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**NAVAL  
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**MONTEREY, CALIFORNIA**

**THESIS**

**INTELLIGENCE LEAKS: WHAT IS THE ROLE OF THE  
LEAK AND THE LEAKER IN U.S. DEMOCRACY?**

by

James A. Barkley

March 2014

Thesis Co-Advisors:

Carolyn Halladay  
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**INTELLIGENCE LEAKS: WHAT IS THE ROLE OF THE LEAK AND THE  
LEAKER IN U.S. DEMOCRACY?**

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Lieutenant, United States Navy  
B.S., Old Dominion University, 2006

Submitted in partial fulfillment of the  
requirements for the degree of

**MASTER OF ARTS IN SECURITY STUDIES  
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from the

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## **ABSTRACT**

What is the role of the leak and the leaker in U.S. democracy? Liberty and security reside at opposite ends of an ever-changing scale. During peace and war, the scale tips in favor of liberty and security, respectively. In any event, intelligence is needed to ensure the safety of the state. Intelligence leaks threaten national security yet bolster transparency between the government and the people, a cornerstone of democracy. As such, intelligence leaks form a matter of First Amendment concern. This thesis will explore First Amendment rights as they relate to the media, whistleblowers, and leakers. The interaction between executive authority and congressional oversight is important in understanding how checks and balances work to monitor executive power and shape intelligence community oversight. Because the goal is to understand how the leak and the leaker affect the balance of security and liberty, the leaker in a time of national crisis, is examined. Through historical and comparative analysis, the thesis will compare and contrast the similarities and differences between the Pentagon Papers and WikiLeaks to Edward Snowden.



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## LIST OF ACRONYMS AND ABBREVIATIONS

CIA	Central Intelligence Agency
DNI	Director of National Intelligence
FBI	Federal Bureau of Investigation
FISA	Foreign Intelligence Surveillance Act
FISC	Foreign Intelligence Surveillance Court
GCHQ	Government Communications Headquarters
GED	General Education Diploma
GWOT	global war on terrorism
IG	Inspector General
IT	information technology
JWICS	Joint World Intelligence Communications System
MAAG	Military Assistance Advisory Group
MSPB	Merit Systems Protections Board
NSA	National Security Agency
ODNI	Office of the Director of National Intelligence
OGE	Office of Government Ethics
PFC	private first class
PCLOB	Privacy and Civil Liberties Oversight Board
PRISM	Planning tool for Resource, Intelligence, Integration, Synchronization, and Management
SIGINT	signals intelligence
TOR	The Onion Router
USA PATRIOT	Uniting and Strengthening America by Provide Appropriate Tools Required to Intercept and Obstruct Terrorism
WPA	Whistleblower Protection Act
WPEA	Whistleblower Protection Enhancement Act

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## I. INTRODUCTION

Security, particularly the intelligence aspect of it, and civil liberties seem to reside at opposite ends of a sliding scale. Intelligence demands secrecy in order to be effective, while democracy demands transparency and accountability in all governmental matters. Such situations as war or terrorism change the emphasis to executive authority, rebalancing the scale toward security and curtailing civil liberties. During times of peace, the balance slides back, at least in theory, toward increased civil liberties and new or restored constraints on executive authority.

Effective intelligence is essential for the executive branch to protect national security, especially in the shadow of terrorist threats and war. In general, however, to be effective, intelligence agencies employ intrusive means and methods, which (may) contradict democratic values. Indeed, even those programs that do not actively infringe on or implicate Americans' cherished civil liberties may, in some estimates, run counter to democratic transparency and accountability simply by being secret. So intelligence programs form a source of concern for the liberty-minded both inside and outside the intelligence community—and this concern occasionally prompts individuals to leak to the public, in one form or another, classified information. When revealed to citizens, whether by intelligence insiders or outsiders, intelligence agencies' intrusive modus operandi becomes a source of consternation for citizens.<sup>1</sup>

Particularly in light of the ongoing revelations of National Security Agency (NSA) methods and programs, much scholarly and journalistic attention has gone to the Fourth Amendment implications of domestic electronic surveillance. However, the First Amendment looms at least as large in the security-versus-liberty debate. In its essence, intelligence leaking is all about a citizen's right to free speech as a function of democratic governance. In the United States, leaks of classified information to the public—for example, the so-called Pentagon Papers that documented the Johnson administration's plans to obscure from the public the real state of the U.S. war effort in Vietnam—have

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<sup>1</sup> Mark Lowenthal, *Intelligence: From Secrets to Policy* (Washington, DC: CQ Press, 2009), 1.



divulged unethical, if not illegal, activities by the U.S. intelligence community, provoking a firestorm of protest on both sides of the issue. Typically, such an intelligence leak provokes public debate, then perhaps congressional inquiry, and changes in oversight measures. Arguably, this process shows U.S. democracy at work; the system, such as it is, accommodates certain breaches of secrecy to allow the light of public awareness and accountability to shine into the otherwise hidden corners of intelligence operations.<sup>2</sup> More specifically, intelligence leakers have a role in checking executive authority in a given instance—an agency director may suddenly retire, or a particular program might be curtailed. But over the longer term, what effect do intelligence leaks have on the balance of liberty and security?

#### **A. MAJOR RESEARCH QUESTION**

How do deliberate intelligence leaks affect the balance between security (the need for intelligence and the need to keep intelligence sources and methods secret) and liberty (the public's right to know and weigh in on the policies and practices conducted in its name) in U.S. democracy? In May 2010, Army Private First Class Bradley Manning provided thousands of secret government documents to WikiLeaks—to date the largest leak of classified documents in U.S. history.<sup>3</sup> His actions met with mixed reactions. In some circles, Manning is considered a hero for exposing secret and troubling government activities, increasing transparency between the executive and the nation.<sup>4</sup> Elsewhere, Manning is considered a traitor for compromising intelligence sources and methods as well as a weakened national security with regards to a seemingly never-ending global war

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<sup>2</sup> Heidi Kitrosser, “Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information,” *Journal of National Security Law & Policy* 6 (2013).

<sup>3</sup> Courtney Kube and Erin McClam, “Manning Set to Learn Fate for Biggest Leak in US History,” *U.S. News*, August 20, 2013, <http://www.nbcnews.com/news/us-news/manning-set-learn-fate-biggest-leak-us-history-v20107714>.

<sup>4</sup> Jack Mirkinson, “Daniel Ellsberg Calls Edward Snowden a ‘Hero,’ Says NSA Leak Was Most Important In American History,” *Huffington Post*, June 10, 2013, [http://www.huffingtonpost.com/2013/06/10/edward-snowden-daniel-ellsberg-whistleblower-history\\_n\\_3413545.html](http://www.huffingtonpost.com/2013/06/10/edward-snowden-daniel-ellsberg-whistleblower-history_n_3413545.html).

on terrorism (GWOT).<sup>5</sup> How should such incidents be understood in light of the complexities of national security, democracy, and statecraft in the United States today?

The proposed research will analyze three significant intelligence leaks in American history: the Pentagon Papers case; WikiLeaks; and Edward Snowden's exposure of the domestic surveillance programs of the National Security Agency (NSA) in 2013. It is important to note that each of these intelligence leaks happened during times of war—when the need for both heightened security and democratic principle are arguably at a peak. The research will explore the connections between these events, executive authority and democratic transparency as well as the rightful role, if any, of the leaker in U.S. democracy.

Subsidiary questions and considerations this thesis will focus on during analysis include:

- Do the leaker's intentions matter in these calculations?
- Do the penalties for leaking, which can range from a bureaucratic rebuke for a technical violation of non-disclosure clauses in a contract to execution for treason, fit the offense and the needs of American democracy?
- Does over classification of information promote intelligence leaks?

## **B. IMPORTANCE**

Edward Snowden's leaks continue to fill the pages of the reputable press inside and outside the Washington Beltway, as well as on both sides of the Atlantic.<sup>6</sup> The Obama administration has declassified at least one set of related documents, to join the conversation in defense of the system of checks and balances that constrain domestic

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<sup>5</sup> Kevin McGinty, "Bradley Manning: Now That Guy's a Traitor..," *The Topeka Capital-Journal*, August 21, 2013, <http://cjonline.com/blog-post/kevin-mcginty/2013-08-21/bradley-manning-now-guys-traitor>.

<sup>6</sup> Ellen Nakashima, "Officials Alert Foreign Services That Snowden Has Documents on Their Cooperation with U.S.," *The Washington Post*, October 24, 2013, [http://www.washingtonpost.com/world/national-security/officials-alert-foreign-services-that-snowden-has-documents-on-their-cooperation-with-us/2013/10/24/930ea85c-3b3e-11e3-a94f-b58017bfee6c\\_story.html](http://www.washingtonpost.com/world/national-security/officials-alert-foreign-services-that-snowden-has-documents-on-their-cooperation-with-us/2013/10/24/930ea85c-3b3e-11e3-a94f-b58017bfee6c_story.html); Nicholas Watt and Rowena Mason, "Angela Merkel Phone-Bugging Claims Are Result of Snowden Leaks, MP Claims," *The Guardian*, October 24, 2013, <http://www.theguardian.com/world/2013/oct/24/angela-merkel-bugging-snowden-leaks-mp>.

electronic surveillance.<sup>7</sup> NSA Chief General Keith B. Alexander continues to engage in clumsily staged outreach to the hacker community—among other players in the cyber realm—while successive revelations about the extent and duration of NSA surveillance programs have not refined the agency’s public-relations approach. While he saved his agency and his key programs from being de-funded over the summer, Alexander has also suggested that the NSA will have that much more difficulty after the leaks and their fallout in continuing its record of thwarted terrorist attacks against the United States.<sup>8</sup> Alexander speaks for most of the intelligence community when he casts his agency’s mission—and even its most controversial programs—as a core matter of national security.

Top-secret surveillance programs, including some that implicate American citizens, are a major part of how we fight this GWOT; however, the democratic prerequisites of transparency and accountability, as well as those civil liberties that undergird life, liberty, and happiness in the United States, might be why we fight. After all, in all of its forms and functions, Homeland Security really protects the basics of the American way of life. For this reason, the balance between liberty and security is a vitally important ongoing function in U.S. society.

### **C. PROBLEMS, HYPOTHESES, AND ASSUMPTIONS**

One of the first problems in this realm of inquiry is the difference—certainly legal and perhaps ethical—between whistleblowers and leakers. Whistleblowers divulge information about illicit activity through legally prescribed channels, which protect—with some restrictions and qualifications—the individual from reprisal since Congress enacted the Whistleblower Protection Act (WPA 1989). These are not blanket protections; the merit and intent of the whistleblower’s action must be non-malicious. It

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<sup>7</sup> Ellen Nakashima, Julie Tate, and Carol Leonnig, “Declassified Court Documents Highlight NSA Violations in Data Collection for Surveillance,” *The Washington Post*, September 11, 2013, sec. World, [http://www.washingtonpost.com/world/national-security/declassified-court-documents-highlight-nsa-violations/2013/09/10/60b5822c-1a4b-11e3-a628-7e6dde8f889d\\_story.html](http://www.washingtonpost.com/world/national-security/declassified-court-documents-highlight-nsa-violations/2013/09/10/60b5822c-1a4b-11e3-a628-7e6dde8f889d_story.html).

<sup>8</sup> David Harris-Gershon, “NSA Director Admits He Lied about Surveillance Thwarting 54 Terror Plots,” *The Daily Kos*, October 15, 2013, <http://www.dailykos.com/story/2013/10/15/1247400/-NSA-Director-Admits-He-Lied-About-Surveillance-Thwarting-54-Terror-Plots>.

is important to note the WPA does not extend to individuals who disclose national security information. Examples of whistleblowers include Mr. Robert Ferro, scientist, who disclosed information concerning his employer, defense contractor TRW (later acquired by Northrop Grumman) selling faulty electronic components on military and intelligence satellites. “Mr. Ferro discovered in 1995 that certain transistors made by TRW were likely to fail. But TRW did not tell the government about the problems, [and] they blocked Mr. Ferro’s effort to include the information in a report to the Air Force after a satellite experienced critical failures in 2001.”<sup>9</sup>

Leakers are individuals with privileged access to classified information concerning national security who violate disclosure agreements and divulge this classified information into the public domain. For example, William Mark Felt, Sr., former Federal Bureau of Investigation (FBI) Deputy Director, secretly leaked information concerning the Watergate scandal to then *Washington Post* journalists Bob Woodward and Carl Bernstein.<sup>10</sup> Better known by his code name in the reporters’ notes, Deep Throat, Felt denied his role in the Watergate scandal for the better part of three decades and, thus far, has eluded any punishment for his divulgements. From the executive branch’s perspective, leakers are criminals and probably traitors, because they violate disclosure agreements and compromise intelligence sources and methods, weakening national security. The punishments can range from simple loss of security clearance to execution.

Issues arising from intentionally leaking intelligence evolve in several forms: national embarrassment; damage to national security; constrained executive authority; waning public support; increased transparency; changes to oversight; and handling of the leaker. From a national security perspective, intelligence leaks divulge methods, means,

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<sup>9</sup> Christopher Drew, “Military Contractor Agrees to Pay \$325 Million to Settle Whistle-Blower Lawsuit,” *The New York Times*, April 3, 2009, <http://www.nytimes.com/2009/04/03/business/03whistle.html>.

<sup>10</sup> Federal Bureau of Investigation, “FBI Records: The Vault, Mark Felt,” accessed December 11, 2013, <http://vault.fbi.gov/mark-felt>; David Von Drehle, “FBI’s No. 2 Was Deep Throat: Mark Felt Ends 30-Year Mystery of The Post’s Watergate Source,” *The Washington Post*, June 1, 2005, [http://www.washingtonpost.com/politics/fbis-no-2-was-deep-throat-mark-felt-ends-30-year-mystery-of-the-posts-watergate-source/2012/06/04/gJQAwwseRIV\\_story.html](http://www.washingtonpost.com/politics/fbis-no-2-was-deep-throat-mark-felt-ends-30-year-mystery-of-the-posts-watergate-source/2012/06/04/gJQAwwseRIV_story.html).

and sources to the enemy. The state loses the benefits of secrecy, giving the adversary a tactical advantage against the state's ability to collect and subdue threats. The state and intelligence community credibility is destroyed from the perceived inability to protect sources. The impact reverberates to recruitment efforts as potential human sources fear for their own family's lives.

The executive branch is tasked with protecting the state. Intelligence collection is one of the main weapons in the executive's arsenal in carrying out this basic function of the office. Although democratically elected, the president has certain authority to implement strategies and programs to protect the citizenry, including robust intelligence collection. Because the U.S. Constitution is set up with checks and balances, increases in executive authority reduce certain civil liberties as it pertains to the collection of intelligence. When the secrets used to protect the state are leaked, congressional inquiries occur that afflict the executive with reduced power.

