HARBORING WIKILEAKS: COMPARING SWEDISH AND AMERICAN PRESS FREEDOM IN THE INTERNET AGE

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I. INTRODUCTION

> "Today, with authoritarian governments in power around much of the world, increasing authoritarian tendencies in democratic governments, and increasing amounts of power vested in unaccountable corporations, the need for openness and transparency is greater than ever. WikiLeaks is a tool to satisfy that need."[1]

1. *WikiLeaks: About*, WIKILEAKS, http://wikileaks.org/media/about.html (last visited Nov. 27, 2010). This link, like any of the following links to WikiLeaks' web

The first image is a group of Vietnamese children, one of them stark naked, screaming and running from napalm. The second image is a Vietcong soldier shot in the head from point-blank range, capturing the precise moment of his death. Ten years removed from a high school American history course, these images are what I remember most about the Vietnam War, and I remember them vividly. When I try to conjure images from the ongoing wars in Iraq and Afghanistan the things that come to mind are a crowd of Iraqis cheering as a statue of Saddam Hussein is beheaded and dragged through the streets, the mundane video clips of tanks driving or soldiers standing idle that accompany almost any news story regarding the wars, and the censored photographs of American troops' caskets. While technology and access to information have made great strides since Vietnam, it appears that wartime journalism has regressed. It is unclear whether this is a result of government pressure, editorial control in modern media, increased public sensitivity, or a combination of factors; but, it is clear there is a void in wartime reporting. With the United States fighting two increasingly unpopular foreign wars, it was only a matter of time until someone used modern technology to fill the void.

On July 25, 2010, the controversial whistleblower website WikiLeaks released roughly 92,000 classified United States government documents relating to the war in Afghanistan,[2] collectively titled "The Afghan War Diary."[3] This was followed by the October 22, 2010 release of nearly 400,000 documents detailing Operation Iraqi Freedom, titled "The Iraq War Logs."[4] These two war document leaks ("the war logs") have incited a firestorm of debate over the morality and legality of digitally publishing confidential government information. While there is a wide range of opinion about

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site may not be active as a result of recent denial-of-service attacks, but the information remains accessible on several mirror websites.

2. Note to Readers, *Piecing Together the Reports, and Deciding What to Publish*, N.Y. TIMES, July 25, 2010, at A8, *available at* http://www.nytimes.com/2010/07/26/world/26editors-note.html?_r=1.

3. *Afghan War Diary 2004-2009*, WIKILEAKS, http://mirror.wikileaks.info/wiki/Afghan_War_Diary,_2004-2010 (last visited Feb. 19, 2011).

4. *Iraq War Logs*, WIKILEAKS, http://warlogs.owni.fr/ (last visited Oct. 31, 2010).

the ultimate significance of the documents,[5] their release raises a number of novel issues about the content's legality and the current state of press freedom. The leaks have drawn several comparisons to the Pentagon Papers,[6] a leaked cache of confidential documents that detailed the U.S. military's involvement in the Vietnam War, and

5. *Compare* Note to Readers, *Piecing Together the Reports, and Deciding What to Publish*, *supra* note 2 ("Most of the incident reports are marked 'secret,' a relatively low level of classification."), *and* Editorial, *WikiLeaks' Release of Classified Field Reports on Afghan War Reveals Not Much*, WASH. POST, July 27, 2010,http://www.washingtonpost.com/wp-dyn/content/article/2010/07/26/AR2010 0726 04626.html ("[T]he release by WikiLeaks of 92,000 reports on the war in Afghanistan hardly merits the hype offered by the Web site's founder. The archive is not comparable to the Pentagon Papers or the secret files of the East German Stasi secret police, as Julian Assange variously claimed on Sunday and Monday."), *and* Thomas E. Ricks, *Underwhelmed by WikiLeaks Leaks*, FOREIGN POL'Y (July 26, 2010), http://ricks.foreignpolicy.com/posts/2010/07/26/wikileaks_this_ is_it_by_ tom_ricks?sms_ss=twitter ("A huge leak of U.S. reports and this is all they get? I know of more stuff leaked at one good dinner on background."), *with* Nick Davies and David Leigh, *Afghanistan War Logs: Massive Leak of Secret Files Exposes Truth of Occupation*, GUARDIAN (U.K.), July 25, 2010, http://www.guardian.co.uk/ world/2010/jul/25/afghanistan-war-logs-military-leaks ("[The Afghan War Diary] give[s] a blow-by-blow account of the fighting over the last six years, which has so far cost the lives of more than 320 British and more than 1,000 US troops"), *and* David Corn, *Ground Truth From Afghanistan*, MOTHER JONES (July 26, 2010), http://motherjones.com/mojo/2010/07/ground-truth-afghanistan ("[The Afghan War Diary] is not what Americans receive from US officials. And with much establishment media unable (or unwilling) to apply resources to comprehensive coverage of the war, the public doesn't see many snapshots like these. Any information that illuminates the realities of Afghanistan is valuable.").

6. *See* John F. Burns & Ravi Somaiya, *WikiLeaks Founder Gets Support in Rebuking U.S. on Whistle-Blowers*, N.Y. TIMES, Oct. 24, 2010, at A12 (detailing a London news conference at which both Julian Assange, the leader of WikiLeaks, and Daniel Ellsberg, the Pentagon Papers leaker, spoke at and drew parallels between the leaks). For video of the news conference, see *WikiLeaks Founder Julian Assange / Daniel Ellsberg Talk About Pentagon Papers*, YOUTUBE (Sept. 17, 2010), http://www.youtube.com/watch?v=rA0ty1ultDw&feature=player_embedded; *see also* Paul Farhi & Ellen Nakashima, *Is WikiLeaks the Pentagon Papers, Part 2? Parallels, and Differences, Exist*, WASH. POST, July 27, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/07/26/ AR201007260 5410.html ("'The parallels are very strong,' Ellsberg said in an interview Monday. 'This is the largest unauthorized disclosure since the Pentagon Papers. In actual scale, it is much larger, and thanks to the Internet, it has moved [around the world] much faster.'").

which the U.S. government unsuccessfully attempted to censor.[7] There are clear factual[8] and legal similarities between the two; WikiLeaks even cited[9] the Supreme Court's decision in the Pentagon Papers case[10] as precedent in its 2008 litigation.[11] However, the differences are sufficiently substantial to question whether WikiLeaks would also be immune from censorship in American courts. An answer to this question does not appear to be forthcoming as WikiLeaks has moved to Sweden, a haven for press freedom.[12]

It should come as no surprise that the U.S. Government openly denounces the war logs leak,[13] and has beseeched WikiLeaks to stop publishing military secrets.[14] WikiLeaks claims to have withheld

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7. The Pentagon Papers are discussed at greater length *infra* Part III.B. For an in-depth analysis of the Pentagon Papers, see DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE (1996).

8. Both WikiLeaks and the Pentagon Papers leaked sensitive U.S. military documents, with aid from the New York Times, about controversial foreign wars. Both leaks were criticized and labeled insignificant when initially published, but gained significant momentum in the media provoking government action and debate about press freedom. *See* Farhi & Nakashima, *supra* note 6.

9. Daniel Mathews' Memorandum of Points and Authorities in Opposition to the Temporary Restraining Order, Proposed Preliminary Injunction, and Permanent Injunction at 9-10, Bank Julius Baer & Co. v. WikiLeaks, 535 F. Supp. 2d 980 (N.D. Cal. 2008) (No. C 08-00824 JSW).

10. N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (discussed *infra* Part III.B).

11. Bank Julius Baer & Co. v. WikiLeaks, 535 F. Supp. 2d 980 (N.D. Cal. 2008) (discussed *infra* Part III.D).

12. *See Press Freedom Index 2010*, REPORTERS WITHOUT BORDERS (Oct. 20, 2010), http://www.rsf.org/IMG/CLASSEMENT_2011/GB/C_GENERAL_GB.pdf (listing Sweden tied with five other countries for the highest press freedom in the world).

13. *See* Guylyn Cummins, *Classified Information Necessary to Protect National Security? Says Who?*, COMM. LAW., Apr. 2010, at 2 ("A recent news report about a leaked U.S. Army intelligence report, classified as secret, says WikiLeaks.org poses a significant 'operational security and information security' threat to military operations.").

14. David Alexander, *U.S. Worried More Secret Documents May Be Released*, REUTERS, July 30, 2010, http://www.reuters.com/article/idUSTRE66T5B120100730 ("'We can do nothing but implore the person who has those classified top secret documents not to post any more,' Gibbs said. 'I think it's important that no more damage be done to our national security.'").

several sensitive portions from the logs,[15] and has asked the American government for specific data it would like censored.[16] However, the Pentagon is unwilling to accept any partially restricted leaks, refusing to cooperate with WikiLeaks in releasing a "sanitized" version of the document caches.[17] This is hardly the first time that the United States has sought to censor a news source,[18] but WikiLeaks poses new questions to this debate for two reasons.

First, WikiLeaks and other whistleblower websites are a novel journalistic medium that American jurisprudence and American law are struggling to regulate.[19] Whistleblower websites are unique because, with only an Internet connection, they can distribute thousands of documents leading to an "immediate and irreversible deluge"[20] of information. The outpour of information is irreversible because once controversial information is uploaded it can "go viral," spreading worldwide in a matter of hours. If, somehow, content is censored, it will gain even more notoriety[21] and probably remain accessible through mirror websites.[22]

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15. *See WikiLeaks Press*, WIKILEAKS, http://wikileaks.org/media/press.html (last visited Nov. 27, 2010).

16. *Pentagon Says No to 'Sanitized' WikiLeaks Release*, VANCOUVER SUN, Aug. 19, 2010, http://www.vancouversun.com/news/Pentagon+says+sanitized+WikiLeaks+release/3417853/story.html.

17. *Id.*

18. Other notable instances are discussed *infra* Part III.

19. *Id.*

20. *See* William G. Childs, *When the Bell Can't Be Unrung: Document Leaks and Protective Orders in Mass Tort Litigation*, 27 REV. LITIG. 565, 592 (2008).

21. The phenomenon of online material gaining exposure after an attempt at censorship is known as "The Streisand Effect," based on Barbra Streisand's unsuccessful attempt to remove an aerial photo of her home from public records for safety reasons. Mike Masnick, *Since When is it Illegal to Just Mention a Trademark Online*, TECHDIRT (Jan. 5, 2005), http://www.techdirt.com/articles/20050105/0132239.shtml.

22. This is exactly what happened in the *Bank Julius Baer* case, discussed *infra* part III.D; *see also* Lolita C. Baldor, *What to do About WikiLeaks? Not Much Can be Done*, SEATTLE TIMES, Aug. 7, 2010, http://seattletimes.nwsource.com/html/politics/2012558664_apuspluggingwikileaks.html ("Once you start messing with the Internet, taking things down, and going to the maximum extent to hide everything from coming out, it doesn't necessarily serve your purpose . . . it makes the story bigger than it would have been had the documents been released in the first place.").

Second, WikiLeaks is able to broadcast sensitive documents throughout the world because of the liberal freedom of press laws in a few European countries—most notably Sweden, where the site is mostly based[23]—raising a number of issues in Swedish and international law.

Press freedom is a necessary check on any democratic government because a free press makes government actions transparent, giving voters the information necessary to make informed decisions at the polls.[24] As such, freedom of the press is enforced to varying degrees in constitutions throughout the democratic world.[25] By using this freedom to upload classified military documents, WikiLeaks has provoked both passionate support and vocal condemnation.[26] The question of whether or not journalists legally can distribute such information over the Internet is unsettled[27] and increasingly important. Online whistleblower journalism is only going to increase in significance as the world relies more and more on

23. *WikiLeaks: About*, *supra* note 1.

24. *See generally* Tracy J. Ross, *A Test of Democracy: Ethiopia's Mass Media and Freedom of Information Proclamation*, 114 PENN ST. L. REV. 1047, 1066 (2010) ("Freedom of expression is the only way to achieve an accountable and transparent government free from corruption and tyranny, while developing a professional and unbiased press. The press, in other words, must have the freedom to criticize the government."); *see also* N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) ("The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.").

