

Wikilaw: Securing the Leaks in the Application of  
First Amendment Jurisprudence to WikiLeaks

Nawi Ukabiala<sup>1</sup>

ABSTRACT

Imagine a media outlet is threatening to publish a classified document that would reveal the identity of a foreign spy cooperating with the United States to prevent the occurrence of an impending nuclear showdown. Does the First Amendment permit the government to take legal action to prevent or punish such a publication?

The most extensive leak of classified material in American history, administered by the anti-secrecy website WikiLeaks, has reignited an everlasting debate over the competing policy justifications for confidentiality and transparency. Moreover, novel aspects of the WikiLeaks saga have challenged the traditional calculus for resolving the debate. Government officials have offered sensational assertions regarding the extent to which WikiLeaks' actions have damaged national security. However, despite such assertions, it is well-settled that the First Amendment generally will not permit a prior restraint or the punishment of a press outlet for doing its constitutionally protected duty to inform the public.

Manifold questions have been raised regarding the government's ability to take legal action in regard to the publication of classified materials in the hypothetical situation where the safety and security of the nation and its people are genuinely in grave danger. Relying on First Amendment precedent, this article demonstrates the existence of an extremely narrow "national security exception" which would provide a legitimate legal framework for government action when publication of classified material would, or does, lead to catastrophic consequences. However, this article also demonstrates that congressional authorization is imperative to the legal success of such government action and, accordingly, proposes a narrowly

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1. Author, Candidate for LL.M. in International Legal Studies and Transitional Justice Scholar, May 2014, New York University School of Law. Nawi served the Iowa Supreme Court as a research attorney and as a judicial law clerk. In 2011 he received his J.D. from Drake University Law School with a constitutional law and civil rights certificate. He obtained his undergraduate degrees in international affairs and economics from George Washington University. Nawi is grateful to Professor Ian Bartrum and Judge Celeste Bremer for their insightful comments and the FCLR for selecting and preparing this article for publication.

tailored amendment to the Espionage Act.

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### I. INTRODUCTION

As Thomas Jefferson once wrote, “Our liberty depends on freedom of the press, and that cannot be limited without being lost.”<sup>2</sup> However, the most extensive leak of classified material in American history, administered by the anti-secrecy website WikiLeaks, has raised serious concerns regarding how far First Amendment rights ought to reach in our brave new digital world, and where the balance between free speech and national security ought to lie. On November 29th, 2011 Secretary of State Hilary Clinton stated that WikiLeaks disclosure of American diplomatic cables constituted not just “an attack on America’s foreign policy interests,” but also “an attack on the international community—the alliances and partnerships, the conversations and negotiations that safeguard global security and advance economic prosperity.”<sup>3</sup> U.S. officials must grapple with the fact that it is more and more difficult to protect state secrets, regardless of the validity of the decision to make the information secret in the first place.

The ancient Chinese sage, Sun Tzu, once counseled military commanders on a fundamental principle of power—“formation and

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2. Letter from Thomas Jefferson to James Currie (Jan. 28, 1786), *reprinted in* 9 THE PAPERS OF THOMAS JEFFERSON 239, 239 (Julian Boyd ed., 1950–1958); *see also* Letter from Thomas Jefferson to John Jay (Jan. 25, 1786), *reprinted in* 9 THE PAPERS OF THOMAS JEFFERSON (Jan. 25, 1786) 215, 215 (Julian Boyd ed., 1950–1958).

3. Mary Beth Sheridan, *Clinton Treads Carefully in Leading Massive Damage-Control Campaign*, WASH. POST, Nov. 30, 2010 at A13.

procedure used by the military should not be divulged before-hand.”<sup>4</sup> One of the eight principles of war espoused by the United States Army is surprise.<sup>5</sup> At the same time the purpose of press is to inform the public with new, previously undisclosed information. While confidentiality is frequently imperative to the national defense,<sup>6</sup> government transparency is essential to self-governance and informed public debate.<sup>7</sup> Since the beginning of recorded history, the relationship between the military and the press has been a tenuous one characterized by disagreement and objectives that often seem entirely mutually exclusive.<sup>8</sup> Further complicating the competition between the age-old principles of confidentiality and transparency are overclassification, exaggerated claims as to national security risks, and official justifications for secrecy that range from compelling to indubitably spurious.<sup>9</sup> The WikiLeaks controversy reinvigorates the debate.

Commentators have characterized the WikiLeaks controversy as the sequel to the Pentagon Papers—*New York Times Co. v. United States*.<sup>10</sup> Clearly parallels can be drawn between the two situations. Like the Pentagon Papers case the WikiLeaks controversy involves a media outlet disseminating classified government documents which officials contend will damage national security interests. However, there are numerous notable differences that could conceivably alter the First Amendment calculus. Firstly, it is at least debatable as to whether WikiLeaks is a news publisher in the traditional sense. Without doubt, the Internet has enhanced free speech diversity while simultaneously enhancing government transparency. However, the underlying difference in editorial process, or lack thereof, complicates the application of traditional free press analysis to the activities of WikiLeaks, Internet reporters, online bloggers, and other social media outlets.<sup>11</sup> A second distinction lies in the sheer scale and

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4. SUN TZU, *THE ART OF WAR* 55 (T. Cleary trans., 1988).

5. Steven S. Neff, *The United States Military vs. The Media: Constitutional Friction*, 46 *MERCER L. REV.* 977, 987 (1995).

6. *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (“[I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy.”).

7. *Id.* at 717 (Black, J., concurring, with Douglas, J., joining) (“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.”).

8. Neff, *supra* note 5, at 1012.

9. *See, e.g.*, Patricia L. Bellia, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 *Yale L.J.* 1448, 1519–21 (2012) (suggesting a bureaucratic culture of overclassification makes the occurrence of leaks more likely).

10. 403 U.S. at 714. *See also* Paul Farhi & Ellen Nakashima, *Is WikiLeaks the Pentagon Papers, Part 2? Parallels, and Differences, Exist*, *WASH. POST*, July 27, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/26/AR2010072605410.html>.

11. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (“[W]e reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial.” (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973))).

frequency with which WikiLeaks releases illegally obtained classified government documents and the reckless disregard for the national security implications with which it does so. Traditional First Amendment jurisprudence has generally contemplated and dealt with a “responsible press.”<sup>12</sup> The advent of technology now allows sensitive information to be disseminated worldwide, anonymously, by anybody, anywhere. Moreover, unlike the New York Times, WikiLeaks is unlikely to abide by a court order enjoining them from releasing sensitive material.<sup>13</sup>

While the WikiLeaks scenario undoubtedly contains novel aspects, it does not render traditional First Amendment doctrine entirely obsolete. Wholesale abandonment of our commitment to freedom of expression is both unnecessary and undesirable.<sup>14</sup> Free press and national security must coexist in a democratic society.<sup>15</sup> Does the First Amendment allow the government to prevent or punish the publication of classified information that endangers the lives of United States troops and human intelligence assets in the field or to punish one that does? A legitimate legal framework already exists for such government action. However, without express congressional authorization to act, government strategies for containing publishers like WikiLeaks are, in a word, leaky. If an organization like WikiLeaks could be successfully enjoined from operating to the detriment of national security, a narrowly tailored amendment to the Espionage Act would be essential to obtaining such an injunction. Furthermore, a

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12. See *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976) (“The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly a duty widely acknowledged but not always observed by editors and publishers.”). See also *N.Y. Times Co.*, 403 U.S. at 750–51 (Burger, J., dissenting) (noting that the practice of affording the Government an opportunity to review secret material was “one that great newspapers have in the past practiced and stated editorially to be the duty of an honorable press”).

To Justice Stewart “[t]he free press meant organized, expert scrutiny of government. The press was a conspiracy of the intellect, with the courage of numbers.” Potter Stewart, “*Or of the Press*”, 26 *HASTINGS L.J.* 631, 634 (1975). But see *Miami Herald*, 418 U.S. at 256 (“[A]ny . . . compulsion to publish that which ‘reason’ tells them should not be published is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.” (internal quotation marks omitted)).

13. See *Bank Julius Baer & Co. Ltd v. Wikileaks*, 535 F. Supp. 2d 980, 985 (N.D. Cal. 2008) (noting that despite a court ordered injunction, WikiLeaks continued to transmit stolen bank information over the Internet via mirror websites located in different countries worldwide). See also *N.Y. Times Co.*, 403 U.S. at 733 (White, J., concurring with Stewart, J. joining) (“Moreover, because the material poses substantial dangers to national interests and because of the hazards of criminal sanctions, a responsible press may choose never to publish the more sensitive materials.”).

14. See, e.g., GEOFFREY R. STONE, *WAR AND LIBERTY: AN AMERICAN DILEMMA: 1790 TO THE PRESENT* 41–63 (2007) (recounting how, during World War I, the Espionage Act of 1917 and the Sedition Act of 1918 suppressed free speech and political debate by making it unlawful to criticize the war or the government).

15. After all, “[c]onsider the opening words of the Free Press Clause of the Massachusetts Constitution drafted by John Adams ‘[t]he liberty of the press is essential to the security of the state.’ Stewart, *supra* note 12, at 634 (citing MASS. CONST. art. XVI).

narrowly tailored statute is necessary in order for a government attempt to punish a publisher whose actions do indeed damage national security to pass constitutional scrutiny.

Part II of this article will discuss the advent of WikiLeaks and part III of this article will discuss the national security concerns advanced by government officials to date. In part IV, the article will examine prevailing First Amendment and prior restraint jurisprudence, and discuss the development of the national security exception to the prior restraint doctrine. Finally, in part V, the article will apply the prevailing jurisprudence to WikiLeaks, propose an amendment to the Espionage Act, and provide guidance for judicial application. This article will not address the legal liability of individuals who steal classified government information or of government employees who leak classified documents to the press.<sup>16</sup> While it is clear that the government cannot merely serve WikiLeaks' servers, this article will not address the jurisdictional issues that arise regarding legal action against a stateless extraterritorial Internet group like WikiLeaks. Nor will this article address relevant extradition issues.<sup>17</sup>

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16. In highly secretive proceedings, Pfc. Bradley E. Manning, a twenty-five year-old intelligence analyst, faced charges for leaking approximately 700,000 classified government documents to WikiLeaks. See Scott Shane, *Soldier to Face More Serious Charges in Leak*, N.Y. TIMES, Mar. 1, 2013, <http://www.nytimes.com/2013/03/02/us/manning-to-face-more-serious-charges-inleak.html?ref=bradleyemanning>. On February 28, 2013, he plead guilty to ten of the twenty-two charges brought against him under the Uniform Code of Military Justice. Julie Tate & Ernesto Londoño, *Bradley Manning Pleads Guilty to 10 Lesser Charges, Explains Motive*, WASH. POST., Feb. 28, 2013, [http://articles.washingtonpost.com/2013-02-28/world/37343204\\_1\\_lesser-charges-face-charges-wikileaks](http://articles.washingtonpost.com/2013-02-28/world/37343204_1_lesser-charges-face-charges-wikileaks); Ellen Nakashima, *Bradley Manning, WikiLeaks' Alleged Source, Faces 22 New Charges*, WASH. POST., Mar. 2, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/02/AR2011030206272.html>. However, he faced additional charges including aiding the enemy and violating the Espionage Act. Tate & Londoño, *supra* note 16. In March 2012, the United Nations special rapporteur on torture, Juan Mendez, formally accused the United States government of cruel, inhuman and degrading treatment for keeping Manning in solitary lockdown for twenty-three hours a day over an eleven month period. Ed Pilkington, *Bradley Manning's Treatment Was Cruel and Inhuman, UN Torture Chief Rules*, THE GUARDIAN, Mar. 12, 2012, <http://www.guardian.co.uk/world/2012/mar/12/bradley-manning-cruel-inhuman-treatment-un>. Mendez stated that he "could not reach a definitive conclusion on whether Manning had been tortured because he has consistently been denied permission by the US military to interview the prisoner under acceptable circumstances." *Id.* Manning was subsequently acquitted on the "aiding the enemy charge" but was convicted on numerous other counts including violations of the Espionage Act. Julie Tate, *Judge Sentences Bradley Manning to 35 Years*, WASH. POST. Aug. 21, 2013, [http://articles.washingtonpost.com/2013-08-21/world/41431547\\_1\\_bradley-manning-david-coombs-pretrial-confinement](http://articles.washingtonpost.com/2013-08-21/world/41431547_1_bradley-manning-david-coombs-pretrial-confinement). In August a military judge sentenced him to 35 years in prison. *Id.*

17. WikiLeaks is a stateless organization run by the nomadic fugitive Julian Assange, an Australian citizen. Edward Cody, *WikiLeaks Founder in Hiding*, WASH. POST, Dec. 2, 2010, at A08. In 1989 the Department of Justice Office of Legal Counsel (OLC) issued a memorandum essentially stating that "the FBI may use its statutory authority to investigate and arrest individuals for violating United States law, even if the FBI's actions contravene customary international law" and that an "arrest that is inconsistent with international or foreign law does not violate the Fourth Amendment." Auth. of the FBI to Override Int'l Law in Extraterritorial Law Enforcement Activities, 13 Op. O.L.C. 163 (1989). However, if invoked, the logic in this memo must be examined with the same skepticism as the tortured logic in the Bush OLC's torture memos. See generally David Cole, *The Torture Memos: The Case Against the Lawyers*, 56 N.Y. Rev. Books

This piece will not seek to demonstrate that the actions of WikiLeaks violate the Espionage Act as it exists,<sup>18</sup> but will demonstrate that the Espionage Act, as it exists, cannot be constitutionally applied to an organization like WikiLeaks. The article will, however, demonstrate how the national security exception to the prior restraint doctrine could be employed to enjoin an organization like WikiLeaks from endangering national security and provide a basis for criminal punishment if they do. Finally, the article will propose a narrowly tailored amendment to the Espionage Act to achieve these ends.

