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# Disclosure's Effects: WikiLeaks and Transparency

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# Disclosure's Effects: WikiLeaks and Transparency

Mark Fenster\*

*ABSTRACT: Constitutional, criminal, and administrative laws regulating government transparency, and the theories that support them, rest on the assumption that the disclosure of information has transformative effects: disclosure can inform, enlighten, and energize the public, or it can create great harm and stymie government operations. To resolve disputes over difficult cases, transparency laws and theories typically balance disclosure's beneficial effects against its harmful ones—what I have described as transparency's balance. WikiLeaks and its vigilante approach to massive document leaks challenge the underlying assumption about disclosure's effects in two ways. First, WikiLeaks' ability to receive and distribute leaked information cheaply, quickly, and seemingly unstoppably enables it to bypass the legal framework that would otherwise allow courts and officials to consider and balance disclosure's effects. For this reason, WikiLeaks threatens to make transparency's balance irrelevant. Second, its recent massive disclosures of U.S. military and diplomatic documents allow us to reconsider and test the assumption that disclosure produces certain effects that can serve as the basis for judicial and administrative prediction, calculation, and balancing. For this reason, WikiLeaks threatens transparency's balance by disproving its assumption that disclosure necessarily has predictable, identifiable consequences that can be estimated ex ante or even ex post.*

*This Article studies WikiLeaks in order to test prevailing laws and theories of transparency that build on the assumption that disclosure's effects are predictable, calculable, and capable of serving as the basis for adjudicating difficult cases. Tracing WikiLeaks' development, operations, theories, and effects, it demonstrates the incoherence and conceptual poverty of an effects model for evaluating and understanding transparency.*

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INTRODUCTION.....	755
I. WIKILEAKS' DISCLOSURES .....	758
II. WIKILEAKS' THEORIES.....	769
A. <i>DISCLOSURE AS LIBERAL REFORM</i> .....	770
B. <i>DISCLOSURE AS RADICAL RESISTANCE</i> .....	774
III. DISCLOSURE'S EFFECTS: WIKILEAKS IN LAW AND ACTION.....	781
A. <i>TRANSPARENCY'S BALANCE</i> .....	782
B. <i>THE CLASSIFICATION SYSTEM, THE ESPIONAGE ACT, AND         DISCLOSURE'S EFFECTS</i> .....	784
C. <i>WIKILEAKS' UNCERTAIN EFFECTS</i> .....	788
1. WikiLeaks' Direct Effects on Military Operations .....	789
2. WikiLeaks' Direct and Indirect Effects on Diplomatic Relations .....	791
3. WikiLeaks' Effects on Intra-Governmental Information Sharing.....	795
4. WikiLeaks' Effects on the American Public .....	798
5. WikiLeaks' International Effects.....	802
CONCLUSION: THE CONSEQUENCES OF DISCLOSURE'S UNCERTAIN EFFECTS.....	805

## INTRODUCTION

The disclosure of government information must surely make a difference. Myriad laws<sup>1</sup> and a large international community of transparency advocates<sup>2</sup> presume so, as does most academic commentary on the subject.<sup>3</sup> Consider the following description of transparency's promise: "Publishing [leaked material] improves transparency, and this transparency creates a better society for all people. Better scrutiny leads to reduced corruption and stronger democracies in all society's institutions, including government, corporations and other organisations. A healthy, vibrant and inquisitive journalistic media plays a vital role in achieving these goals."<sup>4</sup>

This declaration appears on the *About* page of WikiLeaks, the website whose project of leaking secret documents has recently brought it international fame and notoriety. Asserting that it is "part of that media" that spreads transparency, WikiLeaks contends that its publication of authentic documents leaked from governments and powerful private entities will expose "otherwise unaccountable and secretive institutions" that engage in unethical acts, and thereby help establish "good government and a

1. See, e.g., *Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 928 (D.C. Cir. 1982) (explaining that Congress's intent in enacting the Government in the Sunshine Act, 5 U.S.C. § 552b (2006), requiring open agency meetings, was to "enhance citizen confidence in government, encourage higher quality work by government officials, stimulate well-informed public debate about government programs and policies, and promote cooperation between citizens and government. In short, it sought to make government more fully accountable to the people"); H.R. REP. NO. 89-1497, at 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2429 (stating that the legislative purpose for enacting the Freedom of Information Act, 5 U.S.C. § 552, was that "[a] democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies").

2. See ALASDAIR ROBERTS, *BLACKED OUT* 107-11 (2006).

3. Some advocates make this claim in a direct and straightforward manner, asserting that disclosure produces public knowledge. See, e.g., GEOFFREY R. STONE, *TOP SECRET 2* (2007) (asserting that public disclosure alerts the public to poor government performance and allows citizens to press officials to remedy the situation); Cass R. Sunstein, *Government Control of Information*, 74 CALIF. L. REV. 889, 920-21 (1986) (summarizing competing First Amendment theories of disclosure and finding that all of them assume that access to information necessarily allows public deliberation and self-government). More sophisticated treatments of the concept characterize the process in terms of access and potential. See, e.g., Peter Dennis Bathory & Wilson Carey McWilliams, *Political Theory and the People's Right To Know*, in *GOVERNMENT SECRECY IN DEMOCRACIES* 3, 8 (Itzhak Galnoor ed., 1977) (arguing that the "people's right to know" demands public access to "those facts necessary for public judgment about public things" and allows "the greatest possible opportunity [for the public] to learn and master the art of political judgment" (emphasis omitted)); Ann Florini, *Introduction: The Battle over Transparency*, in *THE RIGHT TO KNOW* 1, 5 (Ann Florini ed., 2007) (defining transparency as "the degree to which information is available to outsiders that enables them to have informed voice in decisions and/or to assess the decisions made by insiders"). In both approaches, information and its content either guarantee or necessarily allow for public enlightenment, knowledge, and action—all of which are likely to occur, or else the enterprise would be unnecessary.

4. *About WikiLeaks*, WIKILEAKS, <http://wikileaks.org/About.html#> (last visited Dec. 24, 2011).

healthy society,” “alter the course of history in the present, and . . . lead us to a better future.”<sup>5</sup> This sequential narrative, in which information disclosure leads to a more engaged public, more democratic politics, and a more efficient state, forms a core tenet of the transparency ideal. Information transforms; therefore, it must be *disclosed*.

A similar narrative plays the same role in concerns about the unauthorized disclosure of classified information. The laws and regulations that govern classification assume the state knows—or at least can confidently predict—disclosure’s ill effects. The classification system, for example, is premised upon anticipating risk by sorting documents into the categories of “confidential,” “secret,” or “top secret,” based on the conclusion that the information these documents contain “reasonably could be expected to cause,” respectively, “damage,” “serious damage,” or “exceptionally grave damage” to national security.<sup>6</sup> The Freedom of Information Act (“FOIA”) explicitly exempts properly classified information from disclosure, protecting any document properly classified from release in response to a public request.<sup>7</sup> The Espionage Act criminalizes, among other things, classified information’s unauthorized disclosure, again by presuming that authorized officials have reasonably anticipated disclosure’s danger in classifying documents.<sup>8</sup> Constitutional executive-privilege and state-secret doctrines rest on the parallel presumption that the threat of disclosure will affect the executive’s ability to protect the nation and perform his delegated duties.<sup>9</sup> *This* sequential narrative, in which information disclosure impairs the state’s operations and endangers the nation, forms a core tenet of the transparency ideal’s limitations.<sup>10</sup> Information transforms; therefore, it must be *controlled*.

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5. *Id.*

6. Exec. Order No. 13,526, 3 C.F.R. 298, § 1.2(a)(1)–(3) (2010), available at <http://www.gpo.gov/fdsys/pkg/CFR-2010-title3-vol1/pdf/CFR-2010-title3-vol1-eo13526.pdf>.

7. 5 U.S.C. § 552(b)(1) (2006).

8. See 18 U.S.C. § 793(d)–(e) (2006) (defining classified national security information subject to the act as “any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense”); see also *infra* notes 161–63 and accompanying text.

9. See, e.g., *United States v. Nixon*, 418 U.S. 683, 705 (1974) (recognizing the executive-privilege doctrine for internal communications on the grounds that “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process”); *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (establishing the state-secrets doctrine for cases in which the government can show “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged”).

10. See GABRIEL SCHOENFELD, NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW 21 (2010) (arguing that keeping information from the public is essential for government deliberation and national self-preservation).

Faith in information's transformative power thus sustains efforts both to reveal and to control government information. It demands that both democratic theory and contemporary laws of transparency recognize a presumption of disclosure. It also demands exceptions from disclosure that allow for greater state control in certain circumstances.

This Article argues that such assumptions about information's essential, predictable effects rely on a mistaken understanding of what is a complicated administrative, political, and communicative process. Government information frequently has no obvious meaning. Its significance often creates significant political and social contest. It is sometimes misinterpreted; it is often ignored by all but a small minority of interested groups and individuals. There is no guarantee that a government document or meeting, when made public, will enlighten the public that sees it. And the reverse is equally true—there is no guarantee that government secrecy shuts down the flow of information or even conceals knowledge about government action. Nor is there any guarantee that disclosure will endanger the nation or adversely affect the government's ability to deliberate or operate. In a complex democratic state and civil society, secrecy and disclosure rarely exist in pure forms, and they seldom have diametrically opposed effects. Information-disclosure law and the theory that supports it rely upon the ability to predict and ascertain disclosure's effects. But if we cannot predict them in advance, how can we hypothesize about—much less base laws upon—disclosure's benefits and risks?

This Article uses the recent events and controversies surrounding WikiLeaks to question the meaning and effects of the suppression and disclosure of government information. Doing so makes plain the frequently unexamined and undertheorized complexity of disclosure's effects. WikiLeaks promises to allow its readers access to "evidence of the truth,"<sup>11</sup> and to that end has released largely unredacted, classified documents that would not have been released for years or decades—if they were released at all. It did so without the typical delays that attend public requests or declassification processes. Although it is of course far too soon to evaluate the full effects of WikiLeaks' disclosures, it is possible to sketch out how this episode illustrates the conceptual poverty of prevailing legal doctrines and theories of transparency. WikiLeaks demonstrates that disclosure's effects are in fact unpredictable and contingent upon existing political, legal, and social conditions in the political units and among the publics affected by disclosures.

The Article begins in Part I with a brief narrative of WikiLeaks and its emergence as an agent of and model for a radical form of transparency. Part II then describes and analyzes the theories of transparency and disclosure that WikiLeaks' public leader, Julian Assange, has articulated to explain and

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11. *About WikiLeaks*, *supra* note 4.

justify the project. Part III places WikiLeaks' project in the broader context of existing open-government laws and theories of transparency as well as in the specific legal context in which WikiLeaks may be prosecuted. The prevailing law requires courts to weigh disclosure's dangerous effects alongside its benefits. The Article then sketches what we know or can ascertain thus far of WikiLeaks' uneven and unpredictable short-term effects—effects that are relatively insubstantial in the U.S., at least according to available open-source materials, but arguably more significant elsewhere.

### I. WIKILEAKS' DISCLOSURES

WikiLeaks' 2010–11 release of multiple large caches of classified documents stolen from the U.S. government constitutes the most radical form of unauthorized disclosure since the leak of the Pentagon Papers forty years ago.<sup>12</sup> Its model of anonymously provided, unedited or barely edited documents promises its readers complete transparency in unexpurgated form, made available via a self-proclaimed “scientific journalism” that grants the public full access to the state's internal workings.<sup>13</sup> The site's most prominent figure, Julian Assange, has offered in his writings and interviews a well-articulated—if somewhat conflicted—theory of political information and power, which asserts that disclosure can both create an enlightened public and discipline those corrupt and authoritarian state actors whose nefarious ways depend upon their ability to keep their activities secret.<sup>14</sup> To a proponent like Daniel Ellsberg (of Pentagon Papers fame), WikiLeaks “is serving our democracy and serving our rule of law precisely by challenging

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12. As of this writing, for the most comprehensive account of the legal and institutional implications of WikiLeaks' history and operations, see Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311 (2011). For other sources, see DAVID LEIGH & LUKE HARDING, WIKILEAKS: INSIDE JULIAN ASSANGE'S WAR ON SECRECY (2011); GREG MITCHELL, THE AGE OF WIKILEAKS: FROM COLLATERAL MURDER TO CABLEGATE (AND BEYOND) (2011); MICAH L. SIFRY, WIKILEAKS AND THE AGE OF TRANSPARENCY (2011); Alasdair S. Roberts, *WikiLeaks: The Illusion of Transparency* (Suffolk Univ. Law Sch. Research Paper No. 11-19, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1801343](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1801343); mollysauter, *Wikileaks FAQ*, FUTUREOFTHEINTERNET.ORG (Dec. 7, 2010), <http://futureoftheinternet.org/wikileaks-cable-faq>; and *WikiLeaks*, WIKIPEDIA, <http://en.wikipedia.org/wiki/WikiLeaks> (last visited Dec. 24, 2011). For an excellent resource for information about Assange and about the development of WikiLeaks, see Robert Manne, Essay, *The Cypherpunk Revolutionary: Julian Assange*, MONTHLY (Austl.), Mar. 2011, at 17. An abridged version of this essay is available at <http://www.themonthly.com.au/julian-assange-cypherpunk-revolutionary-robert-manne-3081>; see also <http://cryptome.org/0003/assange-manne.htm>. A memoir by a disgruntled former member of the WikiLeaks collective is also informative, though the author's close, fraught, and now embittered relationship with Assange renders it less than authoritative. See DANIEL DOMSCHEIT-BERG, INSIDE WIKILEAKS (Jefferson Chase trans., Crown Pubs. 2011). On the Pentagon Papers, see DANIEL ELLSBERG, SECRETS (2002); DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE 33–47 (1996).

13. See *infra* text accompanying notes 86–89.

14. See *infra* Part II.B.

the secrecy regulations, which are not laws in most cases, in this country”;<sup>15</sup> to Yochai Benkler, the site represents the emerging “networked fourth estate” that fundamentally challenges incumbent media institutions<sup>16</sup> and that “mark[s] the emergence of a new decentralized, global, and networked model of the watchdog function.”<sup>17</sup> It also plays a prominent role in what one commentator has termed the “Age of Transparency”: an era of networked communication in which social media and so-called crowd-sourced information are inexorably changing the shape of the government and its relationship to its citizens.<sup>18</sup> The WikiLeaks story, in this account, is one in which the site’s disclosures will necessarily change what the state does and how it performs. To its most vociferous critics, however, WikiLeaks constitutes a dangerous, illegal disruption to state security and operations that must be stopped by any means possible.<sup>19</sup> The WikiLeaks narrative, in sum, presents a struggle over the promise and limits of transparency and disclosure’s presumed effects.

WikiLeaks was created in late 2006 by what was then described as an anonymous “team” of open-source computer engineers (i.e., hackers) and political activists who sought to expose corrupt and oppressive regimes throughout the world.<sup>20</sup> Prior to its most famous (at least to American and Western European politics) releases, which began in mid-2010, WikiLeaks had gained international attention by posting a mix of raw documents concerning diverse newsworthy public figures and governments in the United States, Africa, and Western Europe.<sup>21</sup> In all of these releases, one or

15. John Nichols, *Dan Ellsberg on WikiLeaks & the Essential Democratic Question: Who Will Tell the People?*, NATION (July 26, 2010, 7:19 PM), <http://www.thenation.com/blog/37949/dan-ellsberg-wikileaks-essential-democratic-question-who-will-tell-people> (internal quotation marks omitted).

