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WikiLeaks: Balancing First Amendment Rights with National Security

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WIKILEAKS: BALANCING FIRST AMENDMENT RIGHTS WITH NATIONAL SECURITY

In July 2010, Private First Class Bradley Manning released thousands of classified documents with the help of WikiLeaks, a private website created to expose government and corporate corruption. During the months that followed, WikiLeaks disseminated several thousand additional classified documents, including the whereabouts of U.S. troops and diplomatic cables. Public concern grew over the rapid release of the documents into Internet space. Lawmakers and government officials questioned whether the release of such information would compromise national security and foreign relations and violate the Espionage Act of 1917. While not all of the information distributed by WikiLeaks violated the law, the vast majority of the documents should not have been released. If asked, the Supreme Court should hold that WikiLeaks did violate the Espionage Act, and should be held accountable. Furthermore, lawmakers should change the existing laws to conform to modern times by including sections regarding the dissemination of classified information over the Internet.

I. INTRODUCTION

With the click of a mouse, it is now possible to access anything—a video of a friend across the country, a favorite recipe, or a street view of a city thousands of miles away. The Internet has created a realm of opportunities and access to an abundance of information that was unimaginable only two decades ago. For the most part, this information is incredibly beneficial—in an instant, people can easily keep in touch with their friends or find the nearest Starbucks—but few people imagined that the same click of a mouse could also allow a foreign enemy to instantaneously access classified national security information.

On July 25, 2010, this scenario became a reality when Private First Class Bradley Manning released thousands of classified documents through WikiLeaks,[1] a website that encourages whistleblowers[2] to share documents

1. Elisabeth Bumiller, *Army Broadens Inquiry into Disclosure of Reports to WikiLeaks*, N.Y. TIMES, July 31, 2010, at A4; Christine Delargy, *Impact of Leaked WikiLeaks Docs Still Un-*

in order to expose government or corporate misconduct.[3] This incident immediately garnered national attention and reignited an ongoing debate regarding the tension between the First Amendment[4] and the Freedom of Information Act ("FOIA")[5] on the one hand, and the need for national security on the other.[6]

WikiLeaks, a website registered in Sweden and run by The Sunshine Press,[7] leaks mass amounts of information regarding places where governments, corporations, and institutions are under intense scrutiny by the global community.[8] Australian citizen Julian Assange founded the site in 2006 and is considered the website's public face.[9] While the site's primary objective is "exposing oppressive regimes in Asia, the former Soviet Bloc, Sub-Saharan Africa and the Middle East,"[10] it also encourages users from any region to provide documents for release.[11] The site asserts that such

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certain, CBS NEWS (July 26, 2010), http://www.cbsnews.com/8301-503544_162-20011720-503544.html.

2. A "whistleblower" is "one who reveals something covert or who informs against another." *Whistleblower Definition*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1348 (10th ed. 1999). In this Comment, the term whistleblower will refer to individuals who provide information about the government to WikiLeaks.

3. *See About: What Is WikiLeaks?* § 3.2, WIKILEAKS, http://www.wikileaks.ch/About.html (last visited July 31, 2011); Ashley Fantz, *WikiLeaks' Growing Impact*, CNN NEWS BLOG (Nov. 29, 2010, 1:35 PM), http://news.blogs.cnn.com/2010/11/29/what-is-wikileaks-2/. WikiLeaks' original website at www.wikileaks.org has been removed from the Internet; the website's information has been moved over to "mirror" websites, primarily to www.wikileaks.ch. While most of the WikiLeaks content remains the same, the website's original "About Us" and "Introduction to WikiLeaks" articles cease to exist as they did in July 2010.

4. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

5. Freedom of Information Act, 5 U.S.C. § 552 (2006) (requiring government agencies, in certain circumstances, to disclose information to the public).

6. *See generally* Kristen Wyatt, *Sotomayor to Denver Students: WikiLeaks Supreme Court Case Likely*, HUFFINGTON POST (Aug. 26, 2010), http://www.huffingtonpost.com/2010/08/26/sotomayor-to-denver-stude_n_696253.html; Gilead Light, *WikiLeaks: Lawbreaker? Website that Releases U.S. Government Secrets May Be Protected from Prosecution*, BALT. SUN, Sept. 2, 2010, at 17; Bumiller, *supra* note 1.

7. *About: What is WikiLeaks?*, *supra* note 3, § 1.5; *see also WikiLeaks and the Sunshine Press*, EDUCATIONAL CYBERPLAYGROUND (Mar. 27, 2010, 11:47 PM), http://blog.educyberpg.com/2010/03/28/Wiki+Leaks+And+The+Sunshine+Press.aspx ("Our publisher, The Sunshine Press, is an international non-profit organization funded by human rights campaigners, investigative journalists, technologists, lawyers and the general public.").

8. *About: What is WikiLeaks?*, *supra* note 3.

9. Fantz, *supra* note 3.

10. *See Unpluggable; How WikiLeaks Embarrassed and Enraged America, Gripped the Public and Rewrote the Rules of Diplomacy*, ECONOMIST, Dec. 4, 2010, at 33; *WikiLeaks*, RATIONALWIKI, http://rationalwiki.org/wiki/WikiLeaks (last modified Feb. 9, 2011) (originally available at http://WikiLeaks.org/wiki/WikiLeaks:About).

11. *About: What Is WikiLeaks?*, *supra* note 3, § 1.3.

exposure leads to "reduced corruption, better government[,] and stronger democracies."[12] Furthermore, WikiLeaks contends that by providing documents and information to the international community, it is furthering the principle "that it is not only the people of one country that [sic] keep their government honest, but also the people of other countries who are watching that government."[13]

Scrutiny both by a country's citizens and the international community is important, and at times necessary, to ensure a government is free of corruption; however, "[t]he unveiling of government secrets through the media channels has long been a controversial issue."[14] Now more than ever, websites such as WikiLeaks pose a significant threat to national security in the United States, predominantly because the general public can intentionally disseminate documents and information via the Internet within seconds. The First Amendment was established to ensure the freedom of the press and allow citizens to expose and criticize the government.[15] Later, Congress created the FOIA, grounded in the underlying principle that people have the right to obtain information from their government. Accordingly, the FOIA requires the U.S. government and its agencies to release documents and information to the public.[16] However, an appropriate balance must be struck, as it is equally important to withhold classified documents and information when disclosure could compromise national security.[17]

Such concern for national security has led commentators and government organizations alike to propose the imposition of a prior restraint on classified information distributed by sites such as WikiLeaks.[18] Jeh Charles Johnson, general counsel of the U.S. Department of Defense, wrote on behalf of the department, "[t]he department demands that nothing further be released by WikiLeaks, that all of the U.S. government classified docu-

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12. *WikiLeaks*, *supra* note 10.

13. *About WikiLeaks*, TACTICAL MEDIA FILES, http://www.tacticalmediafiles.net/article.jsp?objectnumber=47815 (last visited July 31, 2011).

14. Doug Meier, Note, *Changing with the Times: How the Government Must Adapt to Prevent the Publication of Its Secrets*, 28 REV. LITIG. 203, 205 (2008).

15. N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971).

16. Memorandum from Ramsey Clark, Att'y Gen.'s Memorandum on the Pub. Info. Section of the Admin. Procedure Act (June 1967) (on file with the U.S. Dep't of Justice), *available at* http://www.justice.gov/oip/67agmemo.htm ("This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits.").

17. *Id.* ("[T]he welfare of the Nation or the rights of individuals may require that some documents not be made available. As long as threats to peace exist, for example, there must be military secrets.").

18. Adam Entous, *Pentagon Rebuffs Negotiations with WikiLeaks*, WALL ST. J. WASH. WIRE BLOG (Aug. 18, 2010, 7:35 PM), http://blogs.wsj.com/washwire/2010/08/18/pentagon-rebuffs-wikileaks-request-for-help/.

ments that WikiLeaks has obtained be returned immediately, and that WikiLeaks remove and destroy all of these records from its databases."[19] The issue has not yet been brought before the U.S. Supreme Court; however, the Court has previously held that due to the longstanding essential role of free speech and press in the U.S. democracy, "'[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' . . . The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'"[20] With such a heavy burden weighing on the government, the military's request to stop the dissemination of its classified documents may not prevail. Conversely, the contents of the leaks juxtaposed with the medium by which the documents were and will continue to be disseminated—that is, the Internet—presents new concerns that may allow the government to justify a prior restraint.

The mass leak of military documents and diplomatic cables highlights the problems with the release of classified information over the Internet. First, the document leaks pose threats to national security.[21] While information regarding the general operations of American soldiers is important to facilitate public scrutiny and debate, tactical details chronicled in the Afghan War Diary 2004–2010 ("Afghan War Diary")[22] could provide enemies with too much information about soldiers, consequently endangering those soldiers' lives.[23] The leaked documents also included videos and other information detailing American war strategies in Afghanistan,[24] which, if received by foreign enemies, might be life-threatening and could significantly hinder international war efforts against the Taliban and other

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19. *Id.*

20. *N.Y. Times Co.*, 403 U.S. at 714 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) and Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

21. Geoff Morrell, *The Defense Department's Response*, N.Y. TIMES, Oct. 23, 2010, at A9 ("By disclosing such sensitive information, WikiLeaks continues to put at risk the lives of our troops, their coalition partners and those Iraqis and Afghans working with us."); *see* Tom Vanden Brook, *Pentagon Braces for WikiLeaks Disclosure on Iraq*, USA TODAY (Oct. 19, 2010), http://www.usatoday.com/news/military/2010-10-19-wikileaks19_ST_N.htm; *see also* Delargy, *supra* note 1.

