult for US diplomats and human intelligence operatives to do their jobs,"[207] this "does not present an immediate threat to American lives . . . ."[208]

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[202] Michael Brenner, *Lessons of WikiLeaks*, HUFF. POST, Jan. 17, 2011, *available at* http://www.huffingtonpost.com/michael-brenner/lessons-of-wikileaks_b_809946.html.
[203] *Id.*
[204] *Id.*
[205] Katie Connolly, *Has Release of WikiLeaks Documents Cost Lives?*, BBC NEWS, Dec. 1, 2010, *available at* http://www.bbc.co.uk/news/world-us-canada-11882092.
[206] *Id.*
[207] *Id.*
[208] *Id.*

While some might argue that "strained international relations may create a more dangerous world[,]"[209] this is insufficient to justify the imposition of liability in this case. Kenneth Roth, Executive Director of Human Rights Watch, explains that the Constitution prohibits "criminal punishment of those who report matters of public interest except in fairly narrow circumstances."[210] For example, liability is justified when "official secrets [are released] with the effect and intent of harming the security of a nation, in the sense of genuine threats to use force against the government or territorial integrity of a country."[211] However, "[d]iplomatic embarrassment, though potentially detrimental to the interests of the government, is not itself a threat to national security."[212] Instead, the lawful imposition of liability requires a direct link between the release of information and a national security breach.

Given the context of the releases, it is highly unlikely that the national security exception is sufficient to justify the prior restraint or subsequent charging of the WikiLeaks site, particularly with regards to the first two series of releases. While the documents contain admittedly sensitive information, there is simply no evidence that the release of such information would have a negative impact on our domestic security at this time, let alone cause grave, direct, immediate and irreparable harm. The argument relating to certain diplomatic cables is somewhat stronger, particularly with regards to those documents identifying potential sites for attack. However, even that argument is lacking in evidentiary support, thus undermining any imminent legal attack against the website. Accordingly, those publicly decrying the WikiLeaks site for its illegality receive little support from domestic law.

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[209] *Id.*
[210] Open Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Barack Obama, President of the United States (Dec. 15, 2010), *available at* http://www.hrw.org/en/news/2010/12/14/us-wikileaks-publishers-should-not-face-prosecution.
[211] *Id.*
[212] *Id.*

2. International Legality

Given the futility in charging WikiLeaks under its domestic law, it is rumored instead that "the WikiLeaks.org Web site [has been] proposed as the first public target for a U.S. government cyberattack."[213] Although the U.S. has not yet confirmed the possibility of such an attack, representatives have not refuted this claim either; in August 2010, Press Secretary Morrell "left open the possibility of offensive action against WikiLeaks. 'If it requires compelling them to do anything, then we will figure out what other alternatives we have to compel them to do the right thing'."[214] However, the U.S. would be in direct violation of its international obligations should it launch such an attack on the WikiLeaks site.

The two international treaties most applicable to the WikiLeaks case study are the UDHR and the ICCPR. While the UDHR provides some flexibility in allowing a state to restrict the right of free speech, its text contains specific qualifiers as to when this may occur. The UDHR holds that "the state imposed limitations must relate to the 'just requirements' of 'a democratic society'."[215] A "just society" is that which respects the rights to human dignity and self-determination; when you eliminate or infringe upon one of these rights, that "just society" has ceased to exist. Freedom of expression is one of the most important tools in a society based on self-determination; it is through this freedom that the population of a state can voice their dissent and call for political action or reform. Thus, the attempt of a government to regulate the political content of the media would "thwart the right of the people of such a state to self-determination."[216] Due to this complete inhibition of the right to self-determination, it "hardly

[213] Declan McCullagh, *Has WikiLeaks Landed in Cyberattack Crosshairs?*, CNET NEWS, Oct. 27, 2010, *available at* http://news.cnet.com/8301-13578_3-20020835-38.html.
[214] *Id.*
[215] Jordan Paust, *International Law and Control of the Media: Terror, Repression and the Alternatives,* 53 IND. L.J. 621, 627 (1978).
[216] *Id.* at 629.