## II. ABOUT WIKILEAKS

WikiLeaks is, in essence, a stateless Internet organization creating a viral buzz with arresting secret intelligence, while simultaneously garnering the ire of intelligence officials who would like to arrest the members of its advisory board. The international non-profit media organization, has gained worldwide notoriety by publishing otherwise unavailable classified government documents and media obtained from anonymous sources.<sup>19</sup> The WikiLeaks website was launched in 2006.<sup>20</sup> WikiLeaks' slogan is "we open governments" and according to the website it achieves this end by providing "an uncensorable version of Wikipedia for untraceable mass document leaking and analysis . . . which combines the protection and anonymity of cutting-edge cryptographic technologies with the transparency and simplicity of a wiki interface."<sup>21</sup> While WikiLeaks has infuriated government officials, political activists, and journalists, it has won a number of awards for promoting government transparency including Amnesty International's UK Media Award for 2009<sup>22</sup> and the Index on

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15 (2009). Such action would constitute a rather clear violation of a number of treaties to which the United States is a party, including the United Nations Charter's prohibition on interfering with a member states territorial integrity. U.N. CHARTER art. 2, para. 4. In any event, such action would be an unlikely finale given the current state of affairs.

18. 18 U.S.C. § 793 (2010)(d)–(e).

19. Cody, *supra* note 17.

20. The organization itself has no offices or central location but hosts its main web servers in Sweden. Mia Shanley, *WikiLeaks Builds a Legal Shield in Sweden*, REUTERS (Aug. 26, 2010), <http://www.reuters.com/article/idUSTRE67P2U320100826>. Sweden's media laws are among the world's most protective for journalists. See Noah Goldstein, *An International Assessment of Journalist Privileges And Source Confidentiality*, 14 NEW ENG. J. INT'L & COMP. L. 103, 121–22 (2007). The organization also maintains backup servers in other jurisdictions. See Shanley, *supra* note 20. Recently, Iceland's Parliament, the Althing, voted unanimously in favor of a package of legislation aimed at making the country a haven for freedom of expression by offering legal protection to whistle-blower web sites like WikiLeaks, which helped to craft the proposal. Jeff Stein, *Wikileaks Founder in Hiding, Fearful of Arrest*, WASH. POST, June 18, 2010, [http://voices.washingtonpost.com/spytalk/2010/06/new\\_wikileaks\\_massacre\\_video\\_i.html](http://voices.washingtonpost.com/spytalk/2010/06/new_wikileaks_massacre_video_i.html).

21. WIKILEAKS: ABOUT PAGE, <http://wikileaks.org/About.html> (last visited May 28, 2013).

22. *Amnesty Announces Media Awards 2009 Winners*, AMNESTY INT'L U.K. (June 2, 2009), [http://amnesty.org.uk/news\\_details.asp?NewsID=18227](http://amnesty.org.uk/news_details.asp?NewsID=18227).

Censorship/Economist Freedom of Expression Award for 2008.<sup>23</sup> The website states vaguely that it was “founded by Chinese dissidents, journalists, mathematicians, and startup company technologists, from the United States, Taiwan, Europe, Australia and South Africa.”<sup>24</sup> However, the name that is most frequently associated with WikiLeaks is that of its infamous and imperious director, Mr. Julian Assange, a fugitive “cyber-hacker” known for sleeping on peoples’ couches and changing his hair color to avoid surveillance.<sup>25</sup>

Assange, a native Australian and self-proclaimed free speech activist, was a prominent hacker and programmer prior to co-founding WikiLeaks in 2006.<sup>26</sup> In his own words Assange is “the heart and soul of [the WikiLeaks] organization, its founder, philosopher, spokesperson, original coder, organizer, financier, and all the rest.”<sup>27</sup> He promotes a “radical democracy”<sup>28</sup> and is an absolutist when it comes to disclosure of state

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23. *Index on Censorship Award Winners 2008*, INDEX ON CENSORSHIP, <http://www.indexoncensorship.org/index-on-censorship-awards-archive/index-on-censorship-award-winners-2008/> (last visited Dec. 3, 2010).

24. WIKILEAKS: ABOUT PAGE, *supra* note 21.

25. Marc A. Thiessen, *Obama Administration is Weak in the Face of WikiLeaks*, WASH. POST, Nov. 29, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112902474.html>. On November 18th, 2010 Swedish authorities obtained an arrest warrant for Assange, for questioning related to alleged sexual abuse offenses. CODY, *supra* note 17. On December 1st, 2010 Assange was placed on Interpol’s Most Wanted List. *Id.* Assange described the accusations as “dirty tricks” and claimed that he had been caught in a politically motivated conspiracy to discredit him and WikiLeaks. John F. Burns & Ravi Somaiya, *Sweden Issues Warrant for WikiLeaks Founder*, N.Y. TIMES, Nov. 19, 2010 at A10.

In December 2010, Assange surrendered to British authorities and was taken into custody pursuant to a European Arrest Warrant for the charges in Sweden. John F. Burns & Ravi Somaiya, *In Embassy Drama, Eyes of Police (and Public) Focus on Assange*, N.Y. TIMES, Aug. 18, 2012, <http://www.nytimes.com/2012/08/19/world/europe/julian-assange-under-watch-at-ecuadorean-embassy.html>. Prosecutors resisted Assange’s subsequent successful bid for bail arguing that he was likely to abscond. Mark Tran, *Julian Assange Granted Bail at High Court*, THE GUARDIAN, Dec. 16, 2010, <http://www.guardian.co.uk/media/2010/dec/16/julian-assange-wikileaks>. He did, thereby forfeiting \$375,000 wealthy supporters put up as surety. Burns & Somaiya, *Embassy Drama*, *supra* note 25.

Given the political nature of the entire saga, it is little surprise that Assange found a nation willing to grant him political asylum. Ecuador granted Assange’s request for political asylum and since June 2012, Assange has resided in the “Ecuadorian Embassy’s second-story suite of rooms in a central London apartment block.” *Id.* Assange, facing an extradition order to Sweden, remains voluntarily confined with the knowledge that an attempt to exit the embassy and travel to Ecuador will lead to immediate seizure by the small platoon of British police guarding the embassy around the clock. *Id.*

Prior to December 2010, Assange lead a nomadic existence with the knowledge that he could not be arrested at his IP address. He was said to be in hiding and increasingly fearful of arrest, prosecution, and assassination. Cody, *supra* note 17.

26. Raffi Khatchadourian, *No Secrets: Julian Assange’s Mission for Total Transparency*, NEW YORKER, June 7, 2010.

27. John F. Burns & Ravi Somaiya, *WikiLeaks Founder on the Run, Trailed by Notoriety*, N.Y. TIMES, Oct. 24, 2010, at A1.

28. *Profile: Julian Assange, the Man Behind Wikileaks*, THE SUNDAY TIMES, Apr. 11, 2010, [http://technology.timesonline.co.uk/tol/news/tech\\_and\\_web/the\\_web/article7094231.ece](http://technology.timesonline.co.uk/tol/news/tech_and_web/the_web/article7094231.ece). Assange stated that “[w]hen governments stop torturing and killing people, and when corporations stop abusing the legal system, then perhaps it will be time to ask if free-speech activists are

secrets, stating in the New York Times that “[f]ull source material is what helps keep journalism honest . . . [because it is] independently checkable in a way that a scientific paper is checkable. It’s time that the media upgraded its capabilities along those lines.”<sup>29</sup>

Assange has boasted that WikiLeaks has released more classified documents than the rest of the world press combined.<sup>30</sup> According to Assange this demonstrates “the parlous state of the rest of the media.”<sup>31</sup> Spies and moles, defectors and renegades, as well as many others who have exposed inciting insights into the great secrets of their age highlight the annals of history. Mr. Assange has rapidly become such a figure for the Internet era, with as yet undetermined consequences for himself and for the keepers of the world’s secrets.

### III. NATIONAL SECURITY CONCERNS ASSOCIATED WITH WIKILEAKS

In April 2010, WikiLeaks posted a video of a 2007 military incident in which about a dozen Iraqi civilians and two Reuters employees were killed by United States forces, on a website called Collateral Murder.<sup>32</sup> In July 2010, WikiLeaks released the Afghan War Diary, a compilation of some 92,000 classified reports concerning the War in Afghanistan that were previously unattainable by the public.<sup>33</sup> In October of 2010 WikiLeaks released nearly 400,000 documents entitled the Iraq War Logs, which contained classified information concerning the Iraq war.<sup>34</sup> On November 28, 2010, WikiLeaks began an ongoing release of 250,000 classified diplomatic cables and published the entire cache of unredacted documents in September 2011.<sup>35</sup>

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accountable.” *Id.*

29. *Id.*

30. *The Secret Life of WikiLeaks Founder Julian Assange*, THE SYDNEY MORNING HERALD, May 22, 2010, <http://www.smh.com.au/technology/technology-news/the-secret-life-of-wikileaks-founder-julian-assange-20100521-w1um.html>.

31. *Id.*

32. Elisabeth Bumiller, *Video Shows U.S. Killing of Reuters Employees*, N.Y. TIMES, Apr. 6, 2010, at A13.

33. C.J. Chivers et al., *View Is Bleaker Than Official Portrayal of War in Afghanistan*, N.Y. TIMES, July 26, 2010, at A1.

34. Burns & Somaiya, *supra* note 27.

35. Scott Shane & Andrew W. Lehren, *Leaked Cables Offer Raw Look at U.S. Diplomacy*, N.Y. TIMES, Nov. 29, 2010, at A1 (The “cache of a quarter-million confidential American diplomatic cables, most of them from the past three years, provides 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.”). Initially WikiLeaks partnered with the Guardian, New York Times, El Pais, Der Spiegel and Le Monde to redact details that put the safety of sources at risk. The five newspapers “established lists in common of people to protect, notably in countries ruled by dictators, controlled by criminals or at war,” according to an account by Le Monde. Nancy A. Youssef, *No Evidence that WikiLeaks Releases Have Hurt Anyone*, MIAMI HERALD, Nov. 28, 2010. But in a September 2011 move deplored by the five newspapers, as well as government officials and human rights activists Assange made the decision to publish the entire archive without redactions thereby endangering the lives of thousands of sources and



In an interview with the *New Yorker* in June 2010, Assange acknowledged “some leaks risked harming innocent people—’collateral damage, if you will’—but that he could not weigh the importance of every detail in every document.”<sup>36</sup> He went on to say that his routine of releasing largely unfiltered classified information online could, one day, result in the organization having “blood on our hands.”<sup>37</sup> According to the Pentagon that bloody day has already come.<sup>38</sup> In August of 2010, the Pentagon asserted that the Afghan War Diary endangered the safety of cooperating Afgans and their families and demanded that Mr. Assange hand back the original material and permanently take down the information from the website.<sup>39</sup>

According to a *Newsweek* report, after WikiLeaks published the Afghan War Diaries a spokesman for the Taliban promptly “threatened to ‘punish’ any Afghan listed as having ‘collaborated’ with the U.S. and the Kabul authorities against the growing Taliban insurgency.”<sup>40</sup> Soon thereafter the Taliban demonstrated just how willing they are to put the bullets where the mouth is. Four days after the publication of the documents, at least seventy tribal elders in southern Afghanistan began receiving death threats.<sup>41</sup> On the weekend following the release, a tribal elder by the name of Khalifa Abdullah, who the Taliban believed had been in cooperation with United States forces, was abducted from his home in Monar village and executed by insurgent gunmen.<sup>42</sup> Amnesty International as well as a number of human rights organizations that formerly heralded WikiLeaks for promoting government transparency, began to decry their failure to properly redact releases that were generating visibly “negative, sometimes deadly ramifications for those Afghans identified as working for or sympathizing with international forces.”<sup>43</sup>

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assets. James Ball, *WikiLeaks Publishes Full Cache of Unredacted Cables*, THE GUARDIAN Sept. 2, 2011, <http://www.theguardian.com/media/2011/sep/02/wikileaks-publishes-cache-unredacted-cables>. (“The newly published archive contains more than 1,000 cables identifying individual activists; several thousand labelled with a tag used by the US to mark sources it believes could be placed in danger; and more than 150 specifically mentioning whistleblowers.”).