22. *Afghan War Diary, 2004–2010*, WIKILEAKS, http://mirror.wikileaks.info/wiki/Afghan_War_Diary,_2004-2010/ (last visited July 31, 2011) (describing the Afghan War Diary as a detailed compilation of thousands of documents that provide a dismal picture of the War in Afghanistan. The documents were released by the WikiLeaks website on July 25, 2010, sparking a debate over their legality as free speech and press or, alternatively, as the illegal leaking of classified documents. The information in the documents includes names and location of soldiers, videos, and other details of the war.).

23. *Gates: Posting Classified War Documents Was Morally Wrong*, CNN, Aug. 1, 2010, http://www.cnn.com/2010/POLITICS/08/01/gates.wikileaks/index.html.

24. *See Afghan War Diary, 2004–2010*, *supra* note 22.

terrorist organizations.[25] As a result, the United States may be forced to alter war strategies or retreat entirely from various locations identified in the disclosed documents.[26]

Second, the speed at which the Internet allows documents to be dispersed creates additional problems. Posting such documents on the Internet, as opposed to printing them in traditional media sources such as newspapers, allows the classified information to be viewed rapidly around the world without the intermediation of "judgment" by seasoned journalists and editors.[27] Once the documents are distributed to the virtual abyss, it is nearly impossible to track the identity of every Internet user who has accessed the information through the use of proxies and anonymizers.[28] This means that when a current document is leaked, enemies can use the information immediately.[29]

The Internet also makes it is impossible to retract the posted documents in the case of a mistake or problem.[30] WikiLeaks does not generally censor its document collection, as its goal is to have viewers analyze and determine the truth and significance of the documents for themselves.[31] Because all documents are released,[32] a document that might be borderline or outright top secret could be published on the website and spread around the world, and WikiLeaks would have no way of undoing the damage.

As the Internet continues to expand and more websites like WikiLeaks begin to disseminate classified information, the line becomes blurred as to what information is protected under the FOIA and First Amendment, and what information is illegal to distribute in the name of national security. The problem is exacerbated because WikiLeaks and its

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25. Morrell, *supra* note 21, at A9; *see also* Delargy, supra note 1.

26. Morrell, *supra* note 21, at A9 ("[WikiLeaks] does expose secret information that could make our troops even more vulnerable to attack in the future. . . . [W]e know our enemies will mine this information, looking for insights into how we operate, cultivate sources and react in combat situations, even the capability of our equipment. This security breach could very well get our troops and those they are fighting with killed.").

27. *See* Joby Warrick, *Exposing Secrets Through Secrecy; Cloaked in the Virtual World, Wikileaks Gives Whistleblowers A Powerful Platform*, WASH. POST, May 20, 2010, at A01 ("There's a difference between journalism and just putting out information.").

28. *See* Andrew Kantor, *It's A Big Internet, but You Can Still Be Tracked Down*, USA TODAY: CYBERSPEAK (June 17, 2004, 7:02 PM), http://www.usatoday.com/tech/columnist/andrewkantor/2004-06-17-kantor_x.htm.

29. Morrell, *supra* note 21, at A9.

30. *See, e.g.*, Maria Aspan, *How Sticky Is Membership on Facebook? Just Try Breaking Free*, N.Y. TIMES, Feb. 11, 2008, at C1 (discussing that even when a Facebook account is deleted, Facebook is able to keep all of the user's information and posts).

31. *About: What is WikiLeaks?*, *supra* note 3, § 1.2.

32. *Id.*

web servers may be outside the jurisdiction of American courts and executive agencies.[33]

This Comment examines the security risks created by the rapid dissemination of information over the Internet as well as the protection the First Amendment and the FOIA provide. Furthermore, this Comment will analyze the legal solutions to this vast and instantaneous international circulation. Part II provides a background and history of the publication of classified government documents through various media sources. Part III analyzes the problems with the application of the FOIA and the First Amendment in the Internet age. The arguments against limitations on the FOIA and First Amendment as a means of protecting civil liberties are then assessed and disputed. Part IV proposes several legal solutions the U.S. may implement to stop such distribution. Finally, Part V concludes with the next possible step toward stopping unlawful distribution of classified documents.

II. BACKGROUND

A. The Right to Information Granted by the First Amendment and Freedom of Information Act

Courts have sought to define the scope of the First Amendment since the Constitution's inception. There is no doubt the freedom was introduced as a means of abolishing the restrictions imposed by the English on freedoms of speech and the press.[34] In fact, "[t]he Government's power to censor the press was abolished so that the press would remain forever free to monitor the Government."[35] As such, the fundamental purpose of the First Amendment is to encourage "the free flow of ideas and opinions on matters of public interest and concern."[36] More specifically, "[i]n determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints on publication."[37] Honoring the framers' intent, the Supreme Court tends to uphold First Amendment rights by frequently tipping

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33. Ashlee Vance, *WikiLeaks Struggles to Keep a Step Ahead of Hackers*, N.Y. TIMES, Dec. 4, 2010, at A8 ("WikiLeaks was directing users to Web addresses in a number of European countries, including Switzerland, Germany, Finland and the Netherlands. This was WikiLeaks's effort to solve the problems caused when EveryDNS.net dropped it.").

34. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 922 (3d ed. 2006).

35. N.Y. Times Co. v. United States., 403 U.S. 713, 717 (1971) (Black, J., concurring).

36. Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 50 (1988).

37. Near v. Minnesota, 283 U.S. 697, 713 (1931).

the scales in favor of protecting speech and press.[38] However, these rights are not absolute, and the government's interest in protecting national security is also central to the survival of the United States, particularly in times of war.[39]

The creation of the Freedom of Information Act ("FOIA" or "Act") in 1966 established another avenue to protect the people's right to censure the government.[40] The primary purpose of the FOIA, which generally provides for disclosure of agency records and information, is to open the administrative processes to the scrutiny of the press and general public.[41] The FOIA was the first law to allow Americans access to the records of government agencies.[42] The Act is necessary, as the Supreme Court has held that there is no First Amendment right to access such information.[43] There have been several revisions since the Amendment's enactment, most conspicuously in 1974 after the Watergate scandal.[44] The scandal, which involved high-ranking government officials, including President Richard M. Nixon, led to a general distrust of the government and a demand by the people that the government adhere to the FOIA.[45] The Privacy Act Amendments[46] were added

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38. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 767 (1986).

39. United States v. Progressive, Inc., 467 F. Supp. 990, 992 (W.D. Wis. 1979) ("First Amendment rights are not absolute."); *see* United States v. Brown, 250 F.3d 907 (5th Cir. 2001); *see also* Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 412 (1950) (holding that when the freedom of speech or press poses a clear and present danger, the right is not absolute); *Near*, 283 U.S. at 716 (stating that the right of the press to be free from "previous restraint is not absolutely unlimited," as that right could be limited in times of war).

40. Freedom of Information Act, 5 U.S.C. § 552 (2006).

41. Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 17 (1974); *see also* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) ("The basic purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.").

42. *History of the Freedom of Information Act*, PBS, http://www.pbs.org/now/politics/foia.html (last visited July 31, 2010).

43. Houchins v. KQED, Inc., 438 U.S. 1, 14–15 (1978) ("'The Constitution itself is [not] a Freedom of Information Act . . . .' Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." (citation omitted)). *See generally* Branzburg v. Hayes, 408 U.S. 665, 684–85 (1972) ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.").

44. "The Watergate scandal" refers to the incident in which President Richard M. Nixon and several members of his staff were caught conducting illegal activities. They were exposed when members of the president's staff were caught breaking into the Democratic National Committee's headquarters. As a result, the American public demanded that government agencies produce documents in hopes that the increased scrutiny would deter future scandalous behavior. 1 WILLIAM B. DICKINSON, JR., WATERGATE: CHRONOLOGY OF A CRISIS (1973).

45. *History of the Freedom of Information Act*, *supra* note 42.

46. The "Privacy Act Amendments" refers to several amendments made to the Freedom of Information Act in 1974 as a way to enforce the Act. *See* Dan Lopez, et al., *Veto Battle 30*

to the FOIA as a means of ensuring that the government produces documents to avoid incidents such as Watergate.[47] Since then, many additional amendments have been included to guarantee the government agencies' proper disclosure of documents and information.[48]

In addition to amendments aiding the enforcement of the Act, there have also been several exemptions limiting the FOIA. Currently, there are nine exemptions in place to ensure that under certain circumstances the government agencies are not required to release information and documents.[49] Such exemptions include: (1) when an Executive Order has been issued to keep the information a secret "in the interest of national defense or foreign policy;"[50] (2) "[information] related solely to the internal personnel rules and practices of an agency;"[51] and (3) "geological and geophysical information and data, including maps."[52] These exemptions expressly call for the limited availability of information to be available to the public on various issues involving national security.[53] Information released on WikiLeaks in connection with U.S. Army operations, especially those like the Afghan War Diary 2004–2010 ("Afghan War Diary"), may fall under one of the latter two exemptions. Because such limitations are explicitly defined in the law and have been analyzed and expanded in judicial opinions, there appears to be room to place a lawful limit, or simply enforce the current limit, on WikiLeaks' continuous broad disclosure of potentially classified information.