25. *See, e.g.*, U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press"); Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c.11 (U.K.) ("[Everyone has the] freedom of the press and other media of communication..."); TRYCKFRIHETSFÖRORDNINGEN [TF] [CONSTITUTION] 1:1 (Swed.) ("The freedom of the press is understood to mean the right of every Swedish citizen to publish written matter, without prior hindrance by a public authority or other public body, and not to be prosecuted thereafter on grounds of its content other than before a lawful court, or punished therefor other than because the content contravenes an express provision of law, enacted to preserve public order without suppressing information to the public.").

26. *See infra* notes 47-48 and accompanying text.

27. This question is discussed *infra* Parts II-III.

non-conventional, Internet news sources.[28] Sites like WikiLeaks can play a valuable journalistic role in exposing military misconduct in already controversial wars, but there is also a very real possibility that this medium can be abused and endanger innocent lives. The United States must realize the inevitability of this type of journalism, and adapt its press laws to accommodate whistleblower websites, which will in turn engender ethical journalism in the medium. While whistleblower sites like WikiLeaks present challenges to the U.S. government, their value to democratic society in exposing corruption and demanding accountability outweighs their detrimental effects, and they should be protected accordingly.

This Comment is structured to explore the legal challenges to the continued existence of WikiLeaks and other whistleblower websites. Section II will introduce WikiLeaks, the current vanguard of whistleblower websites, as well as provide a brief analysis of trends in media regulation. Section III focuses on Sweden's digital press laws, which are instrumental to WikiLeaks' current existence. By tracing the history of press freedom in Sweden, its current application to WikiLeaks, and current legal trends and popular opinion, Section III will outline the favorable aspects of Swedish law that protect whistleblower websites, and explore whether Sweden will remain a safe haven for these sites. Section IV focuses on freedom of the press law in the United States, how the law developed, and how it would likely be applied to the WikiLeaks war logs. Section V proposes a federal statute that, if enacted, would strike an appropriate balance between the need to protect whistleblower websites and the legitimate security interests of governments. This Comment concludes by positing a likely future for whistleblower websites in America under current law, and explains how the model legislation proposed in Section V will allow this invaluable medium to harmoniously coexist with the United States government and citizens.

28. *See* Raj Dash, *Report: Internet is Increasingly the Source for News*, SOC. TIMES (Mar. 1, 2010), http://www.socialtimes.com/2010/03/pew-news-report.

II. BACKGROUND

A. Brief Overview of WikiLeaks

Julian Assange, an Australian anti-war activist and former hacker, launched WikiLeaks in 2006[29] and remains the site's de facto public face and spokesperson.[30] The site's involvement begins when a person submits files to WikiLeaks (presumably exposing government or corporate corruption). WikiLeaks then verifies the authenticity of the documents, and hosts them on its servers for worldwide access.[31] WikiLeaks styles itself as "the first intelligence agency of the people," and describes its mission as "exposing oppressive regimes in Asia, the former Soviet bloc, Sub-Saharan Africa and the Middle East, but we also expect to be of assistance to people of all regions who wish to reveal unethical behavior in their governments and corporations."[32]

WikiLeaks is an interesting case study in digital press freedom because of its content, method, and controversial nature.[33] While the site leaks a vast number of documents from all corners of the world across a broad spectrum of subject matter,[34] its worldwide notoriety owes primarily to American document releases—most notably the recent war logs. Some of the site's other significant American document leaks are the contents of Sarah Palin's personal email,[35]

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29. David Cohen, *Julian Assange: The End of Secrets?*, NEW SCIENTIST, Aug. 2010, at 32-33.

30. *See id.*

31. *WikiLeaks: About*, *supra* note 1.

32. *Id.*

33. Paulina Reso, *Five Pioneering Web Sites That Could Totally Change the News*, N.Y. DAILY NEWS, May 20, 2010, http://www.nydailynews.com/money/2010/05/20/2010-05-20_5_pioneering_web_sites_that_could_totally_change_the_news.html (listing WikiLeaks as the pioneering website most likely to change the news).

34. *See infra* notes 35-37.

35. Michael D. Shear & Karl Vick, *Hackers Access Palin's Personal E-mail, Post Some Online*, WASH. POST, Sept. 18, 2008, http://www.washingtonpost.com/wpdyn/content/article/2008/09/17/AR2008091703304_2.html?hpid=topnews&sid=ST2008091703731.

operating procedures at the Guantánamo Bay detention camp,[36] and a video depicting American forces killing journalists and civilians in a Baghdad air strike.[37] The latter leak gave the search term "WikiLeaks" the most growth worldwide over a one-week period.[38] WikiLeaks is an equal-opportunity whistleblower whose goal is exposing government and business misdeeds, regardless of the politics or nature of the transgressor.

The Baghdad air strike video is significant because it shows what kind of punishment a whistleblower faces without the protection of WikiLeaks. Through no fault of WikiLeaks, an inadvertent admission in an instant message exposed Bradley Manning, a U.S. Army intelligence analyst, as the apparent whistleblower who submitted the video to WikiLeaks.[39] If convicted on all charges, Manning faces up to fifty-two years in prison,[40] with one American politician urging the death penalty.[41] WikiLeaks publicly claimed they did not know the identity of the whistleblower, but declared, "if Brad Manning . . . is the 'Collateral Murder' & Garani massacre whistleblower then, without doubt, he's a national hero."[42] WikiLeaks also claimed that they attempted to secure defense counsel for Manning, but were

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36. Ryan Singel, *Sensitive Guantánamo Bay Manual Leaked Through Wiki Site*, WIRED (Nov. 14, 2007), http://www.wired.com/politics/onlinerights/news/2007/11/gitmo.

37. Sunshinepress, *Collateral Murder – WikiLeaks – Iraq*, YOUTUBE (Apr. 3, 2010), http://www.youtube.com/watch?v=5rXPrfnU3G0.

38. *Current Google Insight Trends: WikiLeaks Posts Classified Military Video, Masters*, INDEPENDENT (U.K.), Apr. 12, 2010, http://www.independent.co.uk/news/media/current-google-insights-trends-wikileaks-posts-clasified-military-video-masters-1942629.html.

39. Kim Zetter & Kevin Poulsen, *Army Intelligence Analyst Charged With Leaking Classified Information*, WIRED (July 6, 2010), http://www.wired.com/threatlevel/2010/07/manning-charges.

40. *Id.*

41. Declan McCullagh, *Politician: Execution OK for WikiLeaks Source*, CBS NEWS (Aug. 3, 2010), http://www.cbsnews.com/8301-501465_162-20012513-501465.html.

42. Michael Sheridan, *Report: Soldier Arrested for Allegedly Leaking 'Collateral Murder' Helicopter Video to WikiLeaks*, N.Y. DAILY NEWS, June 7, 2010, http://www.nydailynews.com/news/world/2010/06/07/2010-06-07_spc_bradley_manning_allegedly_arrested_for_leaking_collateral_murder_helicopter_.html.

thwarted by the American Government.[43] Manning is also considered a "person of interest"[44] in the U.S. Army's criminal investigation of the Afghan War Diary leak.[45]

WikiLeaks is no stranger to controversy, having received numerous awards from reputable sources,[46] as well as censorship and condemnation by governments worldwide.[47] The recent release of the war logs evidences how powerful a site like WikiLeaks can be, and also of how this power is subject to abuse. The Afghan War Diary did not censor several cooperating Afghanis' names,[48] despite Assange's assurances of security measures preventing collateral damage.[49] This

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43. Ian Traynor, *WikiLeaks Founder Julian Assange Breaks Cover but Will Avoid America*, GUARDIAN (U.K.), June 21, 2010, http://www.guardian.co.uk/media/2010/jun/21/wikileaks-founder-julian-assange-breaks-cover.

44. "Person of interest" is a legally insignificant classification that the government often uses to categorize potential suspects. Donna Shaw, *Dilemma of Interest*, AM. JOURNALISM REV., Feb./Mar. 2006, http://www.ajr.org/Article.asp?id=4042.

45. Julian E. Barnes, *Pentagon Eyes Accused Analyst Over WikiLeaks Data*, WALL ST. J., July 27, 2010, http://online.wsj.com/article/SB10001424052748704700404575391523088194344.html?mod=WSJ_hpp_LEFTTopStories.

46. *WikiLeaks: About*, *supra* note 1. WikiLeaks has received the 2008 Economist Index on Censorship Freedom of Expression Award and the 2009 Amnesty International Human Rights Reporting Award for New Media. *Id.*

47. *See, e.g.*, *WikiLeaks: About*, WIKILEAKS, http://web.archive.org/web/20080216000537/http://www.wikileaks.org/wiki/Wikileaks:About#Is_Wikileaks_blocked_by_the_Chinese_government.3F (last visited Feb. 28, 2011) (detailing China's attempts to block access to WikiLeaks); *Thailand Blocks WikiLeaks Website*, TELEGRAPH (U.K.), Aug. 18, 2010, http://www.telegraph.co.uk/news/worldnews/asia/thailand/7951959/Thailand-blocks-Wikileaks-website.html; John Oates, *Aussie Firewall Blocks WikiLeaks*, REGISTER (U.K.), Mar. 18, 2009, http://www.theregister.co.uk/2009/03/18/ aussie_firewall_wikileaks.

48. *See* Charli Carpenter, *How WikiLeaks Could Use its Powers for Good*, FOREIGN POL'Y (Aug. 12, 2010), http://www.foreignpolicy.com/ articles/2010/08/12/how_wikileaks_could_use_its_power_for_good?page=full.

49. *WikiLeaks Founder Julian Assange Interview*, CHANNEL 4 NEWS (U.K.), July 25, 2010, http://www.channel4.com/news/wikileaks-founder-julian-assange-tells-all ("We've gone through the material and reviewed [The Afghan War Diary] and looked for cases where innocent informers, ie an old man saying next door there is a Taliban, or what he believes is Taliban, so we've looked for those cases and there's a particular type of report that frequently has that - those have been withheld and also the source says they have done some work in doing this as well. So I think it's unlikely that that will happen. We've worked hard to make sure there's not a significant chance of anybody coming to harm . . . . Sources know when they submit

decision has been widely decried as heartless, even by human rights organizations like Amnesty International, that generally support WikiLeaks.[50] The decision appears to have been contested even among WikiLeaks employees, causing some to quit.[51] Because of the potential for this type of abuse, the American government should address these websites with legislation that deals with them specifically. Otherwise, the Pentagon's current hard line stance will only engender further abuse of a medium that can be of great value to democratic society in the coming years.

B. Overview of Media Regulation

The conflict between the media and government is as old as journalism itself.[52] As modern democracies took shape, so did the concept that freedom of the press is an intrinsic civil right in a democratic society.[53] There have always been, however, some limitations to the freedom of the press. Democratic nations probably had more time to codify regulations and protections for traditional media like newspapers, radio, and television as they developed. In contrast with regulation of the Internet, this was easier to do for two reasons. First, traditional forms of media developed over centuries or decades; by contrast, innovations in the Internet are made annually, if not daily.[54] Second, the media in many democratic countries, like the United States, is generally controlled by monolithic entities in private

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material that we go through a 'harm minimisation' process. That harm minimisation process is not about removing material it's about minimising harm.").

50. Anne Gearan, *Amnesty International, Human Rights Groups Ask WikiLeaks to Censor Civilians' Names*, HUFFINGTON POST, Aug. 10, 2010, http://www.huffingtonpost.com/2010/08/10/amnesty-international-hum_n_677048.html.

51. *See WikiLeaks' German Staff Quits, Says Chief Authoritarian,* NDTV (Sept. 28, 2010), http://www.ndtv.com/article/technology/wikileaks-german-staff-quits-says-chief-authoritarian-55532 (stating an employee's decision to leave WikiLeaks was because the site "need[s] to become more professional and transparent").

52. *See* Katsh, *infra* note 161.

53. *See* discussion *infra* Part III.

54. *See The Ten Most Influential Internet Moments of the Decade*, WEBBY AWARDS, http://www.webbyawards.com/press/topwebmomentsdecade.php (last visited Feb. 27, 2011) (listing ten Internet innovations from the last decade).

enterprise.[55] The corporations that publish or broadcast traditional media are generally cooperative with government press regulation, for fear that drawing the ire of government will cause their profits to suffer. Many emerging news outlets on the Internet, like WikiLeaks, are concerned with their message instead of their profit, making them less likely to follow government regulations.[56] The influence of new digital journalism is growing as the importance of traditional media wanes.[57] As such, laws that affect WikiLeaks and other web-based news sources will have far-reaching consequences in determining how the world consumes news in the near future. The Internet's individualism and meteoric rise to prominence as a news source present new challenges for lawmakers across the globe.