seems probable that any relatively objective decision-maker would accept a state claim to prohibit the free expression of political ideas . . . under the guise of anti-terrorist controls . . . ."[217]

The ICCPR similarly poses significant challenges to a state's capacity to inhibit freedom of expression. As such, this right may only be "subject to restrictions that are 'provided by law and are necessary' for respecting the rights or reputations of others, or for 'the protection of national security or of public order [ordre public], or of public health or morals'."[218] Those restrictions that may be enforced are subject to strict guidelines as they must be specific, narrowly applied, and proportionate:

> That is, laws restricting free expression must be sufficiently precise to enable an individual to regulate conduct accordingly, and cannot confer unfettered discretion on those charged with its execution. And the government must show that the specific action taken is necessary by establishing a direct and immediate connection between the expression restricted and the threat faced.[219]

Here the U.S. is met by similar challenges to those posed by its domestic laws: as of yet, no direct connection can be drawn between the WikiLeaks documents and an immediate national security threat.

U.S. regulation of the WikiLeaks site would also violate the nation's obligations under customary international law. While international custom allows for a national security exception to free speech, the circumstances surrounding the security emergency must consist of several specific factors where the threat (1) is actual; (2) will affect the entire population of the state; and (3) endangers the very existence of the state. Various instruments lend clarity to the international interpretation of a national security threat, which "is not equivalent to *any possible* national

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[217] *Id.* at 628.
[218] *Q & A: Human Rights and the WikiLeaks Cable Release*, HUMAN RIGHTS WATCH (Dec. 15, 2010), *available at* http://www.hrw.org/en/news/2010/12/14/q-human-rights-and-wikileaks-cable-release#_Does_international_law (hereinafter "Q & A").
[219] *Id.*

interest."[220] The Johannesburg Principles for National Security, Freedom of Expression and Access to Information [Johannesburg Principles], adopted by a group of international law, national security, and human rights experts in 1995, identifies a legitimate restriction as that which has a

> genuine purpose and demonstrable effect . . . to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.[221]

As such, a restriction is not considered legitimate if it seeks only to "protect interests unrelated to national security, including . . . to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions . . . ."[222]

Yet these can be the only reasons compelling U.S. suppression of WikiLeaks, as government officials have acknowledged the lack of security threat posed by even the November leaks. Indeed, Secretary of Defense Robert Gates "rejected 'overwrought' descriptions of the release's impact and described the effect on foreign policy as 'fairly modest'."[223] Absent definitive information speaking to an actual threat, customary international law forbids the prohibition of free speech based on the national security exception. Accordingly, there exists no international laws or policies that support potential U.S. restrictions of the WikiLeaks site.

C. The Morality of WikiLeaks

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[220] *Id.*
[221] Article 19: Global Campaign for Free Expression, *The Johannesburg Principles for National Security, Freedom of Expression and Access to Information*, at Principle 2(a) (Oct. 1, 1995), *available at* http://www.article19.org/pdfs/standards/joburgprinciples.pdf.
[222] *Id.* at Principle 2(b).
[223] *See Q&A*, *supra* note 207 (*citing Gates: Wikileaks "Embarrassing, Awkward"* (Associated Press broadcast Nov. 30, 2010), *available at* http://www.youtube.com/watch?v=5FnIhYBJmiM).

It was argued that "'in the wake of September 11, 2001, a day on which American life changed drastically and dramatically . . . the primary national policy must be self-preservation'."[224] While there certainly exists valid reasons for protecting sensitive information relating to national security, it has become increasingly clear in recent years that this "policy" of self-preservation has been taken too far. The Executive branch too often excuses its behavior by citing to this imaginary policy when attempting to subvert basic constitutional rights, and the courts have become irresponsible in its policing of the Executive's behavior. Indeed, "[n]ot only has the courts' tendency to defer to the Executive's national security risk assessment become exaggerated, but courts now appear overtly hostile to the very exercise of the right of access during a time of crisis."[225] What exists now is the awkward middle ground founded in the "inherent tension between an open society and the national security state."[226]

What is particularly interesting about the U.S.' policy of self-preservation is its foundation not in the legality, but the morality, of media leaks such as those hosted by the WikiLeaks website. Both domestic and international law have clearly established the right of such media outlets to disseminate such information absent a few particular exceptions. Indeed, domestic law has often portrayed the role of media outlets in policing government action as a critical tool for protecting fundamental constitutional rights. Thus opponents of such media sources as WikiLeaks are reduced to the petty method of naming and shaming various news outlets in a last-ditch effort to coerce their silence.