B. Judicial and Legislative History of the Protection of National Security

Together, the First Amendment and the FOIA create a solid foundation for rights to access and publish a majority of the U.S. government's

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Years Ago Set Freedom of Information Norms, NATIONAL SECURITY ARCHIVE, Nov. 23, 2004, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142/index.htm#_ednref4.

47. *See FOIA Legislative History*, NATIONAL SECURITY ARCHIVE, http://www.gwu.edu/~nsarchiv/nsa/foialeghistory/legistfoia.htm (last visited July 31, 2011); *Amendments*, WHAT IS FOIA?, http://www.whatisfoia.org/amendments1.html (last visited July 31, 2011).

48. *See, e.g.*, Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996).

49. Freedom of Information Act, 5 U.S.C. § 552 (2006).

50. *Id.* § 552(b)(1)(A).

51. *Id.* § 552(b)(2).

52. *Id.* § 552(b)(9).

53. *Id.* § 552. *See generally* Adm'r, FAA v. Robertson, 422 U.S. 255, 262 (1975) (explaining that the Act gives no intimation that all information must be disclosed. The purpose, rather, is to permit access to certain official information which Congress thought had unnecessarily been withheld and to protect certain information where confidentiality is necessary to protect legitimate governmental functions that would be impaired by disclosure.).

information.[54] Still, the Supreme Court in *Schenck v. United States*[55] and *Near v. Minnesota*[56] recognized that government has an interest in national security[57] that necessarily places limits on the information accessible to the public. Congress codified this same interest by enacting the Espionage Act of 1917 ("Espionage Act")[58] and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, also known as the U.S.A. P.A.T.R.I.O.T. Act of 2001 ("Patriot Act").[59]

1. The *Near* Troop/Ship Exception.

Near v. Minnesota,[60] an early landmark case for the First Amendment freedom of the press, established, in dicta, one of the most important limitations to the First Amendment.[61] In that case, Near challenged a Minnesota statute which "provide[d] for the abatement, as a public nuisance, of a 'malicious, scandalous and defamatory newspaper, magazine or other periodical.'"[62] The Supreme Court held the Minnesota statute unconstitutional.[63] The Court explained, "In the first place, the main purpose of such constitutional provisions is 'to prevent all such [previous restraints] upon publica-

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54. *See generally* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."); Freedom of Information Act, 5 U.S.C. § 552 (2006).

55. Schenck v. United States, 249 U.S. 47, 52 (1919) ("When 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 so long as men fight and that no Court could regard them as protected by any constitutional right.").

56. *Near*, 283 U.S. at 716 (stating that the right of the press to be free from "previous restraint is not absolutely unlimited," as that right could be limited in times of war); *see infra* Part II.B.1.

57. *See Near*, 283 U.S. at 716 (stating that the right of the press to be free from "previous restraint is not absolutely unlimited," as that right could be limited in times of war); Freedom of Information Act, 5 U.S.C. § 552(b)(1)(A)–(B) (2009) ("This section does not apply to matters that are . . . (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.").

58. 18 U.S.C. § 793 (2006) (originally enacted as Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217).

59. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (U.S.A. P.A.T.R.I.O.T.) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

60. *Near*, 283 U.S. at 716 (finding a Minnesota law limiting freedom of press to be unconstitutional).

61. *Id.* at 716 (stating that the right of the press to be free from "previous restraint is not absolutely unlimited," as that right could be limited in times of war).

62. *Id.* at 701–02 (quoting MASON'S MINN. STAT. §§ 10123-1–10123-3 (1927)).

63. MASON'S MINN. STAT. §§ 10123-1–10123-3 (1927) (invalidated by *Near*, 283 U.S. at 722–23).

tions as had been practiced by other governments.'"[64] Thus, the Constitution necessarily requires a heavy burden to show justification for the restraint,[65] and any limitation on the freedom of the press must be subject to strict scrutiny.[66]

Despite ruling in favor of the press, the Court outlined an exception to the First Amendment's protection in its discussion.[67] In the midst of a lengthy argument against the Minnesota law, the Court provided that "the protection even as to previous restraint is not absolutely unlimited."[68] The Court expanded on this point by recognizing that the limitation shall only be recognized in "exceptional cases."[69] "Exceptional cases" specifically referred to the following:

> "When 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 so long as men fight and that no Court could regard them as protected by any constitutional right." No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.[70]

The Court thus clearly outlined an exception to the First Amendment during times of war[71] by distinguishing war as a specific time when the First Amendment and its protections *may* be limited.[72]

The Court's finding that specific details of military operations need not be published is relevant to the present case involving WikiLeaks.[73] This constraint classifies a type of information not always protected by the

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64. *Near*, 283 U.S. at 714 (quoting Patterson v. Colorado, 205 U.S. 454, 462 (1907) (emphasis omitted)).

65. United States v. Quattrone, 402 F.3d 304, 309–10 (2d Cir. 2005). *See generally Near*, 283 U.S. at 714–15 (stating that the chief purpose of freedom of the press is to prevent prior restraints on publication); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (stating that the imposition of a prior restraint carries a "heavy presumption against its constitutional validity").

66. *See generally Near*, 283 U.S. at 714–15 (stating that the chief purpose of freedom of the press is to prevent prior restraints on publication); *Bantam Books, Inc.*, 372 U.S. at 70.

67. *Near*, 283 U.S. at 716 (stating that the right of the press to be free from "previous restraint is not absolutely unlimited," as that right could be limited in times of war).

68. *Id.*

69. *Id.*

70. *Id.* (quoting *Schenck*, 249 U.S. at 52; citing ZECHARIAH CHAFEE, FREEDOM OF SPEECH 10 (1920)).

71. *Id.* (stating that the right of the press to be free from "previous restraint is not absolutely unlimited," as that right could be limited in times of war).

72. *Id.*

73. *Near*, 283 U.S. at 716 (stating that the right of the press to be free from "previous restraint is not absolutely unlimited," as that right could be limited in times of war).

First Amendment. Specifically, the exception sets apart military information as a specific category of speech or publication that is more likely to meet the strict scrutiny standard that governs content-based restrictions on the First Amendment.[74] This exception is evidence of the Court's firm interest in national security.

2. The Espionage Act.

The Espionage Act, passed into law shortly after the United States entered World War I,[75] made it a crime to disclose or distribute information that would hinder the operations or success of U.S. military forces or, alternatively, abet the success of U.S. enemies.[76] Though the Act had the support of President Woodrow Wilson, many people felt—even against the backdrop of fear of a worldwide German takeover—that such a law was unconstitutional.[77] The law sparked an ongoing congressional debate over the boundaries of First Amendment rights when juxtaposed with national security.[78] First, there were concerns that the statutory text was vague and could be construed too broadly, thereby granting too much power to both the Department of Justice and the War Department.[79] Proponents of civil liberties were also apprehensive of the Act's infringement on U.S. citizens' First Amendment rights.[80] Even though *Schenck v. United States* upheld the Act in 1919,[81] several courts have since raised concerns about its con-

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74. *Id.*

75. *See* 18 U.S.C. § 793 (originally enacted as Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217); Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 939–42 (1973) (providing an overview of the legislative history of the Espionage Act from its inception to the present law).

76. 18 U.S.C. § 793 (originally enacted as Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217).

77. Edgar & Schmidt, *supra* note 75, at 939–42 (providing an overview of the legislative history of the Espionage Act from its inception to the present law).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Schenck*, 249 U.S. at 52 (upholding the criminal conviction of a defendant who believed he was exercising his First Amendment rights when speaking out against the draft during World War I). A defendant's criminal conviction was deemed Constitutional under the new "clear and present danger" test; the Court held that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* The Court then elaborated, "When 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 so long as men fight and that no Court could regard them as protected by any constitutional right." *Id.* In amending the FOIA to include limitations on information pertaining to national security, the legislature followed the Court in *Schenck*, thereby affirming the necessity for such a limitation. *See* Freedom of Information Act, 5 U.S.C. § 552 (2006).

stitutionality. The law has never been explicitly overturned, but it was examined and questioned in *New York Times Co. v. United States*[82] and *United States v. Progressive, Inc.*[83]

Despite the contentious nature of the law, its "inartful language" was later transferred to the U.S. Code and remains current law.[84] The Espionage Act is now codified in 18 U.S.C. § 793(d) and (e) and was the source of 18 U.S.C. § 794(a).[85] Today, the law still calls for criminal punishment of individuals who violate the modern Espionage Act by a fine or up to ten years in prison.[86] Subsections (d) and (e) provide that a person who possesses information regarding U.S. national defense that could injure the United States or promote the advantage of a foreign nation[87] and who "willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it,"[88] shall be deemed in violation of the law.[89] The two subsections are distinct in that subsection (d) refers to individuals who possess the information lawfully,[90] while subsection (e) refers to individuals who possess the information unlawfully.[91]

The modern Espionage Act remains a viable means of prosecuting individuals for the transmission of unlawful information, and the Supreme Court has not made any recent rulings regarding its constitutionality or application.[92] Though the Court has not examined subsections (d) and (e) exclusively,[93] the Act in its entirety has withstood numerous challenges for vagueness and overbreadth.[94] This firm history indicates the law is "perti-

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82. *See N.Y. Times Co.*, 403 U.S. 713; *see infra* Part III.B.1.