36. Khatchadourian, *supra* note 26.

37. *Id.*

38. Greg Jaffe & Joshua Partlow, *Joint Chiefs Chairman Mullen: WikiLeaks Release Endangers Troops, Afghans*, WASH. POST, July 30, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/29/AR2010072904900.html>. Admiral “Mike Mullen, the chairman of the Joint Chiefs of Staff, told reporters . . . the truth is [WikiLeaks] might already have on their hands the blood of some young soldier or that of an Afghan family.” *Id.*

39. Eric Schmitt, *U.S. Tells WikiLeaks to Return Afghan War Logs*, N.Y. TIMES, Aug. 6, 2010, at A6.

40. Ron Moreau & Sami Yousafzai, *Taliban Seeks Vengeance in Wake of WikiLeaks*, NEWSWEEK, Aug. 2, 2010, <http://www.newsweek.com/2010/08/02/taliban-seeks-vengeance-in-wake-of-wikileaks.html>.

41. *Id.*

42. *Id.*

43. Jeanne Whalen, *Rights Groups Join Criticism of WikiLeaks*, WALL STREET J., Aug. 9, 2010, <http://online.wsj.com/article/SB10001424052748703428604575419580947722558.html>.

In August of 2010, a lawyer representing WikiLeaks claimed that United States government officials had been given codes and passwords granting online access to classified documents that WikiLeaks had not yet released.<sup>44</sup> Apparently the reason for taking this step was to make good on its offer to try to work with United States authorities to remove from future releases sensitive information that could put innocent lives in jeopardy.<sup>45</sup> In response, Pentagon general counsel, Jeh C. Johnson, wrote in a letter to a lawyer representing WikiLeaks “[t]he Department of Defense will not negotiate some ‘minimized’ or ‘sanitized’ version of a release by WikiLeaks of additional U.S. government classified documents.”<sup>46</sup> Ironically, a United States Army Report leaked to WikiLeaks reveals that the Army views WikiLeaks as “a potential force protection [and] counterintelligence . . . threat to the U.S. Army.”<sup>47</sup> Subsequent reports have indicated that the Justice Department is considering pursuing charges against Assange under the Espionage Act and Attorney General Eric Holder has stated that the Justice Department and Pentagon are conducting “an active, ongoing criminal investigation.”<sup>48</sup>

On November 28, 2010, Harold Koh, the State Department legal advisor, issued a letter to Assange stating that the anticipated release of “250,000 secret State Department documents would have ‘grave consequences’ and it could place the lives of journalists, human rights activists and soldiers at risk.”<sup>49</sup> The letter asserted that the release would place ongoing military operations at risk, including those aimed at stopping terrorists and human traffickers and could damage relations among countries that cooperate “to confront common challenges from terrorism to pandemic diseases to nuclear proliferation that threaten global stability.”<sup>50</sup> Assange began releasing the documents anyway.<sup>51</sup>

The whole saga is unfolding like a James Bond movie, and so far many of the finales projected in the media have been more thriller spy novel than real life.<sup>52</sup> At this juncture it has become conceivable that the

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44. Thom Shakner, *WikiLeaks and Pentagon Disagree About Talks*, N.Y. TIMES, Aug. 19, at A10.

45. *Id.*

46. *Id.*

47. Stephanie Strom, *Pentagon Sees a Threat from Online Muckrakers*, N.Y. TIMES, Mar. 17, 2010, [http://www.nytimes.com/2010/03/18/us/18wiki.html?\\_r=0](http://www.nytimes.com/2010/03/18/us/18wiki.html?_r=0).

48. Ellen Nakashima & Jerry Markon, *WikiLeaks founder could be charged under Espionage Act*, WASH. POST, Nov. 30, 2010, at A01. Holder acknowledged the uncertainty in applying current laws to WikiLeaks by stating that “[t]o the extent there are gaps in our laws, we will move to close those gaps.” *Id.*

49. Glenn Kessler, *Obama Administration to WikiLeaks: Documents Release Would Have ‘Grave Consequences’*, WASH. POST, Nov. 28, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/28/AR2010112800401.html>.

50. *Id.*

51. Shane & Lehen, *supra* note 35.

52. Burns and Somaiya, *Embassy Drama*, *supra* note 25 (“Some have ventured to the wilder shores of possibility, including having Mr. Assange flying off the apartment block’s roof

WikiLeaks document dumps constitute more than just an embarrassment that has the United States government searching for the control key. At best they discourage cooperation with United States and NATO forces in war zones. At worst WikiLeaks has become a grave danger to the objectives, prosperity, and security of the free world.

#### IV. FIRST AMENDMENT JURISPRUDENCE RELEVANT TO THE WIKILEAKS SCENARIO

##### A. *Modern First Amendment Jurisprudence*

The First Amendment provides that “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.”<sup>53</sup> Three primary rationales have been advanced in support of the First Amendment’s guarantee of free speech: the promotion of an efficient marketplace of ideas,<sup>54</sup> the assurance of an informed populace for the purpose of reasoned consideration and self-governance,<sup>55</sup> and the allowance of real self-actualization.<sup>56</sup> The absolutist nature of the textual provision has resulted in a substantial body of United States Supreme Court jurisprudence demonstrating a willingness to adamantly protect the right to free speech.<sup>57</sup> Nonetheless, the Court’s approach to dealing with First Amendment issues is more figurative than literal.<sup>58</sup> The prevailing approach established by the Supreme Court seeks to strike a balance between the individual right of expression and access to political information and the good of the community as a whole.<sup>59</sup> Therefore, the context of the expression in question has become a fundamental element of

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with a jetpack, dressing as a woman to sneak past the police or climbing into a diplomatic bag.”).

53. U.S. CONST., amend I.

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

55. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24-27 (1948) (arguing that the true core of free speech is the enhancement of self-government through an informed public); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 301 (1992) (“[T]he First Amendment is principally about political deliberation.”).

56. David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1975) (stating that the value of free expression “rests on its deep relation to self-respect arising from autonomous self-determination without which the life of the spirit is meager and slavish.”).

57. See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 714 (1971).

58. See *Barenblatt v. United States*, 360 U.S. 109, 134 (1959) (holding that the First Amendment did not protect the defendant in contempt of Congress proceedings from disclosing communist relationships); see also Daniel A. Farber & John E. Nowak, *Justice Harlan and the First Amendment*, 2 CONST. COMMENT. 425, 432 (1985) (“For Harlan, ‘constitutionally protected freedom of speech is narrower than an unlimited license to talk.’”). But see Edmund Cahn, *Justice Black and First Amendment “Absolutes”*: A Public Interview, 37 N.Y.U. L. REV. 549, 554 (1962) (quoting Justice Black’s opinion that the First Amendment “says ‘no law,’ and that is what I believe it means”).

59. See generally, Farber & Nowak, *supra* note 58.

the First Amendment analysis.<sup>60</sup> An insightful assessment of the constitutionality of any governmental action that interferes to a nontrivial degree with protected information or ideas invokes a reference to several factors, principally: “(1) the nature and weight of the First Amendment interest; (2) the extent to which the governmental action disserves that interest; (3) the nature and weight of the governmental interest; (4) the extent to which the governmental action serves that interest; and (5) the availability of ‘less restrictive alternatives.’”<sup>61</sup> Since the balance presumptively favors the exercise of free speech, the interest sought to be promoted by a restriction on speech must outweigh the competing speech interest to an exponential degree.<sup>62</sup> Therefore, a restriction may be unconstitutional even though it serves an interest that merely weighs more heavily than the competing speech interest.

The prevailing balancing tests used to determine whether the First Amendment interest at stake outweighs the governmental regulatory interest are referred to as “levels of scrutiny.”<sup>63</sup> Although the Supreme Court has often appeared to be somewhat inconsistent in its application of the levels of scrutiny,<sup>64</sup> the three commonly recognized levels of scrutiny are strict, intermediate, and rational basis scrutiny.<sup>65</sup> Strict scrutiny mandates that, in order to prevail, the government must demonstrate that its “regulation is necessary to serve a compelling state interest[,]” that it is “narrowly drawn to achieve that end[,]” and that there are no less restrictive alternatives.<sup>66</sup> Strict scrutiny is applicable to most discriminatory restrictions or prohibitions on speech, which are commonly referred to as

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60. For instance in *Schneck v. United States*, the Supreme Court upheld a conviction against a defendant charged under the Espionage Act. 249 U.S. 47 (1919). The conviction was based on the defendant’s efforts to encourage citizens to resist conscription for World War I by disseminating leaflets that articulated austere antagonism towards the enlistment effort. *Id.* In his opinion upholding the conviction for the majority, Justice Holmes acknowledged speech that may very well be permissible during times of peace may be prohibited during a time of war. *Id.* at 48–51. Context is decisive in determining whether speech creates a “clear and present danger that . . . will bring about the substantive evils that Congress has a right to prevent.” *Id.* at 48–52.

61. Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1188 (1983). See also Wilson Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 810–13 (2004).

62. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.”).

63. R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 225 (2002).

64. See generally *Id.* (asserting that the Court actually uses six levels of review).

65. *Fed. Election Comm’n v. Christian Coalition*, 52 F. Supp. 2d 45, 53 n.5 (D.D.C. 1999).

66. *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); see also *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 563–65 (1976).

content-based regulations.<sup>67</sup> Intermediate scrutiny requires that, in order to prevail, the government must demonstrate that its restriction on speech is closely related to an important, significant, or substantial government interest.<sup>68</sup> Intermediate scrutiny is typically employed to “evaluate regulations that affect expression but are not targeted at expression, target only ‘low-value’ expression, or do not discriminate among types of expression.”<sup>69</sup> Intermediate scrutiny is also used in evaluating “time, place and manner” which are typically constitutional if they “are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”<sup>70</sup> Rational basis scrutiny is the most lenient scrutiny applied by courts, and merely requires that the state demonstrate that its regulations bear a rational relationship to a legitimate governmental purpose.<sup>71</sup> Since, rational basis scrutiny is seldom applicable when First Amendment interests are at stake, speech regulations are generally governed by strict and intermediate levels of scrutiny.<sup>72</sup>

The right of the American public to be informed about government endeavors is a bedrock principle upon which our nation was founded.<sup>73</sup> The Supreme Court has acknowledged “the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.”<sup>74</sup> While the Constitution does not enumerate

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67. See *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“Content-based restrictions are permissible only if they serve compelling state interests and do so by the least restrictive means available.”).

68. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (“[A] content-neutral regulation will be sustained if ‘it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.’”) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

69. *O’Brien*, 391 U.S. at 376–77 (writing for the majority, Chief Justice Earl Warren explained “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct,” government regulation is “sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest”).

70. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44, 45 (1983) (finding that regulations concerning the time, place, and manner of expression are constitutional if they “are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication”).

71. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

72. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in the judgment and dissenting in part) (“[A] government practice or statute which restricts ‘fundamental rights’ or which contains ‘suspect classifications’ is to be subjected to ‘strict scrutiny’ and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.”).

73. Letter from James Madison to W.T. Berry (Aug. 4, 1822), reprinted in JAMES MADISON, *THE COMPLETE MADISON* 337 (Saul K. Padover ed., 1953) (“knowledge will forever govern ignorance” and “[a] popular government without popular information [ ]or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both”).

74. *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982).

a duty specifically requiring the government to provide the public with information, it is generally understood that the First Amendment prohibits the government from interfering with the public's access to information.<sup>75</sup>

### B. *Prior Restraints and Censorship*

A prior restraint can be described as a state imposed, content-based restriction of speech prior to publication.<sup>76</sup> Government attempts at prior restraints date back to the advent of the printing press.<sup>77</sup> The English government prohibited “printers from publishing works that had not been licensed by government officials, who could censor objectionable passages or deny a license altogether.”<sup>78</sup> The practice of employing prior restraints has long been recognized to be inconsistent with traditional notions of freedom of expression. In his *Commentaries on the Laws of England*, the renowned Sir William Blackstone professed that the liberty of the press is indeed essential to the nature of a free state and that this liberty “consists in laying no *previous* restraints upon publications.”<sup>79</sup> Historians are in general agreement that the framers recognized that a “free press would be essential to their vision of democracy and understood that it would have to mean more than freedom from prior restraint.”<sup>80</sup> To a large extent it is the chilling effect on speech, particularly political dialogue critical of government conduct that renders prior restraints so undesirable.<sup>81</sup> Therefore, the Supreme Court has established the rule that prior restraints are the “most serious and the least tolerable infringement on First

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75. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 192 (1983) (“Any law that substantially prevents the communication of a particular idea, viewpoint, or item of information violates the first amendment except, perhaps, in the most extraordinary of circumstances. This is so, not because such a law restricts ‘a lot’ of speech, but because by effectively excising a specific message from public debate, it mutilates ‘the thinking process of the community’ and is thus incompatible with the central precepts of the first amendment.”).

76. Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 648 (1955) (A prior restraint is an “official restriction[ ] imposed upon speech or other forms of expression in advance of actual publication,” as opposed to subsequent punishment which penalizes the disseminator “after the communication has been made as a punishment for having made it.”). Although the paradigmatic prior restraint takes the form of a court ordered injunction, a statute that prohibits a particular kind of speech may also be a prior restraint. See *Near v. Minnesota*, 283 U.S. 697 (1931).

77. Emerson, *supra* note 76, at 648–650 (The prior restraint doctrine originated in fifteenth century England with the advent of the printing press and by the seventeenth century, all printing endeavors were subject to the Crown’s monopolistic control.).

78. *Id.*

79. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151–52 (1979).

80. LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 272–73 (1985) (advancing the theory that freedom of the press and exemption from prior restraints were central to the envisaged American governmental scheme of checks and balances).

81. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) (“If it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it at least for the time.”).

Amendment rights”<sup>82</sup> subject to a “heavy presumption against . . . constitutional validity.”<sup>83</sup>

Even in cases where restrictions on freedom of expression can be constitutionally justified, courts generally prefer post-publication sanctions that permit the utterance of the offending speech as opposed to the “immediate and irreversible” nature of a prior restraint.<sup>84</sup> No federal court has ever found that a publisher can be held culpable for disseminating confidential information that they had no wrongdoing in obtaining under the Espionage Act.<sup>85</sup> In *Florida Star v. B.J.F.*, the Supreme Court punted on the hypersensitive issue of “whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, the government may ever punish not only the unlawful acquisition, but the ensuing publication as well.”<sup>86</sup> Relatedly, in *Bartnicki v. Vopper*, the Court held that a content-neutral statute prohibiting the publication of illegally intercepted communications (in this case a cell phone conversation) violates free speech where the person who publishes the material did not participate in the interception, and the communication concerns a public issue.<sup>87</sup> Notably, in evaluating a post-publication sanction, the court in *Bartnicki* relied on *New York Times v. United States* and employed principles highly analogous to those governing prior restraints.<sup>88</sup>

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82. *Id.*

83. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). *See also* *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968). However, only content-based injunctions are subject to prior restraint analysis. *See* *DVD Copy Control Ass’n, Inc. v. Bunner*, 75 P.3d 1, 17 (Cal. 2003) (“[a] prior restraint is a content-based restriction on speech prior to its occurrence”). In addition, prior restraints are generally permitted, even in the form of preliminary injunctions, in intellectual property cases, such as those for infringements of copyright or trademark. *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 930 (N.D. Ohio 2004). The Supreme Court has written, in dictum, “that traditional prior restraint doctrine may not apply to [commercial speech],” and the Court has not ruled on whether or not it does. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 571 n.13 (1980).

84. *See* *Neb. Press Ass’n*, 427 U.S. at 559. *See also* *N.Y. Times Co. v. United States*, 403 U.S. 714, 737–39 (1971) (White, J., concurring) (“I would have no difficulty in sustaining convictions . . . on facts that would not justify the intervention of equity and the imposition of a prior restraint.”).

85. Joe Bant, *United States v. Rosen: Pushing the Free Press onto a Slippery Slope?*, 55 U. KAN. L. REV. 1027, 1030–32 (2007). In fact the government has never prosecuted a non-government employee, much less a publisher, for disseminating classified material. *See* Geoffrey R. Stone, *WikiLeaks and the First Amendment*, 64 FED. COMM. L.J. 477, 486 (2012) (citing *Perry v. Sinderman*, 408 U.S. 593 (1972)).

86. *The Florida Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989) (holding that a Florida statute which provided penalties for media outlets that publicized the name of alleged rape victims was unconstitutional).

87. 532 U.S. 514 (2001).

88. *See id.* at 535; *see also id.* at 555 (Rehnquist, C.J., dissenting) (criticizing the majority’s reliance on prior restraint jurisprudence such as the Pentagon Papers case and the employment of “parallel reasoning” to a case involving a post-publication sanction).

C. *The National Security Exception to the Prior Restraint Doctrine.*

The heavy presumption against prior restraints was reiterated by the United States Supreme Court in *New York Times Co. v. United States* (Pentagon Papers).<sup>89</sup> However, the ruling evinced one applicable but very narrow exception under which the government can obtain injunctive relief as a constitutionally legitimate prior restraint on speech. In 1971, amidst growing public resentment and disapproval of the Vietnam War, Daniel Ellsberg, a military analyst and conscientious objector to the war, leaked to the New York Times and Washington Post the infamous Pentagon Papers—a classified government study entitled “History of U.S. Decision-Making Process on Vietnam Policy.”<sup>90</sup> The newspapers proceeded to publish excerpts of the report in installments.<sup>91</sup> After the New York Times published the third installment, the Nixon administration filed suit in a New York federal district court seeking to suppress further publication.<sup>92</sup> The district court granted a temporary restraining order but, in a subsequent ruling, denied the government’s request for a preliminary injunction finding “no cogent reasons were advanced as to why these documents except in the general framework of embarrassment . . . would vitally affect the security of the Nation.”<sup>93</sup> The Second Circuit reversed and remanded for the district court to determine whether any of the items in a Special Appendix, filed subsequent to the district court proceedings, posed “grave and immediate danger to the security of the United States.” The New York Times appealed to the Supreme Court.<sup>94</sup> The appeal was consolidated with the parallel case involving the Washington Post in which the D.C. Circuit affirmed the district court’s denial of a preliminary injunction.<sup>95</sup>

The government renewed its claim before the Supreme Court that “[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

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89. *N.Y. Times Co. v. United States*, 403 U.S. 714 (1971). For an in-depth discussion of the events leading up to the Supreme Court ruling and the previous case history of the Pentagon Papers case see SANFORD J. UNGAR, *THE PAPERS & THE PAPERS: AN ACCOUNT OF THE LEGAL AND POLITICAL BATTLE OVER THE PENTAGON PAPERS* (1972).

90. *N.Y. Times Co.*, 403 U.S. at 714. See also DANIEL ELLSBERG, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* 227-41, 343-51, 372 (2002).

91. Neil Sheehan, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. TIMES, June 13, 1971, <http://www.nytimes.com/books/97/04/13/reviews/papers-overview.html>.

92. See *United States v. N.Y. Times Co.*, 328 F. Supp. 324, 325 (S.D.N.Y.), *rev'd*, 444 F.2d 544 (2d Cir.) (en banc), *rev'd*, 403 U.S. 713 (1971) (per curiam).

93. See *id.* at 330.

94. *United States v. N.Y. Times Co.*, 444 F.2d 544 (2d Cir. 1971) (per curiam) (6-3 decision).

95. *United States v. Wash. Post Co.*, 446 F.2d 1327, 1328 (D.C. Cir.) (en banc) (per curiam), *aff'd sub nom. United States v. N.Y. Times Co.*, 403 U.S. 713 (1971).



Commander-in-Chief.”<sup>96</sup> The result was a very short per curiam opinion joined by six members of the Court, exercising extreme reluctance to create too much law on the controversial topic.<sup>97</sup> Chief Justice Burger, Justice Harlan, and Justice Blackmun dissented.<sup>98</sup> The majority held that the Government failed to carry the “heavy burden of showing justification for the imposition of a [prior] restraint.”<sup>99</sup> From a constitutional standpoint, the ruling was hardly a surprise. The executive branch basically asked the lower court to issue an injunction based on inherent executive power, invoking no statutory or other legal authorization.<sup>100</sup> In support of its national security claim, the government presented only scant evidence. It is not difficult to comprehend why the Court refused to issue an injunction prohibiting publication based on the weak showing and nebulous criteria advanced.

The majority opinion was followed by a stream of concurring and dissenting opinions replete with commentary animated enough to overwhelm an expert flash developer. Each Justice wrote separately. As expected, a national security exception to the prior restraint doctrine found no support in Justice Black’s unequivocal condemnation of the arguments advanced by the government, which he characterized as the greatest “perversion of history.”<sup>101</sup> Justice Black, well known as an unwavering First Amendment absolutist,<sup>102</sup> denounced the notion that the broad, vague generalities of the word “security” could “be invoked to abrogate the fundamental law embodied in the First Amendment.”<sup>103</sup> In his view, “[t]he guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.”<sup>104</sup> Justice Douglas’ concurring opinion, joined by Justice Black similarly

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96. *N.Y. Times Co. v. United States*, 403 U.S. 714, 718 (1971) (Black, J., concurring).

97. *Id.* at 714.

98. *Id.*

99. *Id.* at 714. None of the Justices discussed the facts of the case in the context of determining whether the injunction was a prior restraint. They generally presumed that the injunction was a prior restraint and began the analysis from there. Furthermore, some of the Justices unequivocally equated all injunctions in the First Amendment contexts with prior restraints, further solidifying their relationship in legal academia. *See e.g., Id.* at 731 n.1 (White, J., concurring) (discussing congressional authorization of the issuance of “prior restraints” by numerous government agencies). Some scholars have credited the Pentagon Papers Case with raising the injunctions-as-prior-restraints formulation to preeminence. *See* Owen M. Fiss, *The Unruly Character of Politics*, 29 MCGEORGE L. REV. 1, 13–14 (1997).

100. *See id.* at 730 (Stewart, J., concurring) (“[I]n the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary.”).

101. *See id.* at 716–17 (Black, J., concurring) (“The press was protected so that it could bare the secrets of government and inform the people.”).

102. *See Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring) (stating that the text of the First Amendment, “Congress shall make no law . . . abridging the freedom of speech, or of the press” means that these freedoms are “wholly beyond the reach of federal power to abridge”) (internal quotation marks omitted).

103. *N.Y. Times Co.*, 403 U.S. at 719 (Black, J., concurring).

104. *Id.*

proclaimed that the First Amendment leaves “no room for governmental restraint on the press.”<sup>105</sup> However, a fair and careful reading of Justice Douglas’ opinion does not absolutely preclude the application of a national security exception in an appropriate case.<sup>106</sup> Douglas intimated that the power to “wage war successfully” may justify the imposition of a prior restraint.<sup>107</sup> Because he viewed any such authority as an outgrowth of congressional authority to declare war and not Commander-in-Chief war powers, in the absence of a congressional declaration of war, he declined to further explore the question.<sup>108</sup>

While condemning the issuance of even the temporary restraining order below, in his concurring opinion Justice Brennan recognized that Supreme Court precedent supported “a single, extremely narrow class of cases in which the First Amendment’s ban on prior judicial restraint may be overridden.”<sup>109</sup> According to Brennan, this national security exception applies only during times of war for the purpose of preventing *actual* prejudice to the national interest.<sup>110</sup> Brennan’s opinion gave context to the otherwise hazy standard by setting forth several scenarios, which, in his view, would trigger the exception. These included preventing: (1) actual obstruction to the military recruiting service; (2) the publication of the sailing dates of transports; (3) the number and location of troops; (4) nuclear holocaust; or (5) the peril of a transport already at sea.<sup>111</sup> Furthermore, Brennan established an evidentiary burden requiring the government to prove that publication would “inevitably, directly, and immediately cause the occurrence” of a situation of the gravity of the examples listed.<sup>112</sup> Brennan concluded the government failed woefully in carrying this burden, but rather offered only surmise and conjecture of untoward consequences.<sup>113</sup>

Stewart’s concurring opinion, while not as contextually specific as Brennan’s, set forth the separation of powers rationale underlying the national security exception.<sup>114</sup> According to Stewart, the United States

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105. *Id.* at 723 (Douglas, J., concurring).

106. Little should be made of Douglas’ discussion of the statutory language of section 793 of the Espionage Act and attendant proposition that no statutory basis existed to bar publication. *Id.* at 722-23. This discussion was evidently advanced as an alternate ground and cannot fairly said to be the basis for Douglas opinion that no prior restraint should issue. *Id.* Douglas concluded that by making section 793 inapplicable to publishers “Congress ha[d] been faithful to the command of the First Amendment.” *Id.* at 722. Thus, Douglas would have presumably found a contrary dictate in section 793 to be violative of First Amendment principles. *Id.*

107. *Id.* at 722.

108. *Id.*

109. *Id.* at 726 (Brennan, J., concurring).

110. *Id.* (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Near v. Minnesota*, 283 U.S. 697, 716 (1931)).

111. *Id.* (citing *Near*, 283 U.S. at 716).

112. *Id.* at 726-27.

113. *Id.* at 725.