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[224] Papandrea, *Under Attack*, *supra* note 92, at 63 (*citing North Jersey Media Grp. Inc. v. Ashcroft*, 308 F.3d 198, 202 (2002)).
[225] *Id*. at 79-80.
[226] Steve Vladeck, Washington College of Law, Panel at the Washington College of Law: WikiLeaks, the Espionage Act, and the First Amendment: The Law, Politics, and Policy of Prosecuting Julian Assange (Jan. 11, 2011), *available at* http://media.wcl.american.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=4c53b688a42c4ed18d7f55ec00c548641d.

And yet even this method fails, for not only is WikiLeaks acting within its legal confines, but within its moral ones as well. There is no denying the critical role of the media in disseminating valuable information to the masses and serving as a watchdog of government action. For "[i]f, in fact, the government was operating outside the bounds of the law, then it [i]s the responsibility of the press . . . to bring it to the public's attention and thereby initiate public discourse."[227] While there is some contention as to the legal validity of this principle, the moral standing of the "right to know" doctrine can hardly be disputed. Thus the document releases by WikiLeaks are not only legally permissible, but constitute a moral necessity as well.

1. The "Right to Know" Doctrine

The "right to know" doctrine has its roots in early case law, as "[e]arly First Amendment cases recognized the right of private entities to impart—and of the public to receive—information."[228] This right has primarily been asserted during criminal trials where access to information has been unlawfully restricted. However, noted First Amendment scholar Papandrea acknowledges that "the 'right to know' has no single definition,"[229] and courts or scholars referencing this principle have often ended on different interpretations of the doctrine. Nevertheless, the right to know has long been held to reference the "rights to receive information from willing sources, to gather information from willing or neutral sources, and to acquire information from a perhaps unwilling governmental source."[230] Papandrea interprets these rights to hold that the "first two require the government to refrain from action—namely, to refrain from

[227] Meier, *supra* note 12, at 209.
[228] Papandrea, *Under Attack*, *supra* note 92, at 39.
[229] *Id.* at 37.
[230] *Id.* (*citing* David Mitchell Ivester, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109, 109 (1977)).

interfering with information dissemination or consumption. The last, however, requires the government to provide information for public debate."[231]

Regardless of the varying interpretations of this doctrine, all stem from the same fundamental belief embodied in the Supreme Court's decision in *Grosjean v. American Press Co.*: "[The] informed public opinion is the most potent of all restraints upon misgovernment,"[232] and government measures meant to "limit the circulation of information"[233] to the public goes to the "heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests."[234] Justice Brennan further developed this assertion, contending that the First Amendment not only protects the right to "uninhibited, robust, and wide-open"[235] public debate, but also "the antecedent assumption that valuable public debate . . . must be informed."[236]

Thus despite its varying definitions, the right to know is an established principle under domestic law. However, the uncertainty of this doctrine's meaning has also allowed for its inconsistent application by the courts. While courts certainly struggled to uniformly apply this right before September 11, they also seriously "stumbled after . . . when asked to force information disclosures that, the government claimed, would threaten national security."[237] However, legal scholars argue that the doctrine receives support not only from various court decisions, but also clear statutory protection from such instruments as FOIA.[238]

Despite these claims, the uneven application of the right to know doctrine speaks to its shaky legal foundation. Yet morally, the foundation of this doctrine could not be stronger. One

[231] Papandrea, *Under Attack*, *supra* note 92, at 37.
[232] *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).
[233] *Id.*
[234] *Id.* at 243.
[235] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980).
[236] *Id.*
[237] Papandrea, *Under Attack*, *supra* note 92, at 38.
[238] *See id.* at 50.

of the defining qualities of a democracy is the right of the public to participate in its own governance. The media is among the most powerful and effective channels of communication between a government and its people. If the capacity of the media to communicate honest and accurate information is stunted, then the state has effectively ceased to function as a democracy. The American people would thus fall victim to a targeted propaganda campaign whereby the government has total control over what messages are disseminated to the public. Yet it is the American people who will most assuredly suffer when their representatives fail to govern in a reasonable or responsible manner.

