

SHOUTING FIRE IN A BURNING THEATER: DISTINGUISHING FOURTH ESTATE FROM FIFTH COLUMN IN THE AGE OF WIKILEAKS

Kicked up from the seabed, the tsunami amplified in size and slowed in speed as it moved into the shallows beside the Japanese coastline, and by the time it touched land it was a wall of water, black and smooth. It was as tall in places as a three-story building, moving at fifty miles per hour. It flicked fishing trawlers over seawalls, crunched them against bridges. It sent fleets of cars and trucks hurtling from parking lots, and turned homes into chips of wood and tile....¹

The revolutionary wave sweeping [the Arab world] shows that once the masses are mobilized, no force on earth can stop them If it can happen in Egypt, it can happen anywhere.²

From what we've read from overseas, if the Wikileaks release of classified documents could be recorded on an International Diplomatic Richter Scale, the measurement would be on par to a massive, catastrophic earthquake³

By all measures, 2011 has already proven be a year of seismic ruptures both natural and political. The tectonic earthquakes that devastated Japan and New Zealand symbolize like nothing else the violent shocks to established patterns of domestic governance and international relations humanity has witnessed in recent months. World attention has been focused first and foremost on North Africa and the Middle East, but the sheer magnitude of events in that region obscures

¹ Evan Osnos, *Aftershocks: A Nation Bears the Unbearable*, NEW YORKER, Mar. 28, 2011, at 72, available at http://www.newyorker.com/reporting/2011/03/28/110328fa_fact_osnos#ixzz1H7H7bA5K.

² Alan Woods, *Revolutionary Aftershocks*, IN DEFENCE OF MARXISM (Feb. 21, 2011), <http://www.marxist.com/revolutionary-aftershocks.htm>.

³ LBG1, *Wikileaks Documents Release: 'Political Meltdown For US Foreign Policy, DEATH BY 1000 PAPER CUTS* (Nov. 28, 2010), <http://deathby1000papercuts.com/2010/11/wikileaks-documents-release-political-meltdown-for-us-foreign-policy/>.

the countless smaller tremors rattling the political status quo in country after country across the globe.⁴

Although the conditions giving rise to this turmoil surely vary, and each country's situation is in large part unique, the global economic crisis' role in fueling political friction everywhere has not gone unnoticed.⁵ But there is a second common thread uniting today's turbulent international headlines, and that is the seemingly ubiquitous presence of U.S. State Department cables containing classified communications between American ambassadors and their diplomatic counterparts in foreign embassies.⁶ Australian-born anti-secrecy activist Julian Assange publicly disclosed files from a massive cache containing 250,000 of such cables to five newspapers⁷ through his website WikiLeaks on November 28, 2010⁸ after having received them from an anonymous source⁹ inside the government who had clearance to

⁴ See Eamon Quinn, *Ireland's Governing Party Suffers Crushing Defeat In Wake Of Debt Crisis*, WALL ST. J., Feb. 27, 2011, <http://online.wsj.com/article/BT-CO-20110227-701722.html> (describing how the Irish have voted the country's ruling party of eighty-five years out of power); *Bolivians Stage Indefinite General Strike*, BBC NEWS (May 10, 2010), <http://news.bbc.co.uk/2/hi/8672440.stm> (Bolivia called for an "indefinite general strike" after a week of riots and unrest); see also Nick Mirroff, *Observers Call Haitian Runoff a Success*, WASH. POST, Mar. 20, 2011, http://www.washingtonpost.com/world/tensions-high-at-haitian-polls/2011/03/20/ABYyjo1_story.html ("Haiti struggled once more to pull off an orderly election Sunday, as confusion broke out at polls and turnout appeared low...").

⁵ "How many revolutions in history have been started over the price of bread?" one columnist for *Esquire* magazine rhetorically asked a week before Egypt's January 25 uprising when many doubted whether Tunisia's unrest would spread beyond its borders. Thomas P.M. Barnett, *Who Should Worry About the Tunisia Fallout, Really?*, ESQUIRE, Jan. 18, 2011, <http://www.esquire.com/blogs/politics/tunisia-revolution-4924024#ixzz1H7uuMOTG>. "Are you kidding?" he answered, "Virtually all of them. Re-read your Victor Hugo." *Id.* (referring to Hugo's novel, *Les Misérables*).

⁶ See Scott Shane & Andrew W. Lehren, *Leaked Cables Offer a Raw Look Inside U.S. Diplomacy*, N.Y. TIMES, Nov. 29, 2010, at A1 (describing cables which discuss Libya, North Korea, Afghanistan, Pakistan, and other countries in the news today).

⁷ The initial five newspapers with which Assange shared the cables were *The New York Times*, *The Guardian*, *Le Monde*, *Der Spiegel*, and *El País*. See *U.S. Documents Obtained by WikiLeaks Posted Despite Site Problem*, CNN (Nov. 29, 2010, 5:23 AM), <http://www.cnn.com/2010/US/11/28/wikileaks.attack/index.html>.

⁸ See Shane & Lehren, *supra* note 6, at A1.

⁹ The Government suspects Private First Class Bradley Manning as the leaker and has held him at a Marine Corps base in Quantico, Virginia since the summer of 2010 before moving him to the military prison in Leavenworth, Kansas. See Brad Knickerbocker, *Alleged 'WikiLeaker' Bradley Manning Sent to Less Restrictive Prison*, CHRISTIAN SCI. MONITOR, Apr. 21, 2011, available at <http://www.csmonitor.com/USA/Justice/2011/0421/Alleged-WikiLeaker-Bradley->

access them.¹⁰ Since then, Assange has been slowly releasing more and more such files day-by-day, week-by-week, and month-by-month.¹¹ The published cables have been credited with critically galvanizing the revolutions in Tunisia,¹² Egypt,¹³ and Libya¹⁴ and with fundamentally destabilizing governments everywhere else.¹⁵

Examples of the cable's explosive worldwide political impact abound. India's ruling party was dealt a crushing blow on March 17, 2011 when *The Hindu* published cables it has received from Wiki-

Manning-sent-to-less-restrictive-prison. Manning allegedly stored the cable-containing files on a Lady Gaga compact disc to smuggle them to Assange. See David Muir & Jessica Hopper, *Who Is Pvt. Bradley Manning?*, ABCNEWS (Jul. 26, 2010), <http://abcnews.go.com/WN/wikileaks-case-pv-bradley-mannings-allegedroleleaking/story?id=11254454>. Assange claims to be suspicious of the Government's identification of Manning as the leaker, but considers Manning a "hero" if he in fact is the leaker. Sam Jones, *Julian Assange: Whoever Leaked US Embassy Cables is Unparalleled Hero*, GUARDIAN (UK), Dec. 3, 2010, available at <http://www.guardian.co.uk/media/2010/dec/03/julian-assange-live-online-answers>. Popular outrage over Manning's treatment at Quantico, which allegedly involved being forced to sleep naked, is widely cited as having prompted his transfer to Leavenworth. See Knickerbocker, *supra*.