16. Benkler, *supra* note 12, at 311–12.

17. Yochai Benkler, *The Real Significance of WikiLeaks*, AM. PROSPECT, June 2011, at 31, 33, available at <http://prospect.org/article/real-significance-wikileaks> (book review).

18. SIFRY, *supra* note 12, at 137–68; see also Clay Shirky, *WikiLeaks and the Long Haul*, CLAY SHIRKY (Dec. 6, 2010, 12:03 PM), <http://www.shirky.com/weblog/2010/12/wikileaks-and-the-long-haul/> (praising WikiLeaks for allowing citizens to know what the state is doing and thereby creating “the democracy of citizens distrusting rather than legitimizing the actions of the state”).

19. See Benkler, *supra* note 12, at 331–33 (summarizing what he characterizes as the “political attack” on WikiLeaks).

20. Paul Marks, *How To Leak a Secret and Not Get Caught*, NEW SCIENTIST, Jan. 13, 2007, at 26, 26. The precise origins of the site’s initial cache of documents are contested, according to a prominent blog. See Kim Zetter, *WikiLeaks Was Launched with Documents Intercepted from Tor*, THREAT LEVEL (June 1, 2010, 4:28 PM), <http://www.wired.com/threatlevel/2010/06/wikileaks-documents>. An important predecessor to WikiLeaks as an anonymous host for leaked documents is Cryptome, whose founder, Paul Young, served briefly on the WikiLeaks advisory board. See Declan McCullagh, *WikiLeaks’ Estranged Co-Founder Becomes a Critic (Q&A)*, CNET NEWS (July 20, 2010, 1:40 PM), [http://news.cnet.com/8301-31921\\_3-20011106-281.html](http://news.cnet.com/8301-31921_3-20011106-281.html).

21. See LEIGH & HARDING, *supra* note 12, at 57–64 (describing WikiLeaks’ early releases). Among other things, these document caches exposed political corruption and violence in

more sources who obtained apparently authentic documents (through legal or other means) sent the digital files to WikiLeaks. The organization then globally distributed the electronic files—without, it has claimed, filtering or editing the documents.<sup>22</sup> The site's increasing notoriety, along with its zealous protection of its sources' identities,<sup>23</sup> has given it worldwide prominence as a preeminent channel for whistle-blowers.<sup>24</sup> WikiLeaks thereby established a powerful brand identity as a technologically sophisticated service capable of distributing purloined data anonymously and publicizing its release. Its success has in turn inspired other similar sites to open, all patterned on the WikiLeaks model.<sup>25</sup>

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Kenya and other African political and environmental scandals; operations manuals of the Guantanamo Bay detention camp; secret manuals from the Church of Scientology; and self-dealing by the owners of Kaupthing Bank, the bank whose collapse hastened Iceland's financial downfall. See Manfred Goetzke, *WikiLeaks Website Offers Promising Outlet for Fighting Corruption*, DEUTSCHE WELLE (Nov. 26, 2009), <http://www.dw-world.de/dw/article/0,,4930880,00.html>; Andy Greenberg, *WikiLeaks' Julian Assange Wants To Spill Your Corporate Secrets*, FORBES (Nov. 29, 2010, 5:04 PM), <http://www.forbes.com/sites/andygreenberg/2010/11/29/wikileaks-julian-assange-wants-to-spill-your-corporate-secrets/>.

22. *About WikiLeaks*, *supra* note 4.

23. For a nonspecialist's description of the technological backbone of WikiLeaks' capabilities of protecting the anonymity of its sources and of protecting itself from censorship, see LEIGH & HARDING, *supra* note 12, at 55–56.

24. See Joby Warrick, *WikiLeaks Works To Expose Government Secrets, but Web Site's Sources Are a Mystery*, WASH. POST (May 19, 2010), [www.washingtonpost.com/wp-dyn/content/article/2010/05/19/AR2010051905333.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/05/19/AR2010051905333.html).

25. A disgruntled former WikiLeaks member, Daniel Domscheit-Berg, has launched another rival site, while the *New York Times*, WikiLeaks' U.S. journalistic collaborator (with whom it has a stormy relationship), may establish a competing site that would allow whistle-blowers to anonymously pass documents to the newspaper. See Michael Calderone, *NY Times Considers Creating an "EZ Pass Lane for Leakers"*, YAHOO! NEWS (Jan. 25, 2011), <http://news.yahoo.com/blogs/cutline/ny-times-considers-creating-ez-pass-lane-leakers-20110125-053811-988.html>; Frank Jordans, *Openleaks, WikiLeaks Rival, Launches New Secret-Spilling Site*, HUFFINGTON POST (Jan. 28, 2011, 10:31 AM), [http://www.huffingtonpost.com/2011/01/28/openleaks-wikileaks-rival\\_o\\_n\\_815309.html](http://www.huffingtonpost.com/2011/01/28/openleaks-wikileaks-rival_o_n_815309.html); *A Swarm of Leaks: WikiLeaks' Rivals Will Be Hard To Fight*, ECONOMIST (Dec. 9, 2010), [http://www.economist.com/node/17674089?story\\_id=17674089](http://www.economist.com/node/17674089?story_id=17674089). WikiLeaks also inspired the *Palestine Papers*, hosted by the commercial Al Jazeera network, which leaked a large cache of recent documents relating to the Israeli-Palestinian conflict. See *FAQ: The Palestine Papers*, AL JAZEERA, <http://www.aljazeera.com/palestinepapers/2011/01/2011123114726552723.html> (last modified Jan. 23, 2011). The *Wall Street Journal's* announcement of its own leaking site, SafeHouse, <https://www.wsjsafehouse.com/>, was roundly dismissed for alleged weaknesses in the technical and legal protection it would offer to any would-be leakers. See Josh Halliday, *Wall Street Journal Faces Backlash over WikiLeaks Rival*, GUARDIAN (May 6, 2011, 09:21 EDT), <http://www.guardian.co.uk/media/2011/may/06/wall-street-journal-wikileaks-safehouse>; Paul Marks, *Absurd Rules Make WSJ's New Leak Site a Non-Starter*, ONE PER CENT (May 6, 2011, 13:44), <http://www.newscientist.com/blogs/onepercent/2011/05/phone-hacking-publishers-leak.html>. For a compelling discussion of the possibilities and limits of WikiLeaks as a model, see Geert Lovink & Patrice Riemens, *Twelve Theses on WikiLeaks*, EUROZINE (Dec. 7, 2010), <http://www.eurozine.com/articles/2010-12-07-lovinkriemens-en.html>.

Julian Assange, much of whose earlier life had been spent as a prominent hacker and participant in the so-called cypherpunk community, orchestrated and oversaw the site's creation.<sup>26</sup> It exists only as an ephemeral noncommercial venture, thereby distinguishing itself from traditional place-based journalistic authorities that operate either commercially, under state ownership, or with state subsidies. It also prizes and attempts to keep secret details about its internal operations and management.<sup>27</sup> Its absence of physical grounding extends to its operations: it is not "housed" anywhere but in servers in multiple countries, and it makes its content available via hundreds of domain names.<sup>28</sup> It represents itself as an institution without a home, a populist news medium for an online world. Hence, its name and brand: *Wiki* conjoined with *Leaks*.<sup>29</sup>

As WikiLeaks reached the current peak of its influence and celebrity in 2010, Assange emerged as the previously anonymous site's spokesperson and leader, and quickly came to embody WikiLeaks.<sup>30</sup> He gave it at least the

26. See Manne, *supra* note 12, at 21–31; Hans Ulrich Obrist, *In Conversation with Julian Assange, Part I*, E-FLUX (May 2011), [www.e-flux.com/journal/view/232](http://www.e-flux.com/journal/view/232).

27. At least at one time, WikiLeaks required its staff to sign a confidentiality agreement recognizing that all information that staff is exposed to, including the existence of the agreement itself, belongs to WikiLeaks, and a staff member's significant breach would be subject not only to an injunction to prevent disclosure but would also cause damages to the organization "in the region of £12,000,000." WikiLeaks ITC, Ltd., Confidentiality Agreement, available at <http://images.newstatesman.com/wikileaks.pdf>. Compare David Allen Green, *The £12m Question: How WikiLeaks Gags Its Own Staff*, NEW STATESMAN (May 11, 2011, 3:31 PM), <http://www.newstatesman.com/blogs/david-allen-green/2011/05/wikileaks-information-legal> (criticizing the confidentiality agreement as "draconian and extraordinary"), with Kevin Gosztola, *2011-05-12 Leaked WikiLeaks Confidentiality Agreement: Neither "Draconian" Nor "Extraordinary"*, WL CENT. (May 12, 2011, 13:08), <http://wlcenral.org/node/1763> (defending the agreement). The agreement was leaked by James Ball, who had worked for WikiLeaks and had refused to sign the agreement, characterizing it as "by orders of magnitude the most restrictive I have ever encountered" in the media industry. James Ball, *WikiLeaks, Get Out of the Gagging Game*, GUARDIAN (May 12, 2011, 12:43 EDT), <http://www.guardian.co.uk/commentisfree/2011/may/12/wikileaks-confidentiality-agreement-julian-assange>.

28. Raffi Khatchadourian, *No Secrets: Julian Assange's Mission for Total Transparency*, NEW YORKER, June 7, 2010, at 40, 40; see also Jay Rosen, *The Afghanistan War Logs Released by WikiLeaks, the World's First Stateless News Organization*, PRESSTHINK (July 26, 2010, 1:31 AM), <http://pressthink.org/2010/07/the-afghanistan-war-logs-released-by-wikileaks-the-worlds-first-stateless-news-organization/>. Assange's British attorney has characterized the site's statelessness as, in part, a legal strategy to limit its susceptibility to the laws of individual states. See Emily Badger, *WikiLeaks and the Future of Whistle-Blowing*, MILLER-MCCUNE (May 2, 2011), <http://www.miller-mccune.com/media/wikileaks-and-the-future-of-whistle-blowing-30795/>.

29. See LEIGH & HARDING, *supra* note 12, at 52 (describing derivation of the WikiLeaks name and its relationship to Wikipedia). The decision to use *Wiki* as a prefix in the site's name seems in hindsight a mistake, given Assange's later criticism of crowd-sourcing for journalism. See *infra* text accompanying note 120. It seems best to understand the prefix now as signifying the demand-side prominence of Wikipedia as a freely available, collectively produced, antiauthoritarian source for the people.

30. Assange explains that his identity and role were revealed by others when journalists began to investigate WikiLeaks' inner workings. See Hans Ulrich Obrist, *In Conversation with*

potential for a material grounding in a legal and jurisdictional sense.<sup>31</sup> Like the site, Assange seems to have no permanent national residence, and in mid-2010, he claimed to feel secure only in four “different bases in different places” where his project has strong political support.<sup>32</sup> His criminal indictment in late 2010 in Sweden for rape has both complicated his jurisdictional association and defined him even further as a nearly stateless person, an Australian national without a permanent address.<sup>33</sup> But his existence as an individual figure subject to identification and prosecution—indeed, his omnipresence in news conferences, television interviews, and dead-tree media reportage—transfigured WikiLeaks’ public image as a semi-anonymous hacker collective<sup>34</sup> into that of a more traditional organization and website.

WikiLeaks’ most celebrated U.S. military- and diplomatic-document releases from U.S. government sources began in April 2010 with the uploading of a video (which it titled *Collateral Murder*) showing a lethal 2007 U.S. Army Apache helicopter attack on a group of men in Baghdad.<sup>35</sup> The video was allegedly part of a large cache of digital files the site had received from Bradley Manning, a young army intelligence officer with the rank of private first class who leveraged his level of security clearance and access to two classified databases to download data from a military server.<sup>36</sup> More traditional documentary releases followed: in July 2010, tens of thousands of

*Julian Assange, Part II*, E-FLUX (June 2011), <http://www.e-flux.com/journal/in-conversation-with-julian-assange-part-ii/>.

31. On Assange, see especially Manne, *supra* note 12, as well as John F. Burns & Ravi Somaiya, *WikiLeaks Founder on the Run, Trailed by Notoriety*, N.Y. TIMES (Oct. 23, 2010), <http://www.nytimes.com/2010/10/24/world/24assange.html?ref=wikileaks>; see also Eben Harrell, *Defending the Leaks: Q&A with WikiLeaks’ Julian Assange*, TIME (July 27, 2010), <http://www.time.com/time/world/article/0,8599,2006789,00.html>; David Kushner, *Cloak and Dagger: Inside WikiLeaks’ Leak Factory*, MOTHER JONES (June 2, 2010), <http://motherjones.com/politics/2010/07/click-and-dagger-wikileaks-julian-assange-iraq-video-updated>; Khatchadourian, *supra* note 28.

32. Harrell, *supra* note 31; see also Obrist, *supra* note 30.

33. On the rape charge, efforts by Swedish authorities to extradite Assange from England, and the effects of Assange’s prosecution on WikiLeaks, see LEIGH & HARDING, *supra* note 12, at 145–63, 227–39; Benkler, *supra* note 12, at 345–47.

34. There are widely accepted rumors that at least some of WikiLeaks’ early disclosures were based on data that it had hacked from the Tor network. See LEIGH & HARDING, *supra* note 12, at 53–56.

35. See WikiLeaks, *Collateral Murder*, COLLATERAL MURDER (Apr. 5, 2010), <http://collateralmurder.com/> (also available at <http://www.youtube.com/watch?v=3ALAZdsguO8&feature=dir>). A full account of the *Collateral Murder* video and its production appears in Khatchadourian, *supra* note 28, at 43–45, 49–51.

36. See Alex Altman, *Afghan Leaks: Is the U.S. Keeping Too Many Secrets?*, TIME (July 30, 2010), <http://www.time.com/time/nation/article/0,8599,2007224,00.html>; Ginger Thompson, *Early Struggles of Soldier Charged in Leak Case*, N.Y. TIMES (Aug. 8, 2010), <http://www.nytimes.com/2010/08/09/us/09manning.html?scp=1&sq=Early%20Struggles%20of%20Soldier%20Charged%20in%20Leak%20Case&st=cse>; see also LEIGH & HARDING, *supra* note 12, at 72–89; MITCHELL, *supra* note 12, at 38–50.

classified documents from the war in Afghanistan;<sup>37</sup> in late October 2010, hundreds of thousands of documents about the Iraq war;<sup>38</sup> from late November 2010 through early 2011, diplomatic cables between the U.S. State Department and its diplomatic missions around the world;<sup>39</sup> and in April 2011, files concerning detainees held as suspected terrorists at the Guantanamo Bay military prison.<sup>40</sup> In September 2011, all of the State Department cables were made publicly available in unredacted form after reporters for the *Guardian* newspaper inadvertently disclosed the encryption key for the files, copies of which were accessible on the Internet.<sup>41</sup> Many of the documents, but by no means all, were classified, and none was classified above “secret.”<sup>42</sup> Nevertheless, these documents were unavailable to the public, and likely would have remained so for years—if not forever.<sup>43</sup> After granting preview access to major Western newspapers that independently reviewed and reported on the documents, WikiLeaks posted the raw documentary sources—with minimal redactions to protect the anonymity of

37. See LEIGH & HARDING, *supra* note 12, at 116–27; Benkler, *supra* note 12, at 323–24.

38. See LEIGH & HARDING, *supra* note 12, at 128–34; Benkler, *supra* note 12, at 325–26.

39. See LEIGH & HARDING, *supra* note 12, at 135–44; Benkler, *supra* note 12, at 326–30.

40. Tom Lasseter, *Guantanamo Secret Files Show U.S. Often Held Innocent Afghans*, MCCLATCHY (Apr. 26, 2011), <http://www.mcclatchydc.com/2011/04/26/112854/guantanamo-secret-files-show-us.html#ixzz1QUV5GJcN>; Charlie Savage et al., *Classified Files Offer New Insights Into Detainees*, N.Y. TIMES (Apr. 24, 2011), <http://www.nytimes.com/2011/04/25/world/guantanamo-files-lives-in-an-american-limbo.html>.