During times of national crisis, when public support should be high, intelligence leaks—especially those substantiating violations of constitutional rights—will reduce support for activities that increase security and limit civil liberties. Transparency increases between the executive branch and the nation, as a result of intelligence leaks. Public debates occur, giving the citizenry opportunity to leverage congress in resetting the balance of liberty and security to comport with public will. The democratic process is flexed, causing the executive to justify intelligence programs—or they are held accountable for violations of the Constitution. Either the executive authority is restrained through increased oversight, or strengthened through legislation agreeable to all branches of government.

#### **D. LITERATURE REVIEW**

There is extensive literature concerning the importance of intelligence and the challenges it poses to democracy. The tradeoff between secrecy and transparency is central to the challenge intelligence poses to democracy—individual rights and national security is at the heart of the matter. The challenges to democracy increase during times of war when the executive's requirement to restrain or suspend individual rights is at its

peak. Many scholars assert that the secretive nature of intelligence counters the democratic principles of transparency. The need of transparency is essential for effective democracy; the secretive nature of intelligence works counter to democratic transparency.<sup>11</sup> The lack of transparency may result in a democratic government transgressing against its citizens' values without any accountability. On the other hand, democracies cannot afford to focus solely on maximizing accountability because national security is equally important.<sup>12</sup> This conundrum is not exclusive to the United States; democracies throughout the world, old and new, have experienced their own versions of it.<sup>13</sup> For this reason, the debate is ongoing—and vitally important. “Can we in short have the benefits of the grin (Cheshire Cat) whilst allowing the body, and especially the claws, to remain hidden?”<sup>14</sup>

The use of intelligence in the United States dates back to the Revolutionary War, when then-General George Washington created espionage networks to defeat the British. Ever since, intelligence, in its varied forms, has developed into a key tool in defending the state through gaining advantage over adversaries, and is equally critical in helping

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<sup>11</sup> Kate Martin, “Domestic Intelligence and Civil Liberties,” in *Secret Intelligence: A Reader*, ed. Christopher Andrew, Richard Aldrich, and Westley Wark (New York, NY: Routledge, 2009); Derek Bambauer, “Chutzpah,” *Journal of National Security Law & Policy* 6 (2013).

<sup>12</sup> Mike Rettig, “Democracy and Intelligence: An Uneasy Working Partnership,” *Fair Observer*, March 12, 2013, <http://www.fairobserver.com/article/democracy-intelligence-uneasy-working-partnership?page=11>.

<sup>13</sup> Timothy G. Borden, “Intelligence and Democracy: Issues and Conflicts,” *Espionage Encyclopedia*, accessed October 24, 2013, <http://www.faqs.org/espionage/In-Int/Intelligence-and-Democracy-Issues-and-Conflicts.html#b>; David Lundberg, “Democratic Accountability of the United States Intelligence Community,” in *Democratic Oversight of Intelligence Services*, ed. Daniel Baldino (Annandale, NSW: Federation Press, 2010); Peter Gill, *Policing Politics: Security Intelligence and the Liberal Democratic State* (London, ENG: Frank Cass, 1994); Thomas C. Bruneau and Florina Matei, “Intelligence in the Developing Democracies: The Quest for Transparency and Effectiveness,” in *The Oxford Handbook of National Security Intelligence*, ed. Loch K. Johnson (New York, NY: Oxford University Press, 2010); Florina Cristiana Matei and Thomas C. Bruneau, “Policymakers and Intelligence Reform in the New Democracies,” *International Journal of Intelligence and CounterIntelligence* 24, no. 4 (2011): 656–91, doi:10.1080/08850607.2011.598784; Florina Cristiana Matei and Thomas Bruneau, “Intelligence Reform in New Democracies: Factors Supporting or Arresting Progress,” *Democratization* 18, no. 3 (2011): 602–30, doi:10.1080/13510347.2011.586257.

<sup>14</sup> Rhetorical question in David Omand, “Can We Have the Pleasure of the Grin without Seeing the Cat? Must the Effectiveness of Secret Agencies Inevitably Fade on Exposure to the Light?,” *Intelligence and National Security* 23, no. 5 (2008): 593–607, doi:10.1080/02684520802449476. Sir Omand uses the characteristic of the Cheshire cat in *Alice in Wonderland* to illustrate the dilemma of democratic accountability (exposure) of the intelligence community and effective intelligence.

policy makers make good policy decisions. <sup>15</sup> Intelligence is most effective when methods and source are protected; “intelligence would not, and could not, function under conditions of openness—its function is to discover the information of others, while concealing their own position and that of their government.”<sup>16</sup>

There is extensive literature supporting strong national security that limits civil liberties. <sup>17</sup> The literature argues the survivability of the state is first priority, especially in times of extreme crisis. Ensuring the health of the state requires the suspension of civil liberties; therefore, it is the political and moral duty of the executive to temporarily violate constitutional rights. This camp—pro national security—operates under the assumption that civil liberties are important in democracy, but its importance is misplaced. Civil liberty is not achievable if the state in which it exists is under attack and the violation of those liberties is the best means to secure the state. <sup>18</sup>

Members of the pro-liberty camp suggest the primary focus of government action is to ensure constitutional rights are upheld at all cost. Members of the camp include Hacktivist, Libertarians, and Wikileaks that lament security is a dangerous artifice and

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<sup>15</sup> David Kahn, “An Historical Theory of Intelligence,” in *Intelligence and National Security: Key Questions and Debates*, ed. Peter Gill, Stephen Marrin, and Mark Phythian (New York, NY: Routledge, 2009); Richard English, *Terrorism: How to Respond* (Oxford, England: Oxford University Press, 2010); Jennifer E. Sims, “Defending Adaptive Realism: Intelligence Theory Comes of Age,” in *Intelligence and National Security: Key Questions and Debates*, ed. Peter Gill, Stephen Marrin, and Mark Phythian (New York, NY: Routledge, 2009).

<sup>16</sup> Robert Dover and Michael S. Goodman, “Intelligence in the Information Age,” in *Spinning Intelligence: Why Intelligence Needs the Media, Why the Media Needs Intelligence* (New York, NY: Columbia University Press, 2009).

<sup>17</sup> Julian Müller-Maguhn Assange, *Cypherpunks: Freedom and the Future of the Internet* (New York, NY: OR Books, 2012), 1–9; Jameel Jaffer and Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (New York, NY: Columbia University Press, 2007); Nadine Strossen, “Terrorism’s Toll on Civil Liberties,” *Journal of Aggression, Maltreatment & Trauma* 9, no. 3–4 (2005): 365–77, doi:10.1300/J146v09n03\_07.

<sup>18</sup> John Ashcroft, *Never Again* (New York: Hachette, 2006); “Alberto Gonzales Memorandum for the President,” 25 January 2002, George Washington University, accessed September 3, 2013; David Omand, “Can We Have the Pleasure of the Grin without Seeing the Cat? Must the Effectiveness of Secret Agencies Inevitably Fade on Exposure to the Light?,” *Intelligence and National Security* 23, no. 5 (2008): 593–607, doi:10.1080/02684520802449476; Richard Posner, *Not a Suicide Pact: The Constitution in Time of National Emergency* (New York: Oxford Press, 2006), Kindle Ed.; Gregory F. Treverton, *Intelligence for an Age of Terror* (New York: Cambridge University Press, 2009); Robert Kennedy, *Of Knowledge and Power: The Complexities of National Intelligence* (Westport: Praeger Security International, 2008); and James M. Olsen, *Fair Play: The Moral Dilemmas of Spying* (Washington DC: Potomac Books, 2006).

liberty is critical to functional democracy.<sup>19</sup> Their motivation is fueled by past abuses of executive authority and the perceived exploitation of technology, specifically electronic media.

As Julian Assange, who may be one of the most prominent and most extreme proponents of this idea notes, the rule of law is important in democratic societies. The executive branch is considered irresponsible to pick and choose laws that advance their agenda to secure the state without following the laws that protect the civil liberty.<sup>20</sup>

Splitting the difference is a hybrid camp—liberty and security. The state does not have to totally sacrifice liberty for security, or vice versa; an acceptable middle ground is possible. Within this camp, there are individuals who recognize that the GWOT is open-ended due to the nature of the threat and is parasitic to democratic transparency<sup>21</sup> These camps are important because they are the spectrum of competing ideas affecting the balance of liberty and security. The White House admittance of the need for constraints on the way information is gathered and used indicates the balance is moving toward decreased security.<sup>22</sup> American citizens' sentiments fall into one of these three camps; however, in either case, democracy will most likely keep the scale from tipping to the extreme ends of the spectrum.

The question of what the national security entails and how it should proceed, is inextricably linked to the broader question of the appropriate role of the executive in American democracy. Proponents of strong executive authority rely upon the Constitution, specifically Article 2, granting the executive the power of commander in chief. Based in that power, the intelligence community is an extension—just like the

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<sup>19</sup> Assange, *Cyberpunks*, 1–9; John W Whitehead, *A Government of Wolves: The Emerging American Police State* (New York, NY: SelectBooks, 2013); Jaffer and Singh, *Administration of Torture*; Strossen, “Terrorism’s Toll on Civil Liberties.”

<sup>20</sup> Assange, *Cyberpunks*; Kitrosser, “Free Speech Aboard the Leaky Ship of State;” Kate Moss, *Balancing Liberty and Security: Human Rights, Human Wrongs* (London, England: Palgrave Macmillan, 2011); Daniel J Solove, *Nothing to Hide: The False Tradeoff Between Privacy and Security* (New Haven, CT: Yale University Press, 2011).

<sup>21</sup> Alan M. Dershowitz, “Rethinking the Balance between Liberty and Security,” accessed October 21, 2013, <http://www.alandershowitz.com/publications/docs/libertysecurity.html>.

<sup>22</sup> Steven Holland and Patricia Zengerie, “White House Admits Need to Crack down on NSA Spying,” *Capitol Hill Blue*, October 28, 2013, <http://www.capitolhillblue.com/node/50008>.



military—of executive authority whose methods and sources are protected by the President’s duty to protect the nation.<sup>23</sup> The executive has the sole power executed by intelligence agencies to grant and revoke security clearances, as well as classify information pertaining to national security.<sup>24</sup>

Current legislation supports expanded executive authority.<sup>25</sup> The Uniting and Strengthening America by Provide Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act is an example of legislature that expands executive authority. Shortly after the 9/11 attacks on October 23, 2001, President Bush signed into law legislation expanding executive authority to assist in the GWOT. It gives the presidency authority to employ tools and techniques to detect and prevent terrorism, including robust surveillance programs. Since its inception, the USA PATRIOT Act was reauthorized in March 2006 by President Bush, and extended by the Obama administration in May 2011, with minor changes to Section 215.<sup>26</sup> This section grants expanded power under the Foreign Intelligence Surveillance (FISA) Act to gather public information through electronic surveillance.<sup>27</sup> The USA PATRIOT Act, especially in light of Edward Snowden’s revelations about the NSA surveillance programs, is forcing

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<sup>23</sup> John Ashcroft, *Never Again* (New York, NY: Hachette, 2006); Alberto Gonzales, “Memorandum for the President, 25 January 2002,” accessed September 3, 2013, <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>; Richard A Posner, *Not A Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006).

<sup>24</sup> Argument supported by *Navy v Egan* ruling that awarding and revoking security clearances is a function unique to the executive branch and is unreasonable for an outside, non-expert to review such judgments and Tim Doorey, “Intelligence Secrecy and Transparency: Finding the Proper Balance from the War of Independence to the War on Terror,” *Strategic Insights* VI, no. 3 (May 2007).

<sup>25</sup> Legislation includes but not limited to the Authorized Use of Military Force (AUMF) Foreign Intelligence Surveillance Act (FISA), and USA PATRIOT Act.

<sup>26</sup> Literature referencing Bush administration reauthorization of USA PATRIOT Act is found in Sheryl Gay Stolberg, “Senate Passes Legislation to Renew Patriot Act,” *The New York Times*, March 3, 2006, sec. Washington, [http://www.nytimes.com/2006/03/03/politics/03patriot.html?\\_r=0](http://www.nytimes.com/2006/03/03/politics/03patriot.html?_r=0); Charlie Savage, “Patriot Act Extension Deal Is Reached,” *The New York Times*, May 19, 2011, sec. U.S., <http://www.nytimes.com/2011/05/20/us/20patriot.html>.

<sup>27</sup> Emma Roller, “This Is What Section 215 of the Patriot Act Does,” *Slate*, June 7, 2013, [http://www.slate.com/blogs/weigel/2013/06/07/nsa\\_prism\\_scandal\\_what\\_patriot\\_act\\_section\\_215\\_does.single.html](http://www.slate.com/blogs/weigel/2013/06/07/nsa_prism_scandal_what_patriot_act_section_215_does.single.html).

people to start debating their rights and liberties under the Constitution and what they can do to preserve them.<sup>28</sup>

Another important aspect of executive authority is the classification of information. Scholars argue that a significant amount of secret information is over-classified. The attitude of the intelligence community to label just about every aspect of its organization and work as secret no matter how insignificant contribute to intelligence leaks both intentional and unintentional.<sup>29</sup>

Literature criticizing executive authority suggests that presidents favor increasing their authority, especially during times of crisis, yet typically do not relinquish that authority when the crisis subsides.<sup>30</sup> History reveals a ratcheting effect concerning executive power. Once out of office, subsequent presidents follow the previous patterns of incrementally increasing executive authority. Past abuse of domestic surveillance power by the executive branch, fueled the critics' desire to check executive authority.<sup>31</sup> Additionally, scholars within this camp refute the notion that the president has exclusive, ultimate, and unimpeded authority over the collection, retention, and dissemination of national security information.<sup>32</sup>

What about legislative oversight—specifically methods and effectiveness? Scholars who study oversight methods either promote institutional oversight or

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<sup>28</sup> *Misuse of Patriot Act Powers: The Inspector General's Findings of Improper Use of the National Security Letters by the FBI*, 110<sup>th</sup> Cong. (2007); Dan Gillmor, "Six Months after NSA Story Broke, Snowden Looks Even More Patriotic," *The Guardian*, December 6, 2013, <http://www.theguardian.com/commentisfree/2013/dec/06/nsa-edward-snowden>; Robert Kuttner, "Time to Thank Edward Snowden," *Huffington Post*, November 10, 2013, [http://www.huffingtonpost.com/robert-kuttner/time-to-thank-snowden\\_b\\_4252208.html?view=print&comm\\_ref=false](http://www.huffingtonpost.com/robert-kuttner/time-to-thank-snowden_b_4252208.html?view=print&comm_ref=false).