¹⁰ WikiLeaks emphasizes the anonymous nature of its sources, and puts a great deal of effort into guaranteeing that anonymity. *Submissions*, WIKILEAKS, <http://wikileaks.ch/Submissions.html> ("Wikileaks does not record any source-identifying information and there are a number of mechanisms in place to protect even the most sensitive submitted documents from being sourced.") (last visited May 2, 2011).

¹¹ Assange has so far released only around one percent of the entire cache of 251,287 cables and continues to slowly release only a handful or two per day. Raphael G. Satter, *WikiLeaks: 1 Percent of Diplomatic Cables Published*, WASH. TIMES, Jan. 23, 2011, available at <http://www.washingtontimes.com/news/2011/jan/23/wikileaks-one-percent-cables-published/>.

¹² See Andrew Sullivan, *Tunisia's WikiLeaks Revolution*, ATLANTIC (THE DAILY DISH) (Jan. 14, 2011), http://andrewsullivan.theatlantic.com/the_daily_dish/2011/01/tunisias-wikileaks-revolution.html; see also Robert Mackey, *Qaddafi Sees WikiLeaks Plot in Tunisia*, N.Y. TIMES, (Jan. 17, 2011, 12:30 PM), <http://thelede.blogs.nytimes.com/2011/01/17/qaddafi-sees-wikileaks-plot-in-tunisia/> (Libya's Muammar Gadhafi blamed WikiLeaks cables for Tunisia's unrest days after Tunisian president Zine el-Abidine Ben Ali was forced to flee the country.).

¹³ See Gus Lubin, *WikiLeaks Spurs On Protests By Releasing New Egypt Corruption Cables*, BUSINESSINSIDER (Jan. 28, 2011, 5:15 AM), <http://www.businessinsider.com/wikileaks-egypt-brutality-2011-1>.

¹⁴ See Scott Shane, *WikiLeaks Cables Detail Qaddafi Family's Exploits*, N.Y. TIMES, Feb. 22, 2011, at A9, available at <http://www.nytimes.com/2011/02/23/world/africa/23cables.html>.

¹⁵ Assange himself has taken credit for helping the Arab uprisings through the release of certain cables. See *Assange Claims Wikileaks Boosted Mid East Uprisings*, BBC NEWS (Mar. 16, 2011), <http://www.bbc.co.uk/news/education-12758380>.

Leaks substantiating long-standing allegations that in July 2008 it had bribed members of parliament to enter a vote of confidence on a nuclear deal between India and the United States.¹⁶ Cables obtained by Peru's leading newspaper *El Comercio* have seriously compromised the populist and nationalist credentials of multiple presidential candidates weeks before the country's upcoming elections, portraying them as little more than American stooges masquerading as left-wing populists.¹⁷ The U.S. ambassador to Mexico resigned after a WikiLeaks cable was published that quoted him complaining of "inefficiency and

¹⁶ See A. Srivathsan, *Amar Singh Asked Manmohan and Sonia to Remove Chidambaram, Deora: 2008 Cable*, HINDU (THE INDIA CABLES) (Apr. 23, 2011), <http://www.thehindu.com/news/the-india-cables/article1718475.ece>.

¹⁷ *El Comercio Gets Huge Cache of Wikileaked Cables About Peru*, PERUVIAN TIMES (Feb. 13, 2011), <http://www.peruviantimes.com/13/el-comercio-gets-huge-cache-of-wikileaked-cables-about-peru/10869/>. The cables portray them reassuring U.S. diplomats of their willingness to contain popular social radicalism and acknowledging America's fear of "indigenous power" in Peru, and pledging to support multinational mining interests in spite of their being unpopular among the Peruvian electorate. See also *Wikileaks: Peru Officials Knew of Illegal Logging*, HARDWOOD FLOORS (Mar. 3, 2011), <http://hardwoodfloorsmag.com/editors/blog/default.aspx?id=294&t=Wikileaks-Peru-Officials-Knew-of-Illega> (Cables show that Officials in Peru knew that 70 – 90 of the mahogany exported in 2005 where illegally felled.); *Peru: WikiLeaks Impact seen on Elections*, WORLD WAR 4 REP. (Feb. 28, 2011, 18:14 GMT), <http://www.ww4report.com/node/9551> ("[T]he cables seem to indicate a US tilt to García's ruling Peruvian Aprista Party (PAP)."); Marco Sánchez, *WikiLeaks Make Peru Presidential Candidates "Panic," Says Analyst*, LIVING IN PERU (Feb. 22, 2011, 16:57 GMT), <http://www.livinginperu.com/news/14210> ("Ariel Segal is a historian, journalist and international analyst. He thinks that the disclosure of the WikiLeaks cables will make the electoral campaign more complicated."); Juan Arellano, *Peru: Wikileaks and the Presidential Campaign*, GLOBAL VOICES (Mar. 5, 2011, 22:01 GMT), <http://globalvoicesonline.org/2011/03/05/peru-wikileaks-usa-and-their-effect-on-the-presidential-campaign/> ("Nowadays, Toledo participates in the U.S. intervention in Peru. While Humala has separated from Chavez, Toledo has been widely recognized as the officially protected person, at least one, of the U.S. government."); Brenda Norrell, *Wikileaks Peru: US Feared Indigenous Power*, NARCOSPHERE (Feb. 26, 2011, 8:53 PM), <http://narcosphere.narconews.com/notebook/brenda-norrell/2011/02/wikileaks-peru-us-feared-indigenous-power> ("Wikileaks releases from Peru once again reveal the pro-copper mining and anti-Indigenous sentiment of the US Embassy in Lima."); Ángel Páez, *Wikileaks Cables Reveal Two-Faced Politics by US*, IPSNEWS (Dec. 16, 2010), <http://ipsnews.net/news.asp?idnews=53887> ("It's not surprising for the United States to cooperate with military or government officials in Peru about which it has information linking them to serious crimes," said activist Ricardo Soberón, referring to contradictions revealed in cables released by the whistle-blowing website Wikileaks."). In fact, one cable implicated the Peruvian army in drug trafficking. InSight, *WikiLeaks: Peruvian Army Connected to Drug Trafficking*, UPSIDE DOWN WORLD (Dec. 15, 2010, 9:47 PM), <http://upside-downworld.org/main/peru-archives-76/2819-wikileaks-peruvian-army-connected-to-drug-trafficking>.