Thus the outrage with the WikiLeaks releases is displaced; the real problem here is not the unfettered release of government documents, but the astounding information contained therein. The government was understandably infuriated when the September 11 attacks claimed the lives of almost 3,000 victims.[239] Nine days later, President Bush swiftly condemned al Qaeda for the attacks, and more specifically for its targeting of civilians:

> On September the 11th, enemies of freedom committed an act of war against our country. Americans have known wars, but for the past 136 years they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war, but not at the center of a great city on a peaceful morning. Americans have known surprise attacks, but never before on thousands of civilians.[240]

Yet the documents released by WikiLeaks reveal the startling callousness with which U.S. officials have treated foreign civilians during the War on Terror. The WikiLeaks homepage most recently listed the death toll in Iraq as 109,032 lives lost;[241] of those, 66,081 were classified

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[239] NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: EXECUTIVE SUMMARY 1-2 (2004), *available at* http://www.c-span.org/pdf/911finalreportexecsum.pdf.
[240] President George W. Bush, Address to Joint Congress Following September 11 Attacks (Sept. 20, 2001), *available at* http://157.166.255.31/2001/US/09/20/gen.bush.transcript/.
[241] *Clinton Contacts Countries*, *supra* note 156.

as civilians.[242] This means that more than 60% of those killed in Iraq during the War on Terror have been foreign civilians, which equals roughly 31 civilians dying every single day during the six-year period covered by the WikiLeaks documents.[243]

U.S. citizens have a right to know when their government is taking such action as to claim the lives of almost 110,000 foreign civilians. The government was quick to condemn al Qaeda for its targeting of civilians in 2001, but its military actions since then have claimed the lives of roughly 36 times those killed on September 11. Not only is this morally reprehensible, but one must ask: what if U.S. action dictates the standards by which this war was fought? Civilian status would thus lend no protection to U.S. citizens, whose lives have been greatly devalued by their own government and who could potentially become legitimate wartime targets as a result.[244] Given that government representatives have consistently denied even keeping a civilian death toll, it has become increasingly clear that transparency can only be ensured by the vigilance of such media outlets as WikiLeaks.

U.S. citizens not only have a right to know how their government conducts its military operations, but also its foreign relations. The late November leak by WikiLeaks sent a wave of panic through government agencies due to the nature of the diplomatic cables that were released. It has been said that the "State Department is worried the information could include embarrassing details or communications about other countries."[245] This is an entirely valid concern, given that "[s]ome of the documents are expected to reveal details about how some U.S.

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[242] *Id.*
[243] *Id.*
[244] This is not intended to serve as a legal conclusion, as the targeting of civilians during wartime is undeniably prohibited under both domestic and international law. Instead, this speaks more to the anticipated response of states whose civilians have been targeted. If one party takes such action as to claim the lives of its opponent's civilians, it can reasonably be expected that the second state will similarly retaliate. Thus the protection of civilian status should be a priority in the military interactions of warring states.
[245] *Clinton Contacts Countries*, *supra* note 156.

diplomats feel about top foreign leaders."[246] The documents also possess highly offensive and disparaging remarks about other countries, such as those discussing "Canada's 'inferiority complex'."[247] Although the U.S. is widely considered to be an international superpower, this standing is not indissoluble. At a time when global cooperation is of the utmost importance, U.S. citizens should know whether the government is composing itself with appropriate decorum or is unnecessarily jeopardizing its standing in the international community.