<sup>29</sup> Michael S. Goodman, "British Intelligence and the British Broadcasting Corporation: A Snapshot of A Happy Marriage," in *Spinning Intelligence*, ed. Robert Dover and Michael S. Goodman (New York, NY: Columbia University Press, 2009); Kitrosser, "Free Speech Aboard the Leaky Ship of State."

<sup>30</sup> President Lincoln is an exception to the argument of ratcheting executive authority. He suspended habeas corpus during the Civil War but restored it after the war concluded.

<sup>31</sup> Jeremy Neff, "Does (FISA + NSA) -AUMF - Hamdi = Illegal Domestic Spying?," *University of Cincinnati Law Review* 75, no. 2 (2006): 916.

<sup>32</sup> James P. Pfiffner, "The Contemporary Presidency Constraining Executive Power: George W. Bush and the Constitution," *Presidential Studies Quarterly* 38, no. 1 (March 2008), doi:10.1111/j.1741-5705.2007.02632.x; David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb: A Constitutional History," *Harvard Law Review* 121, no. 4 (2008).

investigational oversight. The Institutional oversight model views oversight as a cooperative relationship between the executive and legislative branch. The goal of this model is for both branches to strengthen and improve functions they deem important—not policing for the sake of policing. The investigational model of oversight involves an adversarial relationship between the executive and legislative branch. The prime objective to this method is to proactively make Congress and the public aware of abuses within the intelligence community.<sup>33</sup>

Proponents of the investigative model suggest institutional intelligence oversight methods are profunctionary in nature.<sup>34</sup> The exposure of intelligence community failures and/or scandals provokes oversight mechanisms into responding. Moreover, intelligence scandals or “fire alarms” are more effective means of intelligence oversight and preferred by Congress.<sup>35</sup> Congress has other means of intelligence oversight that include budgetary control, hearings, and ability to confirm or reject nomination within the intelligence community.<sup>36</sup>

There is substantial literature on intelligence leakers, the media’s role in oversight, and First Amendment protections. Regarding intelligence leakers, two broad camps exist, supporters and condemners. Scholars within the supporter camp view leakers as beneficial to the health of democracy. Their actions uncover questionable executive branch activities and abuses. Through these revelations, violators are held accountable for their actions. Moreover, citizens can weigh in on the government

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<sup>33</sup> Frank John Smist, *Congress Oversees the United States Intelligence Community, 1947–1989* (Knoxville, TN: University of Tennessee Press, 1990), 21–2.

<sup>34</sup> Loch K. Johnson, “Secret Spy Agencies and a Shock Theory of Accountability,” Occasional Paper, University of Georgia, School of Public and International Affairs, Athens, GA, 1–2.

<sup>35</sup> Johnson, “Secret Spy Agencies and a Shock Theory of Accountability;” Mathew D. McCubbins and Thomas Schwartz, “Congressional Oversight Overlooked: Police Patrols versus Fire Alarms,” *American Journal of Political Science* 28, no. 1 (1984): 165–79, doi:10.2307/2110792.

<sup>36</sup> Lowenthal, *Intelligence*, 205–10.

activities, due to the newly created transparency. Because of this relationship, the leaker deserves First Amendment protections, such as the media enjoy.<sup>37</sup>

Some intelligence leaks are authorized. Senior government officials “authorize” intentional intelligence leaks for political gain, making an argument about government hypocrisy. This argument is best articulated by Senator John McCain’s comment, “the fact that this administration would aggressively pursue leaks perpetrated by an Army private in the WikiLeaks matter and former CIA employees in other leaks cases, but apparently sanctions leaks made by senior administration officials for political purposes, is simply unacceptable.”<sup>38</sup> Another important point resounding within this camp, is increased prosecution of leakers will discourage government employees from speaking to the media and coming forward with questionable government practices.<sup>39</sup>

The condemnation camp view leakers are criminals requiring stiff punishment under the law. Leakers cause irreparable damage to the state.<sup>40</sup> Prosecutions of intelligence leakers are rising. Prior to George W. Bush administration’s successful prosecution of State Department analyst Lawrence Franklin, Samuel Morison was the only person in U.S. history to be convicted under the Espionage Act.<sup>41</sup> Subsequently, the

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<sup>37</sup> Kitrosser, “Free Speech Aboard the Leaky Ship of State;” Mirkinson, “Daniel Ellsberg Calls Edward Snowden A ‘Hero,’ Says NSA Leak Was Most Important in American History;” James Goodale, *Fighting for the Press* (New York: City University of New York Press, 2013); Nancy Snow, *Information War: American Propaganda, Free Speech, and Opinion Control Since 9/11*, 1st ed. (New York: Seven Stories, 2003); Bart Cammaerts, “Citizenship, the Public Sphere and Media,” in *Reclaiming the Media: Communication Rights and Democratic Media Roles*, ed. Bart Cammaerts and Nico Carpentier (Bristol: Intellect, 2007); Bart Cammaerts, “Journalism, Media, and Democracy,” in *Reclaiming the Media: Communication Rights and Democratic Media Roles*, ed. Bart Cammaerts and Nico Carpentier (Bristol: Intellect, 2007); Edwina Clare Reid, “Congressional Intelligence Oversight: Evolution in Progress 1947–2005” (Master’s thesis, Naval Postgraduate School, 2005).

<sup>38</sup> John McCain, “Floor Statement by Senator John McCain on Obama Administration’s National Security Leaks on June 5, 2012,” accessed October 21, 2013, <http://www.mccain.senate.gov/public/index.cfm/2012/8/post-e2f02cf7-04a9-e566-6b04-e46c45a5c500>.

<sup>39</sup> Chris Chillizza, “How President Obama Got out of Balance on Leaks,” *Washington Post*, May 20, 2013, <http://www.washingtonpost.com/blogs/the-fix/wp/2013/05/20/how-president-obama-got-out-of-balance-on-leaks/>.

<sup>40</sup> Lowenthal, *Intelligence*; McCain, “Floor Statement by Senator John McCain on Obama Administration’s National Security Leaks on June 5, 2012.”

<sup>41</sup> Cora Currier, “Charting Obama’s Crackdown on National Security Leaks,” *ProPublica*, July 30, 2013, <http://www.propublica.org/special/sealing-loose-lips-charting-obamas-crackdown-on-national-security-leaks>.

Obama administration has brought charges against seven times as many leakers.<sup>42</sup> So far three of the seven men indicted are convicted.<sup>43</sup>

Two main categories in the argument against First Amendment protections for intelligence leaks exist. First, leakers are trusted executive branch employees who through disclosure agreements forfeit their right to First Amendment protection, while third-party media organizations are protected.<sup>44</sup> Second, opponents champion the elimination of the double standard of First Amendment protection so that both the media and leaker are subject to prosecution. Protecting media outlets that publish classified information—while prosecuting the leaker—is arguably hypocritical. Damages to national security, if caused by the leaker or perpetuated by the media, deserve the same level of punishment. To date no journalist has been convicted of publishing U.S. classified information. However, this category suggests that limiting the media’s free speech will help to eliminate the threat of intelligence leaks to the public. Consequently, limiting the press opposes core principles of democracy.<sup>45</sup>

## **E. THESIS OVERVIEW**

Analysis of this thesis will begin with discussing liberty and security, and the major factors in the debate to include executive authority, congressional oversight, intelligence, and the challenges to democracy. Next, a comparative analysis of the Pentagon Papers and WikiLeaks will discuss the similarities and difference between the cases focusing on the classification of information, national threat posture, methods, information access, and the intention of the individual. The results of this analysis will be analyzed against Edward Snowden’s leaks. Subsidiary questions and considerations that

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<sup>42</sup> Kitrosser, “Free Speech Aboard the Leaky Ship of State,” 411.

<sup>43</sup>For a chronological history detailing indictments and convictions under the Espionage act see Cora Currier, “Charting Obama’s Crackdown on National Security Leaks.”

<sup>44</sup> Yochai Benkler, “A Free Irresponsible Press: Wikileaks and the Battle Over the Soul of the Networked Fourth Estate,” *Harvard Civil Right-Civil Law Review* 311 (2011); Jonathan Peters, “WikiLeaks, the First Amendment, and the Press,” *Harvard Law & Policy Review*, 2011, [http://works.bepress.com/jonathan\\_peters/3](http://works.bepress.com/jonathan_peters/3).

<sup>45</sup> Gabriel Schoenfeld, “Has the New York Times Violated the Espionage Act,” *National Affairs*; John C. Eastman, “Listening to the Enemy: The President’s Power to Conduct Surveillance of Enemy Communications During Time of War,” *ILSA Journal of International and Comparative Law* 13, no. 1 (2006).

this thesis will focus on in the course of the analysis include: do the leaker's intentions matter in these calculations? And do the penalties for leaking—which can range from a bureaucratic rebuke for a technical violation of non-disclosure clauses in a contract to execution for treason—fit the offense *and* the needs of American democracy? The result of the analysis includes recommendations to policymakers concerning possible First Amendment protections for intelligence leakers, or creating an effective path for intelligence leaks that mitigates the damage to national security.

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## II. FIRST AMENDMENT

That the First Amendment to the U.S. Constitution protects free speech is no coincidence. The founding fathers—coming out of British rule and embroiled in the debate about how much power the federal government should have over its people—made a symbolic yet strong statement about the fundamentals and principles governing the country in promulgating the Bill of Rights in 1789. Specifically, the U.S. Constitution reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>46</sup> The founders believed citizens should have the right to voice grievances against the government without fear of retaliation.

Placing the protection of the freedom of speech as the First Amendment indicates the critical role expression, particularly political expression, plays in U.S. democracy. First and foremost, speech popular—or more urgently perhaps because it is unpopular—is vital to the health of U.S. democracy. Whistleblowers, who expose improper government activity, claim the government is suppressing their free expression of information and damaging the republic because of the classification of information. However, the government takes a narrower view of leaks, characterizing them as theft or a breach of the leaker’s sworn oath and contractual agreement not to disclose classified information. That is, the government does not engage the First Amendment aspect of whistleblowing, perhaps because exceptions under the First Amendment are few and far between.

### A. ALIEN AND SEDITION ACTS

However healthy—in principle—dissent and disclosures of government wrongdoing might be, the political leaders of the United States, like anywhere else, dislike speech that is unpatriotic or accusatory of government activities. Thus, there is a fine

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<sup>46</sup> U.S. Constitution, Amendment I.



line—sometimes vanishingly fine—between protected, if unpopular, political discourse, and criminal or criminalizable utterances. This phenomenon is intensified when the security of the state is or is perceived as being under threat. During such times of national conflict the government, typically the executive branch pushes for legislation to protect the United States from acts deemed disloyal to the state to include physical acts of protest and other forms of dissent. These measures almost always prove, in the long run, to be illegal. Sometimes, however, this determination is years in the making.

Formed in the shadow of national crisis, the Alien and Sedition Acts of 1798 were the first legislation created to eliminate anti-government behavior. The Alien and Sedition Acts were passed into law in 1798, during the Adams administration, as a partial response to political infighting between the Federalist and Republican political parties and mostly in preparation of a possible war with France. The Federalists controlled government and looked on any activity against the government as a serious threat to the security of the newly formed republic. More concretely, in these most expansionary years of Napoleon's reign, the young government in Washington also had reason to fear France.<sup>47</sup> From the Federalist perspective, former French citizens and those favorable to France—the French had been close allies during the Revolutionary War—posed a threat to national security. Surely conflict with France would cause aliens to support their native country and oppose American sovereignty.<sup>48</sup>

The Alien and Sedition Acts were really four pieces of legislation designed to protect the state against domestic insurrection—the Naturalization Act, Alien Act, Alien Enemy Act, and Sedition Act. The Naturalization Act lengthened citizenship requirements from five to 14 years. The Alien Act gave the president the authority to expel dangerous aliens at will. The Enemy Alien Act authorized the president to deport or

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<sup>47</sup> David Jenkins, "The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence," *The American Journal of Legal History* 45, no. 2 (2001): 155–6, doi:10.2307/3185366.

<sup>48</sup> *Ibid.*, 156.

imprison enemy aliens during declared war. And the Sedition Act—which is pertinent to the First Amendment discussion—made it a crime to conspire against the government, to include individual and media speech.<sup>49</sup>

The Sedition Act, in its letter and its spirit, ran directly counter to the First Amendment. Most controversial to the First Amendment was Section II, making seditious libel illegal:

And be it further enacted, that if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and wittingly assist or aid in writing, printing, uttering, or publishing, any false, scandalous and malicious writing or writings against the Government of the United States, or either House of Congress of the United States, or the President of the United States, with intent to defame the said Government, or either House of the said Congress, or the said President, or to bring them or either-of them, into contempt or disrepute; or to excite against them, or either of them, the hatred of the good people of the United States, or to stir up sedition within the United States; or to excite any unlawful combinations therein, . . . shall be punished by a fine not exceeding two thousand dollars and by imprisonment not exceeding two years.<sup>50</sup>

Then-President John Adams did not discriminate in using the Sedition Act. He condemned any perpetrator of perceived seditious language, including politicians and editors of print media. Congressman Mathew Lyon was sentenced to four months in prison and fined \$1,000 for publishing several letters criticizing the Adams administration, the first of which was written before the Act had even become law. Thomas Cooper, a lawyer and newspaper editor who criticized President Adams in a broadside, was convicted and sentenced to six months imprisonment and a \$400 fine.<sup>51</sup>

This controversial legislation was short-lived, ending with the election of Republican President Thomas Jefferson. The significance of the Alien and Sedition Act is

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<sup>49</sup> Martin Kelly, “Alien and Sedition Acts—John Adams Presidency,” *About.com American History*, accessed February 3, 2014, <http://americanhistory.about.com/cs/johnadams/g/alienacts.htm>.

<sup>50</sup> Thomas F. Carroll, “Freedom of Speech and of the Press in the Federalist Period; The Sedition Act,” *Michigan Law Review* 18, no. 7 (1920): 616, doi:10.2307/1278027.; For statement of the law see i PET. STAT. AT L, 596, and ANNALS 5TH CONG. III, 3776-3777.

<sup>51</sup> Bruce Ragsdale, “The Sedition Act Trials” (Federal Judicial History Office, 2005), 3–5, <http://www.fjc.gov/history/docs/seditionacts.pdf>.

twofold: it shows how the United States restricted civil liberties during an imminent threat to national security, and it marked the first significant clash between the government and the First Amendment. This incident marks the start of contention of the United States over freedom of the press.