83. *See Progressive, Inc.*, 467 F. Supp. at 1000 (issuing a temporary injunction against Progressive to halt the publication of an article revealing secret information about the atomic bomb).

84. Edgar & Schmidt, *supra* note 75, at 939.

85. *Id.* at 939–42 (providing an overview of the legislative history of the Espionage Act from its inception to the present law).

86. 18 U.S.C. § 793(a)–(f).

87. *Id.* § 793(d)–(e).

88. *Id.* § 793(d)–(e).

89. *Id.* § 793(d)–(e).

90. *Id.* § 793(d).

91. *Id.* § 793(e).

92. *See generally* United States v. Rosen, 445 F. Supp. 2d 602, 613 (E.D. Va. 2006) (finding that the litigation history of 18 U.S.C. § 793 is sparse).

93. *Id.* (stating that 18 U.S.C. § 793(d) and (e) have not yet been considered by the Supreme Court).

94. *See, e.g.*, Gorin v. United States, 312 U.S. 19 (1941); United States v. Morison, 844 F.2d 1057 (4th Cir. 1988). *See generally Rosen*, 445 F. Supp. 2d at 613 (stating that 18 U.S.C. § 793(d) and (e) have not yet been considered by the Supreme Court).

nent and instructive."[95]

The criminal sanctions within the Espionage Act are important in preventing U.S. citizens, such as Private First Class Bradley Manning,[96] and non-citizens, such as WikiLeaks founder Julian Assange, from distributing classified government information to various sources. However, these laws are in need of additional support to counter the rise of cyber-warfare.[97] The punishments asserted in the Espionage Act, such as incarceration and fines, may be unable stop the spread of this information by entities masked as websites. Part IV of this Comment proposes additional solutions for combating such cyber-warfare and document leaks.

III. ANALYSIS

*A. The "*Near *Troop/Ship Exception" Applies to WikiLeaks*

Although WikiLeaks illuminates several modern problems with disclosing classified government documents through a media avenue, the limits on freedom of speech to benefit national security have been litigated before, and therefore the problem is not entirely without precedent.[98] The dicta in the *Near* decision explicates that the First Amendment may be limited in times of war, particularly with regard to the publication of information concerning military operations.[99] Though the Court ultimately held in

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95. *See, e.g.*, *Gorin*, 312 U.S. 19; *Morison*, 844 F.2d 1057. *See generally Rosen*, 445 F. Supp. 2d at 613 (stating that 18 U.S.C. § 793(d) and (e) have not yet been considered by the Supreme Court).

96. *See supra* Part I.

97. "Cyber-terrorism" is "[a] criminal act perpetrated by the use of computers and telecommunications capabilities, resulting in violence, destruction and/or disruption of services to create fear by causing confusion and uncertainty within a given population, with the goal of influencing a government or population to conform to a particular political, social, or ideological agenda." *See Cyber-terrorism Definition*, U.S. ARMY TRAINING & DOCTRINE COMMAND, ASSISTANT DEPUTY CHIEF OF STAFF FOR INTELLIGENCE—THREATS, DCSINT HANDBOOK NO. 1.02—CYBER OPERATIONS AND CYBER TERRORISM GLOSSARY-1 (2005).

98. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919) (finding limitations on the freedom of the press justified when a clear and present danger exists); Abrams v. United States, 250 U.S. 616, 619 (1919) (holding leaflets intending to promote violence were not protected by the First Amendment); Near v. Minnesota, 283 U.S. 697, 716 (1931) (stating that the right of the press to be free from prior restraints is not absolutely unlimited, as that right could be limited in times of war, but ultimately holding the publication lawful under the First Amendment); Brandenburg v. Ohio, 395 U.S. 444, 447–50 (1969) (holding the government may not prohibit or punish inflammatory speech unless it is directed to incite violence or imminent lawless action); N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (holding the government did not meet its heavy burden to justify a prior restraint on the publication of classified documents from the Vietnam War).

99. *Near*, 283 U.S. at 716 (stating the right to prior restraints of the press is not absolutely unlimited, and should be recognized particularly during times of war); *see supra* Part II.A.

favor of the press, this limitation left room for national security as a compelling government interest.[100] There is no doubt the Court has been careful to implement the national security limitation on the First Amendment;[101] however, the *Near* exception should apply to WikiLeaks's dissemination of various documents from both the War in Afghanistan and the War in Iraq.[102]

First, it is presently a time of war.[103] While the current "War on Terror" has not been formally declared by Congress, it caused the deployment of troops to Afghanistan and Iraq.[104] Specifically, Congress authorized the War in Afghanistan despite a formal declaration of war.[105] In addition, the Iraq War was authorized by Congress and the United Nations Security Council,[106] and Congress passed legislation providing significant funds and troops to support the war effort.[107] Although Congress rarely formally declares war,[108] the president is nevertheless able to conduct a war without a formal declaration.[109] Many modern conflicts, which have posed significant threats to the United States' national security, have gone undeclared.[110] Additionally, the government rarely declares formal war, since "war" is not a public-relations friendly term.[111] For purposes of applying the *Near* exception, these "conflicts" are still extreme financial and military invest-

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100. *Near*, 283 U.S. at 716.

101. *Id.* ("[T]he limitation has been recognized only in exceptional cases . . . .").

102. *See supra* Part I.

103. President George W. Bush, Address to the Nation Regarding the September 11, 2001 Attacks (Sept. 20, 2001) (transcript available at http://articles.cnn.com/2001-09-20/us/gen.bush.transcript_1_joint-session-national-anthem-citizens?_s=PM:US) (coining the term "War on Terror").

104. *Id.* (coining the term "War on Terror").

105. Authorization For Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 498 (2002); *see* Lieut. General Greg Newbold, *Why Iraq Was a Mistake*, TIME, Apr. 17, 2006, at 42.

106. Authorization For Use of Military Force Against Iraq Resolution of 2002.

107. *Id.*

108. *See* John Dean, *FindLaw Forum: President Needs Congressional Approval to Declare War on Iraq*, CNN (Aug. 30, 2002,12:12 PM) http://archives.cnn.com/2002/LAW/08/columns/fl.dean.warpowers/ ("In the almost 30 years since Congress adopted the War Powers Resolution, presidents have regularly employed our Armed Forces in hostilities without consulting with Congress."); Major John L. Beacon, THE DECLARATION OF WAR: ONE FOR THE HISTORY BOOKS, (1991) (unpublished seminar paper, National Defense University) *available at* http://www.globalsecurity.org/military/library/report/1991/BJL.htm ("The declaration of war . . . is, in reality, a seldom used concept . . . .").

109. Editorial, *Who Can Declare War?*, N.Y. TIMES, Dec. 15, 1990, at 26.

110. *See id.*

111. *See* Norman Soloman, *War Needs Good Public Relations*, FAIR (Oct. 25, 2001), http://www.fair.org/media-beat/011025.html.

ments for the government, and it is thereby presumable that as investments, the United States' interest in national security extends to undeclared wars.

Assuming it is presently a time of war, the *Near* analysis should be applied. As the Court in *Near* held, times of war are distinct from times of peace.[112] The WikiLeaks controversy stemmed from a leak of documents regarding the War in Afghanistan.[113] By its nature, wartime means clear and present dangers are more likely to exist.[114] For example, the release of documents regarding an army base during a time of peace presents very little danger,[115] whereas during a time of war the same information may provide the enemy an opportunity to endanger the lives of soldiers on the base.[116] Moreover, in leaking extensive and detailed documents regarding the War in Afghanistan, WikiLeaks calls to mind the "hindrance" to the nation's effort to which the dicta in *Near*[117] alluded and which the *Schenck* decision described in detail.[118] The Court's unwavering distinction between times of war and times of peace is important in understanding how some of WikiLeaks' posts may, in fact, be illegal.[119]

Though to classify the present state of affairs at a time of war is important in analyzing the effect of the leaked information, the WikiLeaks disclosures are mainly unlawful in their content. According to *Near*, although the First Amendment might protect the disclosure of specific details of military positioning, strategies, and tactics, the government may justify a prior restraint on the publication of such information if it satisfies strict scrutiny.[120]

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112. *Near*, 283 U.S. at 716 ("When 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 so long as men fight and that no Court could regard them as protected by any constitutional right." (quoting *Schenck*, 249 U.S. at 52)).

113. *See supra* Part I.

114. *See supra* Part II.B.2, note 83. *See generally Schenck*, 249 U.S. 47.

115. *But see* Greer v. Spock, 424 U.S. 828, 836, 839 (1976) (holding constitutional tradition supports the notions that the military is free to be insulated from partisan political campaigns and that "[t]he guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" (quoting Adderley v. Fla., 385 U.S. 39, 48 (1966))).

116. *See Schenck*, 249 U.S. at 52 ("But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

117. *Near*, 283 U.S. at 697.

118. *Schenck*, 249 U.S. at 52.

119. *Near*, 283 U.S. at 716 ("When 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 so long as men fight and that no Court could regard them as protected by any constitutional right." (quoting *Schenck*, 249 U.S. at 52)).

120. *Id.* ("No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and lo-

All content-based restrictions of the First Amendment are subject to strict scrutiny,[121] and the WikiLeaks disclosures are no exception. This heightened scrutiny aims to preserve the original intent of the First Amendment,[122] protecting freedom of speech as a method to censure the government,[123] thereby fostering democracy.[124] To satisfy the strict scrutiny standard, the restriction or law must be: (1) justified by a compelling state interest; (2) narrowly tailored to achieve that interest; and (3) the least restrictive way of achieving that interest.[125] A restriction on the WikiLeaks disclosures would meet this high standard of review.