The degree of press freedom in a country tends to mirror that country's Internet regulation. China, for example, is among the lowest ten countries worldwide in terms of press freedom[58] and is notorious for censoring websites that its citizens access.[59] Conversely, Sweden was the first country in the world to enact freedom of the press laws,[60] and is currently among the top countries in the world in press freedom.[61]

Sweden's relaxed digital press laws are exactly why WikiLeaks and several other controversial digital entities base their operations

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55. *See* Christa Corrine McLintock, *The Distruction of Media Diversity, or: How the FCC Learned to Stop Regulating and Love Corporate Dominated Media*, 22 J. MARSHALL J. COMPUTER & INFO. L. 569, 572 (2004) ("Presently, the traditional, mainstream media regularly engage in self-censorship, putting the public's interest in quality journalism behind their premiere loyalty to parent corporations, advertisers and the government.").

56. *See WikiLeaks: About*, *supra* note 1 ("Because we are not motivated by making a profit, we work cooperatively with other publishing and media organisations around the globe, instead of following the traditional model of competing with other media.").

57. *See* Dash, *supra* note 28.

58. *See Press Freedom Index 2010*, *supra* note 12. China has the 171st freest press out of 178 countries. *Id.*

59. *See WikiLeaks: About*, *supra* note 47.

60. Erik Göthe, *The Swedish Tradition of Freedom of Press*, FECL, http://www.fecl.org/circular/1507.htm (last visited Feb. 28, 2011).

61. *See Press Freedom Index 2010*, *supra* note 12.

there.[62] Its release of the war logs has called worldwide attention to Sweden as a safe haven for WikiLeaks.[63] There is recent Swedish jurisprudence that suggests the country may be taking steps to increase Internet regulation.[64] The state of Swedish Internet press law makes an interesting comparison to its American counterpart because both countries' press laws are based on similarly phrased constitutional rights, yet the interpretation of each constitution has yielded entirely different results.[65] This Comment will explore whether Sweden's relaxed digital press laws are a forward-looking necessity that addresses rising digital journalism and should be mirrored by the United States and others; also, this Comment will discuss whether these laws are a uniquely Scandinavian phenomena that will continue to allow controversial information to bypass Swedish servers en route to the rest of the world, or a soon-to-be relic of the Internet's wild west days before international government and business manage to close the loophole.

III. THE STATE OF DIGITAL PRESS FREEDOM IN SWEDEN

The following analysis of WikiLeaks' presence in Sweden seeks to inform American digital press law in two ways. First, by discussing WikiLeaks' legal status in Sweden, I hope to establish that, contrary to some opinions, WikiLeaks will likely continue to operate in Sweden undisturbed. If this is the case, the U.S. Government's current hard-line stance against WikiLeaks will remain futile;[66] the government should instead adapt its current laws to accommodate the inevitability of whistleblower websites. Second, I highlight aspects of Sweden's press laws that will inform my proposal for legislation to protect whistleblower websites.[67]

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62. *See* Malin Rising, *WikiLeaks Seeks Online Safe Haven in Sweden*, ABC NEWS (Aug. 18, 2010), http://abcnews.go.com/Technology/wireStory?id=11430847.

63. *See* Clint Hendler, *A Swedish Shield, Unraised*, COLUM. JOURNALISM REV. (Sept. 2, 2010), http://www.cjr.org/campaign_desk/a_swedish_shield_unraised.php?page=all.

64. *See infra* Part II.C.

65. *See* discussion *infra* Parts III.A, IV.A-C.

66. *See* discussion *infra* Part III.D.

67. The proposed legislation can be found *infra* Part IV.

A. The History of Swedish Press Freedom

Sweden became the first country in the world to enact a law protecting the freedom of the press, with a constitutional provision passed in 1766.[68] The law was written during an era of change in Sweden from absolute monarchy to parliamentary monarchy known as "the Age of Liberty."[69] This law, roughly translated as the "The Law on the Freedom of Printing," provided an attenuated press freedom that prohibited certain religious and governmental criticism.[70] The provision was later buttressed by the Free Press Statute of 1812 and several constitutional amendments, which provided that the press could not be censored except where publication would result in libel, blasphemy, obscenity, or undermining the political or social order.[71] These laws gave Sweden the most liberated press in nineteenth century Europe.[72]

Sweden's press freedom continued to evolve in the twentieth century, mirroring the dominant Social Democratic Party's liberalism and focus on individual rights.[73] The law eventually took its current form in 1982 and is known as the Freedom of the Press Law.[74] The relatively recent Fundamental Law on the Freedom of Expression, a constitutional law passed in 1991, applies press freedom to media like television and the Internet.[75] These two laws make up half of the four fundamental laws of Sweden's constitution and as such are given great deference. "As in the U.S. Constitution, no other law or act of the state is allowed to infringe on the rights described in fundamental laws."[76] Also similar to American jurisprudence, there are some

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68. *See* Göthe, *supra* note 60.

69. BYRON J. NORDSTROM, SCANDINAVIA SINCE 1500, at 109-10, 134 (2000).

70. *Id.* at 111.

71. CHARLES A. RUUD, FIGHTING WORDS: IMPERIAL CENSORSHIP AND THE RUSSIAN PRESS 15 (2009).

72. *Id.*

73. *See* Göthe, *supra* note 60.

74. *See generally* TRYCKFRIHETSFÖRORDNINGEN [TF] [CONSTITUTION] (Swed.).

75. *See generally* YTTRANDEFRIHETSGRUNDLAGEN [YGL] [CONSTITUTION] (Swed.).

76. *See* Hendler, *supra* note 63.

restrictions to freedom of the press built into the constitution, which provides:

> Freedom of printing means the right of every Swedish national, without any hindrance raised beforehand by an authority or other public body, to publish any written matter, thereafter not to be prosecuted on account of the contents of such publication otherwise than before a legal court, or to be punished therefore in any case *other than such where the contents are in contravention of the express terms of law.*[77]

In practice, the Swedish restrictions are far less invasive of press freedom than their American counterparts, calling for censorship of only "national security crime[s] like treason, or of knowingly leaking a properly classified document."[78]

The most important aspect of Sweden's freedom of the press for sites like WikiLeaks is the right to anonymity of source material; the law grants a strong right of anonymity to information sources like whistleblowers.[79] Sweden's press law is unique in that it not only permits journalists to withhold the identity of their sources, but also punishes journalists who reveal their sources with fines or imprisonment for up to one year.[80]

B. WikiLeaks' Presence in Sweden

The high level of press freedom in Sweden probably owes to the importance of the press in the country. Swedes read the most newspapers in the world per capita,[81] and place enormous social value on a free press.[82] The liberal press laws reflect that value. Thus,

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77. Göthe, *supra* note 60 (emphasis added).

78. *See* Hendler, *supra* note 63.

79. *Id.*

80. TRYCKFRIHETSFÖRORDNINGEN [TF] [CONSTITUTITON] 3:5 (Swed.).

81. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2193 (1992).

82. Bernard Michael Ortwein II, *The Swedish Legal System: An Introduction*, 13 IND. INT'L & COMP. L. REV. 405, 405 (2003) ("It has been stated that if one were to ask the average Swedish citizen what the 'third branch of power' in their government might be, they would most likely reply 'the press, the media.' No one would think of the Courts."); *see also* Robbe van Lier, *The Strong Newspaper*

WikiLeaks provides a service that most people in the country probably agree with in theory, however controversial the site's content may be. Sweden also has one of the highest rates of Internet access per capita in the world, with more than ninety percent of its citizens accessing the web,[83] and is considered the "most wired" country in the world.[84] The importance of the press and the level of technology in Sweden make it a fitting place for WikiLeaks to base its operations.

WikiLeaks uses advanced encryption and hosting methods[85] to publish documents from Swedish servers with the help of sympathetic partners in Sweden. The site initially based its servers in the United States, but moved the majority of their operations to Sweden in 2007.[86] Julian Assange cites Sweden's relaxed press laws as motivation for the move.[87] WikiLeaks also lists Sweden's press laws as a measure of safety and anonymity to potential contributors.[88] The

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Market in Sweden, EUR. CULTURE & EUR. JOURNALISM (June 20, 2010), http://www.schoolvoorjournalistiek.com/europeanculture09/?p=1752 (outlining the omnipresence of newspapers in Sweden).

83. *Internet Usage in Europe*, INTERNET WORLD STATS, http://www.internetworldstats.com/stats4.htm#europe (last visited Nov. 26, 2010).

84. Elizabeth Woyke, *The World's Most Wired Countries*, FORBES (June 26, 2008), http://www.forbes.com/2008/06/25/computers-sweden-wef-tech-bizcountries 08-cx_ ew_0626wiredcountries.html; *see also* Tara Touloumis, *Buccaneers and Bucks From the Internet: Pirate Bay and the Entertainment Industry*, 19 SETON HALL J. SPORTS & ENT. L. 253, 258-59 (2009) ("The Internet plays a pivotal role in Swedish culture. Sweden possesses one of the most developed Internet infrastructures in the world and encourages Internet use by offering a national tax credit to computer purchasers.").

85. *See* Baldor, *supra* note 22 (postulating that the encryption method WikiLeaks uses, a 256-bit key, is practically unbreakable using a typical code breaking scheme).

86. Rising, *supra* note 62.

87. *See* Hendler, *supra* note 63 ("WikiLeaks has long advertised that portions of its operations, especially its key submission and publication servers, are based in Sweden in order to take advantage of the country's constitutionally established source protection laws.").

88. *WikiLeaks: About*, *supra* note 1 ("How does it work? Where is it based? Physically WikiLeaks does two things—it receives disclosures from whistleblowers or journalists who can't get their material into the press in the ususal [sic] manner due to legal reasons. It then publishes this material and keeps it online in the face of political or legal attack. So in the first part that's a matter of protecting the source and there is some sophisticated infrastructure to do that, bouncing our submissions around the world in an encrypted way to lose the trail of surveillance activities and

site was first hosted by PeRiQuito AB ("PRQ"), an Internet Service Provider started by the founders of The Pirate Bay,[89] a controversial BitTorrent[90] site. This was a convenient arrangement for WikiLeaks, as PRQ keeps little to no information about their clients on file, promoting secrecy.[91]

WikiLeaks has recently allied with one of Sweden's oldest and largest Internet service providers, Bahnhof, which is openly supportive of WikiLeaks' cause.[92] This development is significant because it shows that prominent businesses with mainstream clients have no qualms about backing WikiLeaks, and reflects a national sentiment of support for digital press freedom. Fittingly, Bahnhof is storing WikiLeaks' data 100 feet underground in a Stockholm cold war era nuclear bunker, which a Bahnhof executive described as "a kind of metaphor" for the company's dedication to its clients.[93] Despite WikiLeaks' technological fortification in Sweden and Assange's confidence in the site's security within Swedish borders,

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also to pass that information through protective legal jurisdictions like Sweden or Belgium, which have legislation to ensure communications between a journalist and a source are protected. Then in the second part, the publishing aspect, there are other laws in different jurisdictions that protect the rights of people to communicate in public in different ways. So we have infrastructure situated in New York, Sweden, [and] Iceland to take advantage of that protection.").

89. *See* David F. Gallagher, *WikiLeaks Site Has a Friend in Sweden*, N.Y. TIMES, Feb. 20, 2008, http://bits.blogs.nytimes.com/2008/02/20/wikileaks-site-has-a-friend-in-sweden.

90. Rebecca Giblin, *A Bit Liable? A Guide to Navigating the U.S. Secondary Liability Patchwork*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 7, 8 (2008-2009) (describing BitTorrent as a peer to peer file sharing protocol used to distribute large, often copyrighted, files over the Internet.).

91. *See* Dan Goodin, *WikiLeaks Judge Gets Pirate Bay Treatment*, REGISTER (U.K.), Feb. 21, 2008, http://www.theregister.co.uk/2008/02/21/wikileaks_bulletproof_hosting/page2.html (noting that PRQ has almost no information about its clientele and maintains few if any of its own logs).