## **B. THE ESPIONAGE ACT OF 1917 AND SEDITION ACT 1918**

More than a century later during another national crisis, World War I, the government would create the Espionage Act of 1917 restricting the freedom of speech. Essentially, the act made any activity that hampered the American war and/or promoted the success of the enemy illegal. The operative text read:

Whoever, when the United States is at war, shall willfully make or convey false statements with intent to interfere with the operations or success of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than 20 years or both.<sup>52</sup>

President Woodrow Wilson—who that same year championed American action as making the world safe for democracy—reached for these startlingly undemocratic means of achieving consensus at a tricky time in U.S. history. The White House needed the full support of American citizens for World War I. The war seemed distant and rather like an adventure to many Americans, though both extremes of the political spectrum opposed U.S. involvement in the conflict for various reasons. Like in 1798, the government was mostly concerned about domestic sedition and other acts of fifth-column agitation among resident aliens and those loyal to Germany. With the Italians, U.S. authorities took more drastic measures, including internment.<sup>53</sup> Moreover, war mobilization required a huge investment from the citizenry to include bond purchases, manufacturing support, and

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<sup>52</sup> Espionage Act, 40 Stat. 217, 1917.

<sup>53</sup> “Injustice Ignored: The Internment of Italian-Americans During World War II,” *Pace International Law Review* 13, no. 1 (2001): 164–170.

draft participation. The home front was activated, as well. In this vein, the government resented any activity that would hamper the mass mobilization of the country for war effort.

Thus, the Espionage Act was amended in 1918 to include the Sedition Act, which contained language to suppress individual and media speech opposing to the U.S. War effort. The authority to thwart seditious acts extended to the postal system. The Postmaster General could authorize non-delivery of mail that violated the act. The newly amended act made enforcement easier to obtain.<sup>54</sup> The act imposed hefty fines and prison sentences to anyone who “willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the government of the United States.”<sup>55</sup> Unlike the Alien and Sedition Act of 1798, the Supreme Court heard several cases concerning the Espionage/Sedition Act of 1918.<sup>56</sup>

In *Abrams v. United States*, the Supreme Court upheld the new Sedition Act. Jacob Abram a Russian and self-professed anarchist wrote, printed, and distributed two sets of leaflets criticizing President Wilson and the war. One set of leaflets, written in English, referred to President Wilson as a coward and a hypocrite for sending troops into the Soviet Union with the hidden agenda of subverting the Russian Revolution. The other leaflet—in Yiddish—appealed to immigrant Russians to stop producing munitions for American servicemen, insinuating that the bullets would not only be used against the Germans but also against Russian revolutionists. The court held the defendants in violation of the Espionage Act for inciting resistance to the war effort and for urging curtailment of production of vital war material. They were sentenced to 20 years in prison.<sup>57</sup>

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<sup>54</sup> “U.S. Congress Passes Espionage Act,” *History.com*, accessed February 5, 2014, <http://www.history.com/this-day-in-history/us-congress-passes-espionage-act>.

<sup>55</sup> Sedition Act, 40 stat.553, 1918.

<sup>56</sup> The chief difference between the original Espionage Act and the 1918 Amendment is language to include offenses against the government in addition to the military; for exact verbiage see Sedition Act, 40 stat. 553, 1918.

<sup>57</sup> *Abrams v. United States*, 250 U.S. 616 (1919).

The jurisprudence of this age culminated in the “clear and present danger” test, which arose in *Schenck v. United States*, a landmark case involving anti-war rhetoric and the Espionage and Sedition Acts of 1918.<sup>58</sup> Charles Schenck, a prominent socialist, attempted to distribute thousands of circulars to recently drafted men to prevent their participation in the war on Thirteenth Amendment grounds. Specifically, Schenck disputed the legality of the draft based on the involuntary servitude clause in the Thirteenth Amendment, essentially equating the draft to slavery. The government charged Schenck with violating the Espionage Act by conspiring to cause insubordination in the military. Schenck alleged he was protected under the First Amendment.<sup>59</sup>

The Supreme Court upheld that Schenck’s actions violated the Espionage Act, which it took as legal, at least with the nation embroiled in the Great War. Justice Holmes’ majority opinion is significant in the sense that he made a distinction between free speech protection in times of peace and war:

We admit that, in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.<sup>60</sup>

Just like the Alien and Sedition Act of 1798, the 1918 measures were promulgated during a time of national crisis. These acts targeted all forms of criticism against the government and war on the theory that dissent was disloyal and probably dangerous. The First Amendment was interpreted to support executive authority on the logic that the preservation of the state arguably represents a higher priority than the protection of such

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<sup>58</sup> *Schenck v. United States*, 249 U.S. 47 (1919). The clear and present danger test is derived from Justice Holmes opinion. The test would allow the Supreme Court to view each speech cases on a case-by-case basis charactering the act based on the in which it is done. In 1969, the test was replaced by the “imminent lawless action” test in *Brandenburg v. Ohio*.

<sup>59</sup> U.S. Constitution.

<sup>60</sup> *Schenck v. United States*, 249 U.S. 47 (1919).

civil liberties as free speech. Prosecutions under these laws—particularly the Espionage Act—highlight the convention of judicial deference to the executive branch when crisis looms.

More specifically, this episode demonstrates that the executive branch will seek to protect itself from divisive speech and actions to preserve its policy agenda—and the courts remain inclined to let it, rather than impose the slow and ponderous judicial process on decisions taken in the heat of battle.

### **C. THE FIRST AMENDMENT AND CIVIL SERVANTS**

It is apparent from the text that the First Amendment affects all U.S. citizens and forms of press. Absent the free speech cases heard during World War I, every type of speech or entity is not protected under the First Amendment. For one thing, the Bill of Rights applies only to governmental actions—private companies can exact different or more stringent restrictions on their employees, for example, without running afoul of the First Amendment. Some policies may implicate equal-rights protections that are found elsewhere in the Constitution, but no one can sue a private entity for offending *First Amendment* rights, however, restrictive the speech policy might be.

By this same logic, the government employee occupies a special place in First Amendment jurisprudence. On the one hand, government workers remain citizens to whom basic Constitutional rights attach at all times. On the other hand, the government employee is the ultimate insider, entrusted with the responsibilities of office, so the government has more control over the speech of its employees than that of ordinary citizens.<sup>61</sup> Thus employees are restricted in the speech they can use in relation to the performance of their job and the safety of the workplace. The question, then, is the distinction between free speech that may be protected in terms of employment capacity and the criteria for what is not protected for the individual.

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<sup>61</sup> David Hudson, “Balancing Act: Public Employees and Free Speech,” *First Reports* 3, no. 2 (2002): 1.

Arguably the most notable free speech case concerning government employees is *Garcetti v. Ceballos*. In this case, plaintiff Deputy Attorney General Richard Ceballos, claimed he was passed over for promotion out of retaliation for criticizing the legitimacy of an arrest warrant. The Supreme Court ruled in a 5-4 decision that the First Amendment does not protect speech made by public employees pursuant to duties of employment. Employees are subject to employer disciplinary action because employees do not speak as citizens when it fulfills employment responsibility.<sup>62</sup> As a result of this case, the criterion for what may be and is not protected free speech depends on whether the individual is acting in the capacity of an ordinary citizen whose speech benefits public welfare or as an individual acting in the performance of their employment.

Several other court cases were key in determining the First Amendment rights of individuals within the workplace, as well as set the legal precedence of how to test for First Amendment speech protection. For example, in *Givhan v. Western Line Consolidated School District*, Bessie Givhan, a junior high school teacher complained to the principle in the 1970–1971 school year of discriminatory practices within the schools where she taught. She claimed racial discrimination existed in the appointment of the administrators, clerical staff, and cafeteria workers. Her allegations were communicated both verbally and in writing. At the end of the school year her contract was not renewed. The school board superintendent’s decision was heavily influenced by the principle’s letter stating, “Ms. Givhan is a competent teacher, however, on many occasions she has taken an insulting and hostile attitude towards me and other administrators. She hampers my job greatly by making petty and unreasonable demands. She is overly critical for a reasonable working relationship to exist between us.”<sup>63</sup> Givhan sued the school district, claiming her dismissal was based on complaints made to the principle and the First Amendment protected them. The U.S. Supreme Court reversed the Fifth Circuit court decision against her. This case is significant because the Supreme Court ruled the First

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<sup>62</sup> Sandra Norman-Easy, “Summary of *Garcetti v. Ceballos* and the Impact of Decisions on Connecticut Whistleblower Laws,” *Office of Legislative Research Report*, no. 0399 (2007).

<sup>63</sup> Frederick Schauer, “Private Speech and the Private Forum: *Givhan v. Western Line School District*,” *1979 Supreme Court Review*, January 1, 1979, 220.

Amendment might protect an employee from reprisal by their employer, offering the employee a certain amount of protection against employer reprisal.

Essentially, the Supreme Court decided that public employees are allowed to express their opinions either negative or positive without the fear of reprisal.<sup>64</sup> This case is unique because it further refined the degree of one's free speech within the work environment, at least in the public sector. Free speech protection is not solely dependent on the individual's right to address public concern in a public forum, but to balance it against the interest of the employee.

Through case law the Supreme Court has developed a three-part test to evaluate whether the First Amendment protects a public employee in a given utterance or publication. First, such conditions are reviewed as the manner, time, and place an employee's comment. Second, the court must assess if the speech impedes the proper operation of the employee's duties or the overall operation of the workplace. Third, when job loss is at stake, the court determines if the employee was terminated for exercising constitutional right of free speech or whether termination would occur regardless.<sup>65</sup> The *Pickering* balance test is used to make those determinations. The test gets its name from *Pickering v. Illinois Board of Education*, which marked the first time the Supreme Court adjudicated a case of a public employee criticizing an employer.<sup>66</sup> The eponymous balance test that came of *Pickering* is a two-part process that asks first, if the speech is a matter of public concern. Second, it weighs the employee's interest speaking on a matter of public concern and that of the interest of the employer.<sup>67</sup>

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<sup>64</sup> Schauer, "Private Speech and the Private Forum."

<sup>65</sup> Carroll, "Speech and Press in the Federalist Period," 616.

<sup>66</sup> It differs from *Givhan v. Western Line Consolidation School District* because the speech took place in a public forum. Marvin Pickering, a high school teacher, was fired for writing a letter to the *Lockport Herald* criticizing the school boards fund allocation between educational and athletic programs. The Board of Education justified firing him because from their perspective, his letter contained false statements and undermined the efficacy of school district operation. The Supreme Court overturned the lower court's decision ruling that Pickering's exercise of speech on public issues is not cause to terminate public employment. Hudson, "Balancing Act: Public Employees and Free Speech," 8-12.

<sup>67</sup> *Ibid.*, 7.



The interest of the government is, as a matter of general principles, considered to be particularly high in safeguarding state secrets.<sup>68</sup> Thus, federal employees requiring access to classified information are vetted through a security screening process. Once granted, the individual signs a non-disclosure agreement restricting their ability to divulge classified information. The agreement is an acknowledgement between the individual to the executive branch to keep information secret in agreeing to certain punishment if the agreement is broken. In this regard, the First Amendment does not automatically protect all federal employees' free speech, if used in the function of employment. In fact, the federal employee is subject to government reprisal to include termination of security clearance or employment—harsh measures that are meant to make compliance more likely.

The security clearance vetting system is designed to screen and mitigate compromises of classified information. The security clearance granting system is based on establishing an individual's trustworthiness. Arguably, federal employees with access to privileged information hold a position of trust because they handle sensitive information involving national security. This trust is violated when a federal employee leaks classified information.

#### **D. THE MEDIA, THE U.S. GOVERNMENT, AND NATIONAL SECURITY**

Generally speaking, the media fare better than individuals as far as First Amendment protection is concerned. After all, the text of the amendment explicitly guarantees freedom of the press. Today, "the press" encompasses a wide variety of media, including movies, music, print, and television. The constitutional concern remains the same: Government censorship that stifles free expression in these crucial media, particularly when political expression is at issue.

The First Amendment was—and is—necessary because the media and the government have a love-hate relationship, even as all sides acknowledge the centrality of a lively, independent media to the health of the democracy. On one hand, the relationship

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<sup>68</sup> Herbert L. Packer, "Offenses Against the State," *The ANNALS of the American Academy of Political and Social Science* 339, no. 1 (1962): 77–89, doi:10.1177/000271626233900107.

is harmonious when both parties benefit. For example, the government uses the media to communicate policy and gauge the temperature of the nation's response. Similarly, the media benefits when it is able obtain exclusive access to information and develop sources of future media releases. The relationship becomes contentious when the media releases controversial information implicating the government—for example, secret national security programs. The government may seek to silence the story or gain access to the information source.

This tension becomes particularly acute when the story at issue implicates the national security. For example, in the Pentagon Papers case, the government attempted to intervene in the publication of classified information about American efforts in the Vietnam War. More properly, *New York Times Co. v. United States*, the landmark case, tested the limits of the government to restrict and the media to exercise free speech. The Supreme Court decided resolutely in favor of the newspaper's First Amendment rights. Supreme Court justice Potter Stewart's concurrent opinion communicates the rationale for broad media protection—the democratic role of the media to create transparency and place checks on executive authority:

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.<sup>69</sup>

The media enjoys a certain amount power and prestige—as the storied “fourth estate” in society—because it is the primary means to inform the nation. The media facilitates interaction between the government and the people. Through this function, the public learns about government programs and policy. Most citizens rely on a free and open media to do the legwork and inform. The abundance of media outlets affords

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<sup>69</sup> *New York Times Co v. United States*, 713 U.S. (1971).

citizens the opportunity to learn about issues that are not in the local news headlines. Through this means the media helps the public to form opinion, and thus participate in the democratic process.<sup>70</sup>

Leakers leverage American citizens' expectations of a free press to influence policy. Leakers use the media to leak classified information. This aspect of the media is troublesome for the government, and has been a protagonist for legal action by the government against media. Secrecy is an inherent part of the intelligence community and a function of executive authority. The ability to keep methods and sources confidential is critical to state security. On the other hand, classifying information to hide criminal, unethical, or political ambitions abuses the trust between the government and its citizens. The leakers are not limited to the intelligence community; policymakers intentionally leak information for political reasons.