infighting among Mexican security forces in the campaign against drug cartels.”¹⁸ Perhaps most disturbingly, a cable published by *The Guardian* on March 14, 2011 quotes a Japanese parliamentarian accusing Japan’s Ministry of Economy, Trade and Industry—the agency that oversees nuclear energy—of “covering up nuclear accidents, and obscuring the true costs and problems associated with the nuclear industry.”¹⁹

But American public officials have the most to fear from the existence of the cables and their constant, slow trickle, because U.S. diplomacy is the hub through which each and every one of these scandals travels. To date, the world has learned from WikiLeaks that Secretary of State Hillary Clinton ordered American diplomats to spy on the United Nations officials and obtain their “DNA data—including iris scans and fingerprints—as well as credit card and frequent flier numbers,”²⁰ that President Obama has been fighting a “secret war” in Yemen, ordering cruise missile attacks on suspected terrorists,²¹ and that the United States pressured Spain to stop investigating torture and rendition at Guantanamo Bay.²² We have also learned from WikiLeaks that the “Obama and Bush administrations repeatedly characterized Bahrain as more open and reform-minded than its neighbors” and pushed back against human rights groups that have criticized the Bahrain government for the arrest of protesters and lawyers.²³ And further, that Omar Suleiman, the United States’ preferred successor to

¹⁸ *US Ambassador to Mexico Resigns Over WikiLeaks Embassy Cables*, GUARDIAN (UK) (Mar. 20, 2011, 4:17 GMT), <http://www.guardian.co.uk/world/2011/mar/20/us-ambassador-mexico-resigns-wikileaks>.

¹⁹ *US Embassy Cables: MP Criticizes Japanese Nuclear Strategy*, GUARDIAN (UK) (Mar. 14, 2011, 17:22 GMT), <http://www.guardian.co.uk/world/us-embassy-cables-documents/175295>.

²⁰ Gerry Peev, *How Hillary Clinton Ordered U.S. Diplomats to Spy on UN Leaders*, DAILY MAIL ONLINE (Nov. 29, 2010, 9:02 AM), <http://www.dailymail.co.uk/news/article-1333920/WikiLeaks-Hillary-Clinton-ordered-U-S-diplomats-spy-UN-leaders.html#ixzz1H8TzvU8r>.

²¹ Josh Gerstein, *WikiLeaks Sheds Light on Obama’s Secret War*, POLITICO (Dec. 6, 2010), http://www.politico.com/blogs/joshgerstein/1210/WikiLeaks_shed_light_on_Obamas_secret_war.html.

²² Giles Tremlett, *Wikileaks: US Pressured Spain Over CIA Rendition and Guantánamo Torture*, GUARDIAN (UK) (Dec. 1, 2010), <http://www.guardian.co.uk/world/2010/nov/30/wikileaks-us-spain-guantanamo-rendition>.

²³ Mark Landler, *U.S. Offered Rosy View Before Bahrain Crackdown*, N.Y. TIMES, Feb. 18, 2011, at A12, available at <http://www.nytimes.com/2011/02/19/world/middleeast/19diplomacy.html?pagewanted=all>.

ousted Egyptian president Hosni Mubarak, ruthlessly oversaw the horrific torture of detainees the CIA had “rendered” to Egypt.²⁴

Senator Joe Lieberman, who has suggested prosecuting not only Assange but even the *New York Times* and other newspapers reporting on the cables,²⁵ may have been thinking about a certain recently-leaked cable dating to February 23, 2009 when he decided not to run for reelection in 2012.²⁶ The cable depicts him asking President Mubarak’s hated investment-banker son and erstwhile heir apparent Gamal for his advice, as “an experienced international financier,” on U.S. fiscal policy after the trillion-dollar Troubled Asset Relief Program²⁷ failed to halt Wall Street’s free fall.²⁸ The younger Mubarak advised Lieberman to “inject even more money into the system” and the senator “agreed on the need for bold measures to restore confidence.”²⁹

Lieberman has been at the forefront of a bipartisan effort to extradite and prosecute Assange³⁰ from the day WikiLeaks first began pub-

²⁴ Mahmoud Abu Ghosh, *Suleiman Helped CIA Torture Prisoners*, INDY NEWS ISRAEL (Feb. 6, 2011), <http://www.indynewsisrael.com/suleiman-helped-cia-torture-prisoners>.

²⁵ Jack Mirkinson, *Joe Lieberman: New York Times Should be Investigated for Publishing WikiLeaks Cables*, HUFFINGTON POST (Dec. 7, 2010, 2:20 PM), http://www.huffingtonpost.com/2010/12/07/liebermantimescrimewikileaks_n_793293.html.

²⁶ David M. Halfinger, *Lieberman Will Not Run for Re-election*, N.Y. TIMES CITY ROOM (Jan. 18, 2011, 5:27 PM), <http://cityroom.blogs.nytimes.com/2011/01/18/lieberman-will-not-run-for-re-election/>.

²⁷ Nelly Avila Moreno, *Gamal Mubarak Talks to Joe Lieberman – Wikileaks, PROPAGANDA PRESS! FREEDOM NOW GUYANA* (JAN. 29, 2011), <http://propagandapress.wordpress.com/2011/01/29/gamal-mubarak-talks-to-joe-lieberman-wikileaks/>. The total cost to U.S. taxpayers of TARP, by some estimates, exceeded “the total combined costs in today’s dollars of the Marshall Plan, the Louisiana Purchase, the Korean War, the Vietnam War and the entire historical budget of NASA, including the moon landing....” See Russell Goldman, *Financial Bailout Balloons to the Trillions*, ABCNEWS (Nov. 25, 2008), <http://abcnews.go.com/Business/Economy/story?id=6332892&page=1>.

²⁸ Moreno, *supra* note 27.