92. Andy Greenberg, *WikiLeaks Servers Move to Underground Nuclear Bunker*, FORBES (Aug. 30, 2010), http://blogs.forbes.com/andygreenberg/2010/08/30/wikileaks-servers-move-to-underground-nuclear-bunker (Bahnhof executive Jon Karlung stated, "[w]e're proud to have clients like these . . . . The Internet should be an open source for freedom of speech, and the role of an ISP is to be a neutral technological tool of access, not an instrument for collecting information from customers.").

93. *Id.*

there is a growing sentiment among Swedish legal scholars that the website is not within the country's freedom of the press protection.[94]

Unlike traditional media, which are automatically protected under Sweden's Freedom of the Press Law, websites must satisfy additional criteria to gain protection under the Fundamental Law on Freedom of Expression, which describes the law pertaining to websites when it refers to "databases."[95] According to this law, a website must first apply for a license with the Swedish Radio and Television Authority.[96] The site must be registered to a Swedish resident, which likely explains Assange's recent application for residency, although WikiLeaks would probably have no problem finding a sympathetic Swede to register.[97] The procedure is supposedly a formality that does not consider content, but WikiLeaks, contrary to prior reports and according to the licensing division itself, has apparently not yet applied for a license.[98] Sites that are not properly registered, like WikiLeaks, are denied constitutional protection and remain open to a variety of civil causes of action.[99] Supposing that WikiLeaks does obtain a license, it is unsettled whether the constitution would provide retroactive protection for documents released prior to certification, like the recent war document leaks, or whether they could be subsequently censored.[100]

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94. *See* Hendler, *supra* note 63.

95. *Id.*

96. YTTRANDEFRIHETSGRUNDLAGEN [YGL] [CONSTITUTITON] 1:9 (Swed.); *see also* Hendler, *supra* note 63 ("[T]he Swedish Radio and Television issues certificates and registrations to electronic outlets seeking constitutional protection.").

97. *WikiLeaks: U.S. Army Willing to Discuss Afghan Files*, USA TODAY, Aug. 18, 2010, http://www.usatoday.com/news/military/2010-08-18-afghanistan-wikileaks_N.htm ("[Assange] was in Sweden in part to prepare an application for a publishing certificate that would allow WikiLeaks to take full advantage of the Scandinavian nation's press freedom laws . . . . That also means WikiLeaks would have to appoint a publisher that could be held legally responsible for the material. Assange said that person would be 'either me or one of our Swedish people.'").

98. Hendler, *supra* note 63 ("In fact, despite August press coverage in Sweden pointing out that the site had not taken this basic step, Morast told CJR that WikiLeaks had not even filed for a certificate. 'As far as I can see, I have no application for WikiLeaks registered,' says Morast. 'And we're a rather small authority, so I would know!'").

99. *Id.*

100. *Id.*

There is reason to suspect that WikiLeaks' failure to register with the Swedish government may lead to government action. The Swedish authority that would initiate action against a non-registered website for violating press laws is the Chancellor of Justice.[101] The Deputy Chancellor of Justice has recently commented on WikiLeaks' failure to meet the requirements for constitutional protection, stating, "I think it is a bit strange that WikiLeaks doesn't seem to know the rules."[102] The official qualified his commentary as limited because WikiLeaks "could become a case for the Chancellor of Justice, I don't want to preempt our review."[103] This suggests that the Swedish Government is at the very least keeping an eye on WikiLeaks, and could be in the process of planning a lawsuit.

Even if WikiLeaks is not registered as a protected website, the site has taken certain measures that could possibly provide protection. The Pirate Party, a recently formed and surprisingly well-represented Swedish political party that is seeking seats in the European Parliament, considers WikiLeaks an ideological ally.[104] The party has taken action to potentially protect WikiLeaks by letting WikiLeaks use Pirate Party servers.[105] The theory is that WikiLeaks may receive protection through its political affiliation. While there is no constitutional basis for such protection, it is not much of a stretch to argue that Sweden, which provides generous autonomy to political parties, would give this affiliation legal significance. Another measure that could protect WikiLeaks is Julian Assange's affiliation with Aftonbladet, a liberal Swedish tabloid with the highest

101. Arvid Jurjaks, *English version: "Swedish Law Does Not Protect WikiLeaks Sources,"* SYDSVENSKAN (SWED.), Aug. 10, 2010, http://www.sydsvenskan.se/kultur-och-nojen/article1196808/English-version-Swedish-law-does-not-protect-Wikileaks-sources.html.

102. *Id.*

103. *Id.*

104. *Swedish Pirate Party to Host WikiLeaks Servers*, CNN, Aug. 18, 2010, http://edition.cnn.com/2010/WORLD/europe/08/18/sweden.wikileaks/#fbid=zfd5Igi2Lea&wom=false. (Assange described the synergy between the Pirate Party and WikiLeaks, stating, "[o]ur organizations share many values, and I am looking forward to future ways we can help each other improve the world").

105. *See id.*; *Piratpartiet Sköter Wikileak-Servrar*, DAGENS NYHETER (SWED.), Aug. 17, 2010, http://www.dn.se/nyheter/sverige/piratpartiet-skoter-wikileak-servrar-1.1155285.

circulation of any daily newspaper in Sweden[106] and itself a role-player in Sweden's press freedom history.[107] The paper hired Assange as a reporter[108] suggesting that it would help protect WikiLeaks in Sweden. This proposition also lacks a constitutional basis,[109] but certainly suggests popular support for WikiLeaks among Swedes.

Even if these measures are not construed to offer any legal protection, at the very least they echo popular and political support for WikiLeaks, which would make any legal action against the site an unpopular and contested endeavor. Assange has acknowledged WikiLeaks' tentative position in Sweden, but believes the nation supports its presence.[110] When asked whether WikiLeaks was safe in Sweden, Assange replied, "[T]ime will tell... [and Sweden's] political will to protect WikiLeaks is strong."[111] While Sweden has grounds for legal action against WikiLeaks, it may refuse to initiate such an action due to the high value it places on press freedom and its overall judicial philosophy. Bahnhof's founder, Oscar Swartz, opines that "[l]awyers in the U.S. . . . use the law in an adamant way and try to find any opportunity they can to throw spanners into the works of people . . . . We don't use the law in that way in Sweden."[112] Sweden's deep-seated respect for transparency is part of the reason it is regarded as such a forward-looking democratic nation.

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106. Matti Friedman, *Swedish Article Suggesting Israeli Troops Kill Palestinians, Harvest Organs Infuriates Israel*, HUFFINGTON POST (Aug. 19, 2009), http://www.huffingtonpost.com/2009/08/19/swedish-article-suggestin_n_262787.html.

107. *See* MARTINA SPRAGUE, SWEDEN: AN ILLUSTRATED HISTORY 158-60 (2005).

108. Oisín Cantwell, *Klar som Kolumnist för Aftonbladet*, AFTONBLADET (SWED.), Aug. 14, 2010, http://www.aftonbladet.se/nyheter/article7616188.ab.

109. *See* Hendler, *supra* note 63.

110. Peter Vinthagen Simpson, *Assange: Swedish Press Freedoms 'Most Proven,'* LOCAL (SWED.), Aug. 16, 2010, http://www.thelocal.se/28398/20100816. Assange was quoted as stating, "Sweden is vital for our work. We have had long-term support from the Swedish people and the Swedish legal system." *Id.*

111. Vakenpunktse, *WikiLeaks in Stockholm, Part 4/5*, YOUTUBE (Aug. 14, 2010), http://www.youtube.com/user/vakenpunktse#p/a/u/1/wcdc7QpfMbM.

112. *See* Rising, *supra* note 62.

C. Lessons from the Pirate Bay Trial

Operators of The Pirate Bay ("TPB"), one of the world's most popular file sharing websites, were recently found guilty in a Swedish court in a joint criminal and civil prosecution for copyright infringement.[113] Private copyright holders like the Motion Picture Association of America and the Recording Industry Association of America, and even the U.S. government influenced Sweden's decision to sue TPB's operators. [114] The trial followed a 2006 police raid on TPB's servers.[115] After the raid, the servers were temporarily moved to the Netherlands, and the site was back online within three days.[116] The raid failed to discourage TPB hosts, and the resulting press doubled the amount of members on the site and also gave the Pirate Party international exposure and a spike in membership.[117] This raid exemplifies the futility of trying to shut down a well-supported grassroots website by seizing its servers and targeting its operators.

While the raid on TPB's servers ultimately backfired, the Swedish government was able to make its point in court. The guilty verdict in TPB trials came as a bit of a surprise because Sweden is very tolerant, and even outright supportive, of unrestricted file sharing.[118] The

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113. Stockholm Tingsrätt [TR] [Stockholm District Court] 2009-04-17 ref B 13301-06 (Swed.).

114. Ann Persson, *USA-hot Bakom Fildelningsrazzia*, DAGENS NYHETER (SWED.), June 20, 2006, http://www.dn.se/nyheter/sverige/usa-hot-bakom-fildelningsrazzia-1.748900; Frank Ahrens, *U.S. Joins Industry in Piracy War*, WASH. POST, June 15, 2006, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/14/AR20060614 02071_pf.html.

115. Miaoran Li, *The Pirate Party and the Pirate Bay; How the Pirate Bay Influences Sweden and International Copyright Relations*, 21 PACE INT'L L. REV. 281, 288-89 (2009).

116. *Id.*

117. *Id.*

118. *See* Ulric M. Lewen, Note, *Internet File-Sharing: Swedish Pirates Challenge the U.S.*, 16 CARDOZO J. INT'L & COMP. L. 173, 192-94 (2008) (listing four factors that contribute to Swedish support of piracy: (1) technological sophistication of most Swedes along with high broadband speeds for easier file sharing; (2) Sweden's small national media is heavily subsidized so Swedes don't tend to think of copyrighted media as private property; (3) property rights in general are far more communal in Sweden than in continental Europe or America, with allmansrätten being a prime example; and, (4) under the welfare nation, Swedes are used to getting many things 'free'); James D. Nguyen, *The Global War Against*

sentence, which was on appeal at the time this Comment was written,[119] prescribed one year in prison for each of TPB's administrators and almost four million dollars in damages.[120] This was a relatively harsh penalty by Swedish standards,[121] likely conveying a governmental message that file sharing will not be tolerated, and it was widely protested in Sweden and elsewhere.[122] Despite the verdict, TPB has continued to operate in Sweden much as it had before sentencing because the operators, not the website, were on trial.[123] The case tends to show that the Swedish Government may not be comfortable with its reputation as a safe haven for digital outlaws, but is taking very measured steps in prevention.

While this case involves a different aspect of digital rights than WikiLeaks, it is highly probative of the current state of Swedish Internet jurisprudence, and one can draw several parallels to WikiLeaks' potentially tentative legal footing in Sweden.[124] Both

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Online Piracy: Lessons From the Pirate Bay, in TECH. & ENT. CONVERGENCE 2009: HOT BUS. & LEGAL ISSUES IN 'TECHNOTAINMENT' 147, 152 (PLI Pats., Copyrights, Trademarks, & Literary Prop., Course Handbook Series No. 978, 2009) ("1.2 million of Sweden's 9 million citizens reported in a census that they engage in [Internet file sharing].").

119. Duncan Geere, *Pirate Bay Appeal Begins in Stockholm*, WIRED (Sept. 28, 2010), http://www.wired.co.uk/news/archive/2010-09/28/pirate-bay-appeal-begins-in-stockholm.

120. Sofia Ström, *Så Mycket Ska De Betala*, AFTONBLADET (SWED.), Apr. 17, 2009, http://www.aftonbladet.se/nyheter/article4931970.ab.

121. Andre Paine, *Billboard Q&A: Lawyers Analyze Pirate Bay Case*, BILLBOARD (Apr. 24, 2009), http://www.billboard.biz/bbbiz/content_display/industry/e3i55fbb4c9063b301d1651610b4d1bb390 ("It's the longest sentence that's ever been awarded under Swedish copyright law. There are usually fines and damages."); Fredrik Söderling, *The Pirate Bay Sentence is Surprisingly Harsh*, DAGENS NYHETER (SWED.), Apr. 17, 2009, http://www.dn.se/kultur-noje/musik/fredrik-soderling-the-pirate-bay-sentence-is-surprisingly-harsh-1.846920.

122. *Pirate Bay Sentences Prompt Protests*, UPI (Apr. 19, 2009), http://www.upi.com/Entertainment_News/2009/04/19/Pirate-Bay-sentences-prompt-protests/UPI-15441240156999.