## **E. WHISTLE-BLOWER**

### **1. What is a Whistle-blower?**

Whistleblowers are important to U.S. democracy and the discussion about intelligence leaks. The person who divulges information is considered either a whistleblower or a leaker—there is not a middle ground or subcategory. Whistleblowers are individuals who reveal information in either one of two forms: authorized or non-authorized disclosures. In some circles, whistleblowers are loathed because they reveal information that brings scrutiny to the effected organization. In others, they are celebrated for shedding light on fraudulent and at times criminal behavior. In the past, employers have had little concern for retaliation against whistleblowers due to limited protections. The employer has had the prerogative to discipline the employee—in the worst case, the employee is blacklisted in his or her profession. In other words, the whistleblower assumes enormous risk, often to his or her own detriment. Because of the risks involved, the question looms: Why would someone knowingly subject himself or herself to potential reprisal in divulging classified information?

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<sup>70</sup> U.S. Constitution, Amendment I.

According to Executive Order 12731, whistleblower laws are not specifically designed to protect employees with valid proven allegations against their employer. It mandates all federal employees to disclose “waste, fraud, abuse, and corruption.”<sup>71</sup> The Office of Government Ethics (OGE) set the regulations implementing the order encouraging robust reporting of suspected misconduct. It is not the whistleblower’s responsibility to determine whether an offense is worthy of reporting—just report what they believe as wrongdoing to the appropriate authority.<sup>72</sup>

It is impossible for the Congress to find every instance of fraud, waste, abuse, and wrongdoing. It has a vested interest in encouraging whistleblowing because it aids in oversight and creates transparency between the people, business and government so Congress encourages whistleblowing to bring attention to those issues. According to Senator Grassley:

Whistleblowers strengthen our system of checks and balances, and that strengthens our system of representative government. It’s a constant battle to make sure that these patriotic citizens who shed light on overspending, mismanagement and layers of ineffective leadership within the federal government are protected.<sup>73</sup>

## **2. Whistleblower Protection Enhancement Act**

The latest legislation pertaining to whistleblowing is the Whistleblower Protection Enhancement Act (WPEA) of 2012. Signed into law November 27, 2012, WPEA strengthens the Whistleblower Protection Act (WPA) to better protect federal employees who come forward to disclose government waste, fraud, abuse, and other wrongdoing.<sup>74</sup> Previous iterations of the WPA made it difficult for the Whistleblowers to acquire protection under the law.

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<sup>71</sup> Executive Order No. 12,731, 5 C.F.R. 2635, 1990.

<sup>72</sup> “5 CFR Part 2635 Standards of Ethical Conduct for Employees of the Executive Branch,” *Federal Register*, Office of Government Ethics, 57, no. 153 (1992).

<sup>73</sup> *President Obama Signs Senator Akaka’s Whistleblower Protection Enhancement Act into Law* (Lanham, MD: Federal Information & News Dispatch, Inc, November 27, 2012), <http://search.proquest.com.libproxy.nps.edu/docview/1220472123/D89E5C9A29F74B31PQ/1?accountid=12702>.

<sup>74</sup> *Ibid.*

The Merit Systems Protections Board (MSPB) was designed to assess the merits of the employer's retaliation against the whistleblower. Federal employee petitions for whistleblower protection undergo the MSPB. It determines if the whistleblower will be protected from agency reprisal. The decision is final unless overturned by the appeals process, however the Federal Court of Appeals rarely rules in the whistleblower's favor. Between October 1994 and May 2012 the Court has a 3–226 record against whistleblowers for decisions on the MSPB. The WPEA allows the whistleblower to petition the MSPB for protection before the agency presents its defense and expands appeals court jurisdiction. Additionally, the act protects whistleblowers from criticizing the results of government policy.<sup>75</sup>

## **F. CONCLUSION**

Arguably the impetus for creating the First Amendment was to protect citizens against a tyrannical government. The founding fathers recognized the importance of the media to enlighten the people—and thus insured its protection with the First Amendment. They also understood a certain amount of tension between the government and the governed is unavoidable; therefore, individual speech must be protected.

Whistleblowers benefit U.S. democracy by enlightening the public. Through the whistleblower's awakening, citizens can demand change and hold their leadership accountable. This dividend aligns with the democratic principles the founding fathers enshrined in the U.S. Constitution. The ability to criticize government practices protects the citizens from tyrannical governance. Information by way of whistleblowers or leakers is critical to the congressional oversight process. Therefore, whistleblowers and leakers are an integral part of the discussion concerning government transparency and accountability. The sum of the relevant First Amendment cases is that the best intentions to protect the state can damage the principles and/or people it was created to protect.

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<sup>75</sup> Whistleblower Enhancement Protection Act of 2012, S. 743, 112th Cong., 2012.

### **III. LEAKS OF AN EXTERNAL NATURE: THE PENTAGON PAPERS AND WIKILEAKS**

There were two major leaks of government activities an external nature. Leaks of an eternal nature divulge government information towards foreign policies; for example, the United States foreign policy decisions concerning Vietnam. Daniel Ellsberg, who leaked a government study that he was involved in, conducted the first leak. Private First Class Bradley Manning, who had leaked over 720,000 documents over the course of several months, conducted the second leak. Both of these leaks were initially considered acts of treason, as they exposed classified policies of the United States during times of war. These leaks were the first significant intelligence leaks to occur within the United States.

Although civil servants and others with access to sensitive information may leak this material at any time, the urgency of—and sensitivity to—leaking is much higher during times of crisis. Daniel Ellsberg and Private First Class (PFC) Bradley Manning are two such individuals who exploited their privileged access to classified documents and leaked them in the public domain during a period of national crisis: the Pentagon Papers and WikiLeaks, perpetrated by Ellsberg and Manning respectively. Aside from committing a possible treasonous act, Ellsberg's Pentagon Papers leaks revealed the true nature and cause for the Vietnam War and redefined the media's role in the United States.<sup>76</sup> Manning's disclosure, also considered treasonous in many circles, disclosed a host of documents affecting public opinion domestically and internationally about United States conduct in Afghanistan, Iraq, and within the diplomatic arena.

#### **A. THE PENTAGON PAPERS**

The leak by Ellsberg (hereafter referred to as the Pentagon Papers) was quickly named the Pentagon Papers by the press because the Pentagon originated the study material that was leaked. This leak became the archetype for contemporary leakers

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<sup>76</sup> Judith Ehrlich and Rick Goldsmith, *The Most Dangerous Man in America: Daniel Ellsberg and the Pentagon Papers*, DVD, Documentary, 2009.

because it was the first incident of this sort, and it set the precedence for leaking classified information. Ellsberg became the face of intelligence leaks due to the following four reasons: 1) the method in which he leaked the material; 2) the content of the material leaked; 3) the implication to the government from the material leaked; and 4) the fact that he was exonerated in a court of law. These four characteristics led to the de facto standard for the conduct of future leakers.

## **1. Background**

The Pentagon Papers, officially named “History of U.S. Decision-making in Vietnam, 1945–1968,” was a study commissioned in 1967 by then-Secretary of Defense Robert McNamara. Concerned about U.S. military progress in Vietnam, McNamara assembled a team from the Pentagon, State Department, universities, and such think-tanks as the RAND Corporation, and granted them unprecedented access to information ranging from his personal files, White House and Joint Chiefs of Staff documents, State Department records, and CIA requests—all in the name of assembling the complete history of the Vietnam War. Information contained in the study required high classification due to the breadth of knowledge gained from confidential sources and such questionable practices as domestic wiretapping, to say nothing of the increasing controversy in the United States about the war. In 1971, as more and more Americans identified themselves as opponents of the war, the 7,000-page, 47-volume, study was leaked to the *New York Times*, which published parts of the document on its front page. The revelations in it proved explosive.

For instance, until the Pentagon Papers appeared, both Congress and the public believed the Gulf of Tonkin incident was the reason why the United States went to war with Vietnam. The conventional account is straightforward. On August 4, 1964, North Vietnamese torpedo boats attacked the *USS Maddox* and *USS Turner Joy* while conducting reconnaissance missions in the Gulf of Tonkin. A day later, Johnson gave a special message to Congress asking for permission to retaliate against North Vietnam. He leveraged President Dwight Eisenhower’s 1954 pledge of support and the Southeast Asia Collective Defense Treaty signed in 1955. The treaty required the United States to

counter the threat of communist aggression against signatory states. On August 7, Congress passed a resolution authorizing the use of force against North Vietnam.<sup>77</sup>

The Pentagon Papers told the rest of the story. Before the August 4, 1964, attacks, the United States had ordered air strikes over Laos and strafed North Vietnamese villages. Congress was not aware of these military operations, or any covert action against North Vietnam. As the report confirmed, the executive branch had deceived and manipulated Congress into supporting a war that had already commenced.<sup>78</sup>

## 2. Daniel Ellsberg

Daniel Ellsberg was one of the first people recruited to work on the Pentagon Papers. In many ways, he was a natural choice. Born in Chicago, Illinois, on April 7, 1931, Ellsberg was smart and patriotic. He attended Harvard University on scholarship and earned his PhD in economics. In between, he attended the University of Cambridge on the Woodrow Wilson fellowship and enlisted in the U.S. Marine Corps, serving as platoon leader and company commander in the Marine 2<sup>nd</sup> Infantry Division. Ellsberg's patriotism does not end with his decision to leave Harvard and join the Marines. He chose to delay his return to school and extended active duty service so he could lead his company into battle if the United States opposed Egypt's decision to nationalize the Suez Canal. Ellsberg could not stand the thought of watching the men he commanded be put to the test while he watched from Harvard. His academic and military experience gained him employment at the RAND Corporation as a strategic analysis.<sup>79</sup>

Ellsberg's views against U.S. involvement in Indochina started to develop in 1961 while he was working on a government task force in Vietnam. Interviews with members of the Military Assistance Advisory Group (MAAG) cemented his position that the United States should not become further entangled in Vietnam affairs because the conflict

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<sup>77</sup> Lyndon B. Johnson, "Special Message to the Congress on U.S. Policy in Southeast Asia," August 5, 1964, The American Presidency Project," University of California, Santa Barbara, accessed October 31, 2012, <http://www.presidency.ucsb.edu/ws/print.php?pid=26422>.

<sup>78</sup> George McGovern and John P. Roche, "The Pentagon Papers—A Discussion," *Political Science Quarterly* 87, no. 2 (1972): 174–7, doi:10.2307/2147824.

<sup>79</sup> Daniel Ellsberg, *Secrets: A Memoir of Vietnam and the Pentagon Papers* (New York, NY: Penguin, 2003), 3, 21–8.



was not winnable. The MAAG leadership felt that Vietnam was at most two years away from succumbing to communism. If a coup attempt against then-President Ngo Dinh Diem was successful, communism would prevail in a matter of months. All the documents that Ellsberg read pointed to a situation in which the United States would not prevail.<sup>80</sup>

In 1964, his assignment as the special assistant to John T. McNaughton, deputy assistant secretary of defense for international security, offered more insight into the situation occurring in Vietnam. McNaughton presented Ellsberg a golden opportunity—to observe the Vietnam conflict from the inside while it was ongoing. He was privy to an array of top-secret documents concerning Vietnam. He joined General Edward Lansdale’s liaison team in Vietnam and saw the conflict with his own eyes. He read copious amounts of classified documents and spent his time in Vietnam conversing with Vietnamese leaders as well as with U.S. military personnel.<sup>81</sup>

McNaughton recruited Ellsberg to work on the Pentagon Papers project. Ellsberg focused on the 1961 Kennedy administration policy, on which he wrote 350 pages.<sup>82</sup> He also read the other sections of the reports. His expertise in Vietnam, plus the knowledge he gained while working on the Pentagon Papers, set him on a course to change U.S. foreign policy—when he took the report to a *New York Times* reporter.<sup>83</sup>

Leaking to the media was not Ellsberg’s first recourse. He made several attempts to change the government’s policy regarding Vietnam inside government channels. First he helped several congressmen who opposed the war draft a resolution insisting for U.S. troop withdrawal from Vietnam. A month later he gave Senator William Fulbright, Chairman of the Senate Foreign Relations Committee, a copy of the Pentagon Papers. Later he met with Secretary of State Henry Kissinger, to whom he voiced his concern over U.S. policy in Vietnam and encouraged him to read the Pentagon Papers.

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<sup>80</sup> Daniel Ellsberg, *Some Lessons from Failure in Vietnam* (Santa Monica, CA: RAND Corporation, July 1969), 2–22, <http://www.dtic.mil/docs/citations/AD0690857>.

<sup>81</sup> Michael Young, “The Devil and Daniel Ellsberg,” *Reason*, June 2002.

<sup>82</sup> Ellsberg, *Secrets*, vii–ix.

<sup>83</sup> Ellsberg, *Secrets*.

Additionally, he met with Senator George McGovern where he again voiced concerns over the U.S. Vietnamese foreign policy. After their meeting, Senator McGovern told Ellsberg he would read the Pentagon Papers in a filibuster—but later reneged on the promise after announcing his presidential candidacy.<sup>84</sup>

Government inaction was Ellsberg's tipping point. Dissatisfied with government inactivity, Ellsberg decided to leak the Pentagon Papers to the *New York Times*.<sup>85</sup> For his actions, Ellsberg faced 12 federal felony charges and the possibility of 115 years in prison. Government criminal misconduct arising from White House attempts to covertly silence and/or incapacitate Ellsberg led to dismissal of all charges.<sup>86</sup>

## **B. WIKILEAKS**

The leak by PFC Bradley Manning (hereafter referred to as WikiLeaks) occurred nearly four decades after the Pentagon Papers. The soil for the WikiLeaks disclosure was cultivated by the legacy of the Nixon administration—a muscular but aloof executive that would stoop to dirty tricks and outright crimes to make its point with the public that it needed but did not much respect. WikiLeaks flooded the public arena with a host of secrets concerning the United States and some of its closest allies—all with the implication that the prevailing powers must be up to something behind all those closed doors, sealed safes, and classification levels.

Manning's leak is referred to as WikiLeaks because the documents were published on the WikiLeaks website, which was once an obscure internet repository of leaked documents and other artifacts of the millennial cyber-punk set. The obscure website gained global notoriety for the massive intelligence leak of U.S. documents. Debuting in 2007, the website's most prominent exposure up until Manning's leak was from non-U.S. related information about the governmental corruption of former Kenyan

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<sup>84</sup> Douglas O. Linder, "The Daniel Ellsberg (Pentagon Papers) Trial: A Chronology," *Famous Trials Pentagon Papers Trial 1972–73*, accessed February 14, 2014, <http://law2.umkc.edu/faculty/projects/ftrials/ellsberg/pentagonpaperschrono.html>.

<sup>85</sup> *Ibid.*

<sup>86</sup> Melville B. Nimmer, "National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case," *Stanford Law Review* 26, no. 2 (1974): 312–3, doi:10.2307/1227790.