²⁹ *Id.*

³⁰ Mirkinson, *supra* note 25. Attorney General Eric Holder launched a criminal investigation of Assange and WikiLeaks soon after the release of the cables, and vowed to hold “accountable” and “responsible” “anybody who was involved in the breaking of American law....” Pete Yost, *Holder Says WikiLeaks Under Criminal Investigation*, ABCNEWS (Nov. 29, 2010), <http://abcnews.go.com/Politics/wiresStory?id=12266154>. He offered, however, “little in the way of specifics about the American legal strategy . . .” Justin Elliott, *Holder Threatens WikiLeaks, Again*, SALON (Dec. 6, 2010), http://www.salon.com/news/politics/war_room/2010/12/06/holder_on_assange_again. The question of what U.S. law Assange may have violated is and will remain speculative unless and until the American government successfully manages to secure his

lishing the cables.³¹ He and Representative Peter King have sought to broaden the scope of Section 798³² of the Espionage Act of 1917³³ to cover non-state “transnational threat[s]” such as WikiLeaks.³⁴ The

extradition to the United States. See Greg Barns, *Assange Extradition Fears are Real*, AUSTL. BROAD. CORP. (Mar. 7, 2011), <http://www.abc.net.au/unleashed/44710.html> (examining how under Swedish law Assange may be turned over to the Americans).

³¹ Lieberman’s role as chairman of the Homeland Security Committee has given him the opportunity to bring the power of the federal government to bear against WikiLeaks in ways that go beyond legislative measures and include coercing private companies like Amazon.com and PayPal to cease doing business with Assange and WikiLeaks. Alan Greenblatt, *WikiLeaks Fallout: Unease Over Web Press Freedoms*, NPR (Dec. 8, 2010), <http://www.npr.org/2010/12/08/131905226/wikileaks-fallout-unease-over-web-press-freedoms>.

³² 18 U.S.C. § 798 (2006).

³³ §§ 791-98, 2388.

³⁴ The current Section 798 reads in part:

(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—

(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or

(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

(3) concerning the communication intelligence activities of the United States or any foreign government; or

(4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

Shall be fined under this title or imprisoned not more than ten years, or both.

(b) As used in subsection (a) of this section—

The term “classified information” means information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution;

The terms “code,” “cipher,” and “cryptographic system” include in their meanings, in addition to their usual meanings, any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance, or meanings of communications;

The term “foreign government” includes in its meaning any person or persons acting or purporting to act for or on behalf of any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a foreign country, whether or not such government is recognized by the United States;

government favors an interpretation of the Act more generally that subjects to criminal liability not only government employees who leak classified information they are cleared to access but also third party recipients of that information who publish it—the category under which Assange and WikiLeaks fall—provided the latter’s intent to harm national security can be proven.³⁵

Senator Dianne Feinstein popularized the idea of prosecuting Assange and WikiLeaks under the Espionage Act soon after the initial release of the cables,³⁶ evoking Justice Holmes’s well-known analogy

The term “communication intelligence” means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

The term “unauthorized person” means any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States.

§ 798. The Securing Human Intelligence and Enforcing Lawful Dissemination (“SHIELD”) Act would add “or transnational threat” to Section 798(a)(1) and would insert the two new subsections, “(4) concerning the human intelligence activities of the United States or any foreign government” and “(5) concerning the identity of a classified source or informant of an element of the intelligence community of the United States[.]” to Section 798(a). See S.315, 112th Cong. (2011). The Act would define “human intelligence” as “all procedures and methods employed in the collection of intelligence through human sources” and would define “transnational threat” as follows:

(A) any transnational activity (including international terrorism, narcotics trafficking, the proliferation of weapons of mass destruction and the delivery systems for such weapons, and organized crime that threatens the national security of the United States; or

(B) any individual or group that engages in an activity referred to in subparagraph (A).

See *id.* The Act would define the terms “informant” and “intelligence community” as they are currently defined in the National Security Act of 1947. *Id.* (citing 50 U.S.C. §§ 401(a), 426 (2006)).

³⁵ JENNIFER K. ELSEA, CONG. RES. SERV., CRIMINAL PROHIBITIONS ON THE PUBLICATION OF CLASSIFIED DEFENSE INFORMATION 11 (rev. ed. 2011), available at <http://www.fas.org/sgp/crs/secretary/R41404.pdf> (“[I]t seems that there is ample statutory authority for prosecuting individuals who elicit or disseminate many of the documents at issue, as long as the intent element can be satisfied and potential damage to national security can be demonstrated.”).

³⁶ See Dianne Feinstein, *Prosecute Assange Under the Espionage Act: Just as the First Amendment is not a License to Yell ‘Fire!’ in a Crowded Theater, it is also not a License to Jeopardize National Security*, WALL ST. J. (Dec. 7, 2010),

in *Schenck v. United States*.³⁷ “Just as the First Amendment is not a license to yell ‘Fire!’ in a crowded theater,” she claimed, “it is also not a license to jeopardize national security.”³⁸ But Feinstein omitted a small detail in her paraphrase of Holmes that is actually highly relevant in the WikiLeaks context. Holmes wrote of “a man . . . *falsely* shouting fire in a theatre and causing a panic.”³⁹ As much of a panic Assange’s release of the WikiLeaks cables has surely caused among the world’s governing classes, the cables all contain content that is nothing if not *true*. That is not to say, of course, that each and every one of the documents contain the truth, the whole truth, and nothing but the truth.⁴⁰ Among of the most scandalous, controversial, and widely discussed cables are those that reveal one world leader’s *opinion* of another world leader⁴¹ or an ambassador’s frank and uncensored, *subjective* assessment of a country’s political situation.⁴² The veracity of these documents is rather a product of manner in which they were produced, hidden from public view, and subsequently revealed. WikiLeaks “accepts a range of material but . . . [does] not solicit it” and provides a high security anonymous drop box fortified

<http://online.wsj.com/article/SB10001424052748703989004575653280626335258.html>.

³⁷ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

³⁸ Feinstein, *supra* note 36.

³⁹ *Schenck*, 249 U.S. at 52 (emphasis added).