123. *See* Nguyen, *supra* note 118.

124. A direct comparison is not justifiable because, unlike the material at issue in the TPB trial, the United States government by statute does not have copyrights for its war documents. However, the classified nature of those documents may provide a basis for analogy to copyrighted material.

TPB and WikiLeaks host controversial information that Swedes consider culturally valuable. Just as TPB faced enormous pressure from mostly non-Swedish intellectual property holders,[125] WikiLeaks faces external pressure from many foreign governments.

Like TPB, if WikiLeaks ever posts leaks that fit the constitutional exceptions, the site could face a lawsuit whether or not it is granted a media license. But, it is unclear whether the site has posted any such information. The exception for posting classified information may seem like a potential chink in Wikileaks' armor because this is exactly what the site does. But the exception has been narrowly interpreted to apply only to information that the Swedish Government deems confidential.[126] Thus, WikiLeaks would not be subject to prosecution in Sweden for anything that the United States or any other government considers classified. There is a possibility that in the 92,000 pages of The Afghan War Diary there is something confidential relating to the 500 or so Swedish soldiers who are a part of NATO's International Security Assistance Force in Afghanistan.[127] If there were such a document, it would give the government legal recourse and the right to censor those specific documents.

Even if there is a legally sound basis for prosecuting WikiLeaks, it is unlikely that the government would take such an action. When TPB was shut down, Swedish citizens filled the streets in protest.[128] More recently, a huge crowd turned out to protest when the right-wing party gained the threshold vote for seats in parliament.[129] Thus, if the Swedish government was seen as infringing upon a 250-year-old constitutional right, it is likely that the ensuing popular backlash would be severe. This is especially true if the rationale was to protect

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125. *See* Rising, *supra* note 62 ("[I]n the case of filesharing website The Pirate Bay, extensive communication took place between lobby groups for the U.S. entertainment industry and the Swedish government before the prosecutor pressed charges against the operators.").

126. *Id.*

127. Rick Rozoff, *Pentagon's New Global Military Partner: Sweden*, FRS (Aug. 2, 2010), http://revolutionaryfrontlines.wordpress.com/2010/09/02/the-imperialist-afghanistan-war-us-and-european.

128. *Pirate Bay Sentences Prompt Protests, supra* note 122.

129. *Protests Against Swedish Far-Right Election Gains*, BBC, Sept. 20, 2010, http://www.bbc.co.uk/news/world-europe-11378565.

confidential military information in a country where transparency is revered,[130] and war is generally regarded as barbaric.[131]

Could the Swedish Government respond to external international pressure, much like it did in the Pirate Bay trial,[132] and find a way to censor or prosecute WikiLeaks? The foregoing discussion suggests that WikiLeaks is on shaky legal footing in Sweden. However, while WikiLeaks may have overstated Sweden's interest in proactively pursuing legal action against countries that seek to censor WikiLeaks from abroad,[133] Sweden is unlikely to cooperate with such efforts. Sweden's government has denied recent demands by the Russian and Israeli governments for censorship of material that they considered classified.[134] In addition, Sweden's Foreign Minister Carl Bildt suggests that U.S. pressure will probably meet the same end.[135] When asked if Sweden would treat WikiLeaks differently due to pressure from the American government, Bildt responded, "It makes absolutely no difference."[136] The Swedish government was unable to adopt a similar stance when it faced external pressure to sue TPB because failure to cooperate could easily have led to international copyright sanctions.[137] In contrast to TPB's case, it appears that Swedish foreign policy will not allow external pressure to dictate how the country handles WikiLeaks.

Both WikiLeaks and TPB may publish information that many Swedes believe should be openly accessible, but the values attached to these different sources by both Swedes and the Swedish government are highly disparate. File sharing, while entrenched in Sweden's culture and passionately defended by many, became a headache to Sweden's government when it was forced to take action in order to avoid earning a reputation as a haven for digital theft. If one thing is clear from the foregoing discussion, it is that press freedom is

130. *See* NORDSTROM, *supra* note 69.

131. *See Global Peace Index*, VISION OF HUMANITY, http://www.visionofhumanity.org/ gpi-data/#/2010/scor (last visited Feb. 25, 2011) (listing Sweden as the tenth most peaceful nation in the world).

132. *See* sources cited *supra* note 114 and accompanying text.

133. *See* Hendler, *supra* note 63.

134. Rising, *supra* note 62.

135. *Id.*

136. *Id.*

137. *See* Li, *supra* note 115.

venerated among Swedes and their government both in practice and as an archetype of the nation's regard for human rights. Whistleblowing is seen as an extension of that freedom, and while it may have controversial and even dangerous results, the government appears to place far more value on protecting the platform than the ethics of its message.[138] For these reasons, it is unlikely that WikiLeaks will suffer the same fate as TPB, and likely that Sweden will remain the archetypal nation for high digital press freedom.

D. WikiLeaks' Future in Sweden and Possible Alternatives

It appears unlikely that Sweden will seek to enact legislation limiting the constitutional protection of whistleblower websites. There is, however, some indication that WikiLeaks and Assange may be wearing out their welcome in Sweden. Assange has been the subject of a procedurally bizarre rape prosecution in Sweden.[139] Prosecutors have dropped, then reinstated the charges several times,[140] while Assange claims the suit is groundless and part of a conspiracy.[141] It is too early to conclude that the prosecution is politically motivated; still, it shows at the very least that Sweden is not giving Assange preferential treatment. This apparent badgering by Swedish prosecutors could be a not-so-subtle expression of distaste for the recent outpour of international press that WikiLeaks and Assange have brought upon Sweden.

Another concern that WikiLeaks and other controversial digital media might face in Sweden is the growing level of government surveillance of online activity. In 2008, Sweden passed the FRA (Försvarets Radioanstalt), a very uncharacteristic and controversial surveillance law that has met with vocal criticism and comparisons to

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138. *See* Rising, *supra* note 62 (Swedish Foreign Minister Carl Bildt stated, "[i]s it responsible to publish information that leads to people being killed? I think that is more of an ethical question than a legal one.").

139. *Sweden Reopens Investigation into Rape Claim Against Julian Assange*, GUARDIAN (U.K.), Sept. 1, 2010, http://www.guardian.co.uk/media/2010/sep/01/sweden-julian-assange-rape-investigation.

140. *Id.*

141. *Id.*

George Orwell's *1984*.[142] The law grants the Swedish government the right to intercept all international communication.[143] As a result, all email that crosses Sweden's borders could potentially be subject to governmental scrutiny. It remains to be seen whether this law will have a direct effect on WikiLeaks, but it certainly suggests increased digital regulation in Sweden. The FRA, when viewed in context with the Pirate Bay trial, could represent the beginning of a sea change in the Swedish government's tolerance of controversial digital entities.

Even if WikiLeaks cannot or chooses not to base their servers in Sweden, the site will undoubtedly find some other way to stay online. Like TPB before it, WikiLeaks can react to unfavorable treatment in Sweden by simply plugging itself into servers in another country—hopefully one with more protection. The site lists Belgium as another jurisdiction it uses to host files, so that is certainly a possibility.[144] An even stronger possibility is Iceland, a onetime Nordic outpost that has recently become a hotbed for freedom of press discussion. Iceland passed the Icelandic Modern Media Initiative ("IMMI") in June of 2010, a law WikiLeaks helped draft, which offers more protection to journalists and whistleblowers than Sweden or any other country in the world.[145] The Member of Parliament that spearheaded the law is a vocal supporter of WikiLeaks,[146] and the law seems to cater perfectly to a site like WikiLeaks. It is notable that the law passed without a single vote against it in parliament,[147] suggesting that Iceland would openly embrace WikiLeaks. IMMI is noteworthy not only for the future of sites like WikiLeaks, but also for the observation that a tiny volcano nation of 300,000 people in the North Atlantic, by enacting

142. *See 'Yes' to Surveillance Law*, LOCAL (SWED.), June 18, 2010, http://www.thelocal.se/12534/20080618.

143. *Id.*

144. *See WikiLeaks Press*, *supra* note 15 ("Online submissions are routed via Sweden *and Belgium* which have first rate journalist-source shield laws." (emphasis added)).

145. Jonathan Stray, *Iceland Aims to Become an Offshore Haven for Journalists and Leakers*, NIEMAN JOURNALISM LAB (Feb. 11, 2010), http://www.niemanlab.org/2010/02/iceland-aims-to-become-an-offshore-haven-for-journalists-and-leakers.

146. *Id.*

147. Jonathan Stray, *What Will Iceland's New Media Laws Mean for Journalists?*, NIEMAN JOURNALISM LAB (June 16, 2010), http://www.niemanlab.org/2010/06/what-will-icelands-new-media-laws-mean-for-journalists.

appropriate laws, can become a powerhouse for the spread of controversial information throughout the world.

National governments may succeed in censoring whistleblower websites or forcing them out of their borders, but new websites will simply sprout up in different jurisdictions or under different names in perpetuity. This, along with the inherent value of whistleblowers in democratic societies, are reasons governments need to work collectively in drafting international legislation that accommodates whistleblower websites and encourages ethical leaks.

IV. THE STATE OF DIGITAL PRESS FREEDOM IN THE UNITED STATES

The concept of freedom of the press in America predated,[148] and probably had a hand in, the American Revolution. Prior to American independence, publishers faced a form of prior restraint[149] because the British government screened publications and could censor writings that were blasphemous, obscene, or critical of the Crown.[150] Peter Zenger, a German emigrant living in New York, was arrested in 1734 for publishing "seditious libel" that criticized a British colonial governor.[151] Zenger was tried the next year and, although the existing laws overwhelmingly supported liability, he was acquitted.[152] This outcome exemplified the aversion to colonial rule and emphasis on individual liberty that led to the American Revolution. Andrew Bradford, a prerevolutionary printer, captured the importance of a free press the same year, proclaiming it was "a Liberty, within the Bounds of Law, for any Man to communicate to the Public, his Sentiments."[153]

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148. *See* Jane E. Kirtley, *Legal Foundations of Press Freedom in the United States*, AMERICA.GOV (Feb. 1, 2003), http://www.america.gov/st/democracyhr-english/2003/February/20080817223640SrenoD0.5668756.html.

149. "Prior restraint" is defined as "a governmental restriction on speech or publication before its actual expression." BLACK'S LAW DICTIONARY 1314 (9th ed. 2009).

150. *See* Kirtley, *supra* note 148.

151. Arthur E. Sutherland, *A Brief Narrative of the Case and Trial of John Peter Zenger*, 77 HARV. L. REV. 787, 787 (1964) (book review).

152. William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. ST. B. J. 48, 51 (1996).

153. Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 342 (2008).

With American independence and the adoption of the Bill of Rights came the freedom of the press. It is clearly and unequivocally stated in the First Amendment's Free Press Clause "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[154] Read literally, this language would absolutely prohibit the federal government, and state governments through the Fourteenth Amendment, from restricting the press.[155] In practice, however, press freedom has been abridged throughout American history for several reasons. This Part will explore the development of the freedom of the press in the United States, describe the current state of digital press freedom, and deduce the legal repercussions a site like WikiLeaks could face for publishing classified war documents within U.S. borders.

A. Developing Exceptions to the Freedom of the Press

There are several reasons a government would wish to place limits on the freedom of the press. Governments arguably have an interest in protecting their citizens from exposure to certain types of press like obscenity or libel, preventing theft of copyrighted materials, and barring press that could otherwise endanger citizens. The Framers of the Free Press Clause, while appearing to give the freedom of the press a wide berth, did not intend to erase the lengthy history of common law press restrictions and grant unequivocal press rights. This is evident in the fact that many exceptions to press freedom had been, and continued to be, codified or judicially recognized despite the apparent difference between such laws and a literal reading of the Free Press Clause.[156] Thus, the strong wording of the clause is more properly read as a reaction to the rampant censorship and licensing

154. U.S. CONST. amend. I.

155. *See* Kirtley, *supra* note 148.

156. Defamation has been a part of English common law for centuries, and the Alien and Sedition acts of 1798 were enacted less than a decade after the Bill of Rights were ratified. *See* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L. J. 855, 873 (2000) ("The common law elements of defamation . . . have been set for centuries . . . ."); *see also* Lee, *supra* note 153 at 336, 345-51 (discussing history of the Free Press Clause and the Sedition Act of 1798).

requirements England imposed on the colonies,[157] rather than as an absolute freedom of the press.