President Daniel Arap Moi. In any event, Wikileaks did not reveal anything particularly scathing about the war in Iraq and Afghanistan, and there were no government conspiracies to deceive U.S. citizens. Nonetheless, the staggering amount of official material suddenly stripped of its protective classifications dramatically increased the significance of WikiLeaks. For his role in this massive disclosure, Bradley Manning received a prison sentence of 35 years for violating the Espionage Act.

## **1. Background**

WikiLeaks is a website championed by Julian Assange and dedicated to exposing corruption, broadly defined, and breaking governments' monopolies on information that these same governments classify. Anonymously, individuals would use the site to upload sensitive documents. Assange envisioned WikiLeaks to work similar to Wikipedia—individuals could upload information and create an open source intelligence agency. Documents are write-protected and untraceable. By using cutting-edge encryption technology, large-scale intelligence leaks are protected. The website used sophisticated encryption software—TOR—making it virtually impossible to trace the origin of the leaker. TOR is software that strips all the identifiable metadata from Internet uploads. The U.S. Naval Research laboratory developed TOR in 1995. Its use has proliferated to hackers worldwide. Essentially, the government information was both leaked and protected by a program it designed.

The virtual nature of WikiLeaks shielded it from international legal consequences. A court ruling in one particular country to shut down a domain server (holding classified information) is irrelevant to WikiLeaks' operation because it would shutdown that server and replicate the information to a server in another country outside the jurisdiction of the law.<sup>87</sup>

## **2. Bradley Manning**

U.S. Army PFC Manning committed the second significant and perhaps the largest intelligence leak in U.S. history. The leak was unprecedented, not just by content

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<sup>87</sup> Ibid., 57.

but by its size. Julian Assange, facilitator of the Manning leaks, commented that the files that Manning downloaded and turned over to WikiLeaks were “the largest set of confidential documents ever to be released into the public domain.”<sup>88</sup> They totaled over 720,000 files encompassing more than 251,000 internal U.S. State Department documents, generated by 280 embassies in 180 countries.<sup>89</sup> Some of the documents were benign—for example, essays on new thinking about old problems. Others were provocative, like an account of a Saudi Arabian sex party.<sup>90</sup>

Manning came to these documents through his job. He was an intelligence analyst assigned to the 2<sup>nd</sup> Brigade Combat Team, 10<sup>th</sup> Mountain Division at Camp Hammer in Iraq when he leaked information to WikiLeaks.<sup>91</sup> Bradley Manning was born December 17, 1987, in Crescent, Oklahoma.<sup>92</sup> At a young age, he stood out as a little different. Manning had strong convictions, most notably his atheism, which was unusual in the predominantly Christian town of 1,400 people. He refused to say the Pledge of Allegiance at school because of its invocation of a deity in the closing line: “One nation under God.” On the other hand, his teachers noticed he was smart, precocious, and had a knack for computers.<sup>93</sup>

By age 15, Manning started to develop a political outlook critical of U.S. foreign policy. During the invasion of Iraq, he spoke against President Bush, claiming that the reason for the war was oil, and thus the United States had no legitimate excuse for the action. A former employer at a photo-sharing software company noticed how Manning carried on about his political opinion, which the manager thought was odd for a 17-year-

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<sup>88</sup> Ibid., 52.

<sup>89</sup> Brad Knickerbocker, “Bradley Manning Trial Closing Arguments Ask: Why Did He Do It?,” *The Christian Science Monitor*, July 25, 2013, sec. NEWS.

<sup>90</sup> Joe Wiesenhal, “WikiLeaks Blows the Lid off the Sex Parties and Drug Usage Among the Saudi Royals,” *Business Insider*, March 7, 2011, <http://www.businessinsider.com/wikileaks-blows-the-lid-off-the-sex-parties-and-drug-usage-among-the-saudi-royals-2011-3>.

<sup>91</sup> Leigh and Harding, *Wikileaks*, 211–12.

<sup>92</sup> “Who Is Chelsea Manning?,” *BuzzFeed*, accessed March 19, 2014, <http://www.buzzfeed.com/ellievhall/who-is-bradley-manning>.

<sup>93</sup> Ginger Thompson, “Early Struggles of Soldier Charged in Leak Case,” *The New York Times*, August 8, 2010, sec. U.S., <http://www.nytimes.com/2010/08/09/us/09manning.html>.

old boy. In October 2007, Manning—the lifelong contrarian—followed in his father’s footsteps and joined the military. <sup>94</sup>

Shortly after finishing his military training, Manning became romantically involved with Tyler Watkins.<sup>95</sup> Watkins attended Brandeis University and introduced Manning to his wide array of friends, including several who were actively involved in hacking. Manning’s involvement with the Boston hacker movement influenced his outlook about information. He shared the sentiment of the majority of hackers who believe information—whether classified government communications or copyrighted artistic expression—should be free and in the public domain. Still, although he had access to classified information, Manning had not decided to leak classified information to WikiLeaks. <sup>96</sup>

Arguably, the incident that pushed Manning to violate his disclosure agreements and set about collecting—then leaking—as much information as he could is linked to a situation concerning 15 Iraqi detainees disseminating anti-Iraq leaflets. The group was held by the National Iraqi police force. Tasked with finding the offending party, Manning discovered the detainees were held for distributing a scholarly critique against Iraqi Prime Minister Nouri al-Maliki, specifically on the corruption in his administration. Manning informed the officer in charge what had taken place. According to Manning, “he (officer in charge) did not want to hear any of it . . . . [H]e told me to shut up and explain how we could assist the police in finding more detainees.”<sup>97</sup> According to Manning, the reality sank in that, in his current role, he was part of something to which he was morally opposed.<sup>98</sup>

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<sup>94</sup> Leigh and Harding, *Wikileaks*, 22–5.

<sup>95</sup> “Who Is Chelsea Manning?”

<sup>96</sup> Alexa O’Brien, “Bradley Manning’s Full Statement,” accessed March 19, 2014, [http://www.salon.com/2013/03/01/bradley\\_mannings\\_full\\_statement/](http://www.salon.com/2013/03/01/bradley_mannings_full_statement/).

<sup>97</sup> Leigh and Harding, *Wikileaks*, 31.

<sup>98</sup> *Ibid.*, 30–1.

## C. ANALYSIS

The Pentagon Papers and WikiLeaks occurred while the United States was in an extended conflict. Because the nation was at war for both incidents, a greater number of people had access to classified material as a part of their war-related duties (uniformed and civilian). The fact that there was no end in sight for either conflict raised the likelihood that dissenters, even throughout the ranks of the military, would take sensitive documents to the public.

The Pentagon Papers were significant because they revealed that the United States went to war in Vietnam for reasons other than those given by the executive branch. By the time Manning's leak went live, the public was aware that the original reason for the invasion of Iraq—weapons of mass destruction—was false and the war in Afghanistan was partly in response to the 9/11 attacks. So the effects of each episode are different—but related.

The timing of each leak is worth considering. The leaks did not occur in the infancy stages of public knowledge of the wars. Leaks happened several years into the conflicts. Arguably, they represented popular public opinion about the war. There was not a lot of public support for the Vietnam War; the timing of Ellsberg's disclosure was prime for a receptive public. Manning also leaked information when public support for the war had declined. This same public had learned, thanks to Ellsberg and other figures of the Watergate area, to be skeptical of its government and its war plans. So even if Manning's disclosures did not change the course of the war or the popular perception of it, they did reach a ready audience—confirming the darker suspicions of some critics, and causing the United States to endure ongoing embarrassment in its international relations.

### 1. Access to Leaked Classified Information

While Ellsberg and Manning used their privileged access to classified information to steal government secrets, the United States classification system does have certain safeguards in place to restrict access to information. Access to information is contingent on a need-to-know basis for job requirements, and is not granted solely based on an authorized security clearance level.

Ellsberg limited his leak to the Pentagon Papers only because it was all he deemed necessary to accomplish his goal. In order to remove the classified document from its secure location, Ellsberg smuggled out and returned the report in a piecemeal fashion over an extended period, as he was limited by the technology of his time. In contrast to this, Manning did not limit the scope of material leaked, and he was not constrained to any physical format (his documents were not on paper).<sup>99</sup> Manning could access more information because of technology such as the Secret Internet Protocol Router Network (SIPR-Net) and Joint World Intelligence Communications System (JWICS), which provided him a treasure trove of data. Moreover, Manning was able to produce digital copies on sight, removing the requirement to return the information—thus reducing his overall risk.

Ellsberg and Manning's access to information provided the opportunity to leak information, but the use of technology was problematic to the state in both cases. The copy machine was the government's nemesis in Ellsberg's era, and the Internet during Manning's. Perhaps the problem has less to do with access to information, and more with the technology used for its transfer.

## **2. Material Leaked**

The content of the material Ellsberg and Manning leaked indicates who and what they were trying to target. Ellsberg focused his leaks on the Vietnam War. Manning's leaks were expansive, ranging broadly through the realm of U.S. foreign policy. Both men undertook their disclosures not to harm the United States per se, but to effect change in U.S. policy and practices—changes they believed would restore the country to some better position. Perhaps the material Ellsberg leaked helped to give him a favorable outcome in the court system because it proved government misconduct. In an indirect way, the substance of his material legitimized his leak because it proved he had good intentions for leaking the material.

The scope of Manning's leaks also offers valuable insight to his character. Manning's leak encompassed a wide swath of information without any particular

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<sup>99</sup> Ibid., 86–7.

emphasis. In fact it complicated U.S. national policy more than drastically changing American public opinion about the wars in Afghanistan and Iraq. His omnivorous approach eroded the legitimacy of the message he claimed he was trying to communicate to the public. Arguably, he would have leaked continued leaking non-related information—more or less anything he could scoop up and save on his thumb drive—if he had not been found out.

### **3. Leakers' Desired End-State**

Ellsberg and Manning had specific goals in mind when they leaked classified information. Both individuals were passionate about achieving their goals regardless of the consequences.

Ellsberg wanted to stop the Vietnam War. He believed leaking the Pentagon Papers “was the only way to inform Congress and the public of information that was being wrongfully withheld from them.” He considered and tried many options other than the media leak. In his mind, the information was “vital to the constitutional processes of decision making on an ongoing war in which tens of thousands of U.S. citizens and millions of Vietnamese had been—in effect—lied to death.”<sup>100</sup> During the Pentagon Papers study, Ellsberg became skeptical of U.S. involvement in Vietnam. He came to the knowledge that all the administrations spanning the study had waged a secret war against North Vietnam without public approval or congressional consent. Additionally, his in-country knowledge of Vietnam—gained while embedded with the U.S. military—and his involvement with taskforces caused him to rethink U.S. policy. He believed indiscriminate bombing resulted in unnecessary collateral damage and pushed the population to engender the Viet Cong. He communicated his finding through his chain of command and congressional channels to no avail.

Manning was a professed humanist who believed in the sanctity of all human life. This conviction compelled Manning to leak documents—not to harm the United States, but to convey what was happening during the war. He thought leaking was the right thing

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<sup>100</sup> Daniel Ellsberg, “Secrecy and National Security Whistleblowing,” January 8, 2013, <http://www.ellsberg.net/archive/secrecy-national-security-whistleblowing>.



to do. Arguably, his intentions were influenced by his Hactivist view, namely that information should be free and available to the public. Moreover, he felt that the U.S. public had a right to know what was being done in its name. The manner in which he disclosed information hints to a certain amount of malevolent intent because he leaked the information using an untraceable protocol (TOR) to hide his identity; however, his supporters argue that he needed the cloak of anonymity to gather the material for publication.

#### **4. Fallout of the Leaks**

The government responds to a leak in two ways. First, the executive branch seeks to secure the source of the leak. Second, the legislative branch wants to ensure the executive branch does not overstep its authority. The legislative branch considers public outcry in constructing its response.

##### ***a. Executive Branch***

The executive branch takes its position from the security perspective because the information released could potentially damage U.S. national security. Intelligence sources and methods are compromised, endangering the lives of the men and woman in the field. Enemies of the United States are able to obtain intelligence against her without any effort on their part. In leaking cases, the executive branch sought to contain the leak. Ultimately, the executive branch wants to punish the leaker and return to the informational status quo before the leak occurred. When classified information is leaked, the executive branch takes a defensive posture in order to defend against the backlash the leak imposes, take action to address the leak and to bring the leaker to justice.

With the Pentagon Papers, President Nixon pursued an injunction against the media in the Supreme Court, yet lost. Then the government initiated criminal proceedings against Ellsberg and co-conspirator Anthony Russo. The administration thought that prosecuting Ellsberg and Russo would deter others from committing intelligence leaks.<sup>101</sup>

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<sup>101</sup> Ellsberg, *Secrets*, 410.

In the case of WikiLeaks, the government did not fight a battle against the media due, in part, to the jurisprudence established by the Pentagon Papers. (The U.S. government had entertained the idea of shutting down the WikiLeaks website and prosecuting its founder, Julian Assange,<sup>102</sup> but neither the man nor his servers came under clear U.S. jurisdiction.) The United States could reach the leaker, however, and brought Bradley Manning up for trial.

***b. Legislative Branch***

Congress takes its position from the offensive perspective because must initiate actions demanded by its oversight role and the citizens they represent. In the case of the Pentagon Papers, Congress was outraged and felt deceived. Congress realized the briefings members received regarding the war had been deceptive and misleading. The resounding sentiment in Congress was to limit executive authority to the extent that they proposed legislation to defund the Vietnam War. Trust between the executive and legislative branch had eroded. How could legislators allow the president to make foreign policy decisions without first consulting the Congress?<sup>103</sup>

Congressional response was different in the WikiLeaks revelation. Their backlash was more toward WikiLeaks as an organization than what the leaks revealed. Unlike Congress during the Pentagon Papers leak, legislators during the GWOT were aware of many issues Manning disclosed. (Arguably, since the Vietnam era, oversight legislation had empowered Congress with a reach to constrain somewhat executive authority and demand congressional blessing before certain actions occur.) Their focus fell on the failure of the national security apparatus, though political figures in the anti-war camp appropriated aspects of the leaks that supported their position.

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<sup>102</sup> Marc Thiessen, "Time for Obama to Shutdown Wikileaks' Assange," *The Washington Post*, August 13, 2010, [http://voices.washingtonpost.com/postpartisan/2010/08/time\\_for\\_obama\\_to\\_shut\\_down\\_wi.html](http://voices.washingtonpost.com/postpartisan/2010/08/time_for_obama_to_shut_down_wi.html).