114. *Id.* at 727-30 (Stewart, J., concurring).

constitutional framework vested the Executive with “enormous power in the two related areas of national defense and international relations.”<sup>115</sup> This power, largely unchecked by the legislative and judicial branches, was to be exercised by the Executive with “judgment and wisdom of a high order . . . to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.”<sup>116</sup> Notably, while cautioning that congressional legislation in the field of international relations should afford the President a considerable degree of discretion,<sup>117</sup> Stewart suggested that executive authority to administer a prior restraint in the name of national security might be more likely to pass constitutional scrutiny if exercised pursuant to specific criminal or civil laws.<sup>118</sup> However, in the absence of an applicable law to construe, Stewart concluded the government failed to carry the burden of showing disclosure would “surely result in direct, immediate, and irreparable damage to our Nation or its people.”<sup>119</sup>

Justice White’s concurring opinion, which was joined by Justice Stewart, echoed many of the principles set forth in Justice Stewart’s concurrence. However, Justice White’s conclusion rested more exactly on the lack of legislative guidance to aid a constitutional exercise of the national security exception.<sup>120</sup> Ultimately, White reasoned that while Congress had not provided statutory authority for a prior restraint to enjoin disclosure, numerous sections of the Espionage Act potentially authorized criminal sanctions relying on their deterrent effect.<sup>121</sup> Accordingly, White posited that the failure of the Government to carry the “very heavy burden” necessary to invoke the national security exception did not preclude subsequent convictions for criminal publication—even of members of the press.<sup>122</sup> He also noted another important factor in any analysis concerning a request for relief in federal court—redressability.<sup>123</sup> Because publication had already begun “a substantial part of the threatened damage ha[d] already occurred.”<sup>124</sup> Justice Marshall’s concurring opinion was based squarely on the lack of statutory authority to “prevent behavior that

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115. *Id.* at 727.

116. *Id.* at 729–30.

117. *Id.* at 730 n.6 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

118. *Id.* at 730.

119. *Id.* at 730.

120. *Id.* at 731 (White, J., concurring) (“I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these.”)

121. *Id.* at 740.

122. *Id.* at 731, 733, 740.

123. *Id.* at 733.

124. *Id.* at 733 (“The fact of a massive breakdown in security is known, access to the documents by many unauthorized people is undeniable, and the efficacy of equitable relief against these or other newspapers to avert anticipated damage is doubtful at best.”)

Congress ha[d] specifically declined to prohibit.”<sup>125</sup> In his view it was clear that no legislative enactment authorized the injunctive relief sought or criminalized publication of the disputed material.<sup>126</sup> Notably, Marshall espoused the view that in absence of a clear grant of legislative authorization for a civil injunction, the government might have been able to invoke the equity jurisdiction of the Court by showing a threatened violation of one of the criminal statutes effectuating the President’s “broad power to protect the Nation from disclosure of damaging state secrets.”<sup>127</sup>

Chief Justice Burger, Justice Harlan, and Justice Blackmun dissented from the majority and would have continued the injunctions pending remand and further consideration of the government’s claims.<sup>128</sup> These justices, in essence, concluded the proceedings were conducted too hastily<sup>129</sup> and the postulations contained in the concurrences advanced a burden that impinged to weightily on the Executive’s “constitutional primacy in the field of foreign affairs.”<sup>130</sup>

Thus, all of the Justices except Douglas and Black explicitly recognized the possibility of injunctive relief in cases where publication posed grave harm to national security. However, even Justice Douglas tepidly suggested that such relief may be available during a time of congressionally declared war.<sup>131</sup> Stewart,<sup>132</sup> White,<sup>133</sup> and Marshall<sup>134</sup> each posited, with varying degree of vigor, that a government attempt to enjoin publication in the name of national security was more likely to survive constitutional scrutiny if administered pursuant to a legislative grant of authority. The three dissenters would presumably have embraced this position as a basis for affording the government relief. Furthermore, at least five Justices—White, Stewart, Marshall, Burger, and Blackmun—endorsed the view that Congress had the power to criminalize the publication of material harmful to national security.<sup>135</sup>

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125. *Id.* at 742 (Marshall, J., concurring).

126. *Id.* at 745.

127. *Id.* at 743, 744.

128. *Id.* at 752 (Burger, C.J., dissenting); *id.* at 758-59 (Harlan, J., dissenting); *id.* at 761-62 (Blackmun, J., dissenting).

129. *Id.* at 753 (Harlan, J., dissenting with Burger, C.J. and Blackmun, J., joining).

130. *Id.* at 756.

131. *Id.* at 722 (Douglas, J., concurring).

132. *Id.* at 730 (Stewart, J., concurring).

133. *Id.* at 740 (White, J., concurring) (noting Congress had not “authorized the injunctive remedy against threatened publication. It has apparently been satisfied to rely on criminal sanctions and their deterrent effect”).

134. *Id.* at 745 (Marshall, J., concurring).

135. *See id.* at 737 (White, J., concurring with Stewart, J., joining) (“I would have no difficulty in sustaining convictions under [relevant sections of the Espionage Act] on facts that would not justify the intervention of equity and the imposition of a prior restraint.”); *id.* at 747 (Marshall, J., concurring) (“Either the Government has the power under statutory grant to use traditional criminal law to protect the country or, if there is no basis for arguing that Congress has made the activity a crime, it is plain that Congress has specifically refused to grant the authority the Government seeks from this Court.”); *Id.* at 752 (Burger, C.J., dissenting) (“I should add that I

*Near v. Minnesota* was cited in the per curiam opinion and relied on in five of the separately filed opinions.<sup>136</sup> In *Near*, the Court struck down an injunction entered pursuant to a Minnesota statute making it a nuisance to participate “in the business of regularly and customarily producing, publishing . . . a malicious, scandalous and defamatory newspaper, magazine or other periodical.”<sup>137</sup> A bare majority of the Supreme Court ruled that the statute was unconstitutional.<sup>138</sup> While acknowledging that subsequent punishment of the speech through criminal or civil law channels may have been appropriate,<sup>139</sup> the Court nonetheless found that the purpose of the statute was “not punishment, in the ordinary sense, but suppression of the offending newspaper.”<sup>140</sup> However, the Court in *Near* specifically noted that not all prior restraints were unconstitutional.<sup>141</sup> Truly, the Court set forth the framework for the national security exception to the prior restraint doctrine, citing the abiding principle set forth by Justice Holmes in *Schenck v. United States*: “[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured.”<sup>142</sup> As stated by the Court in dicta, “[n]o 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.”<sup>143</sup> This statement would become the analytical foundation for Brennan’s concurrence in the Pentagon Papers, the most theoretically developed iteration of the national security exception contained in that case.<sup>144</sup>

The fractured nature of the Court’s ruling in the Pentagon Papers case precludes a clear identification of a single analytical framework for applying the national security exception. However, an admittedly rough synthesis of the principles contained therein permits the extraction of a

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am in general agreement with much of what Mr. Justice WHITE has expressed with respect to penal sanctions.”); *Id.* at 759 (Blackmun, J., dissenting) (accord).

136. *N.Y. Times v. United States*, 403 U.S. 714, 714 (1971) (citing *Near v. Minnesota*, 283 U.S. 697 (1931)). See also *id.* at 723–24 (Douglas, J., concurring); *id.* at 726 (Brennan, J. concurring); *id.* at 748 (Burger, J., dissenting); *id.* at 753 (Harlan, J., dissenting); *id.* at 761 (Blackmun, J., dissenting).

137. *Near*, 283 U.S. at 702 (quoting Act of Apr. 20, 1925, 1925 Minn. Law 285, 358 (codified at MINN. STAT. § 10123–1 (1927))) (providing that the state could prosecute such cases and seek to enjoin future publications).

138. The Court concluded that the law was “unconstitutional, as applied to publications charging neglect of duty and corruption” by law enforcement officers.” *Id.*

139. *Id.* at 715 (“For whatever wrong the appellant has committed or may commit, by his publications, the State appropriately affords both public and private redress by its libel laws.”).

140. *Id.* at 711. The Court specifically noted that the statute did not “aim[] at the redress of individual or private wrongs” but at “distribution of scandalous matter as detrimental to public morals and to the general welfare.” *Id.* at 708 (citations omitted).

141. *Id.* at 716 (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

142. *Id.*

143. *Id.*

144. *N.Y. Times Co. v. United States*, 403 U.S. 714, 726 (1971) (Brennan, J., concurring) (citing *Near*, 283 U.S. at 716).

standard of judicial review for a government invocation of the national security exception that is akin to super strict scrutiny on steroids. Firstly, any prior restraint would trigger the rigorous strict scrutiny standard requiring the government to demonstrate that its “regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”<sup>145</sup> Secondly, the government must demonstrate that the compelling interest to be served is the prevention of “direct, immediate, and irreparable damage” to national security.<sup>146</sup> The government must make a showing of imminent actual harm to national security that rises substantially above a showing of “surmise or conjecture that untoward consequences may result.”<sup>147</sup> The potential harm alleged must be “an event kindred to imperiling the safety of a transport already at sea.”<sup>148</sup> Needless to say, the threatened harm must outweigh the well-recognized benefits of disclosure to an exponential degree. A showing by the publisher that the material has been improperly classified should weigh heavily in favor of disclosure.<sup>149</sup> However, the government’s national security interest is proportionality more compelling during times of war or active military hostilities.<sup>150</sup> Finally, the government’s effort to invoke the national security exception against a publisher should be exercised pursuant to a legislative grant of authority.<sup>151</sup> Given the heavy presumption against the constitutionality of prior restraints, this framework is instructive because a majority of the Court in the Pentagon Papers case would presumably have considered it a sufficiently heavy burden for the government to carry.

*United States v. Progressive, Inc.* presents the only exemplar of a federal court upholding a prior restraint on the press under an application of the national security exception.<sup>152</sup> The standard employed by the Western District of Wisconsin is highly analogous to the framework set forth above.<sup>153</sup> In *Progressive*, the government sought an injunction under the Atomic Energy Act<sup>154</sup> in order to prevent *Progressive* magazine from

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145. *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).

146. *N.Y. Times Co.*, 403 U.S. at 730 (1971) (Stewart, J., concurring). Justice Brennan articulated a substantially analogous standard of inevitable, direct, and imminent harm. *Id.* at 726–27 (Brennan, J., concurring). Stewart’s postulation is arguably more useful given the substantial body of law expounding upon the concept of irreparable harm in the context of injunctive relief.

147. *Id.* at 725–26 (Brennan, J., concurring).

148. *Id.* at 726–27 (Brennan, J., concurring).

149. *See Bellia*, *supra* note 9, at 1523 (querying whether the Espionage Act should be amended to permit a defendant to raise improper classification as an affirmative defense).

150. *N.Y. Times Co.*, 403 U.S. at 726 (Brennan, J., concurring) (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)). Even Justice Douglas acknowledged that the national security exception may be applicable during times of congressionally declared war. *Id.* at 722 (Douglas, J., concurring). *See also* *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

151. *Id.* at 730 (Stewart, J., concurring); *Id.* at 740 (White, J., concurring); *Id.* at 745 (Marshall, J., concurring).

152. 467 F. Supp. 990 (W.D. Wis. 1979).

153. *Id.*

154. 42 U.S.C. § 2011 et. seq. (2003).

publishing an article entitled “The H Bomb Secret: How We Got It, Why We’re Telling It.”<sup>155</sup> The government disputed Progressive’s claim that the article merely compiled information already available in the public domain and countered that even if the information was publicly accessible, publication of the article could “help enemies who otherwise would not put all the pieces together.”<sup>156</sup> The Wisconsin federal court held that “publication of the technical information on the hydrogen bomb contained in the article is analogous to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint.”<sup>157</sup> The ruling was primarily hinged on the existence of an applicable statute. Section 2274 of The Atomic Energy Act prohibited the transmission of any data regarding the design of atomic weapons “with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation.”<sup>158</sup> It was on this basis the court distinguished the Pentagon Papers case. The ruling came during a time of heightened cold war hostilities. The government subsequently moved to dismiss the case upon realizing copies of the article had already been distributed extensively, rendering the injunction futile.<sup>159</sup>

Only three reported federal cases have addressed government efforts to enforce post-publication punishments for the dissemination of national security information.<sup>160</sup> The only Supreme Court case, *Haig v. Agee*, held that revocation of an ex-Central Intelligence Agency (CIA) employee’s passport for disseminating classified information, with “the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel,” did not violate the First Amendment.<sup>161</sup> The former operative’s disclosure’s compromised the identities of hundreds of CIA personnel and, as the record demonstrated, led to the murder of at least five individuals including three CIA operatives.<sup>162</sup>

The second case, *United States v. Morison*, was a Fourth Circuit opinion upholding the conviction of a former United States Navy analyst for violating subsections of the Espionage Act, 18 U.S.C. § 7939(d) and (e), by giving national security information to a British defense magazine.<sup>163</sup> The most recent case, *United States v. Rosen*, was an attempt by the George W. Bush administration to prosecute two former members of the American Israel Public Affairs Committee under the Espionage Act for improperly

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155. *United States v. Progressive, Inc.*, 467 F. Supp. 990, 990 (W.D. Wis. 1979).

156. *Id.* at 993.

157. *Id.* at 996.

158. *Id.* at 994.