⁴⁰ When computer security firm HB Gary conspired with Bank of America and several other “top online security firms” to “destroy WikiLeaks,” one of their primary strategies was “planting fake documents with the group and then attacking them when published.” Glenn Greenwald, *The Leaked Campaign to Attack WikiLeaks and Its Supporters*, SALON (Feb. 11, 2011, 4:12 ET), http://www.salon.com/news/opinion/glenn_greenwald/2011/02/11/campaigns. The unique authenticity and hence credibility of the documents is one of the most threatening aspects of WikiLeaks in the opinion of those who have both power and something to hide.

⁴¹ See Chidanand Rajghatta, *US Diplomats Called Putin ‘Alpha-Dog’, German Chancellor ‘Teflon Merkel’*, TIMES OF INDIA, Nov. 29, 2010, http://articles.timesofindia.indiatimes.com/2010-11-29/us/28233746_1_cables-allegations-narcotics.

⁴² The disclosure of the American ambassadors’ unvarnished opinions about the decadent lifestyles of certain countries’ ruling families in leaked cables has been widely credited with fomenting or fueling revolutions within those countries. See, e.g., *US Embassy Cables: The ‘OTT’ Lifestyle of Tunisian President’s Son-in-Law, Including Pet Tiger*, GUARDIAN (UK) (Dec. 7, 2010, 21:29 GMT), <http://www.guardian.co.uk/world/us-embassy-cables-documents/218324> (discussing the cable regarding the Ambassador’s dinner with Al Materi (Ben Ali’s son-in-law) and his lavish life style); Theunis Bates, *The WikiLeaks Guide to the Gadhafi Clan*, AOLNEWS (Feb. 23, 2011, 2:52 PM), <http://www.aolnews.com/2011/02/23/the-wikileaks-guide-to-the-gadhafi-clan/> (discussing the various lifestyles of Libyan dictator Moammar Gadhafi’s children).

by cutting-edge cryptographic information technologies.⁴³ The organization's journalistic staff "asses[es] the submission. If it meets the criteria, our journalists then write or produce a news piece based on the document."⁴⁴ It then publishes both a news story highlighting the most interesting parts and an analysis of the document along with the document itself.⁴⁵

As proof of "the truth of the matter asserted"⁴⁶ within it, each cable is mere hearsay—a "drip" that rarely causes more than a ripple in the political waters of a nation.⁴⁷ This hearsay quality of individual cables is what those who claim their release "reveals little more than gossip on the embassy circuit" have in mind.⁴⁸ But as *cumulative* evidence of a hidden "international state system based on realpolitik, cynicism and cold self-interest, in which moral calculations are conspicuously absent,"⁴⁹ the cables in their totality have overrun the calm harbors of diplomatic trust between sovereign governments and smashed into those governments' edifices of democratic legitimacy with tsunami-like force.⁵⁰

The colossal *volume* of state-secret-containing digital files in Assange's possession and the utter futility of suppressing public knowledge of their contents after WikiLeaks releases them to an Internet-wired world are both products of a revolution in communications technology that has fundamentally shifted political power from rulers to the ruled. In our current age, the monetary costs of obtaining, re-

⁴³ Submissions, WIKILEAKS, <http://wikileaks.ch/Submissions.html> (last visited May 2, 2011).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ FED. R. EVID. 801(c).

⁴⁷ See Caroline Arnold, *The Disruptive Drip of WikiLeaks and the Public's Right to Know*, COMMONDREAMS (Jan. 9, 2011), <http://www.commondreams.org/view/2011/01/09-2>.

⁴⁸ Andrew Bolt, *Wiki Cables Are Low-Rent Gossip, with no Top-Secret Revelations*, HERALD SUN (Melbourne), Dec. 1, 2010, at 30, available at <http://www.heraldsun.com.au/opinion-old/leaked-wikileak-diplomatic-cables-are-low-rent-gossip/story-e6frfifx-1225963581880>.

⁴⁹ Matthew Carr, *Why Persecuting Bradley Manning is a Futile Gesture: Whistleblowers Have an Important Part to Play in Democratic Societies—has Obama Himself Has Said*, FIRST POST (UK) (Mar. 7, 2011, 7:20 AM), <http://www.thefirstpost.co.uk/75979,news-comment,news-politics,why-persecuting-bradley-manning-is-a-futile-gesture-wikileaks-assange#ixzz1GQqBMVRS>.

⁵⁰ Conservative *New York Times* columnist David Brooks writes of a "world order" that "is tenuously maintained by brave soldiers but also by talkative leaders and diplomats," a "fragile international conversation" to which Assange's "old-fashioned anarchist" mindset and agenda poses an existential threat. See David Brooks, Op-Ed., *The Fragile Community*, N.Y. TIMES, Nov. 30, 2010, at A31, available at <http://www.nytimes.com/2010/11/30/opinion/30brooks.html>.

producing, and disseminating information reduce to zero, the ability to do so anonymously is without historical precedent, and the social and legal consequences of doing so illicitly is thus substantially diminished.⁵¹ The sheer *power* of the individual under such circumstances seems destined to overtake traditional debates about the *rights* of the individual.⁵² Only in such a world does Professor Geoffrey Stone's reference to "the problem [that] arises when the public disclosure of secret information is both harmful to the national security *and* valuable to self-governance" make any sense.⁵³

The evolving judicial doctrine that has accompanied the First Amendment since the aftermath of World War I is ill equipped to cope with the brave new world of WikiLeaks. It too has been engulfed by the tidal wave of political truth the cables have set in motion. The uproar over "prior restraint" that followed President Nixon's attempt to enjoin the *New York Times* from publishing Daniel Ellsberg's Pentagon Papers⁵⁴ appears in hindsight almost medieval given the ease

⁵¹ See, e.g., Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427 (2009) (discussing the effect of the new technology reality on First amendment law and how network neutrality will affect future information policy); Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1 (2008) (discussing the constitutionality of NSA's eavesdropping outside of FISA); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004) (arguing that digital technologies alter the social conditions of speech and therefore should change the focus of free speech theory).

⁵² For a thorough treatment of the havoc that the information revolution has wreaked on traditional conceptions of individual rights, see generally DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM?* (1998) (forecasting that information technology in the twenty-first century will be a double-edged sword, forcing much greater public transparency while at the same time eroding individual privacy).

⁵³ *The Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 12 (2010) [hereinafter *WikiLeaks Hearing*] (Statement of Geoffrey R. Stone, Professor of Law, University of Chicago).