First and foremost, the government has a compelling interest to restrict classified military information during a time of war.[126] As mentioned previously, the Supreme Court has stated that the protection of troops and war strategies justifies a First Amendment limitation.[127] In the present case, the Department of Defense and the Pentagon, as well as other government agencies and officials, notified WikiLeaks and other media sources that the release of classified documents regarding the wars in Afghanistan and Iraq endangers troops and exposes war strategies to enemies of the United States.[128] The agencies and individuals have concurred that the release of U.S. soldiers' names and locations may put troops at further risk.[129] As the wars in Afghanistan and Iraq are ongoing, it is an inappropriate time to release information that may result in harm.

Conversely, there is general public concern that the current wars are

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cations of troops.").

121. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 680 (1994) (holding content-based restrictions on the First Amendment to be subject to strict scrutiny).

122. *See* Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (holding the First Amendment means that the government has no power to restrict expression because of subject matter or content); *Turner Broad. Sys., Inc.*, 512 U.S. at 680.

123. *See generally N.Y. Times Co.*, 403 U.S. at 716.

124. *See generally id.* at 717.

125. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).

126. *See Near*, 283 U.S. at 716 ("No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."); *Schenck*, 249 U.S. at 52 (approving limitations on the freedom of the press when a clear and present danger exists).

127. *See Near*, 283 U.S. at 716 ("No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."); *Schenck*, 249 U.S. at 52 (approving limitations on the freedom of the press when a clear and present danger exists).

128. Morrell, *supra* note 21, at A9 ("[W]e know our enemies will mine this information, looking for insights into how we operate, cultivate sources and react in combat situations, even the capability of our equipment. This security breach could very well get our troops and those they are fighting with killed.").

129. *Id.* ("By disclosing such sensitive information, WikiLeaks continues to put at risk the lives of our troops, their coalition partners and those Iraqis and Afghans working with us.").

unnecessary and resulted in the unwarranted loss of troops and taxpayer dollars.[130] Individuals and organizations that support the release of such information via WikiLeaks and other similar media contend that the public deserves to know what is happening in Iraq and Afghanistan.[131] There is no doubt the public deserves to know details of the war, and the Supreme Court has confirmed this notion.[132] At some point, however, the information being dispersed to the public must be limited. For instance, the public should not know the names and locations of troops, facts that were leaked in the Afghan War Diary 2004─2010 ("Afghan War Diary").[133] The details disclosed provided the public with little information on the general war efforts and costs, the primary concern of opponents,[134] but instead compromised soldiers' lives and the U.S. war efforts.[135] The government's desires to protect U.S. troops and to end the wars quickly are compelling government interests.[136] If and when a formal restriction is issued to stop WikiLeaks from disseminating classified U.S. military documents, the restriction must be narrowly tailored and must use the least restrictive means possible to maintain this compelling government interest.[137]

The Freedom of Information Act ("FOIA") requires the disclosure of all government documents,[138] including U.S. military documents.[139] However, the FOIA has a specific exception for information concerning an agency's operation and for Executive Orders regarding national security.[140]

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130. *See, e.g.*, R.M., *Eight Questions for Daniel Ellsberg*, THE ECONOMIST DEMOCRACY IN AMERICA BLOG (July 31, 2010, 6:34 PM), http://www.economist.com/blogs/democracyinamerica/2010/07/daniel_ellsberg_interview.

131. *See, e.g.*, *id.*

132. *N.Y. Times Co.*, 403 U.S. at 714 (holding that the government did not meet its burden to justify a prior restraint on publication of classified documents from the Vietnam War).

133. *Gates: Posting Classified War Documents Was Morally Wrong*, *supra* note 23.

134. *See generally*, R.M., *supra* note 130.

135. Morrell, *supra* note 21, at A9 ("[W]e know our enemies will mine this information, looking for insights into how we operate, cultivate sources and react in combat situations, even the capability of our equipment. This security breach could very well get our troops and those they are fighting with killed.").

136. *Id.* ("By disclosing such sensitive information, WikiLeaks continues to put at risk the lives of our troops, their coalition partners and those Iraqis and Afghans working with us.").

137. *Turner Broad. Sys., Inc.*, 512 U.S. at 680 (holding that content-based restrictions on the First Amendment are subject to strict scrutiny); *see also Carolene Prods. Co.*, 304 U.S. at 152–53 n.4 (establishing the test for strict scrutiny).

138. Freedom of Information Act, 5 U.S.C. § 552 (2006).

139. *Id.* § 552(f)(1).

140. *Id.* § 552(b)(1)(A)–(B) ("This section does not apply to matters that are . . . specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order . . . .").

Thus, the *Near* exception[141] does not conflict with the FOIA's mandate to disclose government documents.[142] In releasing the documents provided by Private First Class Bradley Manning regarding the day-to-day account of the War created by military officials in the course of duty, WikiLeaks violated the *Near* Troop/Ship Exception.[143]

B. The Effect of WikiLeaks is More Detrimental than that of the Pentagon Papers

1. Background of the Pentagon Papers Case

Arguably the most famous contest between national security considerations and the First Amendment occurred in 1971 with the release of the Pentagon Papers,[144] the government's classified, extensive study regarding the Vietnam War. The *New York Times* and the *Washington Post* sought to publish the study but the government attempted to have them enjoined from doing so.[145] The Supreme Court overturned the injunction the District Court granted in the *New York Times* case,[146] and refused to reverse a different District Court's denial of an injunction in the *Washington Post* case.[147] The Supreme Court held that the government did not meet the heavy burden required for the imposition of such a restraint.[148] In stark contrast to its opinion in *Schenck*, in which the Court established that clear and present dangers justify a limitation on the freedom of speech and press,[149] the Court in *New York Times* upheld the principles of the First Amendment despite the ongoing state of the Vietnam War.[150]

Invoking the First Amendment in its broadest capacity, several justices looked to the Framers' intent to safeguard basic freedoms[151] as well as the necessity for transparency in a democracy.[152] Justice Black elaborated

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141. *See supra* Part II.B.1.

142. Freedom of Information Act, 5 U.S.C. § 552 (2006).

143. *See supra* Part II.B.1.

144. DEP'T OF DEFENSE, UNITED STATES-VIETNAM RELATIONS 1945–1967 (1971).

145. *N.Y. Times Co.*, 403 U.S. at 714.

146. United States v. N.Y. Times Co., 444 F.2d 544 (2d Cir. 1971), *vacated*, *N.Y. Times Co.*, 403 U.S. 713.

147. United States v. Wash. Post Co., 446 F.2d 1327 (C.A.D.C. 1971), *vacated*, *N.Y. Times Co.*, 403 U.S. 713.

148. *N.Y. Times Co.*, 403 U.S. at 714.

149. *Schenck*, 249 U.S. at 52 (approving limitations on the freedom of the press when a clear and present danger exists).

150. *N.Y. Times Co.*, 403 U.S. at 714 (holding the government did not meet its heavy burden to justify a prior restraint on the publication of classified documents from the Vietnam War).

151. *Id.* at 715.

152. *Id.* at 724.

on the superiority of the First Amendment, generally finding the content of the documents to be immaterial.[153] Justice Douglas, concurring with Justice Black, asserted that the First Amendment, specifically the liberty of the press, served as an important check on the government.[154] Justices Stewart and White argued to the contrary that in areas of national defense, the President is given great deference to protect information as needed;[155] however, both Justices agreed:

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.[156]

Though the minority cited national security concerns, the Court largely upheld the notion that an informed citizenry is an essential check on executive power in foreign affairs.[157]

2. Distinctions Between the Current Wars and the Vietnam War

The Court in *New York Times Co. v. United States* accurately interpreted the First Amendment's guarantees for the freedom of the press, even during a time of a war.[158] Though there are many parallels, the documents posted on WikiLeaks are distinct from the Pentagon Papers for many reasons.[159] First, the nature of the War in Afghanistan and the greater "War on Terror"[160] is different from the Vietnam War. The U.S. entered into the

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153. *Id.* at 720 (Douglas, J., concurring) ("It should be noted at the outset that the First Amendment provides that 'Congress shall make no law abridging the freedom of speech, or of the press.' That leaves, in my view, no room for governmental restraint on the press." (citing U.S. CONST. amend. I)).

154. *Id.* at 720–24 (Black, J., concurring).

155. *Id.* at 727–40 (Stewart, J. & White, J., concurring).

156. *N.Y. Times Co.*, 403 U.S. at 728 (Stewart, J. & White, J., concurring).

157. *Id.*

158. *Id.* at 714 (holding that the government did not meet its heavy burden to justify a prior restraint on the publication of classified documents from the Vietnam War).

159. Paul Farhi & Ellen Nakashima, *The Pentagon Papers, Part 2? Parallels, and Differences, Exist*, WASH. POST, July 27, 2010, at C1.