41. See Paul Marks, *Assange: Why WikiLeaks Was Right To Release Raw Cables*, NEW SCIENTIST (Sept. 6, 2011), <http://www.newscientist.com/article/dn20869-assange-why-wikileaks-was-right-to-release-raw-cables.html>; Raphael G. Satter, *WikiLeaks Reveals All, Media Groups Criticize Move*, YAHOO! NEWS (Sept. 2, 2011), <http://news.yahoo.com/wikileaks-reveals-media-groups-criticize-move-144202957.html>; Christian Stöcker, *A Dispatch Disaster in Six Acts*, SPIEGEL ONLINE (Sept. 1, 2011), <http://www.spiegel.de/international/world/o,1518,783778,00.html>.

42. Most of the documents that composed the Afghanistan and Iraq “War Logs” were classified “secret.” A Note to Readers, *Piecing Together the Reports, and Deciding What To Publish*, N.Y. TIMES (July 25, 2010), <http://www.nytimes.com/2010/07/26/world/26editors-note.html>; Scott Stewart, *WikiLeaks and the Culture of Classification*, STRATFOR (Oct. 28, 2010), [http://www.stratfor.com/weekly/20101027\\_wikileaks\\_and\\_culture\\_classification](http://www.stratfor.com/weekly/20101027_wikileaks_and_culture_classification). Of the more than 250,000 diplomatic cables WikiLeaks obtained, approximately 11,000 were classified “secret,” 4,000 were classified “secret” and “noform” (that is, not to be shared with a foreign government), and 9,000 were classified “noform.” Scott Shane & Andrew W. Lehren, *Leaked Cables Offer Raw Look at U.S. Diplomacy*, N.Y. TIMES (Nov. 28, 2010), <http://www.nytimes.com/2010/11/29/world/29cables.html>; see also *What Do the Diplomatic Cables Really Tell Us?*, SPIEGEL ONLINE (Nov. 28, 2010), <http://www.spiegel.de/international/world/o,1518,731441,00.html> (giving slightly different figures from the *New York Times*).

43. See Daniel W. Drezner, *Why WikiLeaks Is Bad for Scholars*, CHRON. HIGHER ED. (Dec. 5, 2010), <http://chronicle.com/article/Why-WikiLeaks-Is-Bad-for/125628/> (characterizing the diplomatic cables as documents that would have been unavailable to academics for decades); Dan Murphy, *WikiLeaks Releases Video Depicting US Forces Killing of Two Reuters Journalists in Iraq*, CHRISTIAN SCI. MONITOR (Apr. 5, 2010), <http://www.csmonitor.com/World/Global-News/2010/0405/Wikileaks-releases-video-depicting-US-forces-killing-of-two-Reuters-journalists-in-Iraq> (noting that the *Collateral Murder* video showed an attack about which Reuters had unsuccessfully sought information through the Freedom of Information Act).

sources and other individuals who might face reprisal if their identities were revealed—on its site simultaneously with the newspapers' reports.<sup>44</sup> The so-called "War Logs" from Iraq and Afghanistan generally revealed unflattering, and at times damning, information about the conduct of the American military during two wars, including evidence of civilian deaths, abuse, and torture by local militias friendly to the United States, military reliance on private contractors, and the difficulty that American forces faced both on the ground and in managing complex internal and international political alliances (for example, with Pakistan in Afghanistan).<sup>45</sup> The diplomatic cables revealed a broad range of information about how U.S. diplomats viewed foreign leaders and the political and economic conditions in countries and regions around the world.<sup>46</sup> The Guantanamo files revealed that many of the detainees held as terrorists were low-risk, and some of the intelligence relied on in capturing and holding them was flawed.<sup>47</sup>

U.S. government agencies have responded to rumors that WikiLeaks is about to release potentially damaging documents by scrambling to identify a

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44. See LEIGH & HARDING, *supra* note 12, at 110–15 (describing the negotiated agreements between WikiLeaks and its newspaper partners to redact documents); Benkler, *supra* note 12, at 321–30 (summarizing the WikiLeaks releases and describing the site's relationship with the established print news media). WikiLeaks offered prerelease access to the "War Logs" documents to four news organizations: the *New York Times*, the *Guardian* (U.K.), *Le Monde* (France), and *Der Spiegel* (Germany). The *Times*' coverage appears at <http://www.nytimes.com/interactive/world/war-logs.html>, and the *Guardian*'s at <http://www.guardian.co.uk/world/iraq-war-logs> and <http://www.guardian.co.uk/world/the-war-logs>. For an inside account of the relationship between WikiLeaks and one of the newspapers to whom it granted preview access, written from one of the newspapers' perspectives, see Sarah Ellison, *The Man Who Spilled the Secrets*, VANITY FAIR (Feb. 2011), <http://www.vanityfair.com/politics/features/2011/02/the-guardian-201102> (based on interviews with editors from the *Guardian*); Bill Keller, *Dealing with Julian Assange and the WikiLeaks Secrets*, N.Y. TIMES (Jan. 26, 2011), <http://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html?scp=2&sq=%22the%20booy%20who%20kicked%20the%20hornet's%20nest%22&st=cse> (chronicling a *New York Times* editor's account); see also Javier Moreno, *Why El País Chose To Publish the Leaks*, EL PAÍS.COM (Dec. 23, 2010), [http://www.elpais.com/articulo/english/Why/PAIS/chose/to/publish/the/leaks/elpepueng/20101223elpeng\\_3/Ten](http://www.elpais.com/articulo/english/Why/PAIS/chose/to/publish/the/leaks/elpepueng/20101223elpeng_3/Ten) (describing Spanish newspaper's later role in working with WikiLeaks). By March 2011, WikiLeaks had relationships with "89 media organizations" in fifty countries. See *Global—Media Currently Publishing*, WIKILEAKS, <http://wikileaks.ch/Media-Currently-Publishing.html> (last visited Dec. 24, 2011).

45. The *New York Times* packaged the highlights of its reporting based on the "War Logs" in OPEN SECRETS: WIKILEAKS, WAR, AND AMERICAN DIPLOMACY 252–328 (Alexander Star ed., 2011) [hereinafter OPEN SECRETS]; see also LEIGH & HARDING, *supra* note 12, at 116–34 (providing the *Guardian*'s perspective on the "War Logs").

46. LEIGH & HARDING, *supra* note 12, at 135–44; OPEN SECRETS, *supra* note 45, at 62–203. The State Department releases continued long after the initial wave of disclosures by the major newspapers. WikiLeaks continued to release thousands of documents relating to U.S. relations with other nations, frequently through news outlets in those countries. See Joshua E. Keating, *The WikiLeaks You Missed*, FOREIGN POL'Y (July 1, 2011), [http://www.foreignpolicy.com/articles/2011/01/01/the\\_wikileaks\\_you\\_missed](http://www.foreignpolicy.com/articles/2011/01/01/the_wikileaks_you_missed) (describing releases about Thailand, Haiti, India, Pakistan, and other nations).

47. See Lasseter, *supra* note 40; Savage et al., *supra* note 40.

means to prevent the release or mitigate the expected damage.<sup>48</sup> But they have found no simple solution.<sup>49</sup> In the wake of the first release of Afghanistan war documents, the Department of Justice considered filing criminal indictments against the WikiLeaks principals for, among other charges, encouraging their sources to steal government property and classified information.<sup>50</sup> Establishing that those who attempt to disclose stolen classified documents will face criminal punishment could not only shut down WikiLeaks but also deter others' efforts to open new, similar sites.<sup>51</sup> A legal solution may not be an effective or attractive one, however. Assange is not a U.S. citizen, which does not necessarily make him immune from prosecution.<sup>52</sup> However, because he has traveled only occasionally to the United States (and is even less likely to do so of his own volition now), his arrest will depend upon the U.S. government's ability to have him extradited.<sup>53</sup> Moreover, as the Pentagon Papers episode demonstrated, a state that punishes a whistle-blower and the media that circulates purloined documents only assists the whistle-blower and his cause by escalating the

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48. Tony Capaccio, *Pentagon Alerts House, Senate Panels to New Classified WikiLeaks Release*, BLOOMBERG (Nov. 24, 2010, 12:23 PM), <http://www.bloomberg.com/news/2010-11-24/pentagon-warns-house-senate-defense-panels-of-more-wikileaks-documents.html>; Philip Shenon, *Pentagon Manhunt*, DAILY BEAST (June 10, 2010), <http://www.thedailybeast.com/articles/2010/06/10/wikileaks-founder-julian-assange-hunted-by-pentagon-over-massive-leak.html>. The Obama administration has made a concerted effort to prosecute leaks, and its civil-prosecutorial efforts, like its military-prosecutorial efforts against Bradley Manning, appear to be part of this campaign. See Carrie Johnson, *Case Against WikiLeaks Part of Broader Campaign*, NPR (May 11, 2011), <http://www.npr.org/2011/05/11/136173262/case-against-wikileaks-part-of-broader-campaign>.

49. This refers only to the criminal prosecution of Julian Assange and others involved with WikiLeaks. The criminal prosecution of Bradley Manning, who allegedly stole and passed along the documents, is quite simple, as he is currently in custody and likely has no constitutional protection.

50. Adam Entous & Evan Perez, *Prosecutors Eye WikiLeaks Charges*, WALL ST. J. (Aug. 21, 2010), <http://online.wsj.com/article/SB10001424052748704488404575441673460880204.html>.

51. See Manne, *supra* note 12, at 34 (describing how at least one WikiLeaks volunteer dropped out of the group due to fear of criminal prosecution).

52. The federal Espionage Act criminalizes obtaining national-security information with the intent to use the information or reason to believe that the information is to be used to the injury of the United States or knowing that the person who obtained the information had such intent, and the Act does not limit its reach only to citizens. See 18 U.S.C. § 793(a)-(b) (2006); see also Julian Ku, *Can the U.S. Prosecute WikiLeaks' Founder? Sure, if They Can Catch Him*, OPINIO JURIS (Aug. 21, 2010, 12:11 AM), <http://opiniojuris.org/2010/08/21/can-the-us-prosecute-wikileaks-founder-sure-if-they-can-catch-him/> (arguing that the Espionage Act could be applied to Assange). But see Lolita C. Baldor, *Can the Government Actually Plug the WikiLeaks?*, MIL. TIMES (Aug. 7, 2010), [http://www.militarytimes.com/news/2010/08/ap\\_wikileaks\\_080710/](http://www.militarytimes.com/news/2010/08/ap_wikileaks_080710/) (citing expert opinion that "it's not clear" that U.S. law would apply to a foreign citizen).

53. I discuss in somewhat more detail the legal framework within which Assange could be prosecuted and his constitutional defenses, *infra* Part III.B. This Article does not, however, purport to offer a comprehensive legal analysis of criminal prosecution under the Espionage Act, nor of extradition. Yochai Benkler's article does not either, but he does offer more details. See Benkler, *supra* note 12, at 337-38, 363-65.

whistle's sound and range and making the government vulnerable to charges of a cover-up.<sup>54</sup>

An earlier episode in which a wealthy banking firm sought to stifle a WikiLeaks release illustrates the difficulty, perhaps even futility, of fighting the site's high-tech vigilante transparency through legal means. In 2008, Bank Julius Baer, a Swiss firm, and its Cayman Island sister company sought to enjoin the site after it had posted documents—some of which the firms claimed were fraudulent—that apparently showed that the bank was helping its clients launder money and avoid taxes.<sup>55</sup> After issuing a temporary restraining order when WikiLeaks failed to appear at a preliminary hearing, a U.S. district court judge was forced to conclude that the plaintiffs' interests in stopping the disclosure could not support an injunction against WikiLeaks, given the strength of First Amendment protections against prior restraint.<sup>56</sup> But constitutional doctrine was not the court's sole concern. The plaintiffs' complaint against WikiLeaks raised complex geographical issues—Assange is an Australian citizen who was living in Kenya at the time—that limited the extent of the court's jurisdiction over the case.<sup>57</sup> Even more significantly, the court could not confidently impose any judgment on the website, given the fact that the information had already been circulated globally and the site could simply evade any order to take down the documents by mirroring its site on servers around the world.<sup>58</sup> Soon after the court lifted the temporary restraining order, Bank Julius Baer abandoned the lawsuit.<sup>59</sup>

Alternative, nonlegal strategies seem equally likely to prove ineffective as a long-term strategy to end the WikiLeaks threat. To consider the means available to stop or answer WikiLeaks, the U.S. Army Counterintelligence Center commissioned a secret 2008 report on the site;<sup>60</sup> ironically and

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54. See STANLEY I. KUTLER, *THE WARS OF WATERGATE* 110–11 (1990) (discussing how the Pentagon Papers' political impact was intensified by the Nixon administration's response to them; most significantly, the leak led to the creation of the White House "Plumbers," a secret group that engaged in illegal activity, including the break-in of the Democratic National Committee headquarters in the Watergate building); RUDENSTINE, *supra* note 12, at 5–6 (same); see also SCHOENFELD, *supra* note 10, at 183 (noting that efforts to suppress the Pentagon Papers actually increased attention to them).

55. An inside account of the Bank Julius Baer leak appears in DOMSCHEIT-BERG, *supra* note 12, at 17–33 (the author refers to the institution as the "Julius Bär Bank").

56. *Bank Julius Baer & Co. v. WikiLeaks*, 535 F. Supp. 2d 980, 984–85 (N.D. Cal. 2008).

57. *Id.* at 984.

58. *Id.* at 985.

59. Thomas Claburn, *Swiss Bank Abandons Lawsuit Against WikiLeaks*, INFORMATIONWEEK (Mar. 6, 2008), <http://www.informationweek.com/news/206902154>.