159. See L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. COLO. L. REV. 55, 69–70 (1990).

160. See Derigan Silver, *Power National Security and Transparency Judicial Decision Making and Social Architecture in the Federal Courts*, 15 COMM. L. & POL’Y 129, 154–155 (2010).

161. 453 U.S. 280 (1981).

162. *Id.* at 283–84 n.3, 285 n.7.

163. 844 F.2d 1057 (4th Cir. 1988).

providing sensitive information they had acquired by speaking with American policy makers to journalists and Israeli diplomats.<sup>164</sup> However, the government abandoned the case.<sup>165</sup>

In total, Federal courts have heard eleven cases dealing directly with prior restraints and national security information.<sup>166</sup> The national security prior restraint opinions employ three different approaches to discussing the cases.<sup>167</sup> “First, some identified the key legal issue as dealing with the First Amendment or national security without analyzing the strength of the other interest.”<sup>168</sup> The second manner of analysis “focused on the need to balance freedom of expression with national security. Finally, a number of cases framed the cases as primarily dealing with separation of powers issues.”<sup>169</sup> The majority of the opinions relied upon numerous factors to support their conclusions.<sup>170</sup> “Douglas’ opinion in the Pentagon Papers case relied upon the most, discussing six different factors—statutory textual analysis, legislative intent, precedent, constitutional text, framers’ intent and democratic theory.”<sup>171</sup> It is unclear which of the prevailing three approaches the courts would employ in a case involving WikiLeaks. It is clear, however, that the decision could have paramount effects upon the ultimate outcome.

## V. THE NATIONAL SECURITY EXCEPTION AND WIKILEAKS

### A. Application

“[I]f the recent lessons of history mean anything, it is that the First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security.”<sup>172</sup> While it is

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164. 445 F. Supp. 2d 602 (E.D. Va. 2006).

165. The government filed a motion to dismiss the charges on May 1, 2009, citing concerns over disclosure of classified material, harm to national security, and the likelihood of defeat. *See Silver, supra* note 160, at 155 n.175 (citing Motion to Dismiss Superseding Indictment, *U.S. v. Rosen*, (No. 1:05CR225) (May 1, 2009), available at <http://www.fas.org/sgp/jud/aipac/dismiss.pdf>).

166. *See Silver, supra* note 160, at 147–150 (citing *Snepp v. United States*, 444 U.S. 507 (1980); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971); *Stillman v. CIA*, 517 F. Supp. 2d 32 (D.D.C. 2007); *Nat’l Fed’n of Fed. Emps. v. United States*, 695 F. Supp. 1196 (D.D.C. 1988); *McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983); *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362 (4th Cir. 1975); *United States v. Marchetti*, 446 F.2d 1309 (4th Cir. 1972); *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007); *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005); *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004); *United States v. Progressive Magazine*, 467 F. Supp. 990 (W.D. Wis. 1979)).

167. *Silver, supra* note 160, at 149.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Greer v. Spock*, 424 U.S. 828, 852 (1976) (Brennan, J. dissenting) (arguing that the majority opinion rejected a challenge to regulations at Fort Dix Military Reservation that barred political activities on the base).



difficult to disagree with such profound words spoken by the late, great Justice Brennan, government officials and many journalists are asserting that WikiLeaks has brought the First Amendment to a boiling point at which the glorious tides of free speech must begin to evaporate in the interest of national security. Supporters of WikiLeaks, on the other hand, have argued that enjoining the release of confidential information by WikiLeaks would constitute an unconstitutional prior restraint on free speech that could have a “chilling effect” on other press organizations.<sup>173</sup> At this time it is doubtful the threat posed by WikiLeaks rises to the level of danger precedent suggests would support an invocation of the national security exception against a publisher: revealing troop movements or locations,<sup>174</sup> imperiling the safety of a transport already at sea,<sup>175</sup> or giving United States’ enemies technical information on how to construct a hydrogen bomb.<sup>176</sup> However, imagine the following scenario. The nation is engaged in hostilities that are on the brink of evolving into thermonuclear confrontation. A high-ranking intelligence officer in the enemy nation who possesses information that would end the war has been identified. However, WikiLeaks has obtained classified documents that expose her identity and the nature of her cooperation and is on the verge of releasing them to the world. Clearly, the First Amendment would allow for the prevention of such an action or for its punishment should it occur.

Since a prior restraint is, by its nature, a content-based restriction on speech prior to publication that must pass the exacting strict scrutiny test, the first question to be determined is whether an injunction or statute aimed at WikiLeaks’ releases of classified government documents would amount to a content-based or content-neutral restriction.<sup>177</sup> The content-neutrality principle can be seen as an outgrowth of the core First Amendment prohibition against viewpoint discrimination, which generally prohibits the government from choosing the subjects that are appropriate for public discussion.<sup>178</sup> Since the Pentagon Papers opinion contained no discussion regarding the content-neutrality of the speech in question, and virtually no analysis addressing the reason the particular injunctions amounted to a prior restraint, application of the case to the WikiLeaks content-neutrality

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173. Alex Altman, *A Disquieting Victory for Wikileaks*, TIME, Mar. 03, 2008, <http://www.time.com/time/nation/article/0,8599,1718903,00.html>.

174. *United States v. Progressive, Inc.*, 467 F. Supp. 990, 996 (W.D. Wis. 1979).

175. *N.Y. Times Co. v. United States*, 403 U.S. 714, 726–27 (1971) (Brennan, J., concurring).

176. *Progressive, Inc.*, 467 F. Supp. at 996.

177. Only content-based injunctions are subject to prior restraint analysis. See *DVD Copy Control Ass’n, Inc. v. Bunner*, 75 P.3d 1, 17 (Cal. 2003) (noting that a “prior restraint is a content-based restriction on speech prior to its occurrence”); *Fed. Election Comm’n v. Christian Coal.*, 52 F. Supp. 2d 45, 53 n.5 (D.D.C. 1999) (“Under the rhetoric of modern constitutional adjudication, establishing the level of judicial ‘scrutiny’ is an essential first step.”).

178. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 59 (1982) (Brennan, J., dissenting) (citations omitted).

question is somewhat enigmatic.<sup>179</sup> Nonetheless, a government restriction on WikiLeaks' releases of classified documents would evidently take the form of a content-based restriction.<sup>180</sup> In *Haig v. Agee*, the Supreme Court held that the revocation of an ex-CIA agent's passport for violating the Espionage Act by disseminating classified information about the CIA was a restriction based on the content of speech to the extent it punished him for revealing "intelligence operations and names of intelligence personnel."<sup>181</sup> A government response to the WikiLeaks scenario would likely seek to prohibit the publication of information highly analogous to that at issue in *Agee*.<sup>182</sup> Notably, *Agee* also demonstrates the application of a national security exception to traditional First Amendment norms when necessary to prevent obstruction of intelligence or military engagements.<sup>183</sup>

A finding that a government restriction applicable to WikiLeaks is content-based would trigger the rigorous standard set forth *supra*, at section V., C. To be clear, the applicable standard is one of the highest legal burdens in existence in the United States.<sup>184</sup> Courts have seldom treated

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179. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

180. An argument can be made that a restriction on WikiLeaks that is worded as prohibition on publishing illegally obtained classified information is content-neutral and therefore, not a prior restraint. See *Bartnicki v. Vopper*, 532 U.S. 514 (2001). Even if a government injunction against WikiLeaks is not found to constitute a prior restraint, the substantially high clear and present danger principle is likely to apply. In its current formulation of this principle, the Supreme Court held that "advocacy of the use of force or of law violation" is protected unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Though it could be argued the actions of WikiLeaks and Assange are likely to incite lawless action towards U.S. troops and cooperating civilians, the intent requirement would be nearly impossible to demonstrate. Furthermore, the speech in question here is clearly political speech, the type of speech which garners the highest level of constitutional protection. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (describing advocacy of a politically controversial viewpoint as "the essence of First Amendment expression"). However, the rationale contained in *Schneck v. United States*, may cause the Supreme Court to give the government "national security" deference on the intent requirement. 249 U.S. 47 (1919). The intermediate scrutiny standard for content-neutral restrictions will not be further explored because this article will demonstrate that under the correct circumstances the government can prohibit the envisaged dangers to national security an organization like WikiLeaks poses under the strict scrutiny standard.

181. 453 U.S. 280, 308 (1981).

182. Such a ban would presumably take the form of a content-based restriction prohibiting a type of expression and not the means by which it is expressed. See *Stone*, *supra* note 75 at, 199–200 ("By their very nature, however, content-neutral restrictions limit the availability of only particular means of communication. They thus leave speakers to shift to other means of expression.").

183. *Id.* at 308–309 ("Agee's disclosures, among other things, have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel. They are clearly not protected by the Constitution. The mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law.").

184. Some scholars have argued that the prior restraint standard applicable in national security cases has been relaxed since the Pentagon Papers case. This position may find support in *United States v. Marchetti* a Fourth Circuit ruling for which the Supreme Court refused to grant cert. 466 F.2d 1309 (4th Cir. 1972), cert. denied, 409 U.S. 1063 (1972). The federal government sought to enjoin a former employee of the CIA from publishing a book detailing his career's work.

content-based restrictions on journalism with any sympathy.<sup>185</sup> Considering that no federal court has ever found that a publisher can be held culpable for disseminating confidential information,<sup>186</sup> the burden for enforcing a prior restraint in the WikiLeaks scenario can conservatively be estimated to be as high as the processing speed of an NSA data mining computer. First the government will have to show that regulation serves a compelling government interest in national security. State department and Pentagon officials can give speeches about the dangers posed by WikiLeaks until they turn blue as a hyperlink. However, if the government does not demonstrate a bona fide threat of the gravest nature, the application of the national security exception to the WikiLeaks phenomenon will suffer total system failure. In the Pentagon Papers case, the government asserted a danger to national security that fell woefully short of even a paltry causation analysis.<sup>187</sup> Initially the government refused to introduce any evidence of potential harm, instead contending that it was within the executive branch's constitutional discretion to determine when national security interests warranted suppression.<sup>188</sup> Although it eventually identified specific national security concerns, the government's evidence never supported a finding that publication would cause the "direct, immediate, and irreparable damage" required to justify issuance of an injunction.<sup>189</sup>

In the Wikileaks scenario, the State Department has contended that the information contained in the disclosures "place at risk the lives of countless innocent individuals," "on-going military operations," and "on-going cooperation between countries."<sup>190</sup> Most content-based injunctions invariably raise concerns regarding dubious motives and the WikiLeaks

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*Id.* The Fourth Circuit upheld the injunction under the reasoning that a prior restraint, in the interest of national security, will be justified if the "disclosure may reasonably be thought to be inconsistent with the national interest." *Id.* at 1315. The ruling resulted in the first instance of a judicially sanctioned prior restraint on political speech in the history of this country. MORTON H. HALPERIN, AND DANIEL HOFF, *TOP SECRET NATIONAL SECURITY AND THE RIGHT TO KNOW* 131 (1977). Given the state of existing Supreme Court precedent it is unlikely the court would embrace the permissive standard contained in *Marchetti*.

185. In *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court unanimously struck down a state law mandating that newspapers criticizing political candidates publish their responses. 418 U.S. 241 (1974). The state contended that the law promoted journalistic responsibility. *Id.* at 256. The Court found that freedom, but not responsibility, is mandated by the First Amendment and ruled that the government could not force newspapers to publish the responses of political candidates against their wishes. *Id.*

186. Bant, *supra* note 85, at 1030–32.

187. Justice Stewart, joined by Justice White, argued that the government failed to demonstrate that publication would "surely result in direct, immediate, and irreparable damage" *N.Y. Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring).

188. John Cary Sims, *Triangulating the Boundaries of Pentagon Papers*, 2 WM. & MARY BILL RTS. J. 341, 375 (1993).

189. *N.Y. Times Co.*, 403 U.S. at 730 (Stewart, J., concurring). *See also id.* at 726–27 (Brennan, J., concurring).

190. Mathew Lee, *US: WikiLeaks Release Endangers 'Countless' Lives*, WASH. POST, Nov. 28, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/28/AR2010112800551.html>.

scenario is no different. A July 2010 Pentagon review of the massive flood of secret documents made public by WikiLeaks found no evidence that the disclosures harmed United States national security or endangered American troops in the field.<sup>191</sup> A strict causation requirement is necessary to provide sufficient protection against suppression based upon improper motive such as concealing government misconduct. In the Pentagon Papers case at least two justices appeared skeptical that the true government motive was not avoiding imminent danger to the nation but rather avoiding embarrassment and keeping citizens uninformed about unsettling truths regarding the Vietnam War.<sup>192</sup> Similarly, government contentions regarding WikiLeaks invoke concerns that the true motive is avoiding diplomatic embarrassment, which is unlikely to amount to a compelling governmental interest sufficient to survive strict scrutiny. However, in Pentagon Papers, Justice Stewart, citing *United States v. Curtiss-Wright Export Corp.*, alluded to the importance of avoiding serious embarrassment “in the maintenance of our international relations.”<sup>193</sup> A good faith argument can be made that preventing the release of the diplomatic cables is necessary to maintain friendly foreign relations with critical allies in regions characterized by growing anti-American sentiment. The releasing of classified diplomatic documents inhibits diplomacy by undermining traditional international diplomatic norms such as diplomatic confidentiality. Once diplomacy fails nations are more likely to turn to more hostile means of pursuing their interests such as espionage or armed aggression. However, the odds that such a remote danger can satisfy the imminence requirement of the national security exception is hardly one that would encourage a gambling man to wage his micro-chips.