However, Assange's process of so-called "principled leaking" began to stray from its moral high ground with this "recent WikiDump of classified U.S. diplomatic cables . . . ."[248] Blogger Alex Becker makes an important point when stating that although "'[b]etter scrutiny leads to reduced corruption and stronger democracies in all society's institutions, including government, corporations and other organizations,' [we must] ask what hidden costs may lie beneath the surface."[249] Thus while the WikiLeaks releases are largely justified as promoting much-needed government transparency, it cannot be denied that the release of several diplomatic cables might also have placed the lives of U.S. soldiers and citizens at risk. This begs the difficult question of "just how many stunning government scandals, corporate misdeeds and international conspiracies one needs to uncover to justify even the chance of putting more innocent lives at risk."[250] It is this question that compels Becker, "like most journalists, [to] think what Assange and Wikileaks do is generally important, but not necessarily always right."[251] At a time when WikiLeaks had already released significant materials speaking to illicit

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[246] Youssef, *supra* note 157.
[247] Hennessy, *supra* note 159.
[248] Alex Becker, *WikiEthics: Why WikiLeaks, Julian Assange and Morals Should Not Mix*, HUFF. POST, Nov. 30, 2010, *available at* http://www.huffingtonpost.com/alex-becker/post_1351_b_789728.html.
[249] *Id.*
[250] *Id.*
[251] *Id.*

U.S. action, one must ask whether there truly was a benefit to releasing diplomatic cables that could needlessly place lives at risk.

The right to know doctrine has a precarious position in U.S. law; while courts and scholars agree that such a principle exists, there is little agreement as to what this doctrine entails or what standards should apply. However, placing this doctrine in a moral context reveals that the right to know is of the utmost importance. This doctrine protects the fundamental cornerstone of a functional democracy by ensuring the right of citizens to access information impacting their very existence. This doctrine thus strengthens the U.S. system of checks and balances by providing for alternative methods of information-sharing should the government fail to release critical information about its military operations and foreign relations to the general public. Accordingly, the WikiLeaks website serves to satisfy the moral imperative that U.S. citizens remain informed as to the conduct of their government.

2. Suggested Action

This Article does not advocate for the totally unrestricted right of citizens to access information relating to national security. Indeed, both the national security exception to free speech and the right to know doctrine protect equally valuable rights regarding access to information. There are certainly times when the confidentiality of information is of the utmost importance; for example, information about ongoing or future military tactical operations should rarely be shared with the public, as it could compromise both the success of the operations and the lives of U.S. citizens. What is needed is a more appropriate balancing test between the national security exception and the right to know, so that those circumstances when information must remain confidential is more clearly outlined and applied by the courts. Given the essential

nature of First Amendment rights, the standard for claiming the national security exception should be incredibly high.

i. Reinstate the "direct, immediate, and irreparable harm" test

The courts have failed to enunciate one clear and exclusive standard speaking to the successful application of the national security exception to free speech. Given the constitutional rights at stake, it is imperative that one definitive standard be asserted that allows the limitation of First Amendment rights only in the most grave of circumstances. In order to "preserve the value of free debate, to ensure an informed electorate, and to guard against government overreaching and the undue suppression of free speech, the press should be free to publish…information unless the government can demonstrate that the publication is likely to cause grave and imminent harm."[252] It has long been asserted that "a court should always be vigilant against attempts to prohibit the expression of speech . . . unless such censorship is 'required to save the country'."[253] Indeed, "First Amendment interests must prevail over the government's interest in national security where the threat to national security is slight and explicit rights under the First Amendment . . . are at stake."[254]

The courts have long held that a critical risk to national security must exist to justify the prior restraint of a publication. In determining whether a critical risk exists, courts have considered such factors as the timeliness and scope of the assumed attack. Although these factors have never been isolated to formulate an exact standard for the national security exception, precedent exists which suggests that this is appropriate. As a result, the courts should revert back to the "direct, immediate, and irreparable harm" test enunciated in the Pentagon

[252] Stone, *supra* note 11, at 958.
[253] Epstein, *supra* note 13, at 491.
[254] *Id*. at 494.