60. MICHAEL D. HORVATH, CYBER COUNTERINTELLIGENCE ASSESSMENTS BRANCH, ARMY COUNTERINTELLIGENCE CTR., WIKILEAKS.ORG—AN ONLINE REFERENCE TO FOREIGN INTELLIGENCE SERVICES, INSURGENTS, OR TERRORIST GROUPS? (2008), available at <http://mirror.wikileaks.info/leak/us-intel-wikileaks.pdf> (also available at [http://www.wired.com/images\\_](http://www.wired.com/images_)

perhaps unsurprisingly, WikiLeaks obtained the report in March 2010 and swiftly posted it on the Web.<sup>61</sup> The report's conclusions and tepid prescriptions likely disappointed and depressed military officials. Employing aggressive tactics would, if made public, risk generating public attention and outrage and thereby magnify the original embarrassment that the disclosures caused. Recognizing the military's vulnerability and impotence, the report takes an almost elegiac tone in its exceptionally accurate predictions of what would occur only two years after the report was written. WikiLeaks has or will receive classified documents, the report warned, and disclosure websites like WikiLeaks posed a permanent threat to the military's efforts to secure information from disclosure.<sup>62</sup> The report concluded that the only effective response would be to secure classified information and punish leakers—a strategy it concluded was unlikely to deter those “insiders” who “believe [that it] is their obligation to expose alleged wrongdoing within [the Department of Defense] through inappropriate venues.”<sup>63</sup> In his preface to WikiLeaks' posting of the report, Assange proudly and dramatically claimed that U.S. intelligence planned to “destroy” WikiLeaks.<sup>64</sup> But the WikiLeaks model of decentralized digital distribution of illegally obtained classified information thus appears resistant—if not impervious—to efforts to contain it. The threat of prosecution and disruption may be real, but the state appears to be as powerless and frustrated with WikiLeaks as the site is with the state.

This situation—in which an array of potential whistle-blowers enjoys access to huge caches of documents and can threaten to expose military and diplomatic decisions during a relatively unpopular war—parallels the legendary role that Daniel Ellsberg and his coconspirators played during the Vietnam War, when they used photocopy machines to distribute the purloined documents that became known as the Pentagon Papers.<sup>65</sup> Ellsberg himself quickly trumpeted the analogy, especially after WikiLeaks gained

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blogs/threatlevel/2010/03/wikithreat.pdf); see also Benkler, *supra* note 12, at 317–20 (summarizing the report).

61. Elizabeth Montalbano, *Army: Wikileaks a National Security Threat*, INFORMATIONWEEK (Mar. 16, 2010), <http://www.informationweek.com/news/government/security/223900094>; Stephanie Strom, *Pentagon Sees a Threat from Online Muckrakers*, N.Y. TIMES (Mar. 17, 2010), <http://www.nytimes.com/2010/03/18/us/18wiki.html>.

62. HORVATH, *supra* note 60, at 21–22.

63. *Id.* at 21.

64. See Press Release, Wikileaks, U.S. Intelligence Planned To Destroy WikiLeaks (Mar. 15, 2010), available at [http://www.wired.com/images\\_blogs/threatlevel/2010/03/wikithreat.pdf](http://www.wired.com/images_blogs/threatlevel/2010/03/wikithreat.pdf). At least one news story suggested that the military might have been considering launching “a cyber attack against the website” in the late summer and fall of 2010, the period between the release of the Afghanistan and Iraq documents. See Baldor, *supra* note 52.

65. But see Richard Tofel, *Why WikiLeaks' "War Logs" Are No Pentagon Papers*, PROPUBLICA (July 26, 2010), <http://www.propublica.org/article/why-wikileaks-war-logs-are-no-pentagon-papers> (arguing that WikiLeaks' Afghanistan disclosures lack the historical importance of the documents Ellsberg released).

worldwide notoriety from its 2010 releases. Although Ellsberg had initially turned down WikiLeaks' initial recruitment to serve on its advisory board,<sup>66</sup> after the *Collateral Murder* video release he declared: "The Internet is there to bring out this evidence, when a terribly wrongful, reckless criminal act is being prepared. . . . [T]he anger of the government over this leak suggests that [WikiLeaks has] been successful so far."<sup>67</sup> Assange's celebrity status and his well-earned paranoia about efforts to discredit him, along with actual press reports that seemed to discredit him (that may or may not have been slanderous, as his supporters argued),<sup>68</sup> strengthen the analogy to Ellsberg, who was the target of illegal and frightening efforts by the White House to destroy him.<sup>69</sup>

Although law and technology may not impose clear limitations on WikiLeaks, the site does not have unlimited capacity. As Assange has conceded, WikiLeaks is "completely source-dependent" and must wait for and then sort through the submissions it receives, which vary in quality and relevance.<sup>70</sup> The enormous Iraq, Afghanistan, and State Department leaks required the site's contributors to expend significant time and effort in preparing for their release, especially as the site began to spend more time evaluating the material and working with mainstream news organizations.<sup>71</sup> Meanwhile, it has been forced to wage numerous collateral battles: with the companies on whom it relies for document storage, servers, and donated funds; with governments in legal forums; with detractors and critics in the

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66. Manne, *supra* note 12, at 30.

67. Noam Cohen, *What Would Daniel Ellsberg Do With the Pentagon Papers Today?*, N.Y. TIMES (Apr. 18, 2010), <http://www.nytimes.com/2010/04/19/business/media/19link.html> (internal quotation marks omitted).

68. See Burns & Somaiya, *supra* note 31 (describing internal dissent within WikiLeaks and disgruntled former members, and characterizing Assange in an unflattering light).

69. Glenn Greenwald, an outspoken critic of the Iraq and Afghanistan wars and of Obama's continuation of some of the Bush administration's policies regarding those wars (and of related issues like executive branch secrecy), berated a critical *New York Times* profile as "Nixonian" and a "sleazy hit piece" intended to "smear" Assange and compared the *Times* story to Nixon's efforts to minimize the damage caused by the Pentagon Papers. Glenn Greenwald, *The Nixonian Henchman of Today: At the NYT*, SALON (Oct. 24, 2010, 10:25 AM), [http://www.salon.com/2010/10/24/assange\\_2/](http://www.salon.com/2010/10/24/assange_2/) (criticizing Burns & Somaiya, *supra* note 31). On Nixon's efforts to destroy Ellsberg by authorizing the Plumbers to leak private, stolen information from his psychiatrist, among other things, see RICHARD REEVES, PRESIDENT NIXON: ALONE IN THE WHITE HOUSE 348-49, 368-69 (2001); BARRY WERTH, 31 DAYS: GERALD FORD, THE NIXON PARDON, AND A GOVERNMENT IN CRISIS 84-87 (2006); CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN 312-13, 316 (1974).

70. Time's *Julian Assange Interview: Full Transcript/Audio*, TIME (Dec. 1, 2010), <http://www.time.com/time/world/article/0,8599,2034040,00.html> [hereinafter *Time's Julian Assange Interview*].

71. See Harrell, *supra* note 31.

press; and with government entities and others who have attempted to take WikiLeaks and its mirror sites down through denial-of-service attacks.<sup>72</sup>

The battle is not an entirely losing one; the disembodied, transnational, data-driven universe that WikiLeaks inhabits allows clever workarounds and David-against-Goliath battles that can sometimes reward technical virtuosity and tactics over the brute force of state authority and capitalist logic.<sup>73</sup> Such is the anarchic spirit of the hacker and cypherpunk subculture from which Assange emerged;<sup>74</sup> as John Perry Barlow, cofounder of the Electronic Freedom Foundation and longtime theorist of the Internet's libertarian possibilities, tweeted in December 2010: "The first serious infowar is now engaged. The field of battle is WikiLeaks. You are the troops."<sup>75</sup>

This, then, is the somewhat contested understanding of WikiLeaks as an institution as of January 2012: secretive and hidden behind a veil of encryption and technological sophistication; righteously committed to the cause of whistle-blowing, with the purpose of informing the wired world—which is to say the whole world—of secret, prevaricating, and corrupt authorities; a model for other websites and distribution channels to follow; and outside the normal channels of either a nation or of a commercial or nonprofit enterprise; but led by a perhaps flawed individual who serves as its public face. The WikiLeaks narrative presents the strange, at least temporary triumph of a small, thoroughly independent, underdog medium of disclosure over enormously powerful state actors. The WikiLeaks disclosures both represent and portend enormous changes in how secret documents become public and in the meaning and extent of transparency in a wired, digital age. Their celebrity suggests that disclosure matters—that to some degree, the documents have enlightened the public, affected the ability of state actors to perform their jobs, and created risks for the ongoing efforts that the documents revealed.

## II. WIKILEAKS' THEORIES

In different venues, Assange has identified two related but quite distinct purposes for the WikiLeaks project, each of which builds upon a theory of disclosure's effects. The more conventional explanation, which he has frequently offered in interviews, adopts the reformist ideal underlying the

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72. See LEIGH & HARDING, *supra* note 12, at 203–07, 242; Benkler, *supra* note 12, at 337–47; Andy Greenberg, *An Interview with WikiLeaks' Julian Assange*, FORBES (NOV. 29, 2010), <http://forbes.com/sites/andygreenberg/2010/11/29/an-interview-with-wikileaks-julian-assange/>.

73. See *The War on WikiLeaks: Fingered*, ECONOMIST (Dec. 9, 2010), <http://www.economist.com/node/17674107> (describing WikiLeaks' technical and financial workarounds for efforts to block public access and donations to the site, as well as unaffiliated hackers' attempts to disrupt corporations and websites that acted against WikiLeaks).

74. See Manne, *supra* note 12, at 21–22.

75. John Perry Barlow, @JPBarlow, TWITTER (Dec. 3, 2010), <http://twitter.com/#!/jpbarlow/status/10627544017534976>.

disclosure of government information as it is understood by transparency advocates: disclosure will lead to a more knowledgeable public and ultimately to a more accountable, responsive, and effective state.<sup>76</sup> The alternative explanation, which Assange developed most fully in essays he posted on the Internet as he was building WikiLeaks, proposes that leaks can perform a more radical, revolutionary function by disabling what he views as authoritarian, illegitimate governments.<sup>77</sup> These explanations may not be mutually exclusive, and as explained below, Assange's strategic deployment of them in different forums may not entirely be a duplicitous effort to mask a secret, radical intent. Their dual character suggests, however, that WikiLeaks hopes to provide more than simply a conventional means to further the widely shared goal of liberal democratic governance to which the more mainstream elements of the transparency movement aspire. In doing so, WikiLeaks aspires to serve as a far-reaching and original model for disclosure and for the relationship between states and their publics, and among citizens across nations in a networked world.

#### A. DISCLOSURE AS LIBERAL REFORM

Many advocates of transparency have not fully embraced WikiLeaks.<sup>78</sup> This is, in part, because the site provoked widespread outrage among elected officials and conservative commentators against unauthorized disclosures.<sup>79</sup> It also inadvertently assisted legislative efforts to tighten control on classified information, as it helped Republican opponents to stall efforts to reform the Whistleblower Protection Act at the end of the 112th Congress, and it provoked a potentially overbroad proposal to extend criminal liability under the Espionage Act to sites like WikiLeaks.<sup>80</sup> Besides

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76. See *infra* Part II.A.

77. See *infra* Part II.B.

78. See, e.g., John F. Moore, *WikiLeaks Is a Blow to Open Government*, GOV'T IN THE LAB (Nov. 28, 2010), <http://govinthelab.com/wikileaks-is-a-blow-to-open-government/> (fearing that the site would destroy the trust between government and its citizens and between different governments, which is necessary for transparency reform); *WikiLeaks Shines a Light on the Limits of Techno-Politics*, WHIMSLEY (Dec. 5, 2010), <http://whimsley.typepad.com/whimsley/2010/12/wikileaks-shines-a-light-on-the-limits-of-techno-politics.html> (discussing the difference in aims of transparency proponents, who seek to improve how government functions, and WikiLeaks, which seeks to make government operations more difficult); Anthony D. Williams, *Could WikiLeaks Set Back Open Government?*, ANTHONY D. WILLIAMS (Nov. 29, 2010), <http://anthonydwilliams.com/2010/11/29/could-wikileaks-set-back-open-government/> (worrying that the headway open-government advocates had made with government officials in terms of getting them to recognize the advantages of transparency might be lost as a result of WikiLeaks).

79. See Benkler, *supra* note 12, at 331–33.

80. See H.R. 6506, 111th Cong. (2010) (proposing to amend 18 U.S.C. § 798 (2006) to expand criminal liability for disseminating classified information); Robert Brodsky, *Whistleblower Protection Bill Dies Again, on the 1-Yard Line*, GOV'T EXECUTIVE (Dec. 23, 2010), <http://www.govexec.com/dailyfed/1210/122310rb1.htm>; Glenn Greenwald, *WikiLeaks Reveals More Than*

harming advocates' reform efforts, open-government proponents also found that the site's disclosures conflicted with their own attempts to advocate legal and administrative reform. In the wake of the *Collateral Murder* video's release, Steven Aftergood, who runs the Federation of American Scientists' widely respected Project on Government Secrecy, argued that the site's penchant for mass, mostly unedited disclosures of secret documents constituted a refusal to respect both the rule of law and the rights of private individuals to privacy and security.<sup>81</sup> Although he later softened his criticism as WikiLeaks began to redact personal information and collaborate with mainstream news organizations that were willing to consult with government agencies prior to disclosure, Aftergood continued to criticize the site for appearing more interested in defeating rather than fixing the classification system.<sup>82</sup> Like the transparency advocates with whom they frequently work on open-government issues, journalists and their advocacy organizations have also failed to embrace the site as one of their own.<sup>83</sup> At the same time, however, some members of the open-government community viewed WikiLeaks' success as a necessary response and counterweight to excessive government secrecy.<sup>84</sup> For Thomas Blanton, director of the National Security Archive at George Washington University, "[t]he only remedies that will genuinely curb leaks are ones that force the government to disgorge most of the information it holds rather than hold more information more

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*Just Government Secrets*, SALON (Nov. 30, 2010, 5:31 AM), [http://www.salon.com/2010/11/30/wikileaks\\_10/singleton/](http://www.salon.com/2010/11/30/wikileaks_10/singleton/) (discussing commentators who were outraged by WikiLeaks, some of whom called loudly for Assange's assassination).

81. Steven Aftergood, *WikiLeaks Fails "Due Diligence" Review*, SECRECY NEWS (June 28, 2010, 11:19 AM), [http://www.fas.org/blog/secrecy/2010/06/wikileaks\\_review.html](http://www.fas.org/blog/secrecy/2010/06/wikileaks_review.html).

82. *From One Transparency Advocate to Another: Transcript*, ON THE MEDIA (July 30, 2010), <http://www.onthemedialog.org/2010/jul/30/from-one-transparency-advocate-to-another/transcript/>.

83. Nancy A. Youssef, *In WikiLeaks Fight, U.S. Journalists Take a Pass*, MCCLATCHY (Jan. 9, 2011), <http://www.mcclatchydc.com/2011/01/09/106445/in-wikileaks-fight-us-journalists.html>.