160. Bush, *supra* note 103 (coining the term "War on Terror" after the September 11,

Vietnam War, despite a military policy to fight only defensive wars, as part of a greater containment policy and to prevent communism from spreading to South Vietnam.[161] The Vietnam War was mainly prompted by fear of the spread of communism.[162] The War in Afghanistan, in contrast, was a direct response to the attacks by al-Qaeda on September 11, 2001,[163] which occurred on U.S. soil and resulted in 2,996 casualties[164]—the majority of whom were civilians.[165] The subsequent invasion of Afghanistan was a means of stopping terrorist threats and attacks throughout the world following the September 11, 2001 attacks.[166] As evidenced by continuing attacks by groups such as al-Qaeda, the threats to the U.S. in the current "War on Terror" are legitimate, and there is not the same need to expose the details of the war.[167] During the Vietnam War, U.S. citizens felt left in the dark while the government acted in an improper manner by concealing vast amounts of information from the American public.[168] The Pentagon Pa-

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2001 attacks on the United States).

161. *See* Presidential News Conference of Dwight D. Eisenhower (Apr. 7, 1954) (transcript *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=10202#axzz1HFtG9GBT) (coining the "Domino Theory" that influenced U.S. military policy in Southeast Asia for the next decade). *See generally* President Harry S. Truman, Address Before a Joint Session of Congress Recommending Assistance to Greece and Turkey: The Truman Doctrine (Mar. 12, 1947) (articulating the containment policy, which required the United States to react to Soviet initiatives and gave the President greater military power in order to respond quickly to crises).

162. Denise M. Bostdorff & Steven R. Goldzwig, *Idealism and Pragmatism in American Foreign Policy Rhetoric: The Case of John F. Kennedy and Vietnam*, 24 PRES. STUD. Q. 515, 516 (1994) (describing President John F. Kennedy's policies with regard to Vietnam and communism).

163. On September 11, 2001, two U.S. commercial airplanes were hijacked by al-Qaeda terrorists and flown into the World Trade Center towers in New York City. A third plane was hijacked and flown into the Pentagon, and a fourth plane was hijacked and crashed in a Pennsylvania field. These attacks were the first on the U.S. mainland since the Civil War. The incident instilled fear in many Americans and initiated an international "War on Terror." *See generally September 11: Chronology of Terror*, CNN (Sept. 12, 2001), http://edition.cnn.com/2001/US/09/11/chronology.attack/.

164. Dale Challener Roe, *What is 2996?*, PROJECT 2,996, http://project2996.wordpress.com/what-is-2996/ (last visited Aug. 6, 2011) (describing Project 2996 as a tribute to the 2996 victims of the September 11, 2001 attacks).

165. *Accord* THE UNOFFICIAL HOMEPAGE OF FDNY, http://nyfd.com/9_11_wtc.html (last visited Aug. 6, 2010); *see We Remember* . . . , PROJECT 2,996, http://project2996.wordpress.com/we-remember (last visited Aug. 6, 2011) (listing each victim of the September 11, 2001 attacks).

166. President George W. Bush, Presidential Address to the Nation (Oct. 7, 2001), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011007-8.html.

167. *See* Homeland Security Advisory System, DEPT. OF HOMELAND SECURITY, http://www.dhs.gov/files/programs/Copy_of_press_release_0046.shtm (last visited Nov. 20, 2010) (relaying the U.S. government's current national threat level).

168. *See generally* Martin Arnold, *Pentagon Papers Charges Are Dismissed; Judge Byrne Frees Ellsberg and Russo, Assails "Improper Government Conduct"*, N.Y. TIMES, at A1 (May 12, 1973) (reporting on the judge's dismissal of the Pentagon Papers trial based on what he

pers[169] allowed the nation to see exactly what was happening in Vietnam; they "revealed a 'credibility gap' between the Johnson administration's public statements and its private actions."[170] Supporters argue that the recent WikiLeaks disclosures function as the Pentagon Papers did in the 1970s by exposing the U.S. government's deception.[171] As a result of modern technology, this is not the case.

Today, live broadcasts of American soldiers around the world, Facebook[172] updates, video chats with soldiers abroad, and other media sources are able to show U.S. civilians what is actually happening in the "War on Terror."[173] These new media sources affect a heightened public awareness about the war, particularly in comparison to the Cold War and Vietnam War eras.[174] Soldiers are now able to broadcast their experiences and frustrations from overseas without publishing thousands of documents.[175] Additionally, figures about the war, including the total number of deaths and the amount of money spent, are readily available on the Internet.[176] With such information readily accessible, the argument that the public is in the dark is less persuasive than in prior decades.

A further distinction between the "War on Terror" and the Vietnam War is if the U.S. government has been concealing current war information from the nation, the fact that the information was disseminated over the Internet may render the leaks far more detrimental than the publication of similar information by a newspaper.[177] Depending on who is running the website, online content such as WikiLeaks may be irreversible.[178] Even if a

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called "improper Government conduct shielded so long from public view . . . .").

169. H. COMM. ON ARMED SERVS., UNITED STATES-VIETNAM RELATIONS, 1945–1967: STUDY PREPARED BY THE DEPARTMENT OF DEFENSE (Comm. Print 1971).

170. Farhi & Nakashima, *supra* note 159, at C1.

171. *See id.*

172. FACEBOOK, http://www.facebook.com (last visited Aug. 6, 2011) (existing as a social utility to connect people with others who live, study, and work around them).

173. *See, e.g.*, rainsong14, *US Soldier Speaks Out Against The War in Iraq 1 of 3*, YOUTUBE (May 31, 2009), http://www.youtube.com/watch?v=TuCIiIig0Do; *see also Afghanistan: Key Facts and Figures*, BBC NEWS (July 5, 2010), http://news.bbc.co.uk/2/hi/uk_news/8143196.stm.

174. *See* Eric Blair, *WikiLeaks Being Used to Justify "Patriot Act" Legislation for Internet*, THE INTEL HUB, http://theintelhub.com/2010/12/07/breaking-wikileaks-being-used-to-justify-patriot-act-legislation-for-internet/ (last visited Feb. 28, 2011) (indicating that anything leaked by WikiLeaks was not new news to today's Internet savvy public).

175. *See, e.g.*, rainsong14, *supra* note 173.

176. *See, e.g.*, *Afghanistan: Key Facts and Figures*, *supra* note 173.

177. *See generally* Aspan, *supra* note 30 (discussing the permanence of information disseminated on the Internet via Facebook).

178. *See, e.g.*, *id.* (discussing that even when a Facebook account is deleted, Facebook is able to keep all of the user's information and posts).

website is removed, the information may have already been downloaded or remain on a corporate server or may have been moved to a mirror website, thus allowing the content to continue spreading.[179]

3. The Content of the Leaks and the Pentagon Papers

Even assuming the medium of current leaks over the Internet is not substantially different from the print medium of newspapers, the content of WikiLeaks is nonetheless vastly different from the material in the Pentagon Papers.[180] The Pentagon Papers "disclosed official secrets, such as the covert bombing of Laos and Cambodia, and outright lies, such as Lyndon Johnson's plans to widen the war in 1964 despite an explicit campaign pledge to the contrary."[181] Conversely, the WikiLeaks documents have not revealed the same kind of hidden agenda from either the Bush or Obama Administration.[182] It was clear that even though many people opposed President Bush's decision to invade Iraq and Afghanistan, his agenda was to end terrorism.[183] With this mission in mind, "the Afghan documents don't specifically contradict official statements and administration policies, as the Pentagon Papers did."[184]

Additionally, the leaks differ in that the Pentagon Papers painted a quite different picture from what news reports had been portraying;[185] conversely, the WikiLeaks documents "are a loosely related collection of material covering nearly six years (early 2004 through late 2009) that leaves out important context,"[186] thus adding very little to most Americans' notions of the war.[187] Since the documents include after-action summaries and details described in raw material without context,[188] the leaks actually deceive the American public rather than shed light on a controversial situation. An argument may be made that the recent release of diplomatic cables by

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179. *See generally id.* (discussing the permanence of information disseminated on the Internet via Facebook).

180. Farhi & Nakashima, *supra* note 159.

181. *Id.*

182. *Id.* ("The headlines from the publication of the Pentagon Papers were more consistent: The administration had deceived the public about the war.").

183. Bush, *supra* note 166.

184. *See* Farhi & Nakashima, *supra* note 159 ("The headlines from the publication of the Pentagon Papers were more consistent: The administration had deceived the public about the war.").

185. *Id.*

186. Farhi & Nakashima, *supra* note 159.

187. *See* Blair, *supra* note 174 (stating that the WikiLeaks content revealed "nothing new that wasn't already known or well suspected.").

188. Farhi & Nakashima, *supra* note 159.

WikiLeaks illuminated how certain diplomats felt about other countries, but these statements were not new information.[189] Since the start of the "War on Terror," many countries have declared public opposition to the U.S. stance, and releasing the cables may embarrass or isolate important allies, stirring further controversy with foreign nations.[190] Furthermore, the cables have exposed nations acting in contravention to their asserted positions on certain foreign policies, causing obvious tension between traditional allies.[191] Even though the cables do not present the direct threats that the information in the Afghan War Diary and Iraq leaks contained, the release of such information may be detrimental to U.S. foreign relations.[192] In the case of the Pentagon Papers, foreign relations were not at issue, and the goal was to expose U.S. deception rather than embarrass public officials. For these reasons, the Pentagon Papers and the WikiLeaks documents are fundamentally different.