⁵⁴ Ellsberg was "a high-level Pentagon official" and considered his role in leaking the documents to the *Times* to be roughly analogous to Bradley Manning's alleged leak of the embassy cables to Julian Assange. Ashley Fantz, *Pentagon Papers Leaker: 'I was Bradley Manning.'* CNN (Mar. 19, 2011), http://articles.cnn.com/2011-03-19/us/wikileaks.ellsberg.manning_1_daniel-ellsberg-pentagon-papers-young-man?_s=PM:US. The Pentagon Papers were 7,000 top-secret documents that showed that American leaders knew the "Vietnam War was an unwinnable, tragic quagmire." *Id.* In considering the leak, the Supreme Court denied Nixon his injunction in *New York Times v. United States* holding that "[a]ny system of prior restraints of expression [bears] a heavy presumption against its constitutional validity." *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). Ellsberg, meanwhile, was tried under the Espionage Act, but "a number of bizarre twists" in the course of Ellsberg's 1973 trial re-

with which any individual can anonymously upload classified information to the Internet and the ease, in turn, with which that information can suddenly “go viral.”⁵⁵ The only recourse the current administration has against WikiLeaks that is at all feasible today is a post-publication criminal indictment.⁵⁶ The only way to prevent the WikiLeaks exception from swallowing the norm of a free press is to distinguish Assange’s peculiar trade from proper “journalism” and to distinguish WikiLeaks from “the press.”⁵⁷ Those who are interested in squaring the First Amendment circle in order to “constitutionally” bring down Assange and his organization invariably settle on the pub-

sulted in the dismissal of all charges against him. *See Judge William Byrne; Ended Trial Over Pentagon Papers*, WASH. POST, Jan. 15, 2006, at C09, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/14/AR2006011401165.html>. These “bizarre twists” involved improprieties by the very same Nixon administration operatives whose Watergate hotel break-in ended Nixon’s presidency prematurely. *Id.* They included “a disclosure by the government prosecutor that White House operatives had burglarized the Beverly Hills office of Ellsberg’s psychiatrist” and various illegal wiretapping revelations. *Id.* The trial judge ultimately declared that “[t]he totality of the circumstances of this case . . . offend a sense of justice” and “have incurably infected [its] prosecution” and therefore dismissed the case entirely. *Id.*

⁵⁵ “To go viral” originated as a marketing term during the late 1990s and early 2000s as the Internet was first blossoming into a commercial space. *See, e.g.*, Alan L. Montgomery, *Applying Quantitative Marketing Techniques to the Internet*, 31 INTERFACES 90, 93 (2001). The advent several years later of social media platforms, however, shifted the usage of the term away from the corporate boardroom and into the living rooms of ordinary individuals, each of whom could potentially share an idea with the online community that would strike a popular nerve and spread from computer to computer with the speed of a mouse click. *See generally, e.g.*, PATRICIA MARTIN, *TIPPING THE CULTURE: HOW ENGAGING MILLENNIALS WILL CHANGE THINGS* (2010). The disputed but still palpable role of social media in fueling social unrest in the Arab world and elsewhere in recent months has more thoroughly shifted “going viral” from the commercial to the political sphere and arguably gave it a newly anti-commercial character. *See, e.g.*, Allison R. Soule, *Fighting the Social Media Wildfire: How Crisis Communication Must Adapt to Prevent from Fanning the Flames* (2010) (unpublished Masters of Journalism thesis, University of North Carolina at Chapel Hill), available at http://rightsofright.com/wp-content/uploads/2010/10/Soule_Thesis_UBGwebsite.pdf.

⁵⁶ Not everybody would consider post-publication prosecution to be much more feasible than prior restraint. *See* Jeremy Kinsman, *Truth and Consequence: The WikiLeaks Saga*, POLICY OPTIONS (Feb. 2011), <http://www.irpp.org/po/archive/feb11/kinsman.pdf>.

⁵⁷ Senator John Ensign has made just such a distinction. *See* Steve Rendall, *WikiLeaks Not a Whistleblower, Assange Not a Journalist?*, FAIR (Dec. 3, 2010), <http://www.fair.org/blog/2010/12/03/wikileaks-not-a-whistleblower-assange-not-a-journalist/>.

lisher's *specific intent* "to cause harm to the national security of the United States and/or benefit to a foreign power."⁵⁸

This specific intent standard for criminal third-party publisher liability under the Espionage Act collapses into mangled rubble the carefully compartmentalized distinction between, on the one hand, the executive branch's prerogative to classify documents as secret and maintain their secrecy for national security reasons,⁵⁹ and on the other hand, the constitutional prohibition of Congress from making any law "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."⁶⁰ The Court has long appreciated the symbiotic relationship between education and advocacy in its First Amendment jurisprudence; for decades it has recognized that "[t]he right to express viewpoints would mean little if government could stifle the exchange of facts underlying such viewpoints."⁶¹ The theory under which the government might attempt an Espionage prosecution of Assange and WikiLeaks would change this standard such that the government *could* constitutionally stifle the exchange of facts if it

⁵⁸ *WikiLeaks Hearing*, *supra* note 53, at 68 (Statement of Stephen I. Vladeck, Professor of Law, American University Washington College of Law).

⁵⁹ The *Pentagon Papers Case* does not fall under this category because it concerned the issue of a prior injunction against publishing classified material, not a post-publication prosecution under the Espionage Act or another statute. There is very little precedent involving prosecutions for leaks of classified information with an intent to *publish* for the whole world to see as opposed to an intent merely to share with an enemy state, as with classic espionage. Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 899 (2008). The most notable cases include *United States v. Morison*, 844 F.2d 1057, 1060 (4th Cir. 1988) (upholding conviction under Espionage Act of U.S. Naval Intelligence employee's leaking of satellite photographs of a Soviet aircraft carrier to a British magazine in violation of a nondisclosure agreement he had signed) and *United States v. Rosen*, 557 F.3d 192, 194 (4th Cir. 2009) (affirming conviction under Espionage act of two lobbyists for "obtain[ing] national defense information from various sources within the United States government and unlawfully pass[ing] that information to other [lobbyists], foreign officials, and members of the news media.").

⁶⁰ U.S. CONST. Amend. I, cl. 3-6. *See, e.g.*, *Bartnickiv. Vopper*, 532 U.S. 514, 533-34 (2001) (stating unambiguously that disclosing or publishing information is speech and not "conduct" and describing the disclosure of "truthful information of public concern" as implicating "the core purposes of the First Amendment"); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (overturning an Alabama law restricting picketing during labor disputes and citing "the public need for information and education with respect to the significant issues of the times"); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (holding that primary purpose of the First Amendment's Free Press Clause is "to preserve an untrammelled press as a vital source of public information" and describing "informed public opinion" as "the most potent of all restraints upon misgovernment").