84. See, e.g., Stephen Collins, *Open Government in a WikiLeaks World*, GOV'T TECH. REV. (Dec. 21, 2010), <http://www.govtechreview.com.au/news/open-government-in-a-wikileaks-world> ("[P]henomena such as Wikileaks are a symptom, rather than the disease itself. Wikileaks exists because of the failure of governments around the world to operate openly."); Ron Deibert, *The Post-Cablegate Era*, N.Y. TIMES (Dec. 11, 2010), <http://www.nytimes.com/roomfordebate/2010/12/09/what-has-wikileaks-started/after-wikileaks-a-new-era> ("WikiLeaks is only a symptom of a much larger phenomenon to which governments, businesses and individuals will all have to get accustomed. Our lives have been turned inside out by a digital world of our own spinning. We will need new rules, norms and principles to adjust to this new environment."); Alex Howard, *Is WikiLeaks Open Government?*, GOV 2.0 (Nov. 28, 2010, 2:13 PM), <http://gov20.govfresh.com/is-wikileaks-open-government/>; Jeff Jarvis, *WikiLeaks: Power Shifts from Secrecy to Transparency*, BUZZMACHINE (Dec. 4, 2010, 2:40 PM), <http://www.buzzmachine.com/2010/12/04/wikileaks-power-shifts-from-secrecy-to-transparency/> ("[I]n the internet age, power shifts from those who hold secrets to those [who] create openness. That is our emerging reality.").

tightly.”<sup>85</sup> But whether defending or criticizing WikiLeaks, transparency advocates have viewed the site as something decidedly unconventional and distinct from their own reformist efforts.

Nevertheless, in widely broadcasted or published interviews, Assange has frequently portrayed the site as a conventional, journalistic endeavor to make major public institutions, especially governments, more visible to the public.<sup>86</sup> In an opinion piece he published in a leading Australian newspaper at the height of the public controversy over the diplomatic-cable leaks, Assange offered a recognizably reformist explanation for the site’s work and its disclosure of government documents. The WikiLeaks method is essentially journalistic, he claimed—a form of “scientific journalism” that represents an advance over traditional media reporting.<sup>87</sup> As Assange wrote:

We work with other media outlets to bring people the news, but also to prove it is true. Scientific journalism allows you to read a news story, then to click online to see the original document it is based on. That way you can judge for yourself: Is the story true? Did the journalist report it accurately?<sup>88</sup>

In this telling, WikiLeaks’ essential goal is to reveal the state and other key institutions to the world—not only to the citizens who can hold public institutions directly accountable, but to everyone who is able to “see evidence of the truth.”<sup>89</sup> “[I]f we maximize the reliable, verified information about how the world is working,” Assange told an interviewer, “then we start to produce more sophisticated and intelligent structures that respond to the abuses in societies and also the opportunities there may be in society.”<sup>90</sup> The only limitation that WikiLeaks places on disclosure—one that it shares with most mainstream news outlets—is that it attempts to redact information or

85. *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 79 (2010) (statement of Thomas Blanton, Director, National Security Archive, George Washington University), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg63081/pdf/CHRG-111hhrg63081.pdf>.

86. This is true as well for Bradley Manning’s motives, at least to the extent they have been disclosed. See LEIGH & HARDING, *supra* note 12, at 84–87.

87. Julian Assange, *Don’t Shoot Messenger for Revealing Uncomfortable Truths*, AUSTRALIAN (Dec. 8, 2010, 12:00 AM), <http://www.theaustralian.com.au/in-depth/wikileaks/dont-shoot-messenger-for-revealing-uncomfortable-truths/story-fn775xjq-1225967241332>.

88. *Id.*

89. *About WikiLeaks*, *supra* note 4.

90. Harrell, *supra* note 31; see also Julian Assange on WikiLeaks, War and Resisting Government Crackdown, DEMOCRACY NOW! (Dec. 31, 2010), [http://www.democracynow.org/2010/12/31/julian\\_assange\\_on\\_wikileaks\\_war\\_and](http://www.democracynow.org/2010/12/31/julian_assange_on_wikileaks_war_and) (transcript of interview in which Assange explains that WikiLeaks’ “*modus operandi* . . . is to get out suppressed information into the public, where the press and the public and our nation’s politics can work on it to produce better outcomes”); Time’s *Julian Assange Interview*, *supra* note 70 (presenting Assange’s claim that transparency can “achieve a more just society” by allowing a more knowledgeable, engaged public to oppose “abusive plans or behavior”).

delay disclosure so as to minimize any harm that might foreseeably result from publication.<sup>91</sup>

Viewed this way, WikiLeaks' effort to cast itself as a journalistic enterprise does not appear to be simply a ruse to gain First Amendment protection.<sup>92</sup> The site wants to act, and to be seen as acting, as a medium of disclosure similar to the conventional legacy newspapers with whom it explicitly partnered in the diplomatic-cable disclosures. More pointedly, Assange describes WikiLeaks as part of the long-standing tradition of radical, truth-telling journalists, hearkening back to the English Civil War.<sup>93</sup> It aspires—at least in part—to perform what Assange describes as the essential role of the “Fourth Estate” within a liberal democracy:<sup>94</sup> investigator of fact, provider of scientific, true data to an inquiring public that will act on the truth it is presented, and compiler of the true historical record.<sup>95</sup> The public would thereby have access to authentic facts.<sup>96</sup> Deploying the classical, pervasive discourse of transparency advocacy, Assange's claims amount to an assertion that “WikiLeaks can enforce the human right to know, the right to speak, and, above all, the right to communicate information.”<sup>97</sup>

91. See Obrist, *supra* note 30; Richard Waters, *Online Leaks: A Digital Deluge*, FIN. TIMES (July 30, 2010, 10:06 PM), <http://www.ft.com/intl/cms/s/o/9098a06a-9c1c-11df-a7a4-00144feab49a.html#axzz1bkWjzeLA>.

92. On the question of whether the First Amendment applies to WikiLeaks, and the significance of this question, see Benkler, *supra* note 12, at 351–63; Mike Dorf, *WikiLeaks and the First Amendment*, DORF ON LAW (July 30, 2010, 12:47 AM), <http://www.dorfonlaw.org/2010/07/wikileaks-and-first-amendment.html>; see also Jack Goldsmith, *Why the U.S. Shouldn't Try Julian Assange*, WASH. POST (Feb. 11, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/10/AR2011021006324.html>.

93. See Julian Assange, *What's New About WikiLeaks?*, NEW STATESMAN (Apr. 14, 2011), <http://www.newstatesman.com/digital/2011/04/civil-war-wikileaks-newspapers>.

94. See Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 634 (1975) (identifying the term's derivation in the British liberalism of Thomas Carlyle and Edmund Burke to refer to “fourth institution outside the Government as an additional check on the three official branches”).

95. *WikiLeaks Is the Method We Use Towards Our Goal of a More Just Society: Assange*, HINDU (Apr. 13, 2011), <http://www.hindu.com/2011/04/13/stories/2011041357631300.htm>.

96. Ironically, Assange's popular-democratic vision of a scientific journalism free of interests and capable of appealing to public reason parallels that of the far more statist Progressive Era intellectual Walter Lippmann, who proposed creating independent intelligence bureaus to process information that would create a “valid picture” of the political environment. WALTER LIPPMANN, PUBLIC OPINION 379–97, 407–08 (Macmillan Co. 1949) (1922). Lippmann trusted experts far more than the radical democrat Assange, but both seek a fix that can provide the public access to the authentic truth of a knowable world. See WALTER LIPPMANN, LIBERTY AND THE NEWS 40 (Princeton Univ. Press 2008) (1920) (“[L]iberty is the name we give to measures by which we protect and increase the veracity of the information upon which we act.”).

97. Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 U. PITT. L. REV. (forthcoming 2012) (manuscript at 51 n.218) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1918154](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1918154)) (citing Obrist, *supra* note 30) (chronicling the “rights” approach to transparency advocacy, as enforceable by legal and technological means).

*B. DISCLOSURE AS RADICAL RESISTANCE*

The conventional narrative is not the only one Assange relates, however—it is only the more public one. As he developed the WikiLeaks site, Assange wrote several short posts and posted longer essays on his publicly available blog that offered a more radical understanding of transparency's potential and the political consequences of a major, never-ending series of leaks.<sup>98</sup> In this forum and others, Assange has elaborated an alternative theory of political information and a series of political positions that extend well beyond the liberal democratic theories upon which conventional transparency advocates rely and that traditional journalism has deployed.

In his most fully developed essay, *Conspiracy as Governance*, Assange writes that to “radically shift regime behavior . . . [w]e must understand the key generative structure of bad governance.”<sup>99</sup> Here, “regime” need not refer to a government entity, as “governance” is a broad enough term to encompass operational control and management practices of corporate as well as state entities.<sup>100</sup> He appears to intend the term to include anything from a superpower to an arm of the state and from a multinational financial firm to a small company or even a collective endeavor—any institution through which power flows and can be exercised against an individual.<sup>101</sup> The generative structure of bad governance, Assange argues, is “conspiratorial interactions among the political elite” that allow them to communicate means to maintain and strengthen their “authoritarian power.”<sup>102</sup> Conspiracies are “cognitive devices,” he explains, that operate by

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98. The best account of these writings is *Julian Assange and the Computer Conspiracy: “To Destroy This Invisible Government,”* ZUNGUZUNGU (Nov. 29, 2010, 9:05 AM), <http://zunguzungu.wordpress.com/2010/11/29/julian-assange-and-the-computer-conspiracy-“to-destroy-this-invisible-government”/> [hereinafter *Julian Assange and the Computer Conspiracy*]. See also Peter Ludlow, *Rethinking Conspiracy: The Political Philosophy of Julian Assange* (2010) (unpublished essay), available at <http://commonsenseatheism.com/wp-content/uploads/2010/12/Ludlow-Rethinking-Conspiracy-the-Political-Philosophy-of-Julian-Assange.pdf>.

99. JULIAN ASSANGE, *CONSPIRACY AS GOVERNANCE* 1, 1 (Dec. 3, 2006) [hereinafter *CONSPIRACY AS GOVERNANCE*], available at <http://cryptome.org/0002/ja-conspiracies.pdf>. That essay and another, JULIAN ASSANGE, *STATE AND TERRORIST CONSPIRACIES* (Nov. 10, 2006), are available as part of the same file on the Cryptome website. The former essay is a revision of the latter, written less than a month later, and is a more authoritative version of Assange's argument.

100. Thus, the definition extends to WikiLeaks' rumored release (as of December 2011) of documents stolen from an as-yet unnamed bank (long presumed to be Bank of America) and leaked to the site. See *The Leaky Corporation*, *ECONOMIST* (Feb. 24, 2011), <http://www.economist.com/node/18226961>. The release, Assange told *Forbes*, “will give a true and representative insight into how banks behave at the executive level in a way that will stimulate investigations and reforms, I presume.” Greenberg, *supra* note 72.

101. *Julian Assange and the Computer Conspiracy*, *supra* note 98.

102. *CONSPIRACY AS GOVERNANCE*, *supra* note 99, at 2.

accumulating, processing, and acting upon information.<sup>103</sup> They keep their strategies and plans secret from the public to avoid creating popular resistance and only allow them to be revealed when resistance is futile or incapable of overcoming “the efficiencies of naked power.”<sup>104</sup> Secrecy thus plays a necessary and central role in bad governance.

While concealing itself to those outside, a conspiratorial regime must nevertheless communicate internally. Each conspirator operates at a distinct position within the conspiratorial structure, with some more powerful and knowledgeable about the entire structure than others.<sup>105</sup> This dispersal of authority has the advantage of hindering attempts to destroy the state through the targeted removal of particular conspirators, whether by violent, legal, or political means; unless either all of the conspirators are removed or the links among all of the conspirators are severed, the conspiracy itself can survive.<sup>106</sup> Decentralization makes information exchange among members both more essential and more difficult. In order for the conspiracy to operate, those with more authority must be able to command those beneath them; but to the extent that the multiple lines of authority are complex and obscure, those commands cannot simply be spoken in face-to-face meetings.<sup>107</sup> A regime’s reliance on concealed communication is thus both a source of power and an unavoidable vulnerability. A conspiracy can devise and execute secret plans and orders, but its channels must be functional and secure.

For Assange, this vulnerability represents the best hope for resisting and ending the regime’s rule and its “bad governance.”<sup>108</sup> He calls for “*throttling* the conspiracy” by “constricting (reducing the weight of)” the most significant links (which he terms “high weight”) that “bridge regions” of the conspiratorial system.<sup>109</sup> A revolutionary movement—and indeed, Assange is calling here for overturning existing state apparatuses—may thus succeed through efforts to “*deceive* or *blind* a conspiracy by distorting or restricting the information available to it,” or through “unstructured attacks on links or through *throttling* and *separating*” the conspiratorial structure.<sup>110</sup> Destroy the

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103. *Id.* at 3.

104. *Id.* at 2.

105. *Id.* at 2–3.

106. *Id.* at 2–3.

107. As Assange explained in an interview with the BBC:

There is a reason why people write things down. Yes, you can organise a small group of people to do something with just word of mouth. But if you want to enact policy, for example, to get Guantanamo Bay guards to do something, get the grunts to do something, you’ve got to write it down or it will not be followed.

*Transcript: The Assange Interview*, BBC NEWS—TODAY (Dec. 21, 2010, 12:26 PM), [http://news.bbc.co.uk/today/hi/today/newsid\\_9309000/9309320.stm](http://news.bbc.co.uk/today/hi/today/newsid_9309000/9309320.stm).

108. CONSPIRACY AS GOVERNANCE, *supra* note 99, at 1.

109. *Id.* at 4.

110. *Id.* at 5.

regime's ability to communicate with itself or degrade the quality of the information that the regime processes and passes along, and the regime will no longer be able to rule as effectively and efficiently. Assange uses a metaphor that brings the "conspiratorial" state to life: "When we look at an authoritarian conspiracy as a whole, we see a system of interacting organs, a beast with arteries and veins whose blood may be thickened and slowed until it falls, stupefied; unable to sufficiently comprehend and control the forces in its environment."<sup>111</sup>

He has mixed his metaphors almost beyond intelligibility—shifting from removing links to thickening blood—but his basic point is clear: leaking is not merely a tool for reform but a weapon for resistance and a way to deprive authoritative institutions of their means to control their communications and subjugate their populations. In a now unavailable blog post written soon after he posted the *Conspiracy as Governance* essay, he explained:

The more secretive or unjust an organization is, the more leaks induce fear and paranoia in its leadership and planning coterie. This must result in minimization of efficient internal communications mechanisms (an increase in cognitive "secrecy tax") and consequent system-wide cognitive decline resulting in decreased ability to hold onto power as the environment demands adaption.

Hence in a world where leaking is easy, secretive or unjust systems are nonlinearly hit relative to open, just systems. Since unjust systems, by their nature induce opponents, and in many places barely have the upper hand, mass leaking leaves them exquisitely vulnerable to those who seek to replace them with more open forms of governance [sic].<sup>112</sup>

Stripped of its ability to control information, and therefore to operate as a conspiracy, the regime can no longer suppress the resistance it creates through its actions.<sup>113</sup> It will fall, and the people will finally be able to rule themselves.

Viewed in this light, the question of whether WikiLeaks' disclosures revealed anything meaningful or new about geopolitical or military strategy—part of the debate that has pervaded the aftermath of the

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111. *Id.*

112. Julian Assange, *The Non Linear Effects of Leaks on Unjust Systems of Governance*, IQ.ORG (Dec. 31, 2006). Assange apparently stopped posting at IQ.org in 2007, and the site is no longer operational. See <http://www.iq.org>. But this post is available at <http://cryptome.org/0002/ja-conspiracies.pdf>. For this and other posts from IQ.org, see also [http://www.anorak.co.uk/wp-content/uploads/assange-IQ.org\\_.pdf](http://www.anorak.co.uk/wp-content/uploads/assange-IQ.org_.pdf).