4. Leakers Are Distinct from Classic Journalists

Journalists and "leakers" are also distinct from one another. A journalist takes time to research the facts of his or her article prior to publication.[193] Moreover, when publishing a controversial document in a newspaper, there is usually time for the government to stop the document's release, or at least halt its release temporarily as was true in the case of the Pentagon Papers.[194] The newspaper publication process also allows one or more editors to evaluate prospective articles and controversial publications.[195] Although the news media inherently supports First Amendment rights, the process is structured, deliberate and lawful.[196] The *New York*

189. *Id.*

190. Glenn Kessler, *U.S. Warns Allies About WikiLeaks*, WASH. POST, Nov. 26, 2010, at A02.

191. *Id.*

192. *Id.*

193. *See Code of Ethics*, SOC'Y OF PROF. JOURNALISTS, http://www.spj.org/pdf/ethicscode.pdf (last visited Aug. 6, 2011).

194. *Finding WikiLeaks or Journalists Liable Could Prove Difficult, WUSTL Law Professor Says*, WASH. UNIV. IN ST. LOUIS NEWSROOM (Dec. 9, 2009), http://news.wustl.edu/news/Pages/21621.aspx (reporting that the government could potentially impose liability on WikiLeaks or the *New York Times* for publishing the contents of the leaked documents).

195. Bob Wilson, *How Newspapers Work*, HOW STUFF WORKS, http://www.howstuffworks.com/newspaper.htm (last visited Aug. 6, 2011); *see also Piecing Together the Reports, and Deciding What to Publish*, N.Y. TIMES, July 25, 2010, at A8.

196. *See Piecing Together the Reports, and Deciding What to Publish*, *supra* note 195 (reporting that the *New York Times* "spent about a month mining the data for disclosures and patterns, verifying and cross-checking with other information sources, and preparing the articles that [were] published").

Times remained consistent in its goal not to harm national security interests when it decided not to publish certain documents.[197] Though it described the documents in some detail,[198] it did not disclose the names and locations of soldiers, which is a primary issue in the present case against WikiLeaks.[199] Perhaps this is an indication that such documents fall within the unlawful distribution of classified information and outside the protection of the First Amendment, as a reputable news source such as the *New York Times* would certainly want to publish notable documents about the war if they were truthful, honest, and controversial.

5. The WikiLeaks Documents Lack Proper Authenticity

As part of its goal of exposing various governments, WikiLeaks has amended its authentication process to allow the average person to legally post documents.[200] WikiLeaks originally stated it would not authenticate sources, as the "best way to truly determine if a story is authentic, is not just our expertise, but to provide the full source document to the broader community—and particularly the community of interest around the document."[201] However, now WikiLeaks asserts that the site uses a detailed procedure along with skilled journalists to authenticate documents before they are released.[202] The website currently states:

> We use traditional investigative journalism techniques as well as more modern [technology-based] methods. Typically we will do a forensic analysis of the document, determine the cost of forgery, means, motive, opportunity, the claims of the apparent authoring organization, [sic] and answer a set of other detailed questions about the document. We may also seek external verification of the document . . . .[203]

It is unclear which of the two processes is the website's true authentication policy; however, it is clear that the authentication process is conducted by WikiLeaks "journalists" and not by the agencies or corporations

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197. *Id.*

198. *Secret Dispatches from the War in Iraq*, N.Y. TIMES, http://www.nytimes.com/interactive/world/iraq-war-logs.html (last visited Aug. 6, 2011).

199. Vanden Brook, *supra* note 21.

200. *About: What is WikiLeaks?*, *supra* note 3, § 1.2.

201. *WikiLeaks: About (Translation)*, WIKILEAKS, http://www.wikileaks.ch/wiki/About_Wikileaks (last visited Aug. 6, 2011) (translating a previous "WikiLeaks: About" text).

202. *About: What is WikiLeaks?*, *supra* note 3, § 1.4.

203. *Id.*

by which they are created.

Additionally, documents disseminated by WikiLeaks are never censored or scrutinized before posting.[204] WikiLeaks' goal in posting all documents as an effort to encourage the public to analyze primary sources is very different from the *New York Times*' desire to publish an in-depth look at the Vietnam War via the Pentagon Papers. The publication of the Pentagon Papers was an effort to expose the war and was conducted in an objectively lawful manner as determined by the United States Supreme Court,[205] whereas the posting of the Afghan War Diary on WikiLeaks is likely an illegal posting of a mixture of lawful and unlawful documents.[206]

In failing to authenticate or censor the documents properly,[207] a naïve Internet user viewing the WikiLeaks documents may read false information about the war, assume it to be true, and begin to take action. The First Amendment was undoubtedly established to protect public criticism of the government and its actions;[208] however, speaking falsely has not been constitutionally tolerated, particularly when it may lead to a clear and present danger.[209] In this case, speaking out falsely against the war may upset military morale or lead to a general misunderstanding of the war. It could even lead the public to vote an alternative way on certain issues, such as federal spending, than it would otherwise be inclined to do if the true facts were illuminated. For all of these reasons, the WikiLeaks case should not be examined and analyzed in the same light as the Pentagon Papers, and a leak should be restricted from publication in part or in its entirety.

IV. POSSIBLE SOLUTIONS TO STOP VIOLATIONS BY WEBSITES SUCH AS WIKILEAKS

Assuming the government is able to obtain an injunction to stop the disclosure of military documents, there are several problems in enjoining a site such as WikiLeaks. Primarily, WikiLeaks is run by the Swedish-based company PRQ, whose central server is in Stockholm, Sweden.[210] Additionally, as a result of recent cyberattacks, the site is no longer registered

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204. *Id.* § 2.4.

205. *See generally N.Y. Times Co.*, 403 U.S. 713.

206. *See* Charlie Savage, *Building Case for Conspiracy by WikiLeaks*, N.Y. TIMES, Dec. 16, 2010, at A1.

207. *About: What is WikiLeaks?*, *supra* note 3.

208. *N.Y. Times Co.*, 403 U.S. at 717 (Black, J., concurring).

209. *Schenck*, 249 U.S. at 52. *See generally* U.S. CONST. amend. I.

210. David F. Gallagher, *Wikileaks Site Has a Friend in Sweden*, N.Y. TIMES BITS (Feb. 20, 2008, 10:21 AM), http://bits.blogs.nytimes.com/2008/02/20/wikileaks-site-has-a-friend-in-sweden/.

under the .org domain and now instead has several mirror sites that are run by other domains such as .ch.[211] Since the Swedish-based, Czech-domained website lies outside U.S. jurisdiction, WikiLeaks would have no incentive to follow an injunction even if one were issued.[212] Consequently, the U.S. Supreme Court has no way of enforcing an injunction against the website to stop the dissemination of classified war documents.[213] In order to stop such leaks, the government must turn to alternative solutions to enjoin the sites from mass distribution.

A. Legislative Solution: Revise the Espionage Act

A revision to the language of the Espionage Act of 1917 ("Espionage Act")[214] would be the most effective way to stop and/or punish leakers. While the Freedom of Information Act ("Act" or "FOIA") could be revised to place extra limitations on what information should be provided to the public, its revision would not likely affect the dissemination of information over websites such as WikiLeaks.[215] The Espionage Act is arguably the best way to prosecute leakers.[216] If Julian Assange is delivered to U.S. authorities, it is thought that he would also be prosecuted under the Espionage Act.[217] As discussed above, the Act holds distributors of information pertaining to national defense criminally liable for their actions.[218] While this provision would allow for the prosecution of those who supplied the information to WikiLeaks, "prosecutors . . . have never successfully prosecuted recipients of leaked information for passing it on to others—an activity that can fall under the First Amendment's strong protections of speech and press freedoms."[219] If a case cannot be made for Mr. Assange's aid in extracting the documents, it will be nearly impossible to prosecute him under the Act.[220] Therefore, the language

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211. Vance, *supra* note 33, at A8.

212. *See generally* Gallagher, *supra* note 210.

213. Rob Stengel, *The Government Can't and Shouldn't Stop WikiLeaks*, WASH. SQUARE NEWS (Nov. 28, 2010), http://nyunews.com/opinion/2010/11/28/29stengel/.

214. 18 U.S.C. § 793 (2010) (This section is based on Act June 15, 1917, ch. 30, Title I, BB1, 6, 40 Stat. 217, 219).

215. *See* WIKILEAKS, http://www.wikileaks.ch/ (last visited Aug. 6, 2011).

216. *See* Kevin Poulsen, *Lieberman Introduces Anti-WikiLeaks Legislation*, WIRED THREAT LEVEL (Dec. 2, 2010, 6:32 PM), http://www.wired.com/threatlevel/2010/12/shield/.

217. Ellen Nakashima & Jerry Markon, *WikiLeaks Founder Could Be Charged Under Espionage Act*, WASH. POST (Nov. 30, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112905973.html.

218. 18 U.S.C. § 793(f)–(h).

219. Savage, *supra* note 206.

220. *Id.*

must be changed to include distributors.