During the United States' first century and a half of existence, the constitutional right to a free press was often limited, especially during times of war. The Alien and Sedition Acts of 1798,[158] and the later Espionage Act of 1917,[159] are essentially bookends of a period in American history when the press—especially wartime press and government criticism—was often censored. That is not to say these acts were universally supported, or that this was a dark age for American press; the acts simply permitted a level of censorship that would be unimaginable under modern First Amendment interpretation. First Amendment law as we know it began to take shape in 1919 following *Schenk v. United States*,[160] which established the "clear and present danger rule."[161] The rule was the first in a long line of evolving tests used to determine when the government could justify abridging speech or press rights.[162] Cases setting standards specifically for restricting press freedom would follow.[163]

B. Prior Restraint and the Pentagon Papers

After information is already published, the content can spur civil claims like libel or invasion of privacy, and even criminal liability.[164] In these cases the genie is already out of the bottle—that is, the

157. *See* Lee, *supra* note 153, at 336, 345-51.

158. Akhil Reed Amar, *Kentucky and the Constitution: Lessons from the 1790s for the 1990s*, 85 KY. L. J. 1, 2 n.2 (1997).

159. Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (codified as amended at 18 U.S.C §§ 792-799 (2010)).

160. 249 U.S. 47 (1919).

161. *Id.* at 52.

162. The tests vary widely. Examples include *Schenck's* "clear and present danger" test, the "bad tendency test" announced in *Whitney v. California*, 274 U.S. 357, 371 (1927), the "imminent lawless action" test in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), and others not mentioned here.

163. *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931).

164. *See* Edward L. Carter, *Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 289, 292-93 (2005) (noting that libel can be criminally prosecuted, and that these prosecutions have increased with the rise of the Internet).

harmful material already published—so the courts are left to determine the damages caused by its publication. A much more restrictive method of press control is prior restraint, defined as "administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur"[165]—in other words, government censorship. Prior restraint is almost as old as printing itself,[166] but has long been considered incompatible with a free press.[167] Prior restraint offends the Freedom of the Press Clause under even the most conservative interpretation of the drafters' intent,[168] yet the United States government has invoked it on several occasions. In 1931, the Supreme Court addressed this disconnect in *Near v. Minnesota*, 283 U.S. 697 (1931), the "first great press case."[169] The decision set a precedent barring most forms of prior restraint by declaring a Minnesota state law unconstitutional for its broad discretion to censor.[170] The court prescribed three situations when prior restraint could be justified: information pertaining to the military (like "the number and location of troops"),[171] obscene material, and press intended to incite violence or revolt.[172] Restricting prior restraint was a big step toward press freedom, and one that

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165. Alexander v. U.S., 509 U.S. 544, 550 (1993) (emphasis added).

166. M. Ethan Katsh, *Communications Revolutions and Legal Revolutions: the New Media and the Future of Law,* 8 NOVA L. J. 631, 642 (1984) ("Pope Alexander VI issued a bull in 1501 against the unlicensed printing of books.").

167. *See e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *151-52 ("The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press." (emphasis original)); Se. Promotions, Ltd. v. Conrad, 420 U.S., 546, 559 (1975) ("[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.").

168. *See* Lee, *supra* note 153.

169. ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 90 (1992).

170. Near v. Minnesota, 283 U.S. 697, 722-23 (1931).

171. *Id.*

172. *Id.* at 716.

courts have continued to emphasize and develop[173]; however, the exceptions were stated so broadly in *Near* that judges struggled to apply them consistently.

In 1969, Daniel Ellsberg, a United States Government employee who became opposed to the Vietnam War and hoped to end it, photocopied a sensitive government war study[174] intending to publish it and expose U.S. policy in Vietnam.[175] The study exposed several lies that the Johnson administration told to citizens and Congress about the scope and rationale behind America's participation in the Vietnam War.[176] Ellsberg took the Pentagon Papers to a New York Times editor who agreed to publish excerpts of the study despite warnings from the newspaper's legal counsel.[177] Newly elected President Nixon was initially unconcerned with the leak because it only tarnished the previous administration and the Democratic Party.[178] Nixon subsequently reversed course and initiated efforts to plug the leak. The federal government tried unsuccessfully to deter

173. *See, e.g.*, Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) ("[The Government] thus carries a heavy burden of showing justification for the imposition of such a restraint."); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.").

174. Cummins, *supra* note 13 at 2. The study was officially titled *United States–Vietnam Relations, 1945–1967: A Study Prepared by the Department of Defense*.

175. *Id.* (explaining that Ellsberg believed the study "demonstrated unconstitutional behavior by a succession of presidents, the violation of their oath and the violation of the oath of every one of their subordinates.").

176. R.W. Apple Jr., *Pentagon Papers*, N.Y. TIMES, June 23, 1996, http://topics.nytimes.com/top/reference/timestopics/subjects/p/pentagon_papers/index.html?scp=1-spot&sq=pentagon%20papers&st=cse; John T. Correll, *The Pentagon Papers*, 90 AIR FORCE MAG., no. 2, 2007, at 50, 54, *available at* http://www.airforce-magazine.com/MagazineArchive/Documents/2007/February%202007/0207pentagon.pdf. Among the most inscrutable content in the papers was a memo listing the motives behind American persistence in Vietnam: "[t]o avoid a humiliating U.S. defeat[,] to keep [South Vietnam] (and the adjacent) territory from Chinese hands[, t]o permit the people [of South Vietnam] to enjoy a better, freer way of life[, and t]o emerge from the crisis without unacceptable taint from methods used. [The U.S. was not involved in Vietnam t]o 'help a friend,' although it would be hard to stay in if asked out." Correll, *supra*, at 54.

177. Correll, *supra* note 176, at 54.

178. David Rudenstine, *The Pentagon Papers Case: Recovering Its Meaning Twenty Years Later*, 12 CARDOZO L. REV. 1869, 1875-76 (1991).

the New York Times from publishing the study,[179] and later sought to impose a prior restraint through a temporary restraining order, claiming publication violated a federal espionage statute.[180] Ellsberg responded by sending the document to over a dozen other newspapers that would print portions of the study. When those newspapers were restrained, another newspaper picked up where the previous one had left off.[181] This tactic was the print media equivalent of going viral,[182] increasing national exposure to the Pentagon Papers exponentially.[183]

A flurry of contradictory court decisions surrounded the injunctions, highlighting the danger of inconsistent application of prior restraint exceptions under *Near* and its progeny.[184] The *New York Times* and *Washington Post* cases were fast tracked and joined for Supreme Court review in *New York Times Co. v. United States*[185] to determine the legality of the injunctions. The watershed[186]

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179. Correll, *supra* note 176, at 54 (pointing out that the Attorney General's first salvo against the New York Times was a telegram that never reached the newspaper as it was accidentally routed to a Brooklyn fish company).

180. United States v. N.Y. Times Co., 328 F. Supp. 324, 328 (S.D.N.Y. 1971) ("The Government has asserted a statutory authority for the injunction, namely, the Act of June 25, 1948 . . . .").

181. H. Bruce Franklin, *Pentagon Papers Chase*, NATION (July 9, 2001), http://andromeda.rutgers.edu/~hbf/ELLSBERG.htm.

182. Ellsberg's tactic is the ideological forefather to the Streisand Effect, discussed *supra* note 21, and predates that term by over thirty years. *Compare* sources cited *supra* note 181 and accompanying text *with* Andy Greenberg, The Streisand Effect, Forbes (May 11, 2007), http://www.forbes.com/2007/05/10/streisand-digg-web-tech-cx_ag_0511streisand _print.html (detailing Barbara Streisand's "own ill-fated attempt at reining in the Web in 2003," which led technology consultant Michael Masnick to coin the term "the Streisand effect").

183. *See* Franklin, *supra* note 181.

184. The New York Times appeal claimed the standard was whether publication would "pose such grave and immediate danger to the security of the United States as to warrant [an injunction]." United States v. N.Y. Times, 444 F.2d 544, 544 (1971); The Washington Post Appeal, by contrast, claimed the standard was whether publication "would gravely prejudice the defense interests of the United States or result in irreparable injury to the United States." United States v. Wash. Post Co., 446 F.2d 1327, 1328 (1971).

185. 403 U.S. 713 (1971)

186. *See* John Cary Sims, *Triangulating the Boundaries of Pentagon Papers*, 2 WM. & MARY BILL RTS. J. 341, 345 (1993) (pointing out that the Pentagon Papers court case is in almost every constitutional law casebook).

Pentagon Papers case, in a per curiam decision followed by a diverse array of separate opinions from all nine jusitices,[187] struck down the injunctions as unconstitutional; thus, the government failed to meet the heavy burden required to justify prior restraint.[188] The justices' rationales ranged from favoring an absolute ban on prior restraints[189] to permitting prior restraint for as long as it took to analyze the contested documents.[190] The decision was a victory for press rights that limited executive power[191]; but, as a plurality opinion, its precedential value is dubious.

While the Pentagon Papers failed to accomplish Ellsberg's ultimate goal of stopping the Vietnam War,[192] the leak gave a revealing glimpse into the true nature of the war, driving many to the burgeoning antiwar movement.[193] In the aftermath of *New York Times Co.*, President Nixon formed the White House Plumbers,[194] a secret task force that sought to prevent classified document leaks.[195] The

187. N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curium). Justices Black, Douglas, Brennan, Stewart, White, and Marshall concurred. *See id.* at 714-24 (Black & Douglas, JJ., concurring), 724-27 (Brennan, J., concurring), 727-40 (Stewart & White, JJ., concurring), 740-48 (Marshall, J., concurring). Chief Justice Burger, Justice Harlan, and Justice Blackmun dissented. *See id.* at 748-52 (Burger, C.J., dissenting), 752-59 (Harlan, J., dissenting), 729-63 (Blackmun, J., dissenting).

188. *Id.* at 714.

189. *Id.* at 714-20 (Black & Douglas, JJ., concurring).

190. *Id.* at 748-50 (Burger, C.J., dissenting).

191. Richard Tofel, *Why WikiLeaks War Logs are no Pentagon Papers*, PROPUBLICA (July 26, 2010), http://www.propublica.org/article/why-wikileaks-war-logs-are-no-pentagon-papers (calling the N.Y. Times decision "the most significant defeat for the executive branch in the national security field since Lincoln's suspension of *habeas corpus* was struck down in 1866.").

192. The war did not end until the fall of Saigon in 1975, four years after the leak. *See* Editorial, *Fall of Saigon Revisited*, WASH. POST, Apr. 30, 2010, http://www.washingtontimes.com/news/2010/apr/30/fall-of-saigon-revisited.

193. Mark Barringer, *The Anti-War Movement in the United States*, U. ILL., http://www.english.illinois.edu/maps/vietnam/antiwar.html (last visited Feb. 23, 2011).

194. The task force was aptly named, as they were responsible for plugging information leaks.

195. Seymour M. Hersh, *Kissinger and Nixon in the White House*, ATLANTIC, May 1982, at 35-58, *available at* http://www.theatlantic.com/past/docs/issues/82may/hershwh.htm.

organization's first action was raiding Ellsberg's psychiatrist's office to gather information to use against Ellsberg in his upcoming criminal prosecution for theft, espionage, and conspiracy arising from the Pentagon Papers.[196] Several members of the White House Plumbers later became players in the Watergate Scandal.[197] The Watergate investigation uncovered the plumbers' raid, ironically forcing the judge to dismiss all charges against Ellsberg in his concurrent criminal case due to government misconduct, and helping to secure Nixon's impeachment.[198]

The WikiLeaks war logs bear several factual resemblances to the Pentagon Papers[199] and the facilitators of both leaks have expressed ideological symmetry in each other's respective motives.[200] Paradoxically, these similarities could subject WikiLeaks to different judicial treatment. The site would benefit if judges saw enough similarity to give their leaks the rubber stamp of protection, making it a much easier process than that which the Pentagon Papers faced. But if the war logs are seen as only partially similar to the Pentagon Papers, the differences come increasingly into focus and could prompt less favorable treatment. While both leaks faced government disapproval upon release, the Pentagon Papers' image has benefitted from nearly forty years of analysis that has cemented it as a landmark case in the Freedom of the Press.[201] Critics,[202] and more importantly the U.S. Government,[203] have emphasized the factual distinctions

196. *Id.* (suggesting that Henry Kissinger, a former colleague of Ellsberg, probably influenced Nixon's decision by advising the president that Ellsberg was a crazed, drug-using sexual deviant, was the most dangerous man in America, and must be stopped at all costs).