113. See CONSPIRACY AS GOVERNANCE, *supra* note 99, at 5.

Afghanistan, Iraq, and diplomatic-cable releases<sup>114</sup>—is less important than the fact that diplomats, military leaders, and other mid- to high-level government officials can no longer assume that their off-record, secretive communications among themselves can remain confidential.<sup>115</sup> The *quality* of the information leaked proves less significant, in other words, than the *quantity* of the documents leaked. At the height of their threat thus far, the WikiLeaks releases have appeared as the first wave of an oncoming disclosure torrent, with their breathtaking number of leaked documents coupled with the ongoing threat of more documents to be released in the near future and more leaks to come, and the possibility that yet more sites will be created that will provide safe harbor for even more leaks. The content of disclosed documents still matters—leaking the doodles of low-level functionaries would not shake the conspiracy’s communicative capabilities—but only as a means to the larger end of regime change, which occurs as a result of the act of torrential disclosure. Disclosure’s effects, for Assange, constitute a mortal threat to conspiratorial, institutional authority.

Given the radical nature of these arguments, it is certainly possible that Assange’s reformist statements were a rhetorical strategy for public consumption. They may have been intended to persuade mainstream media to collaborate with WikiLeaks and to assure charitable foundations and other potential sources of funding that the site was no more radical than any emerging idea or technology. The site’s self-portrayal as a truth-telling, journalistic medium might also have been a clever legal strategy—a way of appearing to function like a traditional news outlet worthy of traditional First Amendment protections. There is evidence that Assange was partially motivated by those concerns, and a recent profile suggests that many of his, and the site’s, well-calculated, domesticated statements were more strategic than heartfelt.<sup>116</sup>

Nevertheless, Assange occasionally has explained his seemingly disparate and conflicting goals in two ways that reconcile the tension between these approaches. First, in a 2009 interview, he noted three separate audiences for the documents that WikiLeaks exposes: (1) the

114. See *infra* Part III.C.1–2.

115. SLAVOJ ŽIŽEK, *LIVING IN THE END TIMES* 408–09 (rev. ed. 2011); *Julian Assange and the Computer Conspiracy*, *supra* note 98. In an essay intended to dismiss WikiLeaks’ importance, Umberto Eco concedes this point, noting that even an “empty secret” whose content is widely known can cause “irreparable damage” to those who thought they controlled access to the secret. Umberto Eco, *Not Such Wicked Leaks*, PRESSEUROP (Eric Rosencrantz trans., Dec. 2, 2010), <http://www.presseurop.eu/en/content/article/414871-not-such-wicked-leaks>.

116. See *WikiLeaks:Strategy*, WIKILEAKS, <http://www.wikileaks.ch.nyud.net/wiki/WikiLeaks:Strategy> (last visited Dec. 24, 2011) (declaring that the site should not “alienate” transparency and anticorruption groups and the organizations that fund them “without good cause,” even if those groups tend to be more conservative than WikiLeaks). See *generally* Manne, *supra* note 12, at 30 (quoting internal WikiLeaks documents in which Assange states that the site must disguise its radical nature).

general public, who, should they notice, understand, and respond to the document, can influence or animate legal reform; (2) those with expertise in the issues raised by the documents, such as law enforcement or competitors who can hold accountable any illegal or immoral behavior; and (3) the organization and individuals creating the documents, whose conspiracy will collapse as a result of the distrust and fear that disclosure will create.<sup>117</sup> Assange's different theories, in other words, are not mutually exclusive but instead predict different responses to information.

Second, and related, his theories also predict different potential effects. As he explained to an editor at *Time*, if the behavior of

organizations which are abusive and need to be [in] the public eye . . . is revealed to the public, they have one of two choices: one is to reform in such a way that they can be proud of their endeavors, and proud to display them to the public. Or the other is to lock down internally and to balkanize, and as a result, of course, cease to be as efficient as they were. To me, that is a very good outcome, because organizations can either be efficient, open and honest, or they can be closed, conspiratorial and inefficient.<sup>118</sup>

Faced with total disclosure, the state has two choices: reform or face public upheaval. A state must operate as an optimal, open liberal democracy, or else WikiLeaks and its colleagues and competitors will create the conditions for regime change by imposing the total transparency that will destroy the state's ability to conspire—and therefore to exist. Characterized this way, Assange's seemingly conflicting theories constitute what Finn Brunton has called a "two-tier strategy" that combines a Habermasian ideal of the public's capacity to engage in rational action and logical speech with a more radical, technological threat to disrupt the authoritarian state.<sup>119</sup> Disclosure and its effects serve as the catalyst for both approaches.

Assange has somewhat complicated this model of disclosure's direct effects, however, by recognizing that the political and social conditions within which disclosure occurs inevitably shape its effects. This is true of both the process by which the public is enlightened and the context in which a political regime can change or be changed.

He has first cautioned against a simple understanding of disclosure by recognizing the difficult task he has faced in reaching the public with his disclosures and method. Frustrated with the emerging media with which

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117. See Becky Hogge, *News of the World, Media Cartels and the Fiscalisation of Power: 2009 Interview with Julian Assange*, BAREFOOT TECHNOLOGIST (July 27, 2011), [http://barefootintocyberspace.com/2011/07/27/assange\\_transcript/](http://barefootintocyberspace.com/2011/07/27/assange_transcript/).

118. *Time's Julian Assange Interview*, *supra* note 70.

119. Finn Brunton, *Keyspace: WikiLeaks and the Assange Papers*, RADICAL PHIL., Mar./Apr. 2011, at 8, 13, available at <http://www.radicalphilosophy.com/commentary/keyspace-wikileaks-and-the-assange-papers>.

WikiLeaks is frequently associated, Assange has condemned blogs and other forms of social media for their failure to procure or produce significant information or add value or insight to the information on which they comment. He learned from WikiLeaks' earlier releases that he could not depend solely on the radical possibility of crowd-sourcing and amateur bloggers to process and make sense of the site's authentically sourced documents.<sup>120</sup> The "scientific journalism" that WikiLeaks produces demands the objective truth of fact and authentic documents; social media merely produces and reiterates opinion within closed circles of the like-minded.<sup>121</sup> Having reached this conclusion, Assange decided to work closely with the mainstream media that could contextualize, explain, and publicize the documents' complex content, while WikiLeaks made the raw documents available on the WikiLeaks site and its mirror sites.<sup>122</sup> In an ironic twist, then, the revolutionary project that sought to expose the conspiratorial state could not rely upon the online cognoscenti and multitudes to inform themselves and the mass, nascent public. Instead, WikiLeaks chose to collaborate with the traditional Fourth Estate, itself a set of institutions that constitute, in Assange's view, part of a broader network of linked conspirators governing the people, often undemocratically and unaccountably. This reformist move represented either a sellout, something of which Assange and WikiLeaks have been accused,<sup>123</sup> or a brilliant tactic of turning a tool of power into a weapon of the weak. Assange's relationship with the institutional press, which was never collegial, has since eroded to the point at which he appeared, by the fall of 2011, to embrace unredacted, mass disclosures and the crowd-sourcing and unorganized investigative follow-up that he had eschewed less than two years earlier.<sup>124</sup> Either way, Assange had learned that

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120. See Julian Assange, *The Hidden Curse of Thomas Paine*, GUERNICA (Apr. 29, 2008), [http://www.guernicamag.com/blog/571/the\\_hidden\\_curse\\_of\\_thomas\\_pai/](http://www.guernicamag.com/blog/571/the_hidden_curse_of_thomas_pai/); Obrist, *supra* note 26.

121. Manne, *supra* note 12, at 33; see also *WikiLeaks:Big Picture*, WIKILEAKS, [http://wikileaks.ch.nyud.net/wiki/WikiLeaks:Big\\_picture](http://wikileaks.ch.nyud.net/wiki/WikiLeaks:Big_picture) (last visited Dec. 24, 2011).

122. *Julian Assange in Berkeley*, ZUNGUZUNGU (Dec. 12, 2010, 5:53 PM), <http://zunguzungu.wordpress.com/2010/12/12/julian-assange-in-berkeley/> (transcript of Assange's participation in an academic forum at Berkeley in which he complained that bloggers and the like write largely to gain status for themselves among their peer groups; as a result, they "don't give a fuck about the material" and fail to perform follow-up investigations into the information the disclosed documents reveal); see also *Time's Julian Assange Interview*, *supra* note 70 (describing the process by which social media merely amplify and publicize stories, while WikiLeaks and major newspapers perform the "bulk of the heavy lifting" on the documents).

123. McCullagh, *supra* note 20; John Young, *Wikileaks Stoned Again*, CRYPTOME (Feb. 18, 2011), <http://cryptome.org/0003/wikileaks-stoned.htm>.

124. Peter Finocchiaro, *Breakdown: The New WikiLeaks Scoops*, SALON (Sept. 1, 2011, 3:20 PM), [http://www.salon.com/news/feature/2011/09/01/wikileaks\\_revelations](http://www.salon.com/news/feature/2011/09/01/wikileaks_revelations); Greg Mitchell, *The Return of the WikiLeaks News & Views Blog!*, NATION (Sept. 2, 2011, 1:30 PM), <http://www.thenation.com/blog/163126/return-wikileaks-news-views-blog>. The new crowd-sourcing method, as of September 2011, relied on Twitter postings. See Finocchiaro, *supra*.

raw disclosure by itself could not directly affect the public.<sup>125</sup> To have effects, and especially to have specific, desired effects, disclosures require context and background, as well as wide distribution.

Assange's second cautionary note to his otherwise optimistic theory of disclosure's potential to affect democracy and the state is his recognition that disclosure will affect different states and publics differently. Western societies, Assange argues, have been "fiscalised"—a term he fails to define precisely, but which seems to imply a fairly traditional leftist critique of neoliberalism.<sup>126</sup> The critique views Western democracies as offering formal political and economic freedom with a minimal state whose narrow focus on the protection of property and contract rights, free markets, and free trade allows large multinational corporations and enterprises to make most significant economic and social decisions.<sup>127</sup> It also views the mass public as largely disengaged from a putatively democratic state, both because the locus of power has shifted away from politically accountable institutions and because the public has been seduced by the material pleasures of a consumer economy and the empty sensations of popular entertainment.<sup>128</sup> "In such an environment," Assange has argued, "it is easy for speech to be 'free' because a change in political will rarely leads to any change in the[] basic instruments [of power]."<sup>129</sup> In authoritarian states like China, by

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125. One means of avoiding this trap is to help build nonprofit investigative journalist networks, something that WikiLeaks has begun to establish in Brazil. See Tadeu Breda, "We Will Continue Working Even if Julian Assange Is in Jail": Natalia Viana, Independent Collaborator of WikiLeaks in Brazil, Speaks on the Organization's Ability To Transform the Core Principles of Journalism, NARCO NEWS BULL. (May 22, 2011), <http://www.narconews.com/Issue67/article4417.html>; Natalia Mazotte, WikiLeaks Announces Partnership with Brazilian Investigative Journalism Center, JOURNALISM AM. BLOG (June 24, 2011, 16:43), <http://knightcenter.utexas.edu/blog/wikileaks-announces-partnership-brazilian-investigative-journalism-center>.

126. See *Julian Assange Answers Your Questions*, GUARDIAN (Dec. 3, 2010, 08:45 EST), <http://www.guardian.co.uk/world/blog/2010/dec/03/julian-assange-wikileaks>; LEIGH & HARDING, *supra* note 12, at 56–57 (describing Assange's ties to "anti-capitalist radicals" as well as to the "geeky hacker underground").

127. Compare *Julian Assange Answers Your Questions*, *supra* note 126 ("The west has fiscalised its basic power relationships through a web of contracts, loans, shareholdings, bank holdings and so on."), and Time's *Julian Assange Interview*, *supra* note 70 ("[I]n the United States to a large degree, and in other Western countries, the basic elements of society have been so heavily fiscalized through contractual obligations . . ."), with DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005) (defining a neoliberal state and society as "an institutional framework characterized by strong private property rights, free markets, and free trade").

128. See, e.g., *WikiLeaks: Strategy*, *supra* note 116 (dismissing the "merely superficial democracy" offered by American politics and "the US promise of neocorporatism (better shopping)"); see also Manne, *supra* note 12, at 27 ("[Assange] regards power in western society as belonging to political and economic elites offering a counterfeit conception of democracy and a soul-destroying consumption culture. He points out that when the American colonists waged their struggle for independence there was no talk of shopping or even democracy. Such shallow ideas could not stir the passions.").

129. *Julian Assange Answers Your Questions*, *supra* note 126; see also Time's *Julian Assange Interview*, *supra* note 70 (stating that in fiscalized countries like the United States, "political

contrast, disclosure is more likely to affect the state and its citizens. In this environment, the disclosure of state actions might spur citizens to revolt; indeed, these states' active censorship betrays their fear of dissenting political speech, especially if buoyed by disclosure of their secrets.<sup>130</sup> The stakes of disclosure's effects rise, in other words, for states that are less "fiscalized" and more explicitly authoritarian and secretive.<sup>131</sup> This distinction matters to both of Assange's theories: reform and radical change will each be more difficult to accomplish in Western democracies, where political change seems not to affect the underlying political economy, than, for example, in China, where a challenge to state authority can lead both to state reforms and revolution.<sup>132</sup> Disclosure will still have effects, in other words, but these effects will vary across nations and across time.

### III. DISCLOSURE'S EFFECTS: WIKILEAKS IN LAW AND ACTION

Laws regulating public access to government information rely upon a balance between the presumed necessity that the state may keep some information secret and the equally presumed necessity that the public must have access to government information.<sup>133</sup> WikiLeaks, whose theories of disclosure are based on the latter and ignore the former, profoundly challenges this balance. As the Bank Julius Baer episode illustrated,<sup>134</sup> WikiLeaks' vigilante disclosures—released via immediate, relatively costless, and seemingly unstoppable digital distribution, and made more formidable by the threat that they will serve as a model for others—strain the hold that the U.S. (and all nation states) has over the flow of classified government information. The state can criminally prosecute WikiLeaks' members and others postdisclosure, but in doing so it must suffer disclosure's effects—effects that transparency as a concept and set of legal doctrines assumes can be at least roughly predicted and measured.

That assumption, one that WikiLeaks itself shares, is the subject of this Part. The first section proceeds by describing the balancing test in general, and the second section briefly summarizes the most prominent law that

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change doesn't seem to result in economic change, which in other words means that political change doesn't result in change"). The concept seems also to concern class and ownership of the means of production. See, e.g., Obrist, *supra* note 26 ("[I]t doesn't matter what information is published. It's not going to change who owns what or who controls what.").

130. See *Julian Assange Answers Your Questions*, *supra* note 126 ("In states like China, there is pervasive censorship, because speech still has power and power is scared of it."); Time's *Julian Assange Interview*, *supra* note 70 ("[J]ournalism and writing are capable of achieving change [in China], and that is why Chinese authorities are so scared of it.").

131. *Julian Assange Answers Your Questions*, *supra* note 126; Time's *Julian Assange Interview*, *supra* note 70.