Papers case. Under this standard, "the publication of even classified information cannot constitutionally be restrained unless the government can prove that the disclosure would 'surely result in direct, immediate, and irreparable harm to [the] Nation'."[255] The "right to speak and to publish"[256] could thus only be restricted when the government was able to prove such a threat exists. As soon as that threat is eliminated, so too is the restriction on speech. This standard, based firmly in existing case law, provides a clear test to be uniformly applied by the courts and that successfully balances fundamental constitutional rights with the protection of national security interests.

ii. Add an intent element to dissemination laws

Courts have long struggled to assign personal liability to the leakers of national security information. This poses a current challenge in the case of Pfc. Manning, a young intelligence analyst who enlisted in the U.S. Army in 2007.[257] Manning was transferred to Baghdad where it is alleged he spent some fourteen hours a day looking through classified information.[258] In his communication with a known hacker in the U.S., Manning allegedly stated that he had found "'incredible, awful things that belonged in the public domain and not on some server stored in a dark room in Washington, DC'."[259] In April 2010, WikiLeaks released video footage depicting a 2007 U.S. air attack that killed two Reuters news staffers, and Manning was arrested for his role as the supposed leak the following month.[260] He was then charged with "'transferring classified

[255] Stone, *supra* note 11, at 958 (*citing New York Times Co.*, 403 U.S. at 730).
[256] *Id.* at 959.
[257] Nick Allen, *Bradley Manning: The Prime Suspect of Giving Files to WikiLeaks*, TELEGRAPH, Nov. 28, 2010, *available at* http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8166395/Bradley-Manning-The-prime-suspect-of-giving-files-to-WikiLeaks.html.
[258] *Id.*
[259] *Id.*
[260] *Id.*

data' and 'delivering national defense information to an unauthorised source,' which could carry a maximum sentence of 52 years in jail."[261]

Manning's supporters have charged the government with conducting a "campaign of intimidation"[262] targeting not only Manning, but his allies as well. However, these individuals have little recourse as domestic courts have established dissemination laws targeting the alleged leaks of sensitive information. The problem here is that these dissemination laws grant far too much power to the government to target individuals who disseminate information that it would prefer be kept private. Not only does this instill in the government the largely unsupervised capacity to silence its opponents, but this also places an overwhelming strain on any potential collaboration between government and media. If media sources are constantly worried about their impending arrest, then the media cannot be expected to share with the government any information it has received before publication; the incentive for collaboration is thus completely neutralized.

Once again, the courts must establish a different standard relating to the exercise of the national security exception. While there is reason for dissemination laws to exist, the standards thus far are wholly inappropriate in asserting individual liability. Accordingly, the new standard for the application of these laws should include an intent requirement, whereby an individual may only be held liable for his or her role as a source if they either (1) intended to disclose information that would harm the U.S., or (2) displayed a reckless disregard for the probable direct, immediate, and irreparable harm the disclosure could cause.

Papandrea highlights the primary benefit in adding an intent element to dissemination laws as the creation of "an incentive for government officials to explain their national security

[261] *Id.*
[262] Glenn Greenwald, *Government Harassing and Intimidating Bradley Manning Supporters*, SALON, Nov. 9, 2010, *available at* http://www.salon.com/news/opinion/glenn_greenwald/2010/11/09/manning/.

concerns to the press . . . [while] simultaneously hold[ing] the press accountable for any reckless disregard shown toward genuine threats."[263] As such, the government must provide "a specific and concrete explanation of how the disclosure of classified information could cause imminent and grave danger to our nation's national security"[264] while the media must possess a constructive motive for releasing the information. Thus the intent requirement would allow the "restriction of speech in some cases without unduly chilling legitimate speech. It would protect those who disseminate information based on a good-faith desire to foster public debate."[265] At the same time, this requirement would foster greater collaboration between the government and the media outlet seeking to release sensitive information.

iii. Foster greater cooperation between media and government

While adding an intent element to dissemination laws will certainly encourage greater cooperation between government and media, more emphasis should be placed on strengthening this relationship in general. The contention behind the WikiLeaks' releases has overshadowed the long history of cooperation between the government and media under which, "if anything, history demonstrates that [the media] has been *too* willing at times to engage in self-censorship in times of war."[266] Indeed, members of the media have long acknowledged their professional responsibility to "be mindful that its responsibility to the nation is not to pass along every bit of classified information it receives, but to weigh carefully the public's right to know what its government is doing against the national security harms that might result from publication."[267]

[263] Papandrea, *Under Attack*, *supra* note 92, at 233.
[264] *Id.* at 299.
[265] *Id.*
[266] *Id.* at 237.
[267] *Id.* at 260.