197. *Id.*

198. *Id.*

199. *See* sources cited *supra* note 7-8 and Part III.B.

200. *See e.g.*, Cummins, *supra* note 13 ("Ellsberg said if he had had access to today's Internet, he would have just published the [Pentagon Papers]–perhaps on WikiLeaks.org"); *WikiLeaks: About*, *supra* note 1 ("In its landmark ruling on the Pentagon Papers, the US Supreme Court ruled that 'only a free and unrestrained press can effectively expose deception in government.' We agree.").

201. *See* Sims, *supra* note 186.

202. *See* sources cited *supra* note 5 and accompanying text.

203. *See* Ben Smith, *Gibbs: WikiLeaks not Comparable to 'Pentagon Papers,'* POLITICO (July 26, 2010), http://www.politico.com/blogs/bensmith/0710/Gibbs_Wiki_not_comparable_to_Pentagon_Papers.html.

between WikiLeaks and the Pentagon Papers, characterizing the war logs as comparatively unimportant. Some distinctions that would likely affect judicial interpretation of WikiLeaks' war document leaks are their sheer volume and scope compared to the Pentagon Papers. The war logs have clearly exposed military misconduct,[204] but the vast majority of the documents are the clerical byproduct of waging a war.[205] Judges could point to the fact that the two war logs are roughly seventy times as large as the 7,000 page Pentagon Papers, but are arguably less probative of governmental misconduct.[206] Modern judges sympathetic to Justice Burger's dissent[207] would be irate at the prospect of having to make a speedy ruling on the constitutionality of publishing 400,000 military documents. There are also clear content distinctions between a bureaucratically prepared study and military documents from an ongoing war.[208] Judges could argue that WikiLeaks' digital publication makes the war logs more accessible to enemy combatants.[209] In addition to the factual differences, WikiLeaks would face a different, probably harsher, legal climate in the present day. In the wake of the September 11, 2001 terrorist attacks, American courts have repeatedly deferred to national security

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204. *Id.*

205. *See* Farhi & Nakashima, *supra* note 6 ("By contrast [to the Pentagon Papers], the Afghan documents—more than 91,000 in all—are a loosely related collection of material covering nearly six years [early 2004 through late 2009] that leaves out important context. Many of the documents are unedited, firsthand reports by military officials, some of which are routine after-action summaries. What's revealing about the material may be what's missing: classified documents that could shed further light on some of the incidents described in the raw material.").

206. *Id.* "A further distinction: No single message has emerged from the Afghan documents the way it did from the Pentagon Papers."

207. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 748-50 (1971) (Burger, C.J., dissenting).

208. *But see* Sims, *supra* note 186, at 422 ("The fact that the classified secrets were contained in a study that was a 'history' of our nation's involvement in Vietnam is entirely beside the point. It may be true that a history, in general, is less likely to contain information that, if published, will cause harm to national security than would a current intelligence estimate or a description of a technical system for collecting intelligence, but true secrets do not lose their potential for doing harm simply because they have been incorporated in an analysis of a past event.").

209. *See* Noah Shachtman, *Pentagon to Troops: Taliban Can Read WikiLeaks, You Can't*, WIRED (Aug. 6, 2010), http://www.wired.com/dangerroom/2010/08/pentagon-to-troops-taliban-can-read-wikileaks-you-cant.

concerns at the cost of individual rights.[210] These differences could be used to justify a different legal outcome in a case against WikiLeaks. Even Ellsberg admits the war logs are not the Pentagon Papers.[211] Still, failing to adequately resemble such a highly esteemed case should not be the reason behind denying constitutional protection to WikiLeaks. With mainstream war reporting becoming more sanitized since Vietnam,[212] whistleblower websites may be the only outlet left to portray the brutality of war.

Even though *New York Times Co.* is a plurality decision, its holding could influence future courts. *Marks v. United States*[213] established that the holding of plurality opinions "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[214] Case law has determined[215] that the holding in *New York Times Co.* is represented by Justice Stewart's concurring opinion, which asserts that prior restraints on classified government information are only justified when publication "will surely result in direct, immediate, and irreparable damage."[216] A literal interpretation of this test would almost never secure an effective injunction against WikiLeaks. Information moves so fast over the Internet that by the time a judge can consider whether a leak would "surely result in direct, immediate, and irreparable damage,"[217] damage of this nature would already have been done. Even if the court can justify prior restraint under the test, it will make little

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210. *See* Nicholas D. Kristof, Op-Ed., *Is This America?*, N.Y. TIMES, Sept. 11, 2010, http://www.nytimes.com/2010/09/12/opinion/12kristof.html.

211. Smith, *supra* note 203 (quoting Ellsberg as stating, "[t]hese documents are not the Pentagon Papers—we still await their equivalent for Afghanistan.").

212. *See e.g.*, William J. Astore, *The New American Isolationism: the Cost of Turning Away From War's Horrific Realities*, HUFFINGTON POST, Nov. 1, 2010, http://www.huffingtonpost.com/william-j-astore/the-new-american-isolatio_b_777149.html; Editorial, *Afghanistan War Logs: The Unvarnished Picture*, GUARDIAN (U.K.), July 25, 2010, http://www.guardian.co.uk/commentisfree/2010/jul/25/afghanistan-war-logs-guardian-editorial.

213. 430 U.S. 188 (1977).

214. *Id.* at 193.

215. Harold Edgar and Benno C. Schmidt Jr., *Curtiss-Wright Comes Home: Executive Power and National Security*, 21 HARV. C.R.-C.L. L. REV. 349, 373 (1986).

216. N.Y. Times Co. v. United States, 403 U.S. 713, 730 (1971).

217. *Id.*

difference practically, as the information will have already spread to the public domain. "There's simply no good remedy once confidential information hits the Internet, and that's very frustrating to judges who are used to solving problems."[218] A case against WikiLeaks could either use Justice Stewart's test, essentially guaranteeing protection, or overrule the holding. But "WikiLeaks' technology already gives it de facto immunity from American judicial process."[219] American courts still have the power of prior restraint,[220] but, as applied to whistleblower websites, it is a hollow threat. To ensure these sites can serve democracy with as little collateral damage as possible, the medium should be regulated through legislation.[221]

C. Reporter's Privilege and Whistleblower Protection Laws

Even if whistleblower websites like WikiLeaks were guaranteed immunity from prior restraint, they would have difficulty remaining viable in America because of their inability to protect their sources. These sites would betray their mission and lose credibility if published material could be traced. Journalists in America have a nominal right to keep confidential sources secret through a patchwork of laws known as the reporter's privilege—"the concept that journalists should not be compelled to reveal their confidential sources in a civil or criminal matter."[222] This privilege clearly increases the freedom of the press, but it is not considered to be within the scope of the constitutionally mandated Free Press Clause.[223] The reporter's privilege can be overridden by government subpoenas seeking to compel journalists' sources, presenting the conflict between press

218. *See* Goodin, *supra* note 91.

219. Peter Scheer, *Unplug WikiLeaks? Enact a Federal Shield Law Instead*, HUFFINGTON POST, Nov. 16, 2010, http://www.huffingtonpost.com/peter-scheer/the-us-government-is-inte_b_784555.html.

220. *See* Floyd Abrams & Gail Johnston, *Prior Restraints, in* COMMUNICATIONS LAW IN THE DIGITAL AGE 2008, at 169 (PLI Pats., Copyrights, Trademarks, & Literary Prop., Course Handbook Series No. 951, 2008) (listing several exercises of prior restraint in 2008 alone).

221. Federal legislation is proposed *infra* Part V.

222. Carol J. Toland, Comment, *Internet Journalists and the Reporter's Privilege: Providing Protection for Online Periodicals*, 57 U. KAN. L. REV. 461, 461 (2009).

223. *See* Branzburg v. Hayes, 408 U.S. 665 (1972).

rights and judicial access to evidence.[224] The Supreme Court has heard only one case regarding reporter's privilege, *Branzburg v. Hayes*,[225] which denied journalists a First Amendment right to keep their sources secret in court.[226] The case left no binding precedent; thus, several federal districts and state shield laws have recognized varying degrees of a reporter's privilege.[227] WikiLeaks might have trouble qualifying for protection under these laws[228] and, even if it did, the Supreme Court could exclude WikiLeaks from the laws or create binding precedent further restricting the reporter's privilege.[229]

United States politicians have made recent efforts to enact a federal shield law that would institute a nationwide, qualified reporter's privilege and override the incongruent patchwork of laws currently governing the subject.[230] Congress considered several versions[231] before the House of Representatives passed the Free Flow of Information Act[232]in 2007.[233] The act did not pass the Senate, which has since considered several revisions, struggling to determine who should be protected.[234] After WikiLeaks released the Afghan War Diary, the drafters of the Free Flow of Information Act pronounced they would revise it to specifically exclude sites like

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224. This is what happened in *Branzburg* and in the Plame Affair. The latter is discussed in Toland, *supra* note 224, at 461-62.

225. 408 U.S. 665 (1972)

226. *Id.* at 667.

227. Markus E. Apelis, Note, *Fir to Print? Consequences of Implementing a Federal Reporter's Privilege*, 58 CASE W. RES. L. REV. 1369, 1375-78 (2008).

228. Joel G. Weinberg, *Supporting the First Amendment: A National Reporter's Shield Law*, 31 SETON HALL LEGIS. J. 149, 172-75 (2006) (outlining the varying federal and state reporter's privilege laws).

229. Considering the factual differences between a potential WikiLeaks classified documents case and the distribution of marijuana at issue in *Branzburg*, the Supreme Court could find much more at stake and formulate a more encompassing restriction with respect to WikiLeaks as a matter of public policy.

230. *See* Weinberg, *supra* note 228.

231. Amy Bauer, Note, *Blogging on Broken Glass: Why the Proposed Free Flow of Information Act Needs a Specific Test for Determining When Media Shield Laws Apply to Bloggers,* 10 MINN. J. L. SCI. & TECH. 747, 757 (2009).

232. Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007) (as passed by House by a 398-21 vote on Oct. 16, 2007).

233. Bauer, *supra* note 231, at 757-58.

234. *Id.*

WikiLeaks.[235] This planned revision could help pass the bill by appealing to politicians who want to muzzle WikiLeaks[236]; however, such a revision would be an endorsement of the status quo, potentially causing an international standoff. As Uncle Sam continues to shake his fist across the Atlantic toward Sweden, WikiLeaks will only gain more exposure and more distrust of the American government, potentially provoking unprincipled leaks. Whether or not WikiLeaks would be excluded from the law may be a moot point because of the site's data storage and transmission methods. WikiLeaks claims its encryption prevents even its own employees from discovering the identity of its sources,[237] further proving the government's inability to muzzle WikiLeaks. The U.S. Government should not try to suppress a medium that is clearly inevitable, especially one that is so valuable to democracy for its potential to expose corruption and provide transparency.

D. Bank Julius Baer v. WikiLeaks

A major obstacle to predicting how U.S. courts would handle a suit against WikiLeaks is the novel and complex issues in Internet press cases. In *Reno v. American Civil Liberties Union*,[238] the U.S. Supreme Court recognized broad First Amendment protections for Internet expression. The court struck down Internet restrictions that would regulate it like broadcast media, deciding cyberspace should have the same freedom as speech and the press.[239] Despite this similarity, the nature of Internet expression adds layers of complexity to First Amendment cases. Unlike a newspaper article, which can be traced to its publisher and author, the Internet permits anonymous

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235. Charlie Savage, *After Afghan War Leaks, Revisions in a Shield Bill*, N.Y. TIMES, Aug. 3, 2010, http://www.nytimes.com/2010/08/04/us/04shield.html?_r=3.

236. *See* Scheer, *supra* note 219 ("Turning out the lights at WikiLeaks' is not the only reason or even the main reason to back the shield law, of course. However, it has the advantage of appealing across party lines in a Congress that is otherwise incapable of bipartisan legislation.").

237. Savage, *supra* note 235 ("WikiLeaks says that its Web site uses technology that makes it impossible to trace the source of documents that are submitted to it, so even if the organization were compelled to disclose a source, it is not clear that it would be able to do so.").