132. Time's *Julian Assange Interview*, *supra* note 70 ("[J]ournalism and writing are capable of achieving change [in China], and that is why Chinese authorities are so scared of it.").

133. See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 910-14 (2006).

134. See *supra* text accompanying notes 55-59.

would apply to WikiLeaks—prosecution under the Espionage Act for the release of classified national-security information and a First Amendment claim in defense. Transparency’s balance requires courts to presume both the executive branch’s ability to manage and classify information correctly and courts’ ability to fairly and accurately weigh the competing interests between secrecy and disclosure. The third section sketches out what we know, at the time of this writing, about the effects that WikiLeaks’ disclosures have had. Neither of this Part’s latter two sections is intended as an authoritative statement of a complex set of laws and events relating to WikiLeaks; rather, the two sections work together to deduce the legal standards that our prevailing theory of transparency has established and to note the extent to which those standards’ incoherence and the impossibility of a meaningful application are revealed by the challenge WikiLeaks presents.

#### A. *TRANSPARENCY’S BALANCE*

As a theoretical concept, “transparency” weighs two sets of opposing, mutually exclusive interests. On the one hand, theories of transparency emphasize the normative democratic ideal of a deliberative, engaged public and the consequentialist ideal of a responsible, accountable government that will result from a visible state;<sup>135</sup> on the other hand, transparency theories in the American context also recognize the normative constitutional ideal of a tripartite system in which a semiautonomous President can perform his delegated duties without the interference of Congress and the judiciary (who are themselves free from executive branch interference), as well as the consequentialist ideal of an effective, efficient state that can protect the nation and public from external and internal threats by controlling access to its own deliberations and to sensitive information.<sup>136</sup> Easy cases raise few issues to balance: the disclosure of advanced military technologies, current troop movements and similar operative war plans, and the identities of intelligence sources all pose such clear and immediate dangers to the state that the law requires no balancing. In difficult cases, however, the resulting dualism between transparency’s costs and benefits invites an endless struggle over transparency and its limitations, as the thrust of powerful arguments in favor of broad disclosure requirements continually meet the parry of powerful counterclaims for limitations on disclosure.

The laws that flow from this conceptual coupling recognize broad rights and duties for openness and limit them with exceptions from disclosure that are frequently read broadly by the executive branch and judiciary, especially when the government can make a plausible claim that disclosure would

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135. Fenster, *supra* note 133, at 895–902.

136. *Id.* at 902–10.

place national security, law enforcement, or individual privacy at risk. The constitutional doctrine of executive privilege, for example, protects communications between the President and his advisers from disclosure, but courts must balance that privilege against competing political, legal, and social concerns that require the release of information.<sup>137</sup> Statutory disclosure requirements share this approach. In enacting FOIA, Congress attempted to establish a “general” or “broad” philosophy of openness while respecting “certain equally important rights” and “opposing interests” that are difficult but “not . . . impossible” to balance.<sup>138</sup> It tried to set a framework for courts to achieve this balance by establishing a series of enumerated exemptions to disclosure requirements that would allow some types of information to remain outside of the public’s view.<sup>139</sup> Conflicts between disclosure and secrecy are thus resolved in difficult cases by the administrative and judicial application of statutory provisions or regulations that call for adjudicators either to explicitly balance the two interests or to enforce statutes that incorporate this balance in their structure.

Like all efforts to balance abstract ideals and goals in constitutional and public law, laws regulating the disclosure of public information attempt to require the state to evaluate these competing interests carefully and weigh them comparatively. Critics complain that balancing tests applied by courts constitute an adjudicatory evasion—a judicial “method” that refuses principled rules in favor of an inappropriate and unprincipled weighing of abstract, indeterminate interests that are fundamentally incommensurable.<sup>140</sup> Their ad hoc nature makes them vulnerable to the whim and ideology of the judiciary; the results that they produce can seem precarious, random, and even idiosyncratic. They transform the judiciary into an explicitly political actor that resolves fundamental and contested questions of social policy.<sup>141</sup> At the same time, as they age, balancing tests appear to become routine and even mindless—a rote process by which interests are

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137. See, e.g., *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 452–53 (1977) (citing the need to realize the public benefits of preserving the former presidents’ archival materials for legitimate historical and government purposes); *United States v. Nixon*, 418 U.S. 683, 711–12 (1974) (citing the need for the “fair administration of . . . justice” to criminal defendants).

138. *EPA v. Mink*, 410 U.S. 73, 80 n.6 (1973) (quoting S. REP. NO. 89-813, at 3 (1965)).

139. 5 U.S.C. § 552(b)(1)–(7) (2006). Some exceptions to balancing exist, especially where Congress has universally exempted certain types of documents by rule. See § 552(b)(3) (exempting matter that is “specifically exempted from disclosure by statute” under certain conditions); Jennifer LaFleur et al., *FOIA (b)(3) Exemptions*, PROPUBLICA (Mar. 10, 2010), <http://projects.propublica.org/foia-exemptions/> (interactive list of (b)(3) exemptions, with information about how frequently agencies rely on them in refusing disclosure).

140. See *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment); Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 4–5 (1987).

141. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 984–86 (1987).

invoked but rarely considered in any meaningful way.<sup>142</sup> Such complaints assert that balancing tests operate without clear conceptual grounding. They are inadequate efforts to resolve foundational metaphysical disputes.

But they exist for a reason. In areas of law where no consensus exists among legislators, courts, and the public about a preferable rule, a reasonably effective balancing test may at least correctly identify the interests for courts to balance and the means to evaluate those interests, even if it remains imperfect and imprecise.<sup>143</sup> In some instances, those who interpret constitutional provisions or draft laws or regulations may understandably prefer to devise a balancing test than to construct clear-sounding, mechanical-seeming doctrines. Viewed this way, balancing tests' imprecision and "ad hocery" may either be an optimal method or the best of a series of unsatisfactory approaches to resolve difficult disputes.

The arguments in balancing tests' favor explain why the various constitutional and statutory legal regimes that regulate disclosure of government information seem inevitably to balance the contested normative and consequential elements of transparency theory. If these elements cannot be resolved in the abstract, then a doctrine needed to adjudicate complex disputes must at least appear as though it can do so, even if it fails to satisfy those who lose an individual case as well as those who long for a permanent solution consistent with their preferences. As explained in the next section by using the example of legal efforts to stop WikiLeaks, the measure that transparency laws most typically use to weigh interests considers disclosure's anticipated effects. The issue in this context, then, is whether balancing tests' logic as a means to resolve contested political issues can be satisfactorily applied when reduced and made operational through the method of anticipating and evaluating disclosure's effects as a means to determine legal outcomes.

B. *THE CLASSIFICATION SYSTEM, THE ESPIONAGE ACT, AND DISCLOSURE'S EFFECTS*

The classification system provides the taxonomic logic for the federal government's protection of highly sensitive information. It works merely as an administrative organizational process, rather than as a basis for criminal or civil liability,<sup>144</sup> although any prosecution of individuals who misuse or disclose such classified information without authority will inevitably build on the information's classification. The potential liability for disclosure agents like WikiLeaks thus begins with the classification system and the implicit assumptions it makes about information's inherent power to harm.

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142. See Pierre Schlag, Commentary, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1080 (2002).

143. See Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 82–83 (1997).

144. See, e.g., Exec. Order No. 13,526, *supra* note 6, § 4.1 (outlining the general restrictions on access to classified documents but providing no penalties for violations).

The government has long sought to restrict access to particular types of information, especially those related to national security.<sup>145</sup> The current bureaucratic system, with its various levels of classification and employee access to it, dates to the Cold War-era expansion of the military, the intelligence agencies, and those agencies overseeing the production and regulation of nuclear energy.<sup>146</sup> Beginning in 1940, nearly every President has issued an executive order that establishes the somewhat different approach each administration has taken to classification.<sup>147</sup> The classification system works by a relatively simple logic and process. A document is “classified” by level based on the anticipated effects of its unauthorized disclosure. The three levels are defined in the current executive order as follows: “‘Top Secret’ shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause *exceptionally grave* damage to the national security”; “[s]ecret” information could reasonably be expected to “cause *serious* damage” if disclosed without authorization; and “[c]onfidential” information could reasonably be expected simply to “cause damage” if disclosed without authorization.<sup>148</sup> Individuals are sorted in two ways: first, by their authority to classify, based upon a direct delegation of such authority or their location within the organizational chart of the agency in which they are located;<sup>149</sup> and second, by the extent of their access to particular levels of classified documents, based on their authorization (or “clearance”) to have access and their need to know the information.<sup>150</sup> Those with the authority to classify must be trained to evaluate the effects of disclosure;<sup>151</sup> those with access to classified information are those whom the government has decided will not endanger the national security as a result of their access.<sup>152</sup>

The system thus appears to offer a mechanical means to segregate communicative documents both within the federal bureaucracy and from those outside it. It quarantines the most threatening information through measures that increase security as the classification level proceeds upward

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145. Richard C. Ehlke & Harold C. Relyea, *The Reagan Administration Order on Security Classification: A Critical Assessment*, 30 FED. B. NEWS & J. 91, 91–92 (1983).

146. See JAMES RUSSELL WIGGINS, FREEDOM OR SECRECY 99–103 (rev. ed. 1964); Ehlke & Relyea, *supra* note 145, at 92–93.

147. See ARVIN S. QUIST, SECURITY CLASSIFICATION OF INFORMATION: INTRODUCTION, HISTORY, AND ADVERSE IMPACTS ch. 3 (rev. ed. 2002), available at [http://www.fas.org/sgp/library/quist/chap\\_3.html](http://www.fas.org/sgp/library/quist/chap_3.html); see, e.g., Exec. Order No. 13,526, *supra* note 6 (currently applicable executive order issued by President Obama).

148. Exec. Order No. 13,526, *supra* note 6, § 1.2(a)(1)–(3) (emphasis added).

149. *Id.* § 1.3(a), (d) (defining classification authority); *id.* § 2.1 (defining “derivative” classification authority).

150. *Id.* § 4.1 (defining general restrictions on access to classified documents).

151. See *id.* § 1.3(d) (requiring training of those with original classification authority).

152. See *id.* §§ 1.3(a), 2.1.

toward “Top Secret.”<sup>153</sup> FOIA, in turn, secures classified documents from disclosure to the public until such time as they are declassified.<sup>154</sup> As the Director of Classification Management for the Department of Defense declared in the first article in the first issue of the journal *Classification Management* (the publication of the then-newly formed National Classification Management Society) in 1965, “[t]he single most important function of central management is considered to be to achieve uniform, consistent, and correct classifications in the first instance.”<sup>155</sup>

It is unclear if the new class of professional information managers of the journal ever met such lofty goals. But there is broad consensus that the classification system is currently a mess and has been for decades.<sup>156</sup> Too many documents are classified, securing those documents is too costly, and the classification system resists reform; at the same time, various military and intelligence agencies, and the presidential administrations that oversee them, allow—or even encourage—the expansion of classification authority throughout the bureaucracy and an increase in the number of classified documents.<sup>157</sup> A full accounting of the system’s history and operations, as well as the efforts to reform it, is well beyond the scope of this Article.<sup>158</sup> Instead, I simply want to note that the classification system constitutes a form of information control—or, as Daniel Moynihan characterized it, informational regulation<sup>159</sup>—through which the executive branch and its

153. See *id.* § 1.2(a).

154. 5 U.S.C. § 552(b)(1) (2006) (exempting from disclosure under FOIA documents that are “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order”); Exec. Order No. 13,526, *supra* note 6, § 1.5 (providing time limits for the duration of classification); *id.* §§ 3.1–7 (discussing the process of declassification). Information that is not classified (or declassified) does not fall within one exemption from disclosure under FOIA, 5 U.S.C. § 552(b)(1), although it may fall within another exemption or be made exempt from disclosure under another statute.

155. George MacClain, *The Road Ahead*, in 1 CLASSIFICATION MGMT. 6, 6 (1965), available at <http://www.fas.org/sgp/library/ncms/v1n1.pdf>.

156. See Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL’Y REV. 399, 399–401 (2009) (discussing the current state of the classification system).

157. S. DOC. NO. 105-2, at 1–2 (1997); *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the Subcomm. on Nat’l Sec., Emerging Threats & Int’l Relations of the H. Comm. on Gov’t Reform*, 108th Cong. 23 (2004), available at <http://www.gpo.gov/fdsys/pkg/CHRG-108hhrg98291/pdf/CHRG-108hhrg98291.pdf> (statement of J. William Leonard, Director, Information Security Oversight Office, National Archives and Records Administration) (conceding that “[i]t is no secret that the government classifies too much information” and complaining that “some individual agencies have no idea how much information they generate is classified”); see also Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 133–34 (2006).

158. For fuller discussions, see Aftergood, *supra* note 156, at 401–11; Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 240–43 (2008); Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 OHIO N.U. L. REV. 451, 452–61 (2004).

159. DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* 59 (1998).

myriad agencies with classification authority attempt to keep documents secret. Using their loosely delegated authority to classify, agency bureaucracies operate within a system of secret production that Edward Shils described as “the compulsory withholding of knowledge, reinforced by the prospect of sanctions for disclosure.”<sup>160</sup> Significantly, the withholding of knowledge (as well as, derivatively, sanctions for willfully revealing that information) is based upon the prediction, by duly authorized government employees, of disclosure’s effects.

The most prominent criminal law prohibiting the dissemination of classified information is the Espionage Act of 1917,<sup>161</sup> which criminalizes or prohibits dissemination by those with or without lawful possession and access to the information.<sup>162</sup> The statute appears to sweep broadly to impose criminal sanctions on disclosure,<sup>163</sup> but it is inherently limited in its application by First Amendment protections for free speech and a free press.<sup>164</sup> Together, the broad criminal sanctions against disclosure and the broad constitutional protections against state efforts to limit speech require courts to ask whether, in the words of Geoffrey Stone’s recent restatement of the law, “the value of the disclosure to informed public deliberation outweigh[s] its danger to the national security.”<sup>165</sup> Stone’s balance metaphor/method reflects the general judicial approach.<sup>166</sup> He undertakes

160. EDWARD A. SHILS, *THE TORMENT OF SECRECY: THE BACKGROUND AND CONSEQUENCES OF AMERICAN SECURITY POLICIES* 26 (Ivan R. Dee 1996) (1956).

161. Act of June 15, 1917, ch. 30, 40 Stat. 217 (codified as amended at 18 U.S.C. §§ 793–94 (2006)). Other statutes might also apply in individual cases. For comprehensive discussions of the full statutory framework, see Papandrea, *supra* note 158, at 274–77; Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL’Y REV. 219, 228–31 (2007).

162. 18 U.S.C. § 793(d)–(e).

163. Sections 793(d) and (e) of the Espionage Act both create criminal liability for anyone who either lawfully possesses or otherwise obtains information related to the national defense and who

willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it.

§ 793(d); § 793(e) (using nearly identical language).