<sup>103</sup> "The Nixon Administration and Watergate: Pentagon Papers Leak," *History Commons*, accessed March 16, 2014, [http://www.historycommons.org/timeline.jsp?timeline=nixon\\_and\\_watergate\\_tmln&nixon\\_and\\_watergate\\_tmln\\_pentagon\\_papers=nixon\\_and\\_watergate\\_tmln\\_pentagon\\_papers\\_\\_leak](http://www.historycommons.org/timeline.jsp?timeline=nixon_and_watergate_tmln&nixon_and_watergate_tmln_pentagon_papers=nixon_and_watergate_tmln_pentagon_papers__leak).

As with the Pentagon Papers, public opinion was split between those who value security—and therefore condemned Manning—and those who champion civil liberties, who praised his actions. The divide in public sentiment fits into the liberty-versus-security discussion. Avid supporters on each side of the debate leverage leaks to justify their position, while those in the middle redistribute the weight on the scale.

## **5. Detecting Deliberate Insider Leaks**

It is difficult to detect and stop leakers from deliberately leaking information from inside their perspective intelligence community agency. The Pentagon Papers and WikiLeaks highlight the challenges of protecting classified material from internal compromises. The internal checks and balances in the intelligence community are fairly effective in minimizing accidental leaks or spill and deterring espionage. The system is not designed to detect deliberate insider leaks because it is assumed that everyone with access to classified information is trustworthy. These individuals endured a rigorous vetting process—tiered to the level of authorization—in order to receive access to classified material. Moreover, they signed non-disclosure agreements acknowledging awareness of the duties and responsibilities associated with handling sensitive material and the penalties for violating the agreements.

Ellsberg and Manning understood the consequences of their actions and broke the trust they had with the executive branch. Because the basis of deterrence against wrongdoing in the intelligence community involves trust, perhaps it is impossible to prevent individuals intent on compromising classified information from leaking it.

## **D. CONCLUSION**

These cases reveal several factors worth consideration: 1) Leaking classified material that is external in nature embarrasses the government and possibly threatens national security; 2) technology use in the intelligence community is a dual-edged sword that enables the efficiency of both the intelligence community and the leaker; 3) it is virtually impossible to prevent and detect deliberate insider leaks; 4) the intelligence community is reluctant to incorporate change via the internal grievance system; 5) besides internal review, containing the leak and prosecuting the leaker is the only

recourse the executive branch has in combating an intelligence leak; and 6) intelligence leaks cause the legislative branch to re-evaluate oversight mechanisms.

The intelligence community is reluctant to change based on feedback received through the internal grievance system. Leaders recognize the need for a way to channel and address grievances, but are hesitant to discuss matters that could constrain or change the methods and sources used to secure the country. To develop and establish effective policy is a difficult and extensive undertaking in and of itself that could lead to the unintended consequence of increasing the cost and undermining the overall effectiveness of the intelligence community.

The executive branch is limited in the actions it can take after a leak is exposed. Both cases forced the government to review its intelligence programs; however, containing the leak and prosecuting the leaker are the main recourse the executive branch has in combating an intelligence leak. In both cases, the government tried to control the damage of the leak. During the time of the Pentagon Papers, the government had tools at its disposal, such as injunctions against the media. Jurisprudence created in its aftermath effectively removed that option to suppress the media. The only legitimate option remaining is to bring the leaker to justice and make an example of him or her to dissuade similar behavior.

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## **IV. LEAKS OF AN DOMESTIC NATURE: EDWARD SNOWDEN AND NSA SURVEILLANCE PROGRAMS**

Edward Snowden divulged information about the National Security Administration surveillance programs, detailing bulk information collection against United States citizens. Although his leaks have external or international ramifications, this case will focus on the domestic (internal) aspect of the NSA surveillance programs within the United States. This leak is significant because it exposed the government's ability to collect large sums of metadata through routinely used information systems and communication methods. Additionally, it opened a discussion about the Fourth Amendment and the proliferation of communication technology.

Snowden's case is similar to Ellsberg's and Manning's in the following ways: 1) it occurred during times of national crisis; 2) it exposed the United States government's external activities; and 3) it used the media as a way to spread the leaked material. The most significant difference between Snowden's leak and the others is that his leak resonated deeply among the United States public because it confirmed that the government would and could conduct surveillance of her citizens.

### **A. BACKGROUND**

The U.S. National Security Agency focuses on Signals Intelligence (SIGINT). In 1952 when the NSA was first founded, SIGINT was limited to radio frequency and telephone technologies. As technology advanced, the NSA expanded its signal intelligence capability to cover new transmission media and forms of communication including fiber optics, satellite communications, cellular phones, and the Internet.

Typically, NSA surveillance is conducted against foreign entities internationally. The Foreign Intelligence Surveillance Court (FISC) grants special permission authorizing limited domestic intelligence collection. Without court permission, the NSA is legally prohibited from domestic intelligence collection. James Clapper, Director of National Intelligence (DNI), has denied on several occasions—including congressional hearings—

that the NSA conducts domestic surveillance of U.S. citizens. Edward Snowden's revelation of two major NSA surveillance programs challenged this truth.<sup>104</sup>

On June 5, 2013, *The Guardian*, a left-leaning British national daily, published a secret court order requiring bulk collection of metadata by Verizon. The court forced the telecom giant to furnish the NSA with the telephone records of millions of its U.S. customers. The FISC order required Verizon Business Network System to provide the NSA with an electronic copy of all metadata communications between the U.S. and abroad and/or solely within the United States.<sup>105</sup> The next day, *The Guardian* published the second significant domestic-related leak, the Planning tool for Resource Integration, Synchronization, and Management (PRISM). PRISM is a collaboration program between the NSA and Internet firms. It offers the NSA direct system access to companies like Google, Facebook, and Apple. The access allows analysts to collect email content, search history, and file transfers.<sup>106</sup> These back-to-back revelations intensified the blow to the intelligence community and forced the executive branch to justify the programs. They also caused Congress to question the legitimacy of the programs.

The executive branch reacted to the Snowden's leaks in a similar fashion as the Pentagon Papers and WikiLeaks. Again, it was put in a defensive position as it sought to control the damage of the leak and find out the source in order to bring him or her to justice. Unlike the Ellsberg and Manning leaks, the executive branch could justify its actions according to the law. The executive branch believed it was justified in conducting the programs that Snowden disclosed because it was authorized by the USA PATRIOT Act and FISA.<sup>107</sup> The White House released a whitepaper detailing the legitimacy of the NSA surveillance programs, citing that Section 215 of the USA PATRIOT Act and

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<sup>104</sup> Brian Fung, "Darrell Issa: James Clapper Lied to Congress about NSA and Should Be Fired," *Washington Post*, accessed March 7, 2014, <http://www.washingtonpost.com/blogs/the-switch/wp/2014/01/27/darrell-issa-james-clapper-lied-to-congress-about-nsa-and-should-be-fired/>.

<sup>105</sup> Jeffrey T. Richelson, ed, "The Snowden Affair," *The National Security Archive*, no. 436 (2013): 6.

<sup>106</sup> Luke Harding, *The Snowden Files: The Inside Story of the World's Most Wanted Man* (New York: Vintage Books, 2014), 77,136.

<sup>107</sup> Richelson, "The Snowden Affair," 6.

Section 702 of FISA authorized the bulk collection program and the 2004 FISA opinion authorized the use of internet metadata under the pen register statute.<sup>108</sup>

Congress, on the other hand, questioned the legitimacy of the bulk collection program. With overwhelming support, Congress authorized and renewed the USA PATRIOT Act, but they intended the law be used differently than the executive branch interpreted, especially Section 215. Senators Ron Wyden and Mark Udall have argued for some time that the USA PATRIOT Act that Congress passed is different in material ways than the one the intelligence community is implementing. Included in the discussion is Congresswoman Dianne Feinstein, chair of the intelligence committee, who asked for a review of NSA surveillance programs.<sup>109</sup>

Just like the Pentagon Papers and WikiLeaks, the congressional oversight mechanism was implicated by Snowden's disclosure. The public's concern was factored in the congressional response. Congress has leverage over the NSA because it has budgetary control; however, despite all of their probes and expression of discontent concerning NSA surveillance programs, the NSA budget was enlarged. Perhaps this comports the limited domestic outcry of the United States public indicating their agreement with the programs.<sup>110</sup>

## **B. EDWARD SNOWDEN**

Edward Joseph Snowden was born on June 21, 1983, in Elizabeth City, North Carolina. He spent the majority of his adolescent life in Ellicott, Maryland, where glandular fever and the devastation of his parents' divorce caused him to dropout of high school. He was raised in a patriotic family—his father was a retired Coast Guard officer

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<sup>108</sup> "Foreign Intelligence Surveillance Court Opinion and Order," DNI Documents, accessed March 19, 2014, <http://www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf>.

<sup>109</sup> Dan Roberts and Spencer Ackerman, "US Lawmakers Call for Review of Patriot Act after NSA Surveillance Revelations," *The Guardian*, June 10, 2013, <http://www.theguardian.com/world/2013/jun/10/patriot-act-nsa-surveillance-review>.

<sup>110</sup> Tim Cushing, "NSA Funding Bill Passed by Senate Intelligence Community Gives Agency Extra Cash To Hunt 'Insider Threats,'" *Techdirt*, November 6, 2013, <http://www.techdirt.com/articles/20131106/10584525150/nsa-funding-bill-passed-senate-intelligence-community-gives-agency-extra-cash-to-hunt-insider-threats.shtml>.



and his mother was the chief deputy clerk for administration and information technology for the federal court in Baltimore, Maryland.<sup>111</sup>

At age 16, Snowden earned a General Education Diploma (GED) from Anne Arundel Community College. He also studied computer technology there. He interrupted his studies to join the U.S. Army. Unfortunately, his military career was short-lived. After four months of service, he broke his legs and was discharged.<sup>112</sup>

Snowden returned to his primary interest: computer systems. This knowledge, combined with formal education, created the opportunity to work for the NSA. Upon completing his degree, Snowden was hired as a security guard for the NSA—a position that he translated into an information technology job at the CIA. His technical knowledge earned Snowden a position in Geneva, Switzerland, maintaining CIA computer network security. Later, he resigned his position at the CIA and took a job with Dell as a contractor supporting the NSA computer systems in Japan and eventually Hawaii. With an eye on more access to NSA files, Snowden left Dell for employment at Booz Allen Hamilton as a systems administrator. This position gave Snowden untraceable reach into the NSA's computer network. While serving in this position, Snowden leaked classified documents to *The Guardian*.<sup>113</sup>

So far, it is hard to identify a particular moment or incident that pushed Snowden to leak. In fact, when the Manning WikiLeaks incident broke, Snowden was outspoken in his contempt for Manning's actions. Snowden was in Switzerland at the time. He was still in Geneva when the CIA recruited a Swiss banker to secure secret financial information. To effect the recruitment, the agency got the banker drunk and encouraged him to drive so the Swiss police would arrest him. In his moment of abject need, the banker was befriended by the undercover arresting officer, who offered help and exploited the

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<sup>111</sup> "Edward Snowden Biography," *Bio. True Story*, accessed March 7, 2014, <http://www.biography.com/people/edward-snowden-21262897>; Harding, *The Snowden Files: The Inside Story of the World's Most Wanted Man*, 18–9.

<sup>112</sup> Harding, *The Snowden Files: The Inside Story of the World's Most Wanted Man*, 19–20.

<sup>113</sup> Glenn Greenwald, Ewen MacAskill, and Laura Poitras, "Edward Snowden: The Whistleblower behind the NSA Surveillance Revelations," *The Guardian*, June 9, 2013, <http://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance>; Harding, *The Snowden Files: The Inside Story of the World's Most Wanted Man*, 10–11, 23.

relationship for information. Snowden claims these types of incidents disillusioned him about the U.S. government and how it works in the wider world.<sup>114</sup>

An unwarranted (in his view) reprimand also might have contributed to Snowden's disgruntled view of the government. He says he had detected flaws in a web application and brought it to his boss's attention. The supervisor was disinclined to act on Snowden's claims, but ultimately, he allowed Snowden to test the system's proneness to hacking. Snowden inserted some non-malicious code and text into the program. When more senior management found out, they entered a negative report in Snowden's file, even though his foray into "white-hat" hacking happened with his immediate supervisor's blessing. Snowden later claimed that his lack of faith in the chain of command and proper channels owed to such experiences.<sup>115</sup>

Ultimately, Snowden says he was motivated to leak by the continuous string of lies by NSA officials to Congress—and, by extension, to U.S. citizens—and the realization that congressional oversight was dysfunctional. Moreover, he said, he could not "in good conscience allow the U.S. government to destroy privacy, internet freedom and basic liberties for people around the world with this massive surveillance machine they're secretly building."<sup>116</sup> In his view, DNI James Clapper openly lying to Congress about domestic surveillance programs without repercussion suggested subverted democracy. Snowden believed that the congressional intelligence oversight mechanisms failed to keep the NSA in check.<sup>117</sup>

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<sup>114</sup> Harding, *The Snowden Files: The Inside Story of the World's Most Wanted Man*, 35.

<sup>115</sup> *Ibid.*, 36–7, 51–2. The outcome of former NSA leaker Thomas Drake who stayed within the specified complaint framework justified Snowden's position. Using the approved framework Drake testified to the NSA Inspector General (IG), Pentagon, and before the House and Senate congressional oversight committees before he leaked to the *Baltimore Sun*. Since Snowden was a contractor working for Dell, he did not have the IG mechanism like NSA employees. Based on his understanding of Drake's plight, he thought if he brought the issue to the NSA, they would bury his complaint, dehumanize and or ruin his reputation.

<sup>116</sup> "Edward Snowden Biography."

<sup>117</sup> Harding, *The Snowden Files: The Inside Story of the World's Most Wanted Man*, 40.

## C. ANALYSIS

The disclosure of the NSA surveillance programs occurred while the nation was at war; still, it was the first time there was irrefutable proof that the United States government was collecting data on its citizens. Snowden's supporters characterize his disclosures as a heroic act of free expression; they also point to the questionable legitimacy and legality of mass domestic surveillance programs that have no judicial or meaningful legislative oversight. Neither the First Amendment nor the Fourth Amendment<sup>118</sup> seem to stretch far enough to cover the mountains of data that the NSA programs *store* for indeterminate future use. Meanwhile, the government insists that the priority of national security obviates any of the foregoing niceties.

### 1. Access to Leaked Classified Information

Snowden leveraged his systems administrator position to leak classified information. As a systems administrator, Snowden had access to a plethora of information. Most jobs entail the use of some sort of information system, which information technology (IT) professionals have to access on a routine basis. From the user's perspective, anyone authorized to work with information systems must be trustworthy. Perhaps due to their unfamiliarity with information systems, they are prone to trust and comply with IT department requests.