⁶¹ Kitrosser, *supra* note 59, at 906-07.

could prove beyond a reasonable doubt that the exchanger of facts intended to harm national security.

The philosophical conundrum of defining national security in a democracy, a political system in which the people in theory are self-governing sovereigns,⁶² suddenly resurfaces after nearly a century of efforts by Justice Holmes, Justice Black, Alexander Micklejohn, and others to bury it.⁶³ The “clear and present danger” analysis that has shaped First Amendment doctrine in the twentieth century emerged out of the wartime contradiction between individual liberal freedoms and collective republican loyalty that the same Espionage Act of 1917 that the government currently wants to use against Assange.⁶⁴ But the

⁶² Popular sovereignty was an idea that in Europe entailed a conceptual transference from the person of the royal prerogative of the absolute monarch to the “general will” of the “constituent power.” The philosophical alienation between sovereignty and the rule of law is a theme that eternally polarizing and controversial German jurist Carl Schmitt explored during the politically turbulent years of the Weimar Republic. See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., Univ. of Chi. Press 2005). The United States, however, never had a king, and the American understanding of popular sovereignty has always been looser and less defined than in Europe. See CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* (2008); Carl J. Friedrich, *The Deification of the State*, 1 REV. POL. 18 (1939).

⁶³ Holmes repudiated the “meager *clear and present danger* test formulated in” *Schenck v. United States*, 249 U.S. 47 (1919), in favor of the “*imminent threat* test” he applied in *Abrams v. United States*, 250 U.S. 616 (1919). RONALD K.L. COLLINS & SAM CHALTAI, *WE MUST NOT BE AFRAID TO BE FREE: STORIES OF FREE EXPRESSION IN AMERICA* 112 (2011). The imminent threat test was more context dependent and therefore de-emphasized the actual content of the defendant’s speech. Black and Micklejohn took a broader, more philosophical approach to the First Amendment and considered in the general context of democratic self-government and popular sovereignty. See Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 879 (1960), noting: Misuse of government power, particularly in times of stress, has brought suffering to humanity in all ages about which we have authentic history. Some of the world’s noblest and finest men have suffered ignominy and death for no crime—unless unorthodoxy is a crime. Even enlightened Athens had its victims such as Socrates. Because of the same kind of bigotry, Jesus, the great Dissenter, was put to death on a wooden cross. The flames of inquisitions all over the world have warned that men endowed with unlimited government power, even earnest men, consecrated to a cause, are dangerous. See also Alexander Micklejohn, *The First Amendment is Absolute*, 1961 SUP. CT. REV. 245, 255 (“The First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of those activities of thought and communication by which we ‘govern.’ It is concerned, not with a private right, but with a public power, a governmental responsibility.”).

⁶⁴ Both Holmes’s “clear and present danger” test in *Schenck* and his “imminent threat” test in *Abrams* concern the particular exigencies of the World War I home front. See *Schenck*, 249 U.S. at 52 (“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

formative free speech decisions of that era for the most part focused not on the publication of classified information but on the advocacy of resistance to and obstruction of America's war effort. Title 1, Section 3 of the original 1917 act read:

Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies,...and whoever, when the United States is at war, shall willfully cause, or attempt to cause . . . insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct...the recruiting or enlistment service of the United States,...shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both⁶⁵

Schenck v. United States,⁶⁶ the source of Holmes's "fire" quote, concerned this 1917 language.⁶⁷ But the following year, Congress amended the Espionage Act in what became known as the Sedition Act of 1918.⁶⁸ The language of Section 3 was expanded so as to cover

any constitutional right."). If the Government in its prosecution of Assange were to extend the post-9/11 War on Terror idea of a global battlefield and an indefinite conflict, then there would be presumably no limit to the extent to which "unorthodoxy," as Justice Black might put it, could be constitutionally criminalized.

⁶⁵ See WALTER NELLES, ED., NAT'L CIV. LIBERTIES BUR., ESPIONAGE ACT CASES WITH CERTAIN OTHERS ON RELATED POINTS: NEW LAW IN MAKING AS TO CRIMINAL UTTERANCE IN WAR-TIME 1-2 (1918).

⁶⁶ *Schenck*, 249 U.S. 47 (1919).

⁶⁷ See *id.* at 53 ("The fact that the Act of 1917 was enlarged by the amending Act of May 16, 1918, of course, does not affect the present indictment and would not, even if the former act had been repealed.") (citation omitted); see also RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH 367 (1987) (noting that the repeal of the 1918 Sedition Act in 1921 meant that "the law which had produced *Schenck* remained on the books, but not the law which had produced *Abrams*.").

⁶⁸ For some historical context regarding the manner in which the Espionage and Sedition Acts were debated and enacted, see generally Stephen M. Feldman, *Free Speech, World War I, and Republican Democracy: The Internal and External Holmes*, 6 FIRST AMEND. L. REV. 192 (2008); Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335 (2003) (claiming that the repressive effect attributed to the Espionage Act was more judicial construction than legislative intent). For some scholarly perspective from the period, see Thomas F. Carroll, *Freedom of Speech and of the Press in War Time: The Espionage Act*, 17 MICH. L. REV. 621 (1919); Edward S. Corwin, *Freedom of Speech and Press Under the First Amendment: A Resume*, 30 YALE L. J. 48 (1920); John B.

whole categories of political advocacy speech that had been untouched by the original 1917 language:

Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, or shall willfully make or convey false reports or false statements, or say or do anything except by way of bona fide and not disloyal advice to an investor . . . with intent to obstruct the sale by the United States of bonds . . . or the making of loans by or to the United States, or whoever, when the United States is at war, shall willfully cause . . . or incite . . . insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct . . . the recruiting or enlistment service of the United States, and whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag . . . or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government . . . or the Constitution . . . or the military or naval forces . . . or the flag . . . of the United States into contempt, scorn, contumely, or disrepute . . . or shall willfully display the flag of any foreign enemy, or shall willfully . . . urge, incite, or advocate any curtailment of production in this country of any thing or things . . . necessary or essential to the prosecution of the war . . . and whoever shall willfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both . . .