Even WikiLeaks' critics cannot deny that the website has taken great precautions to protect the most sensitive information contained in its documents, as Assange himself has repeatedly stated that the documents are withheld from publication until they are reviewed and redacted by WikiLeaks representatives. To that end, Assange has even extended an olive branch to the U.S. government in recent months, offering to "consider recommendations made by the International Security Assistance Force 'on the identification of innocents for this material'," [268] as long as the government was willing to provide the redactors. However, this offer was emphatically rejected by government officials, who stated that

> the Department of Defense will not negotiate some "minimized" or "sanitized" version of a release by WikiLeaks of additional U.S. Government classified documents. The Department demands that nothing further be released by WikiLeaks, that all of the U.S. Government classified documents that WikiLeaks has obtained be returned immediately, and that WikiLeaks remove and destroy all of these records from its databases.[269]

Steps must now be taken to repair the relationship between government and media, thereby encouraging the media to return to its practice of "exercis[ing] remarkable self-restraint by routinely considering the ramifications of its publications and frequently holding stories or limiting their scope in order to soften their impact."[270] The ultimate goal, of course, is for the media and government to engage in an open dialogue before sensitive information is released, thus granting the government a meaningful opportunity to honestly discuss the potential national security consequences.

While there are those who doubt the possibility of a functioning partnership between government and media, this has certainly been accomplished in the past. Take for example the deployment of Great Britain's Prince Harry, who was sent to Afghanistan in late 2007 to

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[268] Glenn Greenwald, *Why Won't the Pentagon Help WikiLeaks Redact Documents?*, SALON, Aug. 20, 2010, *available at* http://www.salon.com/news/opinion/glenn_greenwald/2010/08/20/wikileaks/.
[269] *Id.*
[270] Papandrea, *Under Attack*, *supra* note 92, at 257.

complete a tour of duty. Prior to his deployment, the media was informed of the decision to send Prince Harry abroad. Citing serious security risks, the media was then asked to participate in a news blackout under which the deployment would be kept secret until Prince Harry had returned home. Media outlets largely respected the blackout until a foreign website released the story, prompting the British military to withdraw the prince before he had completed his tour. However, former British Defense Secretary Des Browne noted at the time that Prince Harry was only able to deploy "'because of the cooperation of the media, who exercised a degree of discipline and I think that they should be commended for the fact that they have allowed him that space and time so we could manage the risks associated with that'."[271]

Thus cooperation between government and media is entirely possible. To that end, the balance of power must be more evenly distributed, where the government does not have excessive authority to limit free speech and where the media takes on greater responsibility for making informed and deliberate decisions about the release of information. Without greater collaboration between these two entities, the media will have no incentive to take protective measures with potentially sensitive information; here one must wonder if the government would not have been smarter to help WikiLeaks redact the documents rather than pose a challenge to the website to release the materials without review.

iv. Create a "national security" designation for information

Under the current Presidential Order, national security information can be classified as "confidential," "secret," or "top secret." Although these classifications are intended to dictate the circumstances under which information can be released, this designation system has long

[271] *Prince Harry Heads Home from Afghanistan*, CNN, Feb. 29, 2008, *available at* http://articles.cnn.com/2008-02-29/world/prince.afghanistan_1_prince-harry-afghanistan-foreign-media?_s=PM:WORLD.

been abused. Steve Vladeck of the Washington College of Law acknowledges the value of the WikiLeaks case in "expos[ing] the depth and pervasive sweep of over-classification. Every time there is a leak, every time there is a front page story about the latest national security scandal, one of the responses is 'that shouldn't have been secret in the first place'."[272] Thus the current designation system is founded in the government's "propensity and . . . momentum towards [the] classification of virtually everything"[273] regardless of content. As a result, a diplomatic cable discussing the personal disposition of a foreign leader receives the same "top secret" status as that which discusses whether a foreign leader would take military action against the U.S.