Snowden's system administrator-level privileges while employed at Booz Allen Hamilton gave him unadulterated access to computers the NSA hacked worldwide. He used NSAnet—a secure intranet system created after the 9/11 attacks for various

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<sup>118</sup> Surveillance, as a broad category, belongs to the Fourth Amendment of the U.S. Constitution. Since details about NSA surveillance programs were leaked, the Snowden leak also moves into the realm of the First Amendment. Snowden had grievances with the extent of NSA surveillance programs. In his opinion, they were too intrusive on the Fourth Amendment rights of U.S. citizens. Nevertheless, the executive branch points to the USA PATRIOT Act and Section 702 of the FISA Act of 2008, renewed in 2012, which, they argue, grants the NSA mass-surveillance authority. FISA authorizes communication collection without a warrant, where at least one user is a non-U.S. citizen. Section 215 of the PATRIOT Act authorizes the surveillance and collection of phone data from U.S. citizens. "The NSA Files," *The Guardian*, June 8, 2013, <http://www.theguardian.com/world/the-nsa-files>; Savage, "Patriot Act Extension Deal Is Reached;" *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001*, 115 STAT. 272, 2001; Erwin Marshall and Liu Edward, *NSA Surveillance Leaks: Background and Issues for Congress*, Washington, DC: Congressional Research Service, 2013, 4–5.

intelligence community agencies to liaise—to siphon information. In an interview with *Guardian* reporter Glen Greenwald, Snowden explained “that he had a rare overview of the NSA’s extraordinary surveillance capacities, that he could see the dark places where the agency was going.”<sup>119</sup> Normal user access activity is monitor and recorded—especially any downloads, uploads, and file transfers to or from external devices. Part of the security built into secure intranets is its isolation from the traditional Internet—a network security measure known as an “air gap.” Snowden breached this gap when he downloaded untold amounts of data to a storage device.

## **2. Material Leaked**

Snowden revealed the extent of NSA surveillance programs. The world and the U.S. public received a first-hand account of the reach, scope, and depth of the NSA surveillance capability. The PRISM diagram published by the *Guardian* delivered a detailed block diagram of how the NSA collects data from third-party applications such as PayPal, Facebook, Yahoo, and Google.<sup>120</sup> He also leaked information implying that the United States bugged European government facilities, including the phone of German Chancellor Angela Merkel.<sup>121</sup> This revelation, coupled with the PRISM program disclosure, produced resounding reaction in Europe. Within the United States, the majority of focus was placed on the bulk collection program and PRISM.

## **3. The Leaker’s Desired End-state**

Snowden intended to reveal to the U.S. public and the world that the United States was secretly spying on its own citizens. He believed that the NSA surveillance programs operated beyond proper bounds, and that the agency was violating personal privacy—and thereby, the U.S. Constitution. In recounting his first meeting with Snowden, the *Guardian*’s Greenwald found that Snowden was convinced of the rightness of his actions—intellectually, emotionally, and psychologically. Snowden did not view his

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<sup>119</sup> *Ibid.*, 10–1.

<sup>120</sup> “NSA Slides Explain the Prism Data-Collection Program,” *The Washington Post*, June 6, 2013, <http://www.washingtonpost.com/wp-srv/special/politics/prism-collection-documents/>.

<sup>121</sup> Watt and Mason, “Angela Merkel Phone-Bugging Claims Are Result of Snowden Leaks, MP Claims.”

leaks as betrayal, but as a necessary action to right the dysfunctional spy system.<sup>122</sup> To bolster his claims of benevolent intentions, Snowden revealed that he could have caused great harm to the United States if he had been so motivated. “I had a full roster of everybody anybody working at the NSA; the entire intelligence community and undercover assets around the world. The locations of every station we have, all of their missions . . . If I just wanted to damage the U.S. I could have shut down the surveillance system in an afternoon. That was never my intention.”<sup>123</sup>

On the other hand, the NSA does not know the extent of what Snowden stole or whether the leaks will stop. Another outstanding question is whether Snowden might be holding other information to use as leverage in his ongoing efforts to secure asylum somewhere other than Russia. Such a cynical quid pro quo, with information of importance to U.S. national security as part of the bargain, would seriously diminish Snowden’s “only trying to help” argument.

#### **4. Fallout of the Leaks**

Response to *The Guardian* publication of Snowden’s leaked document was dramatic. It triggered a long and at times tense debate in the United States over surveillance and its legality, necessity, and possibilities for reform. The general reaction, both domestic and international, was shock at the thought of the United States spying on its own citizens.

##### ***a. Executive Branch***

The executive branch reverted to damage-control measures in order to minimize the destructiveness of Snowden’s leaks. Arguably, the most significant problem rested in the international community. Foreign nations—friends and foe—realized that they could suffer push-back domestically if Snowden leaked information indicating their involvement in wholesale data collection. Since the nodes that the NSA exploited to collect information are spread throughout the world, cooperation by the states where they

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<sup>122</sup> Harding, *The Snowden Files: The Inside Story of the World’s Most Wanted Man*, 12–4, 110–1.

<sup>123</sup> *Ibid.*, 145.

are located was necessary. There was a risk that the revelations could erode trust between the United States and her cooperative states over intelligence-sharing agreements.

Two major leaks (WikiLeaks and NSA surveillance programs) within a few years' time also hints that the United States may not have control over its intelligence community.

In the aftermath of the Snowden disclosures, the government has released its own material on the exposed government surveillance programs. Although these official releases have helped promote greater public understanding of government surveillance programs, distrust remains. Several government initiatives have also been taken to increase public knowledge of NSA surveillance programs. The Office of the Director of National Intelligence (ODNI) created a public website (IC on the Record), where it released thousands of documents relating to USA PATRIOT Act Section 215 and 702 program—as well as material concerning FISA and the operation of the FISC. The site also includes a compilation of public statements by government officials, press statements, and congressional testimony on these matters. Additionally, the FISA court has created a new website where pleadings, orders, and a host of related materials are posted.<sup>124</sup>

#### ***b. Legislative Branch***

Congress responded in similar fashion to the Pentagon Papers and WikiLeaks in the sense that it sought to exercise its oversight function. A group of U.S. senators requested, and President Obama authorized, the Privacy and Civil Liberties Oversight Board (PCLOB) to review the NSA surveillance program. The president authorized the study, directing that it focus on instances where counterterrorism efforts and national values contend.<sup>125</sup> High-ranking intelligence community officials were called to testify before Congress concerning the NSA bulk collection programs. In the end, however, Congress declined to de-fund the NSA.

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<sup>124</sup> David Medine et al., *Report on the Telephone Records Program Conducted Under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court* (Washington, DC: Privacy and Civil Liberties Oversight Board, 2014), 193–4, <http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf>.

<sup>125</sup> *Ibid.*, 1–2.

## D. CONCLUSION

Surveillance is a necessary function of the NSA and the intelligence community as a whole. Before the means of communicating became so convenient, collection was less tenuous. The laws governing intelligence community surveillance collection arguably were written to the technology of an era before cell phones and the Internet. Issues arise when the intelligence community leverages technology to their advantage. Disputes over what is allowable arise due to the gray area that outdated laws inject concerning new technology. The lethargic nature of laws to address new technology appears archaic, but is a healthy function of societies that respect the rule of law. Snowden's leak forced the government and public to readdress the issues surveillance yields within the use of modern technology. Just about everyone uses information technology in some form; therefore, it is understandable why the NSA would monitor those systems. The uproar resulting from Snowden's disclosure is forcing a new look at old statutes. In this vein, the leak functioned as a catalyst that forced U.S. democracy into action.

On the other hand, the penalties the government levies seem not to deter a leaker from leaking classified information. Snowden knew the consequences associated with leaking classified information and still chose to leak. Snowden was prepared to end his life the way he knew it and suffer the consequences of his actions. In a sense, his attitude is analogous to a suicide bomber who willing to sacrifice his life for what he or she perceives is the greater good.

Overall, one might argue, the Snowden leak has had some positive impact on U.S. democracy, by invigorating the public and all three branches of government. Because the U.S. public was ignorant of the NSA's surveillance programs, Snowden's role was to inform. So in this vein, at least according to his defenders, Snowden's action aligned with the democratic perquisite of transparency.

Regardless of the reason, after Snowden initiated the leak, it charted its own course outside of the leaker's intention. Regardless of where someone stands regarding Snowden's disclosures, he did break the law—but in doing so, created the feedback that

the control circuit of the democratic process needed to readjust the balance between liberty and security. Herein resides the dilemma in determining what degree of protection, if any, should be afforded the leaker.



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## V. CONCLUSION

Although the United States is the longest-standing democracy in the modern world, it is still evolving. The history of challenges highlighted in the earlier chapters and the progress toward liberty and security proves that all democracies are works in progress. From the first Alien and Sedition Act of 1798 to the WPEA, U.S. democracy has proven strong enough to overcome its growing pains. Political, economic, and racial factors influencing U.S. policy all condense to one over-arching factor: fear. This fear drives the need for economic superiority; national survival fuels the need for secrecy.

### A. THE CASES AND THE QUESTIONS

Several generalities are made from these cases. For one, all of the leakers believed in what they were doing. They perceived a wrong and desired to address the issue. They all chose to go outside of the established channels of authority, in no small part because each lost trust in the government apparatus in the same three-step manner. First, they came to detest the actions of the government entity that committed the offense. Second, they were not confident that the government would police itself adequately. And last, they believed oversight was ineffective. Moreover, they each experienced situations that reinforced their perception of non-relief through normal government channels.

The leaks occurred, it seems, when the nation was ready to take back some of its civil liberties. In each of the cases, the United States was at war but the support of U.S. citizens for war was waning. Leaks, like all other revelations in politics, have an optimal window of opportunity to deliver the desired effect. Possibly, the leakers themselves understood the pulse of the nation, which factored into the timing of the leak. It is worth noting that the United States was approximately 10 years into these conflicts when the leakers disclosed secret information. This nexus is significant because it indicates that any prolonged conflict will result in an intelligence leak.

Technology works to the leaker's advantage in each of the case studies here. Specifically, the government's imperfect control over the way that sensitive information is accessed, stored, safeguarded, evaluated, and used means that the motivated leaker can

find a way in. Moreover, the classification of information plays its own role because over-classification is a verified issue within the intelligence community. . Individuals in and around the intelligence community agree that the classification system is bloated and requires reform. Daniel Patrick Moynihan, former chairman of the Commission on Protecting and Reducing Government Secrecy, found that over-classification was prolific and concluded that “excessive secrecy has significant consequences for the national interest when, as a result, policymakers are not fully informed, government is not held accountable for its actions, and the public cannot engage in informed debate.”<sup>126</sup> As U.S. Supreme Court Justice Potter Stewart famously quipped in the Pentagon Papers case, “when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion” <sup>127</sup>

There is no single, yes-no answer to the question of whether the leaker’s intentions matter. On one hand, the main event in any leak is that the information at issue is disclosed beyond its authorized audience. How the information made its way into the public domain is inconsequential to U.S. democracy. Neither the public nor Congress will ignore the leak simply because the leaker’s intentions were malicious. Congress has a duty to respond, and in each of the cases at hand in this thesis, Congress investigated and pressed the executive for accountability and transparency. On the other hand, the intention of the leaker resonates in public opinion. Such laws as the Whistleblower Protection Act indicate that Congress accepts at least the idea that good intentions matter in evaluating a given leak.

Of course, the executive branch will seek harsh penalties for those who commit intelligence leaks. The penalties for leaking range from a bureaucratic rebuke for a technical violation of non-disclosure clauses in a contract to execution for treason. These

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<sup>126</sup> David L. Sobel, “The Urge To Classify,” *Index on Censorship* 40, no. 1 (2011): 30, doi:10.1177/0306422011401974.

<sup>127</sup> Ibid.

punishments must have something to do with the fact that the number of intelligence leaks, when compared to the number of individuals who hold security clearances, is actually quite small.

Conversely, the cases prove that no manner of deterrent will prevent an individual driven by passionately held convictions from leaking information. Moreover, the outstanding issue remains whether such punishment fits the offense *and* the needs of American democracy?

Ultimately, the leak serves democratic self-correction. The leak is analogous to an electronic control circuit. As the output function starts to go out of specifications, a signal is injected into the circuit that brings the output back into tolerable levels. The leak is the feedback. Once the information is released, the resulting actions are irrevocable; the system starts to react. Information in the public domain demands certain responses by the group implicated. Material that illuminates government indiscretions forces U.S. democracy into action. In this sense, the leak is the input, the U.S. democratic process the control circuit, and the balance between liberty and security is the output. Essentially, the democratic process self-corrects due to the stimuli of the leak.

The change that the leaker causes is not limited to congressional oversight, but extends to reform in the intelligence community. The leaker exposes the weakness in the intelligence community security system. By understanding the leaker's motives and methods, the intelligence community as a whole can reassess current policy and make changes—which the leaker's action revealed in regards to the failure of the security system. The leak is a catalyst for change. In the analogy of the control circuit, the leaker is the part of the circuit that generates the leak feedback. The leaker provides the public and Congress with information that aids in oversight. It also informs citizens of what is occurring in their name.

## **B. RECOMMENDATIONS**

Based on these findings, this thesis makes the following recommendations:

1. Expand internal grievance reporting capacity with requisite training.

In all three cases, either the internal grievance apparatus did not work or there was perceived dysfunction in the system. Building trust and confidence within the system will provide an increased incentive to stay within its boundaries fostering a culture of confidence in the viability of the grievance system.

2. Review classification system.  
Multiple committee studies have proven that the classification system is inefficient. A review the system in the context of U.S. citizen's right to know would reduce the burden of unauthorized disclosure for all levels of government.
3. Reassess conflicts to determine those with the possibility of becoming protracted and preemptively channel complaints.  
These cases show a connection between the leak, protracted conflicts, and waning public support. It behooves the executive branch to constantly reassess the cost-benefit calculus of U.S. policy objectives. The cases indicate that the likelihood of leak increases the longer a conflict occurs.
4. Review punishment for unauthorized disclosure of classified information.  
Link the repercussions for unauthorized disclosure to an incentive program for using prescribed grievance procedures. The intelligence community should establish a classified system similar to the WPA and merit board system to determine at what level, if any, to protect the leaker. Of note, the punishment and security clearance vetting system seems to work in deterring acts of espionage. Therefore, it should remain unchanged.
5. Embrace the changes the leak and the leaker precipitate.  
The thesis revealed that the leak and the leaker help to bring about reform within the systems of all parties involved in the leak. The leaks analyzed in the research embarrassed the United States., yet they also bolstered it because the international community witnessed U.S. democracy in action.

It also shows the world (and the folks at home) that the United States is not immune to mistakes, but is able to correct them peacefully within its democracy.

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