⁶⁹

To Title XII of the Act, moreover, was added a provision which in the current WikiLeaks age would be absurdly futile, empowering direct

Stanchfield, *The Peril of Espionage*, 203 N. AM. REV. 830 (1916); M.G. Wallace, *Constitutionality of Sedition Laws*, 6 VA. L. REV. 385 (1920).

⁶⁹ NELLES, *supra* note 65, at 1-2.

government interference with the circulation of offending publications through the mails:

When the United States is at war, the Postmaster General may, upon evidence satisfactory to him that any person or concern is using the mails in violation of . . . this Act, instruct the postmaster at any post office at which mail is received addressed to such person or concern to return to the postmaster at the office at which they were originally mailed all letters or other matter so addressed, with the words 'Mail to this address undeliverable under Espionage Act' plainly written or stamped upon the outside thereof, and all such letters or other matter so returned to such postmasters shall be by them returned to the senders thereof under such regulations as the Postmaster General may prescribe.⁷⁰

Finally, the Attorney General issued the following statement to federal prosecutors regarding the importance of proving disloyal intent when prosecuting speakers under the expanded Act:

The prompt and aggressive enforcement of this Act is of the highest importance in suppressing disloyal utterances and preventing breaches of peace. It is also of great importance that this statute be administered with discretion. It should not be permitted to become the medium whereby efforts are made to suppress honest, legitimate criticism of the administration or discussion of government policies; nor should it be permitted to become a medium for personal feuds or persecution. The wide scope of the Act and powers conferred increase the importance of discretion in administering it. Protection of loyal persons from unjust suspicion and prosecution is quite as important as the suppression of actual disloyalty.⁷¹

The evolution of the Court's First Amendment doctrine from the decisions that arose out of prosecutions under this Act⁷² to the modern principle requiring imminent harm to national security interests is required before political speech can be restricted⁷³ was defined by the

⁷⁰ *Id.* at 2.

⁷¹ *Id.* at 2-3.

⁷² The trilogy of cases typically credited with initiating the Court's modern First Amendment doctrine are *Schenck v. United States*, 249 U.S. 47 (1919), *Frohwerk v. United States*, 249 U.S. 204 (1919), and *Debs v. United States*, 249 U.S. 211 (1919).

⁷³ Traditionally, the requirement of imminent harm to national security made possible a clear distinction between political advocacy (and informative) speech,

slow, if uneven, divergence between radical political advocacy (and the facts underlying such advocacy) *per se*⁷⁴—and the national security exception to the First Amendment.⁷⁵

The WikiLeaks cable disclosures inflict upon Washington with the same seismic force as they do upon its allies and enemies “the embarrassment of having their corrupt, war-mongering ways published for all the world to see” and sitting in the front row of this theater of political voyeurism is “an increasingly restless and volatile electorate.”⁷⁶ Under such circumstances, the distinction between disloyal

which is constitutionally protected under the strictest of scrutiny standards, *see* *Brandenburg v. Ohio*, 395 U. S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”), and security-compromising conduct, such as leaking classified information, *see* *New York Times v. United States*, 403 U.S. 713, 723-24 (1971) (“The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. The present cases will, I think, go down in history as the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.”) (citations omitted).

⁷⁴ During World War I, prosecutors and appellate judges often did not sympathize with the defendant’s insistence on the truth of his utterance. *See* *United States v. Motion Picture Film ‘The Spirit of ‘76’*, 252 F. 946 (S.D. Cal. 1917) (finding defendant filmmaker guilty under the Espionage Act for maligning the government of the UK, America’s wartime ally, by producing a film about the American War of Independence that depicted eighteenth-century British Redcoats committing atrocities against American colonists). *See id.* at 947 (“History is history, and fact is fact. There is no doubt about that. At the present time, however, the United States is confronted with what I conceive to be the greatest emergency we have ever been confronted with at any time in our history. There is now required of us the greatest amount of devotion to a common cause, the greatest amount of co-operation, the greatest amount of efficiency, and the greatest amount of disposition to further the ultimate success of American arms that can be conceived, and as a necessary consequence no man should be permitted, by deliberate act, or even unthinkingly, to do that which will in any way detract from the efforts which the United States is putting forth or serve to postpone for a single moment the early coming of the day when the success of our arms shall be a fact and the righteousness of our cause shall have been demonstrated.”).

⁷⁵ For a comprehensive overview of the national security exception doctrine in the particular context of WikiLeaks, *see* Kate Kovarovic, *When the Nation Springs a [Wiki]Leak: The “National Security” Attack on Free Speech* (2010) (unpublished article), available at http://works.bepress.com/kate_kovarovic/3.

⁷⁶ Angela H, *WikiLeaks, Espionage and Sedition: We are ALL Guilty*, *ACTIVISIONARY* (Jan. 24, 2011), http://activisionary.info/?page_id=46&preview=true#/discussion/3/wikileaks-espionage-and-sedition-we-are-all-guilty/p1.

sedition and loyal criticism that the U.S. Attorney General in 1918 advised his subordinates to honor is even less meaningful than it was during World War I. Under the specific intent standard of Espionage Act liability with which the Government wants to prosecute Assange and WikiLeaks, a trial jury could very well end up convicting or acquitting based on its assessment of a prosecutor's closing argument worded identically to the following assertion by *The National Review's* Rich Lowry:

Assange's goal is wanton destruction, pure and simple. He wants to expose to retribution those who cooperate with us on the ground in war zones. He wants to undercut domestic support for our wars. He wants to embarrass our foreign allies and exact a price for their trust in us. He wants to complicate sensitive operations like securing nuclear material in Pakistan and attacking terrorists with missiles in Yemen. Assange is Noam Chomsky with a knack for computers and a determination to do the "American empire" more harm than just lashing out against it in feverish books gobbled up by college sophomores.⁷⁷

As the current century progresses, more and more of us will develop a sufficient "knack for computers" to be able to inflict the type of political damage Assange has inflicted by releasing the cables. If technological savvy is all that is necessary to make a federal felon out of every questioning soul who dares follow in the footsteps of the kindly old MIT linguistics professor with a political chip on his shoulder, there will be little of substance left of the First Amendment before long.

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⁷⁷ Rich Lowry, *Assange the Anti-American*, NAT'L REV. (Nov. 30, 2010, 12:00 AM), <http://www.nationalreview.com/articles/254095/assange-antiamericanrich-lowry>.

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