238. 521 U.S. 844 (1997).

239. Reno v. ACLU, 521 U.S. 844, 844 (1997).

expression that can be manipulated to be untraceable. It is easy to imagine that federal judges, who were appointed to life terms when computers took up entire warehouses, might have trouble unraveling the layers of Internet expression to determine if a line has been crossed. This difficulty was on full display in *Bank Julius Baer & Co. v. Wikileaks*[240]—the first American case challenging a WikiLeaks' document release.

WikiLeaks released several of Bank Julius Baer's bank records showing how the bank hid wealthy clients' funds in offshore trusts to evade tax obligations.[241] Bank Julius Baer, a Swiss financial institution, responded by suing WikiLeaks and the site's domain registrar, Dydanot, in a California federal court.[242] The judge issued a permanent injunction that ordered Dydanot to lock and disable the WikiLeaks.org domain name and a temporary restraining order restricting WikiLeaks from posting anything relating to the bank.[243] The injunctions led to an explosion in press coverage of the case, as well as legal support for WikiLeaks from a number of organizations.[244] Not only did the injunctions generate popular interest, the site remained accessible through its IP address and a number of mirror sites, so the masses could still read the source of the controversy.[245] A telling example of judicial naiveté regarding technology arose when the judge ordered that copies of the injunction be sent by email to WikiLeaks.org, the website he had just shut down.[246] Two weeks after the judge ordered the injunctions he dissolved them in an opinion acknowledging the unintended effects and highlighting the danger of prior restraint.[247] The case is further proof of the judiciary's inability to contain whistleblower websites.

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240. 535 F. Supp. 2d 980 (N.D. Cal. 2008).

241. *See* David Leigh and Jonathan Franklin, *Whistle While You Work*, GUARDIAN (U.K.), Feb. 23, 2008, http://www.guardian.co.uk/theguardian/2008/feb/23/internet.usa.

242. *Bank Julius Baer*, 535 F. Supp. 2d 980.

243. Abrams & Johnston, *supra* note 220, at 175.

244. Scott Graves, *Prior Restraint or Finger in the Dike?* Bank Julius Baer v. WikiLeaks *and Dydanot*, 29 JUST. SYS. J. 216, 217 (2008).

245. *Id.*

246. *See* Goodin, *supra* note 91.

247. *Bank Julius Baer*, 535 F. Supp. 2d at 985 ("[I]t is clear that in all but the most exceptional circumstances, an injunction restricting speech pending final

The U.S. Government's hard-line, anti-WikiLeaks stance[248] makes it a near certainty that it would sue WikiLeaks if it had the jurisdictional capacity to do so. *Bank Julius Baer & Co.* seems to suggest such a suit would be practically difficult, but, aside from a shared defendant, these two suits present distinct factual and legal questions. From a public policy standpoint, there is clearly much more at stake when deciding whether to censor classified domestic military documents, than in a suit over information about a foreign bank's misdeeds. Furthermore, the exercise of prior restraint in *Bank Julius Baer & Co.* had no legal basis; in a suit against WikiLeaks, however, the government could attempt to invoke the established national security exception[249] to the prior restraint bar. These differences hint that the government could build a much stronger case against WikiLeaks than Bank Julius Baer, but the government should consider whether winning such a suit would do more harm than good. The remedy in *Bank Julius Baer & Co.* backfired, giving worldwide attention to a leak that would otherwise have little mass appeal. An injunction against a WikiLeaks' war leak would have an amplified effect, greatly increasing exposure of leaked documents.

V. PROPOSED LEGISLATION: THE DIGITAL WHISTLEBLOWER PROTECTION ACT

The following is proposed legislation securing press freedom and source protection for whistleblower websites.[250] Legislating these rights is important because the current judicial precedent is far too subjective to consistently regulate this emerging medium. The bill borrows heavily from Sweden's freedom of the press laws, while also

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resolution of the constitutional concerns is impermissible . . . the broad injunction issued as to Dynadot had exactly the opposite effect as was intended.").

248. *See* Cummins, *supra* note 13.

249. *See supra* Part IV.B and notes 215-16.

250. This bill is aimed particularly at whistleblower websites, corresponding with the scope of this Comment. Extending these privileges to other media outlets raises many issues outside of that scope, so those outlets are excluded from consideration. However, those outlets would be protected under the proposed federal shield law discussed *supra* Part III.C, even if that law were to exclude whistleblower websites.

taking into account particular American concerns.[251] The protection must be voluntarily sought out and is contingent upon terms that demand accountability. Most importantly, it will not extend to unethical leaks.

THE DIGITAL WHISTLEBLOWER PROTECTION ACT

Whistleblower websites[252] shall be granted total immunity from prior restraint and absolute source protection, so long as the following requirements are met, and none of the enumerated exceptions apply:

1) Requirements for Protection. To be entitled to protection under this section, a whistleblower website shall:

a. register a description of the digital location (URL, domain name, IP address) it will use to publish information. The protection granted by this section is limited to information published therein;

b. be registered by a United States resident, who:

i. is at least eighteen years of age;

ii. has editorial oversight over publication;

iii. will accept service of process on behalf of the site; and,

iv. will be held personally liable for criminal and civil causes of action arising from publication;

c. make a reasonably diligent attempt to verify the veracity of documents in their entirety prior to publication. This standard shall be relaxed if the documents are proven to be time sensitive and the

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251. This legislation is inherently flawed as a domestic solution to an international problem. There is no reason to believe WikiLeaks would decide to move back to America with the passage of such legislation, but hopefully it would give whistleblowers a domestic option they could trust to do as little collateral damage as possible. Further, the proposed bill could be adapted to work as an international agreement.

252. For purposes of this legislation, "whistleblower website" means a website which operates for the primary purpose of exposing the illegal or unethical activities of governments, corporations, or individuals to public scrutiny. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 1345 (9th ed. 1983) (defining "whistleblower" as "one who reveals something covert or informs against another").

public would benefit more than those injured by inadequate review;

d. operate as non-profit enterprises to minimize the particular dangers of incentivizing whistleblowing[253]; and.

e. bear the burden of source protection and will face criminal and civil liability for negligently or intentionally revealing the identity of a source without that source's express consent.

2) Limits on Protection. The increased freedoms in this section are granted for the purpose of exposing commercial and governmental misconduct and corruption, and not as a conduit for skirting other laws. Information that tends to enlighten a reasonably substantial class of the American public about reasonably substantial commercial or governmental misconduct qualifies for protection, unless it:

a. maliciously incites imminent lawlessness,[254] or will surely result in a direct and immediate threat[255] to the United States or its citizens[256];

b. constitutes libel, licensed property, unreasonably obscene material, or other inherently illegal publication, whether negligently or intentionally published, except where publication of the material is necessary to understand or present misconduct

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253. This requirement may prove to be illegal for prohibiting whistleblowers from operating at a profit, but that is beyond the scope of this Comment. WikiLeaks currently satisfies the requirement. Monetary incentives for whistleblowers or websites that disseminate such information would conflict with the proposed act's goal of developing whistleblower websites that publish information for public benefit not private gain.

254. This standard is derived from *Branzburg v. Hayes*, 408 U.S. 665 (1972).

255. N.Y. Times Co. v. United States, 403 U.S. 713, 727-30 (1971) (Stewart, J., concurring).

256. For purposes of this provision, malice would exist only in situations where a site knowingly publishes information for purposes of inciting imminent lawlessness or endangering national security, and without a reasonably sufficient public interest to justify such damage. *See supra* notes 215-16, 253 and accompanying text; *see also* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (discussing the lack of constitutional protection for speech that incites imminent lawless action).

that is on balance more important to the public than it is damaging to those injured by its publication;

c. exposes an innocent individual or business to physical, emotional, or fiscal damage, whether negligently or intentionally published, except where it is shown that a special need exists to expose misconduct that is clearly more valuable than harmful on balance and the information will lose its value if the damaging information is omitted;

d. is unreasonably voluminous, except where it is shown that the bulk of information is cumulatively necessary to show misconduct, and proof is made that it has been thoroughly inspected prior to publication.[257]

3) Mirror sites that republish information deemed unprotected by this section will face enhanced sanctions for that republication.

4) Registered websites that violate this section shall have their domain registration suspended until any resulting lawsuits are resolved and a new operator re-registers the site.

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257. Much of the public outcry caused by the WikiLeaks war logs probably could have been avoided by exercising more editorial control over the content. Whistleblower websites should have the ability to present documents in bulk that collectively expose misconduct, so long as they are willing to accept responsibility for ethically reviewing the entire bulk of documents. It is difficult to imagine that WikiLeaks adequately reviewed all 500,000 pages of the war logs, which may have been unjustifiably cumbersome in light of the amount of misconduct the leaks uncovered. To their credit, WikiLeaks attempted to cooperate with the U.S. in removing sensitive material from the Afghan War Diary, but were rebuked, possibly contributing to the even greater volume of the Iraq War Logs. The massive number of documents anchored many headlines and probably led to much of WikiLeaks' news coverage, in turn increasing public awareness of the war crimes exposed in the documents. But whistleblower websites should not use volume to gain exposure just because they have access to it. Whistleblower websites can develop into respected journalistic entities if they emulate good journalists by accurately summarizing and condensing source material in a way that preserves its intended meaning.

VI. CONCLUSION

Under existing American jurisprudence, courts could probably enjoin WikiLeaks and try to compel the identities of its sources. While the U.S. Government can articulate a strong public policy argument supporting such an action, it cannot deny the fact that WikiLeaks exposed serious military misconduct. In the age of Abu Ghraib[258] and the increasing privatization of the U.S. military,[259] public insight is vital, especially considering the unpopularity of recent wars. Judges[260] and politicians[261] have both justified heightened press restriction in times of war—an especially odious burden given that wartime reporting is one of the press's most vital functions. In order to uphold the core values of democratic government, citizens deserve heightened insight into the greatest exercise of governmental power and the greatest commitment governments can ask of their citizenry—fighting foreign wars. The U.S. Supreme Court echoed this sentiment when it urged that "paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell."[262] WikiLeaks' war logs, while questionable in scope, accomplish this vital journalistic service just like the Pentagon Papers before them, and they should receive similar protection.[263]

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258. James Risen, *The Struggle for Iraq: Treatment of Prisoners; G.I.'s are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, http://query.nytimes.com/gst/fullpage.html?res=9807E7DC163DF93AA15757C0A9629C8B63&ref=abu_ghraib.

259. James Glanz & Andrew W. Lehren, *Use of Contractors Added to War's Chaos in Iraq*, N.Y. TIMES, Oct. 23, 2010, http://www.nytimes.com/2010/10/24/world/middleeast/24contractors.html.

260. *See generally* Schenck v. United States, 249 U.S. 47 (1919).

261. The Sedition and Espionage Acts, discussed *supra* Part IV.A and notes 156-59, were both passed in times of war.

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

263. *See* Smith, *supra* note 203 ("The Pentagon Papers were used by opponents of the war to seek withdrawal of U.S. troops from the fighting [which continued for two more years]. The WikiLeaks Afghanistan War Logs will fuel political opposition in the U.S. to American troops continuing combat operations in Afghanistan.").

Whistleblower sites like WikiLeaks, while currently a thorn in the American Government's side, provide an invaluable service in a democratic society by exposing corruption and demanding accountability. These sites should not be perceived as rogue enterprises that must be censored because this will only engender more mistrust and undoubtedly lead to unethical leaks. WikiLeaks' apparent security in Sweden demonstrates that controversial whistleblower websites will probably always be able to publish information, regardless of the restrictions imposed by the U.S. Congress or the Supreme Court. Sweden has a long tradition of respect for transparency in the press that, along with a forward-looking and technologically-savvy populace, makes the country unlikely to shut down whistleblower websites even if it has the legal authority to do so. Conversely, the United States has had difficulty in committing itself wholly to the freedom of the press it so plainly espouses in the Bill of Rights. The United States should look to the Pentagon Papers and *Bank Julius Baer & Co.* as cautionary tales of why the press should not be subject to judicial censorship. Additionally, the United States should avoid the current hard line stance from the Executive Branch and the movement in Congress to write whistleblowers out of protective bills. Whistleblower websites are a news source of the future and should be embraced by governments not only because they are inevitable, but also because they are valuable to a democratic society. In turn, this will stimulate future generations of ethical new media sources, and promote accountability in politics and business.

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