The government not only engages in a system of overclassification but officials also consistently override even their own designations by claiming that national security materials must remain confidential regardless of their status. This has damaged the credibility of the classification system to such an extent as to now perpetuate the belief that "if everything is classified, then nothing is classified."[274] Courts have been unable to disentangle the classification statuses enough to "define what classification [status may] be the subject of prosecution . . . ."[275] As a result, this classification system has little credibility and fails to provide a consistent standard as to when a journalist can publish certain information.

This classification system should be updated to include a top-level "national security" designation, which would "apply to documents containing genuine national security secrets."[276] To ensure continuity in the application of the national security standard, documents would only receive this classification if the "disclosure of the document to the public would 'surely result in

[272] *See* Vladeck, *supra* note 226.
[273] *See* Lowell, *supra* note 180.
[274] *Id.*
[275] *Id.*
[276] Meier, *supra* note 12, at 219.

direct, immediate, and irreparable damage'."[277] Thus the media would have a greater appreciation for the content of these documents, and the government would have a better basis for prior restraint in those few cases that warranted it.

V. CONCLUSION

The U.S. has a long history of compromising First Amendment rights in the name of national security. After the attacks of September 11 and the long and tumultuous "War on Terror" that followed, the government was easily able to manipulate public opinion against any mechanism that could potentially pose a threat to national security. In doing so, the U.S. often surpassed legal boundaries in its efforts to restrict legally permissible speech. Yet under domestic law the government must prove that the "disclosure posed an immediate, serious, and direct threat to national security."[278] When the government attempts to regulate speech absent this degree of threat, it has violated its duties under domestic law. Similarly, the government is prohibited from limiting the freedom of expression under international law unless it is "absolutely necessary," or the state will have unlawfully violated the right to self-governance.

The recent WikiLeaks story has thrust U.S. abuses of journalistic freedoms into the international spotlight. That the government approaches the leak of formerly confidential materials with caution is one thing; but to threaten the integrity of our Constitution and the foundational right to free speech is another. For as controversial as the WikiLeaks releases might be, they are also protected under national and international law. There is no evidence that the release of these heavily redacted materials poses a threat to the national security. Instead, the WikiLeaks website does little more than call for the accountability of our government.

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[277] *Id.* (*citing New York Times Co.*, 403 U.S. at 730).
[278] Papandrea, *Lapdogs, Watchdogs and Scapegoats*, *supra* note 1, at 233.

This is exactly as it should be. The documents made public by WikiLeaks reveal that the U.S. government has allowed for the perpetration of grave human rights abuses, and has engaged in little more than fanciful storytelling (or masterful media manipulation, depending on who you ask) since the War on Terror began. Thus its severe reaction to WikiLeaks makes sense, as the site's founder contends "[i]t is the role of good journalism to take on powerful abuses."[279] The site has certainly revealed the powerful abuses of our government, and displayed its willingness to take on other abuses, such as the unlawful restriction of constitutional rights, as needed.

The WikiLeaks site is a true symbol of the democratic spirit upon which our nation was founded. U.S. citizens have every right to know when their representatives are enabling flagrant abuses of national and international law, and to determine if this is truly the type of leadership they are comfortable with. It has been all too easy for WikiLeaks' opponents to overlook the proper time and care shown by its staff in reviewing the documents for national security risks and their willingness to censor information as needed. The true scandal here begs the question: why is the spotlight still being shone on the WikiLeaks website and not on our nation's leaders?

[279] Julian Assange, Interview with The Guardian (July 25, 2010), *available at* http://www.guardian.co.uk/world/video/2010/jul/25/julian-assange-wikileaks-interview-warlogs.