Senator Joseph Lieberman recently initiated a proposed change to the Espionage Act called the SHIELD Act (Securing Human Intelligence and Enforcing Lawful Dissemination Act).[221] The goal of the Act is to "make it a crime for any person knowingly and willfully to disseminate, 'in any manner prejudicial to the safety or interest of the United States,' any classified information 'concerning the human intelligence activities of the United States.'"[222] While this change is the most effective way to prosecute classified document distributors such as Julian Assange, it is likely unconstitutional under the First Amendment.[223] Banning the dissemination of any classified information would "risk too great a sacrifice of public deliberation."[224]

However, Senator Lieberman's proposed change to the Espionage Act, adding a clause indicating that such prosecution could only take place if there was a "clear and present danger," may avoid this risk.[225] This addition would use the Court's language to limit the application of the law to times of war.[226] A broader definition of "times of war," as discussed above, would allow for the prosecution of individuals such as Mr. Assange without compromising First Amendment protection.[227]

Perhaps another option is only to prosecute the disseminator if the source is not disclosed. This alternative would deter people from exposing classified information because it would eliminate the anonymity of WikiLeaks. Additionally, codified language that would allow for the prosecution of distributors of unauthentic or diplomatic opinions would allow non-fact based opinions, such as the ones in the recent diplomatic cable leaks, to be banned on their face.[228] These types of documents do not fall under information necessary to the public under the FOIA, and therefore are not necessary or relevant to one's ability to effectively censure the government.[229] These revisions would be an effective deterrent for third party distributors such as Mr. Assange, thus incentivizing individuals to seek government approval prior to disseminating classified information.[230] As-

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221. Poulsen, *supra* note 216.

222. Geoffrey R. Stone, *A Clear Danger to Free Speech*, N.Y. TIMES, Jan. 4, 2011, at A19.

223. *Id.*

224. *Id.*

225. *See id.*

226. *See id.*

227. *See generally id.*

228. *See generally* Stone, *supra* note 222.

229. *See* 5 U.S.C.S § 552(b) (2010); 37A AM. JUR 2D *Freedom of Information Acts* § 77 (2010).

230. *See* Stone, *supra* note 222, at A19.

suming this solution stops "leaks" from occurring in the first place, additional technical solutions, discussed below, would be necessary to remove the material.

B. Technical Solutions: Cyber-Warfare

An alternative to terminating WikiLeaks is through cyber-warfare.[231] Using advanced hacking technology, the government would terminate the WikiLeaks site making its contents inaccessible.[232] In fact, Marc Thiessen, a renowned author and a former member of White House Senior Staff,[233] recently confirmed, "[t]he United States has the cyber capabilities to prevent WikiLeaks from disseminating those materials."[234] Furthermore, "[t]he Pentagon probably has the ability to launch distributed denial-of-service attacks against WikiLeaks' public-facing servers."[235] Using this method, the government could stop future leaks by shutting down the website and removing any questionable content that currently exists within the domain name.[236] Cyber-warfare effectively addresses the immediacy required to stop the instantaneous mass dissemination of information.

While efficient, the cyber-warfare solution poses problems with public perception.[237] The government may move past this obstacle by hiring an unofficial third party individual to take down the website on its behalf,[238] but this solution would come at a price to that individual—most likely, a prison sentence. Hence, while many see cyber-warfare as an optimal solution, it cannot operate without extreme distaste by many citizens and public organizations that view it as unacceptable censorship.

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231. *See Cyber-terrorism Definition*, *supra* note 97.

232. Poulsen, *supra* note 216.

233. BIOGRAPHY OF MARC THIESSEN, http://www.marcthiessen.com/biography (last visited Aug. 6, 2011).

234. Marc A. Thiessen, Op-Ed, *Time for Obama to Shut Down WikiLeaks' Assange*, WASH. POST POSTPARTISAN (Aug. 13, 2010, 9:59 AM), http://voices.washingtonpost.com/postpartisan/2010/08/time_for_obama_to_shut_down_wi.html.

235. Poulsen, *supra* note 216.

236. *Id.* (opining that preventing service from "public-facing servers" would effectively shut down the WikiLeaks website).

237. David Kravets, *Judge Backtracks: WikiLeaks Resumes U.S. Operations*, WIRED: THREAT LEVEL (Feb. 29, 2008, 1:37 PM), http://www.wired.com/threatlevel/2008/02/post/ (discussing a U.S. district court judge's decision to reinstate WikiLeaks, after having taken it down, as a result of First Amendment concerns).

238. *See generally Michael Walzer Participates in Tikvah Center Conference on His Influential Book and Delivers Straus Institute Lecture (VIDEO)*, NYU SCHOOL OF LAW NEWS, http://www.law.nyu.edu/news/WALZER_CONFERENCE_LECTURE (last visited Aug. 6, 2011) ("[T]he argument that if you stick to the rules of engagement prescribed by international humanitarian law or the Geneva Conventions or just war theory, if you fight like the good guys are supposed to fight, you won't win . . . . That's the most worrying argument that was made.").

C. International Treaty

A diplomatic solution in the form of an international treaty, either on its own or concurrently with the prosecution of leakers under the Espionage Act, could stop the dissemination of classified government information from any country without permission. An international treaty may provide the collaborative effort necessary to prevent the leak of classified information by establishing an avenue to prosecute in international court leakers who operate out of other countries.[239] The treaty could be under the supervision of the Internet Governance Forum (IGF).[240] The IGF was mandated by the World Summit on the Information Society ("WSIS"),[241] and adopted formally by the United Nations ("UN") in 2006.[242] The IGF's purpose is to provide a forum for dialogue on Internet policy issues.[243] At the 2009 meeting in Sharm El Sheikh, Egypt, participants in the Security, Openness and Privacy session discussed the need for more policies on Internet security.[244] These specific policies have yet to be drafted or put in place by the IGF.[245] At the most recent IGF summit in Vilnius, Lithuania, the European Union proposed an international treaty that identifies "12 'principles of internet governance.'"[246] The proposed treaty encourages "cross-border cooperation between countries to identify and address security vulnerability and protect the network from possible cyber attacks or cyber terrorism."[247] While this particular proposal is the first step in establishing an international governance of the Internet, the treaty does little to stop sites such as WikiLeaks since its focus is primarily on stopping cyber-terrorists and hackers.[248] For the treaty to effectively halt WikiLeaks, the treaty must address websites that post classified information and use language resembling the Espionage Act.

In theory, an international treaty is a viable means of preventing the

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239. *See About the Internet Governance Forum*, THE INTERNET GOVERNANCE FORUM, http://www.intgovforum.org/cms/aboutigf (last visited Nov. 20, 2010).

240. *See* THE INTERNET GOVERNANCE FORUM, http://www.intgovforum.org/cms/ (last visited Nov. 20, 2010).

241. *About the Internet Governance Forum*, *supra* note 239.

242. *Id.*

243. *Id.*

244. *The IGF 2009 Meeting*, THE INTERNET GOVERNANCE FORUM, http://www.intgovforum.org/cms/2009-igf-sharm-el-sheikh (last visited Aug. 6, 2011).

245. Claudine Beaumont, *Global "Internet Treaty" Proposed*, TELEGRAPH (Sept. 20, 2010), http://www.telegraph.co.uk/technology/internet/8013233/Global-internet-treaty-proposed.html.

246. *Id.*; *see also About the Internet Governance Forum*, *supra* note 239.

247. Beaumont, *supra* note 245.

248. *Id.*

dissemination of classified information. Nevertheless, there are several problems with its implementation and ability for success. First, there is no guarantee, and it is unlikely, that all countries will sign on to such a treaty. Even the U.S. may be wary of an Internet treaty as it could be seen as a means of limiting the First Amendment.[249] However, assuming the U.S. did sign the treaty, it would not be useful without the support of all countries with Internet access signing the treaty, which is unlikely, and still there is no guarantee. Participation of all countries is essential; otherwise, the information may be disseminated over the Internet without consequence by a country not privy to the treaty.

Additionally, the process of drafting and implementing a treaty can be very lengthy. For instance, the IGF was founded in 2006 and yet there is only one proposed treaty regarding any type of Internet protection.[250] Moreover, the IGF also has many different issues it must focus on, and security will not likely be the first topic it addresses.[251] A treaty may be the best way to align international forces to solve the problem posed by WikiLeaks; however, its feasibility must be scrutinized carefully.

V. CONCLUSION

While a lawsuit enjoining the publication of classified documents in conjunction with an international treaty is an optimal solution to the problems WikiLeaks poses, these solutions lack the ultimate efficiency necessary for the Internet Age, particularly in light of the fact that mirror sites can be posted instantaneously.[252] In order to permanently halt WikiLeaks and similar websites from disclosing classified documents, a combination of all three methods should be applied.

Changes in U.S. laws and the creation of an international treaty are excellent long-term goals. First, the Espionage Act of 1917,[253] as expanded by a law such as the proposed SHIELD Act,[254] will more effectively enable the prosecution of distributors of WikiLeaks and the hosts of mirror sites. However, as mirror sites arise under new domain names,[255] the U.S. will

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249. *See, e.g.*, Kravets, *supra* note 237.

250. Beaumont, *supra* note 245. *See generally* THE INTERNET GOVERNANCE FORUM, *supra* note 240.

251. *See generally The IGF 2009 Meeting*, *supra* note 244.

252. *See, e.g.*, WIKILEAKS, *supra* note 215.

253. 18 U.S.C. § 793 (2010) (originally enacted as Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217).

254. Poulsen, *supra* note 216.

255. *See, e.g.*, WIKILEAKS, *supra* note 215. *See generally Mirrors*, WIKILEAKS, http://wikileaks.ch/Mirrors.html (last visited Aug. 6, 2011).

ultimately need to use cyber-warfare if classified information continues to spread faster than the registries can remove it. Finally, an international treaty would make it easier to prosecute individuals such as Julian Assange for violating various laws. By combining these methods, lawmakers would achieve a balance to preserve civil liberties by restraining public information only when justified while also protecting national security interests.

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