WikiLeaks document dumps are so massive that it is very difficult to

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191. Ellen Nakashima, *Pentagon: Undisclosed Wikileaks Documents ‘Potentially More Explosive’*, WASH. POST., Aug. 11, 2010, [http://voices.washingtonpost.com/checkpoint-washington/2010/08/pentagon\\_undisclosed\\_wikileaks.html](http://voices.washingtonpost.com/checkpoint-washington/2010/08/pentagon_undisclosed_wikileaks.html). Concern of illegitimate motive for Government suppression has also been expressed in regard to the release of the diplomatic cables on November 28, 2010. Shane & Lehren, *supra* note 35.

192. See *N.Y. Times Co.*, 403 U.S. at 723–24 (Douglas, J., concurring with Black, J., joining).

193. *Id.* at 730 n.3 (Stewart, J., concurring) (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)). The Court’s decision upholding an Executive embargo on arms shipments in *United States v. Curtiss-Wright Export Corp.* is seen by many scholars as embodying the most expansive formulation of Executive authority to administer foreign relations. See Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1309 (1988). A more restrictive framework for evaluating Executive power in the field of foreign relations is set forth in Justice Jackson’s seminal concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring). According to this framework presidential powers are at their apex when administered pursuant to congressional authorization and at their “lowest ebb” when administered contrary to congressional will. *Id.* But there is a “zone of twilight” in cases of congressional silence or concurrent presidential and congressional authority where the test of presidential “power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.” *Id.* at 637.

identify which documents are harmful in a real way beyond being the source of embarrassment for the United States government. Given the lack of any real editorial review process, it is a foregone conclusion that WikiLeaks itself does not know which documents truly endanger lives.<sup>194</sup> There remains substantial uncertainty regarding the degree to which our enemies can use the documents in a meaningful way, the nature in which the information can be used against us, and the overall effect on national security.<sup>195</sup> Nonetheless, reports of retaliation against cooperating informants by the Taliban subsequent to the release of the Afghan War Diaries lend credence to government assertions that WikiLeaks' actions to date have actually endangered national security.<sup>196</sup> In any event, it is not difficult to imagine that WikiLeaks' future actions could cause an unmistakable national security threat to materialize.<sup>197</sup>

Assuming the compelling interest in national security prong of the analysis can be met,<sup>198</sup> in order to survive strict scrutiny, government regulation must be narrowly tailored and promulgated by the least restrictive means available.<sup>199</sup> As demonstrated in the Pentagon Papers case, First Amendment dictates will not support a broad, suppressive injunction based upon a speculative and remote harm.<sup>200</sup> Nor will First Amendment dictates support an injunction against WikiLeaks that is over-

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194. If WikiLeaks were to return to the practice of using major newspapers to redact sensitive information, the First Amendment protection would presumably rise and the potential harm to national security would be greatly diminished. Nancy A. Youssef, *No Evidence that WikiLeaks Releases Have Hurt Anyone*, MIAMI HERALD, Nov. 28, 2010, <http://www.miamiherald.com/2010/11/28/v-fullstory/1947638/no-evidence-that-wikileaks-releases.html>.

195. According to Professor Sunstein, "three uncertainties" suggest that the necessary link between publication of confidential information and the feared harm will be difficult to draw: (1) uncertainty regarding whether information is received in a meaningful way, (2) uncertainty regarding the use to which it will be put, and (3) uncertainty as to the effect such information will have if it is put to the feared use. See Cass Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 906 (1986).

196. Moreau & Yousafzai, *supra* note 40.

197. *United States v. Progressive*, 467 F. Supp. 990 (W.D. Wis. 1979).

198. *N.Y. Times v. United States*, 403 U.S. 713, 732 (1971) (White, J., concurring); *id.* at 745-46 (Marshall, J., concurring). Because the nation has been actively engaged in hostilities with Afghanistan since the September 11, 2001, attacks, this article assumes the wartime factor is met and that the War on Terror language is merely a guise under which the war has been justified. Article I, Section 8 of the Congressional declarations of war have become nonexistent in modern times and the lack thereof has not prevented the Court from affording the government national security deference in the past. ELDER WITT, CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 186 (2d ed. 1990). However, government restriction of fundamental rights justified by undefined, unending wars should be viewed with particular skepticism. Even the September 11th Commission's report cautions that "the notion of fighting an enemy called 'terrorism' is too diffuse and vague to be effective." NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 363 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>.

199. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 563-65 (1976).

200. See, e.g., Fiss, *supra* note 99, at 8; see also Doug Rendleman, *Irreparability Irreparably Damaged*, 90 MICH L. REV. 1642, 1665 (1992).

inclusive and suppressive of multitudes of documents that cannot arguably cause any imminent threat to national security.<sup>201</sup> However, WikiLeaks' lack of an editorial review process designed to ensure journalistic responsibility may justify a somewhat broader injunction than that which would be ordinarily contemplated under the national security exception.<sup>202</sup> There is no editor exercising First Amendment-protected editorial decisions. The narrowly tailored requirement would at least require government restrictions to be limited to enjoining the publication of documents in a discrete categories such as the publication of documents that would endanger the lives of United States troops or human intelligence assets in hostile zones.<sup>203</sup> A restraint that merely forbade the press from releasing any classified documents, even those they had no wrongdoing in obtaining, would likely be unconstitutional under *Florida Star*.<sup>204</sup> Similarly, merely forbidding the publication of material that endangers national security would be unconstitutionally vague and overbroad.<sup>205</sup>

Strict scrutiny requires government regulations *serve* a compelling interest. This part of the analysis requires a satisfactory nexus between the government action and the ends that it seeks to achieve.<sup>206</sup> The government restriction must serve its intended purpose.<sup>207</sup> It is presently unclear the extent to which a civil injunction against WikiLeaks would actually serve any government interest since it is apparent that WikiLeaks may merely circumvent the injunction by using its mirror websites.<sup>208</sup> In 2010, Assange posted a heavily encrypted file called "insurance" to the website stating if

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201. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121–22 (1991) (finding over-breadth and over-inclusiveness fatal to New York's Son of Sam law).

202. *See, e.g., Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976).

203. Assuming a restriction is shown to be constitutionally valid, at most "the Court might fashion an injunction requiring the limited redaction of identifying information on the leaked documents." *See Bank Julius Baer & Co. Ltd v. Wikileaks*, 535 F.Supp.2d 980, 985 (2008).

204. 491 U.S. 524, 535 n.8 (1989) (holding that a Florida statute which provided penalties for media outlets that publicized the name of alleged rape victims was unconstitutional).

205. *See Simon & Schuster, Inc.*, 502 U.S. at 121–22 (finding over-breadth and over-inclusiveness fatal to New York's Son of Sam law).

206. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 789-90 (2d ed. 1988) (describing the requirement as an "especially close nexus between ends and means").

207. *Neb. Press Ass'n*, 427 U.S. at 569 (1976).

208. *See Bank Julius Baer & Co. Ltd v. Wikileaks*, 535 F. Supp. 2d 980, 983 (2008). In 2008 Wikileaks and its domain registrar, Dynadot were sued by Bank Julius Baer & Co. Ltd for posting records regarding the anonymization of trust arrangements in the Cayman islands. *See* Edward Taylor, *Julius Baer Says Unit's Client Data Were Stolen*, WALL STREET J., June 16, 2006, <http://online.wsj.com/article/SB111887029173960737.html>. Following a stipulation between Julius Baer and Dynadot, the district court initially issued a permanent injunction requiring that Dynadot, immediately disable the WikiLeaks.org domain name and account and remove all DNS hosting records. *Id.* at 983. Two weeks later the district court dissolved the injunction acknowledging the Plaintiffs had failed to make a showing that an injunction would serve its intended purpose because, since the issuance of the injunction, the records in question had been transmitted over the Internet via mirror websites located in different countries worldwide. *Id.* at 985.

anything happens to him a password will be released allowing the public to access what could ultimately be the most massive dissemination of classified documents yet.<sup>209</sup> However, upon making the burdensome showing that an injunction would prevent WikiLeaks or a similar organization from disseminating classified information which would cause “an event kindred to imperiling the safety of a transport already at sea,”<sup>210</sup> the First Amendment would permit a prior restraint or a criminal prosecution<sup>211</sup> of the publisher under the national security exception. However, the final piece of the framework extracted from the Pentagon Papers case requires a valid legislative grant of authority in order for a national security prior restraint or post-publication prosecution to survive strict scrutiny.

### B. Proposed WikiLaw

In the wake of the WikiLeaks scenario, an amendment to the Espionage Act would be wisely contemplated.<sup>212</sup> The Pentagon Papers case chiefly addressed the limits on injunctive relief in a situation where Congress did not specifically grant Executive authority to enjoin disclosure. The case did not rule out the possibility of injunctive relief or criminal prosecution against the newspapers in the presence of a legislative grant of

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209. Schmitt, *supra* note 39. Furthermore, even if a prior restraint was successful in preventing WikiLeaks from bringing about imminent, irreparable harm to national security, in this new age of global access to digital media it is quite possible that a similar website could pop up with access to the disputed material. See Lori A. Morea, *The Future of Music in a Digital Age: The Ongoing Conflict Between Copyright Law and Peer-to-Peer Technology*, 28 CAMPBELL L. REV. 195, 198 (2006) (discussing how copyright infringement through various other peer-to-peer networks continued to grow and to hurt the music business even after a landmark Ninth Circuit ruling found Napster liable for contributory and vicarious copyright infringement) (citing *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001)). In order to obtain injunctive relief the government must demonstrate that the classified material is destined for secrecy, not publicity. See *N.Y. Times v. United States*, 403 U.S. 713, 723 n.3 (1971) (Douglas, J., concurring) (noting the futility of injunctive relief when numerous sets of the disputed material had already been distributed and were “destined for publicity, not secrecy”).

210. *Id.* at 726–27 (Brennan, J., concurring).

211. As discussed *supra*, at section IV., C., at least five of the Justices in the Pentagon Papers case suggested that Congress has the power to punish the publication of material harmful to national security. Indeed, Justice White’s opinion, joined by Justice Stewart expressed the traditional view that Congress has greater power to punish publication than it does to enjoin it. See *id.* at 737 (White, J., concurring with Stewart, J., joining) (“I would have no difficulty in sustaining convictions under [relevant sections of the Espionage Act] on facts that would not justify the intervention of equity and the imposition of a prior restraint.”). In *Bartnicki v. Vopper*, the court indicated the First Amendment principles governing prior restraints and post-publication criminal sanctions are “parallel.” 532 U.S. 514, 535 (2001). Thus, doctrine supports the proposition that Congress enjoys at least equal power to punish those who intentionally publish classified material harmful to national security as it does to enjoin the parallel disclosures beforehand.

212. The Espionage Act has not been substantially amended since 1950, long before many concerns specific to the digital age of media arose. See Subversive Activities Control Act § 18, Pub. L. No. 113-31, 64 Stat. 987, 1003-04 (1950) (codified as amended at 18 U.S.C. § 793 (2006)).

authority. In fact, several of the Justices suggested that the constitutionality of an invocation of the national security exception would depend heavily on the existence of a valid legislative enactment. The existence of an applicable enactment proved dispositive in the *Progressive* case.<sup>213</sup> Supreme Court precedent, including the Pentagon Paper's case, demonstrates that Executive powers are at their apex when administered pursuant to Congressional authorization<sup>214</sup> and suggests "courts should read foreign affairs statutes with a presumption that they permit executive conduct."<sup>215</sup>

The Espionage Act applies to a vast amount of classified information, the release of which cannot even arguably endanger national security interests. The government "has never prosecuted a media outlet under the Act for disseminating government secrets—despite innumerable news stories that have revealed classified information."<sup>216</sup> Section 793(e) prohibits communicating national security 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" to one "not entitled to receive it."<sup>217</sup> This near universal scope of breadth, coupled with the presumption that section 793 does not apply to the press,<sup>218</sup> would likely be fatal to the application of the Espionage Act to an organization like WikiLeaks.

In 2010, a statutory amendment to the Espionage Act entitled the SHIELD Act (Securing Human Intelligence and Enforcing Lawful Dissemination) was proposed by Senators John Ensign (R-Nev.), Joe Lieberman (I-Conn.), and Scott Brown (R-Mass.).<sup>219</sup> The SHIELD Act would have made it a criminal act to publish "the name of a human

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213. *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).

214. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

215. See Koh, *supra* note 193, 1309 (1988) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)). Post-9/11 Supreme Court jurisprudence has arguably seen a reinvigoration of the framework set forth by Justice Jackson in *Youngstown*, pursuant to which congressional authorization would be essential to the invocation of the national security exception in the First Amendment context. See Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U. L. Rev. 1917, 1920 (2012) ("The post-9/11 decisions, following *Youngstown*, have focused less on the issue of deference as such and more on the shared responsibility of the political branches to create legislative schemes regarding national security policy.")

216. Bant, *supra* note 85, at 1032.

217. 18 U.S.C. § 793 (2010)(d)–(e).

218. Bant, *supra* note 85, at 1032; see also *N.Y. Times v. United States*, 403 U.S. 713, 721 (1971) (Douglas, J., concurring) (professing that section 793 of the Espionage Act, prohibiting communication of national security information, does not apply to the press). Of course, this presumption is partly based on the fact that, unlike WikiLeaks, traditional press organizations have generally exercised scrupulous responsibility in protecting the identities of confidential informants.

219. Press Release, John Ensign, Ensign Legislation Will Limit Wikileaks Ability to Threaten Lives (Oct. 25, 2010) (*available at* [http://ensign.senate.gov/public/index.cfm?FuseAction=Media.PressReleases&ContentRecord\\_id=e4b76bd0-a063-4818-36ce-68c9e1ab247c](http://ensign.senate.gov/public/index.cfm?FuseAction=Media.PressReleases&ContentRecord_id=e4b76bd0-a063-4818-36ce-68c9e1ab247c)).



intelligence (HUMINT) informant to the United States military and intelligence community.”<sup>220</sup> The proposed amendment was narrowly tailored to address only the publication of the names of human assets. However, from a First Amendment standpoint, the proposed SHIELD Act was grossly overbroad in that it would punish conduct that did not arguably result in any *actual* harm to national security. This most troubling aspect of the proposed act was that it invoked notions of a worldwide secrecy statute that would criminalize any media organization, foreign or domestic, that printed the name of anyone who collaborated with United States intelligence agencies anywhere in the world. The underlying assumption seemed to implicate that everybody on earth should see United States military interventions as so unmistakably in the planet’s interest that any collaborator deserved anonymity regardless of the context. The proposition smacks of imperialism, especially considering the history of United States’ collaborations with regimes linked to human rights abuses and brutal military dictatorships.<sup>221</sup> The SHIELD Act would have punished journalists who made these connections regardless of whether their publications actually harmed national security.

An amendment to the Espionage Act is necessary but it must be carefully and narrowly drawn in consonance with the principles set forth in the Pentagon Papers case. The amendment should provide for the government to obtain an injunction to prevent the willful dissemination or publication of classified national defense information such as the details of military and foreign intelligence operations, the location of sensitive equipment or installations, weapons development details, or the identities or locations of military personnel or human intelligence assets in hostile zones when such disclosure would cause direct, immediate, and irreparable harm to the nation’s security. The amendment should also provide criminal penalties for publishers who willfully disseminate such classified national defense information when such disclosure actually causes direct, immediate, and irreparable harm to the nation’s security and the publisher

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220. *Id.* See also H.R. 6506, 111th Cong. (2010).

221. JOSE LUIS MORIN, *LATINO/A RIGHTS AND JUSTICE IN THE UNITED STATES* 29–30, 74, 95 (2004) (during the Cold War The United States supported authoritarian governments in Argentina, Paraguay, and Brazil and outright dictators, like Somoza in Nicaragua, Trujillo in the Dominican Republic, Pinochet in Chile, and Stroessner in Paraguay, who practiced torture and “disappearance” of their enemies). See also Robert Fisk, *Too Hot for Democracy?*, INDEP., Oct. 14, 1994, at 21 (discussing how the United States funded the war waged by the Afghan resistance against the Soviet-backed Kabul regime in the 1980’s. The resistance groups included Islamic fundamentalist groups, like Gulbedin Hekmatyar’s Mujahideen and what would become Osama bin Laden’s Al Qaeda); see also CHOMSKY, *DETECTING DEMOCRACY*, 44, 51–56, 57, 199–201 (1992) (discussing U.S. cold war interventions in which brutal dictators were supported, human rights abuses were ignored, and regimes were “changed”); see also Jon H. Sylvester, *Sub-Saharan Africa: Economic Stagnation, Political Disintegration, and the Specter of Recolonization*, 27 *LOY. L.A. L. REV.* 1299, 1312–13 nn. 43–44 (1994) (noting how strategic considerations trumped concerns for human rights, as evidenced by United States support for Kenyan dictator Daniel Arap Moi during the 1980s and the repressive regime of Somalia’s Mohamed Siad Barre).

knew or recklessly disregarded the risk that such harm would result. Although, the “actual harm to national security” standard is exceptionally high, it is mandated by the First Amendment. The criminal provisions of the statute would serve a compelling interest in maintaining national security by: (1) deterring publishers from releasing such documents<sup>222</sup> and (2) encouraging diplomatic cooperation by sending a message to United States allies and human intelligence assets that we will not tolerate publishers who endanger their lives.<sup>223</sup>

In assessing the validity of a government attempt to enjoin disclosure pursuant to a future “WikiLaw,” a court should utilize the analytical framework set forth in section IV., C. of this article. Naturally, as in the Pentagon Papers case, the disputed classified material should be sealed and reviewed in-camera.<sup>224</sup> Portions of hearings and proceedings which reveal specific aspects of the classified material should similarly be conducted in sealed proceedings.<sup>225</sup> Similar to the Pentagon Papers case, the first stage of related litigation a district court is likely to face will likely involve a government request for a temporary restraining order. A temporary restraining order is an equitable remedy that has as its essential purpose the preservation of the status quo and the prevention of irreparable harm while the merits of the cause are further explored.<sup>226</sup> These orders are typically utilized to prevent the destruction of evidence or the removal of assets until legal rights may be adjudicated.<sup>227</sup> However, in the First Amendment context a temporary restraining order is a prior restraint. A district court must be mindful that, in this context, the status quo of publishers is to publish news that editors decide to publish.<sup>228</sup> “A restraining order disturbs the status quo and impinges on the exercise of editorial discretion.”<sup>229</sup>

Nonetheless, at this preliminary stage of litigation, given the need for expeditious resolution, it is appropriate for the district court to show some deference to Executive postulations regarding the likelihood and extent of

222. *N.Y. Times*, 403 U.S. at 740 (1971) (White, J., concurring) (acknowledging congressional reliance on “criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press”).

223. *Id.* at 728 (1971) (Stewart, J., concurring) (“Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept.”).

224. See Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1-16 (2006).

225. *Cf. Boumediene v. Bush*, 553 U.S. 723, 796 (U.S. 2008) (“We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible.”)

226. See, e.g., *Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1125 (2d Cir. 1989) (“The purpose of a temporary restraining order is to preserve an existing situation in status quo until the court has an opportunity to pass upon the merits of the demand for a preliminary injunction.”).

227. *Id.*

228. *In re Providence Journal Co.*, 820 F.2d 1342, 1352 (1st Cir. 1986), *modified* 820 F.2d 1354 (1st Cir. 1987), *cert. dismissed*, 485 U.S. 693 (1988).

229. *Id.*

the potential harm.<sup>230</sup> A temporary restraining order is appropriate when the government identifies specific classified materials and identifies a grave, irreparable harm to national security posed by their release. However, given the significance of the fundamental First Amendment interests at stake, ex parte temporary restraining orders should be virtually unobtainable and issued only upon a showing that it is impossible to notify the opposing parties and afford them an opportunity to participate before the grave harm occurs.<sup>231</sup> The publisher should be afforded the opportunity to appear and demonstrate that release of the disputed material does not pose the threat of irreparable harm alleged by the government. Furthermore, any temporary restraining order should be limited to the briefest period necessary to permit an adversarial hearing and sound judicial resolution on the merits.<sup>232</sup>

When feasible, and agreeable to the parties, the district court should favor the consolidation of a subsequent motion for preliminary injunction into a full hearing on the merits.<sup>233</sup> Generally, extended trial proceedings will be unnecessary for the court to determine whether the disputed material poses a direct, immediate, and irreparable threat to national security. Adjudicating the entire case on an expedited basis gives the defendant-publisher the opportunity for prompt resolution and thereby minimizes the potential infringement on First Amendment rights. Furthermore, prompt resolution reduces the period of uncertainty that can foster political dysfunction within the Executive. If the government carries its immense burden, the district court should craft an injunction accompanied by thorough findings of fact and conclusions of law mindful of the likelihood

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230. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 26 (2008) (showing national deference to the Navy in an action for preliminary injunction).

231. *See Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968). There is a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate. *Id.* at 180. *See also Doe v. Cahill*, 884 A.2d 451, 461 (Del. 2005) (noting the “disfavor” with which court’s receive ex parte requests when First Amendment interests are at stake).

232. *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1968). In no case may a temporary restraining order exceed the fourteen day time limit set forth in rule 65 of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 65(b)(2).

233. *See* FED. R. CIV. P. 65(a)(2). *See also* Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 534 (2003) (“[I]n most situations it would be more efficient to consolidate the trial on the merits with the motion for a preliminary injunction under Rule 65(a)(2).”). Generally, in order to obtain a preliminary injunction, the plaintiff must show a likelihood of success on the merits and likelihood of irreparable harm. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008). The overlaying of the two applicable standards results in a somewhat bizarre formulation pursuant to which the government must prove a *likelihood* that disclosure will “surely result in direct, immediate, and irreparable damage to our Nation or its people.” *Id.* at 730 (Stewart, J., concurring) (emphasis added). Suffice it to say, the government’s burden is slightly lower at the preliminary injunction stage.

of expedited appellate review.<sup>234</sup> Furthermore, the order should make clear the specific classified materials subject to the injunction so the defendant may proceed to publish other materials.<sup>235</sup> In administering these proceedings the district court should remain mindful of the basic principle that any relief, including provisional relief, should ensure that those against whom relief is sought “should receive fair and precisely drawn notice of what the injunction actually prohibits.”<sup>236</sup>

## VI. CONCLUSION

The actions of WikiLeaks and the evolution of digital media cannot justify a wholesale departure from our enduring and established constitutional commitment to freedom of speech—a bedrock principle upon which our nation was founded. However, a narrowly tailored amendment to the Espionage Act would allow for a legitimate restriction on an organization like WikiLeaks while abiding to the First Amendment standards mandated by the Supreme Court. Absent an amendment to the Espionage Act, under prevailing First Amendment jurisprudence, the application of a prior restraint against an organization like Wikileaks is in a word—leaky. Even in the presence of a narrowly tailored amendment to the Espionage Act, the First Amendment does not allow the overwhelming majority of WikiLeaks releases to be prevented or punished.

Clearly improved technological infrastructure and institutional frameworks to prevent the unauthorized attainment of classified information are needed. Perhaps stiffer penalties for government employees who leak classified material to media organizations are in order—if they can be identified.<sup>237</sup> Improvements to the classification system, as well as legislation to protect whistle blowers who go up the chain of command within their institution will also minimize the occurrence of leaks.<sup>238</sup> Most whistle blowing is a conscientious objection to questionable policies.<sup>239</sup>

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234. *Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 435–36 (1974)

235. *Id.* at 444.

236. *Id.*

237. *See Branzburg v. Hayes*, 408 U.S. 665 (1972) (holding that requiring journalists to appear and testify before state or federal grand juries does not abridge the freedom of speech and press guaranteed by the First Amendment).

238. Richard Lardner, *In WikiLeaks Wake, Whistle-blower Bill Set to Pass*, WASH. POST, Dec. 1, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/01/AR2010120100693.html>.

239. Michael W. Savage, *Army Analyst Linked to WikiLeaks Hailed as Antiwar Hero*, WASH. POST, Aug. 14, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/13/AR2010081305820.html>. Chat logs released by an online confidant suggest that intelligence analyst Bradley Manning was disturbed by U.S. foreign policy. *Id.* In the logs, Manning said he had seen “incredible things, awful things” in classified government files and that it’s “important that it gets out . . . I feel, for some bizarre reason.” *Id.* On February 28, 2013, Manning plead guilty to ten charges and gave a statement in which he explained his view “We were risking so much for people who seemed unwilling to cooperate with us. . . . I believed that if the general

Greater transparency forces the government to conduct better policies. Suffice it to say that even if Assange could successfully be imprisoned or enjoined from operating WikiLeaks, the world wide web would keep on turning—turning out all the classified information that anti-secrecy websites can get their cursors on.

Maybe that is not such a bad thing. Informing the public of what the government is doing and how it is being done is a cornerstone of any real democratic system and the right of the press to keep the public informed is one of the greatest checks on governmental power enshrined in the constitution.

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public, especially the American public, had access to the information . . . this could spark a domestic debate over the role of the military and our foreign policy in general.” Tate & Londoño, *supra* note 16.