164. U.S. CONST. amend. I, cl. 2.

165. STONE, *supra* note 3, at 2.

166. The balance metaphor appeared in the most recent reported decision in a criminal prosecution under the Espionage Act, where the court summarized the key issue in evaluating a First Amendment defense:

Defendants’ First Amendment challenge exposes the inherent tension between the government transparency so essential to a democratic society and the government’s equally compelling need to protect from disclosure information that could be used by those who wish this nation harm. In addressing this tension, it is important to bear in mind that the question to be resolved here is not whether

a heroic effort to sort the fine grains that belong on each side of the scale, providing a roadmap that purports to bring a somewhat complicated order to an unwieldy and underdeveloped set of doctrines.<sup>167</sup> Nevertheless, balancing two utterly vague, incommensurate legal standards is at best a speculative undertaking—as the seminal scholarly treatment of the Espionage Act published nearly forty years ago described the effort, “[A]d hoc evaluations of executive claims of risk are not easily balanced against first amendment language and gloss.”<sup>168</sup>

Nevertheless, courts must try. The balancing approach requires courts to evaluate and balance claims about national security dangers, the unknown consequences of censoring the defendant (including chilling investigative journalism and whistle-blowing), and the risk to a democratic system of an uninformed public. They must comprehend and anticipate the risks created by the defendant’s disclosure and imagine a counterfactual world in which the disclosure did not exist. They must, in sum, estimate disclosure’s unknowable effects without the omnipotence either to isolate the effects that have occurred or to predict future ones.

### C. WIKILEAKS’ UNCERTAIN EFFECTS

The complex nature of the WikiLeaks disclosures, as well as the international geopolitical world through which they have flowed, demonstrates the impossibility of exercising such omniscience in determining their effects in hard cases. It is difficult, if not impossible, to find any clear or meaningful pattern of effects caused by such a broad set of documents that would help determine whether the balance of interests tips in favor of secrecy or disclosure. In addition, the presence or absence now of relatively short-term effects does not preclude the later manifestation of long-term effects or the disappearance of earlier impacts. Below, I briefly identify and evaluate five potential effects that have been discussed extensively by government officials and commentators and reported on by the press and in other open sources. Three concern the state’s interest, as

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[the Espionage Act] is the optimal resolution of this tension, but whether Congress, in passing this statute, has struck a balance between these competing interests that falls within the range of constitutionally permissible outcomes.

United States v. Rosen, 445 F. Supp. 2d 602, 629 (E.D. Va. 2006). As Justice Frankfurter characterized this balance more generally in an oft-cited passage:

The demands of free speech in a democratic society as well as the interest in national security are better served by a candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

Dennis v. United States, 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring).

167. STONE, *supra* note 3.

168. Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 932 (1973).

recognized in the transparency balancing test, in limiting the adverse effects of disclosure: (1) the claim that the disclosures cost the lives of American military personnel and of their allies in Iraq and Afghanistan; (2) the claim that they will affect diplomatic relations between the U.S. and other nations; and (3) the claim that they will harm the flow of information among units of the American military, intelligence agencies, and State Department. The other two potential effects concern the public interest in disclosure: (4) the claim—rarely made explicitly, interestingly enough—that the disclosures have enlightened and enlivened the American public; and (5) the claim that they have played significant roles in inspiring or encouraging the democratic movements in North Africa and the Middle East to overthrow long-standing corrupt and authoritarian rulers. I consider these in turn.

One final note: It is quite possible that what follows excludes evidence that would lead to a certain conclusion; it is equally possible that it does not account for effects that themselves have been classified for some strategic or military purpose.<sup>169</sup> My goal, however, is not to persuade the reader that my own uncertain conclusions about these effects are correct. Rather, it is to persuade you that *any* conclusion about disclosure's strong effects, whether good or bad, is likely to be—and ought to be—contentious. The government can and will claim that disclosure is dangerous, and transparency advocates can and will claim that disclosure is beneficial. At least to date, based on a review of open sources, both claims about WikiLeaks appear tendentious at best.

### 1. WikiLeaks' Direct Effects on Military Operations

Military officials made numerous allegations in the aftermath of the Afghanistan releases about the immediate and likely future effects of the disclosures on American military operations.<sup>170</sup> The allegations seemed

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169. See LEIGH & HARDING, *supra* note 12, at 8–10 (noting the complexity of evaluating the harms and benefits of WikiLeaks releases).

170. Immediately after the first major document release regarding Afghanistan, the Chairman of the Joint Chiefs of Staff declared that “Mr. Assange can say whatever he likes about the greater good he thinks he and his source are doing . . . . But the truth is they might already have on their hands the blood of some young soldier or that of an Afghan family.” Greg Jaffe & Joshua Partlow, *Joint Chiefs Chairman Mullen: WikiLeaks Release Endangers Troops, Afghans*, WASH. POST (July 30, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/29/AR2010072904900.html> (internal quotation marks omitted) (quoting Admiral Mike Mullen, Chairman of the Joint Chiefs of Staff). Less than a week later, the Pentagon press secretary stated in a press conference that WikiLeaks “has already threatened the safety of our troops, our allies and Afghan citizens who are working with us to help bring about peace and stability in that part of the world.” *DOD News Briefing with Geoff Morrell from the Pentagon*, U.S. DEP’T OF DEF. (Aug. 5, 2010), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=53001> (transcript of press conference by former Pentagon press secretary Geoff Morrell). Military officials continued to press such claims months later. *Hearing To Consider the Nominations of: Honorable Michael G. Vickers To Be Under Sec’y of Def. for Intelligence; and Dr. Jo Ann Rooney To Be Principal Deputy Under Sec’y of Def. for Pers. and Readiness: Hearing Before the S. Comm. on Armed*

reasonable after a Taliban spokesman announced that the organization would be using WikiLeaks documents to identify collaborators.<sup>171</sup> Then, in a joint statement e-mailed to WikiLeaks, five human-rights groups, including Amnesty International and the International Crisis Group, complained that the release of uncensored Afghanistan documents would endanger their operations by disclosing the names of those with whom they worked.<sup>172</sup> Such claims, which seem to demonstrate that disclosure is creating grave danger to innocent human life and to the nation's military operations, constitute the strongest evidence that the state can marshal to demonstrate that particular documents must remain secret and that any unauthorized disclosure of them must result in criminal prosecution.<sup>173</sup>

To date, however, no corroborated incident has come to light demonstrating that a document that WikiLeaks released caused significant physical damage to American military or diplomatic interests.<sup>174</sup> Defense Secretary Robert Gates, who complained in July 2010 that WikiLeaks would have "potentially dramatic and grievously harmful consequences,"<sup>175</sup> concluded less than three months later that the disclosures did not reveal any sensitive intelligence methods or sources.<sup>176</sup> Although Gates at that time continued to warn about attacks against individuals named in the documents, a NATO official interviewed at the same time denied that any

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*Servs.*, 112th Cong. (2011), available at <http://armed-services.senate.gov/Transcripts/2011/02%20February/11-03%20-%202-15-11.pdf> at 10–11 (testimony of acting Under Secretary of Defense for Intelligence Michael G. Vickers, agreeing that WikiLeaks' disclosures endangered individuals who were cooperating with the American military and have damaged the military's ability to recruit intelligence assets).

171. Ron Moreau & Sami Yousofzai, *Taliban Seeks Vengeance in Wake of WikiLeaks*, DAILY BEAST (Aug. 1, 2010), <http://www.newsweek.com/2010/08/02/taliban-seeks-vengeance-in-wake-of-wikileaks.html>.

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

173. See *Haig v. Agee*, 453 U.S. 280, 308–09 (1981) (refusing to extend First Amendment protection for disclosure of an intelligence operative's identity); see also *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (noting that the First Amendment would not protect disclosure of troop movements).

174. Robert Burns, *Are Risks from WikiLeaks Overstated by Government?*, BOSTON.COM (Aug. 17, 2010), [http://www.boston.com/news/nation/washington/articles/2010/08/17/are\\_risks\\_from\\_wikileaks\\_overstated\\_by\\_government/](http://www.boston.com/news/nation/washington/articles/2010/08/17/are_risks_from_wikileaks_overstated_by_government/); x70, *Debunked: "Wikileaks Has Blood on Its Hands,"* WL CENT. (Nov. 21, 2010, 04:47), <http://wcentral.org/node/278>; Bradley Klapper & Cassandra Vinograd, *AP Review Finds No Threatened WikiLeaks Sources*, YAHOO! NEWS (Sept. 10, 2011), <http://news.yahoo.com/ap-review-finds-no-threatened-wikileaks-sources-074530441.html>; Deb Riechmann, *Coalition Informant Plays Both Sides of Afghan War*, ABC NEWS (June 7, 2011), <http://abcnews.go.com/International/wireStory?id=13779423>.

175. Charlie Savage, *Gates Assails WikiLeaks over Release of Reports*, N.Y. TIMES (July 29, 2010), <http://www.nytimes.com/2010/07/30/world/asia/3owiki.html> (internal quotation marks omitted).

176. Adam Levine, *Gates: Leaked Documents Don't Reveal Key Intel, but Risks Remain*, CNN (Oct. 17, 2010, 8:25 AM), <http://www.cnn.com/2010/US/10/16/wikileaks.assessment/index.html?hpt=T2>.

such attacks happened.<sup>177</sup> Doubts about WikiLeaks' direct effects on military operations and individual lives cannot erase or remove the threat that such effects could occur in the future, but they suggest that the *assumption* that such effects would necessarily follow—assumptions made upon the documents' release by military officials and conservative political figures—was unwarranted.

Although I do not want to deny the significance of such threats, WikiLeaks at least suggests that the risk of disclosure is just that—a *risk* that should require the government to produce some evidence, and the courts to explicitly perform some predictive calculation, before they conclude that such threats indeed exist. If courts merely deferred to the state's bald claims, they would not engage in adjudicatory balancing—rather, they would be acquiescing to executive prerogative. It is instructive in this context to consider what we know about the Pentagon Papers disclosures nearly forty years ago. In an important 1981 article, Floyd Abrams interviewed the key military witness in the Pentagon Papers case, who had testified about the likely dangerous effects that disclosure of the classified documents would have on the American military campaign in Vietnam.<sup>178</sup> Ten years after the disclosures, Vice Admiral Francis J. Blouin, who was then Deputy Chief of Naval Operations for Plans and Policy, continued to complain of the disclosures' illegality and harm to the “will of our country” to fight the war, but concluded: “I don't think there was any great loss in substance.”<sup>179</sup> No matter how one views the suitability of drawing analogies between the circumstances surrounding the two events,<sup>180</sup> it seems, at present at least, as though their effects on military operations (or lack thereof) are fairly similar.

## 2. WikiLeaks' Direct and Indirect Effects on Diplomatic Relations

The claim that disclosures would affect the State Department and the United States' diplomatic relations with other nations exhibits a similar dynamic. On the eve of the diplomatic cables' release, Harold Koh, the State Department's Legal Adviser, warned Assange in a letter made public that WikiLeaks' planned disclosure violated U.S. law and complained of the

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177. *Id.*

178. Floyd Abrams, *The Pentagon Papers a Decade Later*, N.Y. TIMES MAG., June 8, 1981, at 22, 25. *See generally* N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (popularly known as the Pentagon Papers case).

179. Abrams, *supra* note 178, at 25; *see also* John T. Correll, *The Pentagon Papers*, AIR FORCE MAG., Feb. 2007, at 50, 55, *available at* <http://www.airforce-magazine.com/MagazineArchive/Documents/2007/February%202007/0207pentagon.pdf> (observing that the Pentagon Papers provided North Vietnam with “rich insights into early US objectives, strategies, uncertainties, and degrees of commitment,” but conceding that “their publication appears to have had little or no effect on the remaining course of the war” because the documents were several years old and focused more on political machinations than on current military strategy).

180. *See* Tofel, *supra* note 65 (questioning the analogy).

certain increased danger that the disclosure of diplomatic cables would create for innocent civilians named in the documents, ongoing military operations, and cooperation and relations between the United States and other nations.<sup>181</sup> The State Department also warned hundreds of human-rights activists, officials of foreign governments, and businesspeople who were identified in the diplomatic cables of the threats their identification might create for them.<sup>182</sup>

Again, however, no clear evidence has come to light of any direct ill effects the disclosures have caused. Administration officials have not publicly identified any additional harassment that its sources experienced as a result of the WikiLeaks disclosures.<sup>183</sup> The U.S. ambassador to Mexico was forced to resign after the release of cables in which he criticized the Mexican government's efforts to fight drug trafficking,<sup>184</sup> but no direct harm has

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181. See Letter from Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, to Jennifer Robinson, Att'y for Mr. Julian Assange (Nov. 27, 2010) [hereinafter Koh Letter], available at [http://media.washingtonpost.com/wp-srv/politics/documents/Dept\\_of\\_State\\_Assange\\_letter.pdf](http://media.washingtonpost.com/wp-srv/politics/documents/Dept_of_State_Assange_letter.pdf).

182. Mark Landler & Scott Shane, *U.S. Sends Warning to People Named in Cable Leaks*, N.Y. TIMES (Jan. 6, 2011), <http://www.nytimes.com/2011/01/07/world/07wiki.html>.

183. *Id.* One episode that commentators identified concerned a cable that indicated Zimbabwean opposition leader Morgan Tsvangirai secretly encouraged Western nations, through diplomatic channels, to impose sanctions on the Zimbabwean government, led by Robert Mugabe, with whom Tsvangirai's party has a power-sharing arrangement. See Christopher R. Albon, *How WikiLeaks Just Set Back Democracy in Zimbabwe*, ATLANTIC (Dec. 28, 2010), <http://www.theatlantic.com/international/archive/2010/12/how-wikileaks-just-set-back-democracy-in-zimbabwe/68598/>; James Richardson, *US Cable Leaks' Collateral Damage in Zimbabwe*, GUARDIAN (Jan. 3, 2011), <http://www.guardian.co.uk/commentisfree/cifamerica/2011/jan/03/zimbabwe-morgan-tsvangirai>. In response to the disclosure, the Zimbabwean attorney general, whom Mugabe had appointed, announced that his office would investigate Tsvangirai on charges of treason, a crime for which he could be executed. See Richardson, *supra*. There are two weaknesses with an effort to describe this episode as a direct, adverse effect that WikiLeaks has inflicted upon American diplomatic efforts. First, the cable was published, in its entirety, by the *Guardian* newspaper before it was posted by WikiLeaks—although, but for WikiLeaks, the *Guardian* would not have had access to the cables, and WikiLeaks did publish it later. See x70, 2011-01-04: *James Richardson's Collateral Damage in the Guardian: WikiLeaks & Tsvangirai*, WL CENT. (Apr. 1, 2011, 02:57), <http://wlcentral.org/node/820>. Second, Mugabe has regularly accused his opposition of treason for years, using any convenient excuse, and has attempted to use his control of the country's prosecutors and newspapers to press those charges. See Robert I. Rotberg, *Mugabe Doesn't Need an Excuse*, FOREIGN POL'Y (Dec. 28, 2010), [http://www.foreignpolicy.com/articles/2010/12/28/mugabe\\_doesnt\\_need\\_an\\_excuse](http://www.foreignpolicy.com/articles/2010/12/28/mugabe_doesnt_need_an_excuse); *WikiLeaks in Zimbabwe, and in the Media*, ZUNGUZUNGU (Jan. 5, 2011, 9:12 AM), <http://zunguzungu.wordpress.com/2011/01/05/wikileaks-in-zimbabwe-and-in-the-media/>. In July 2011, the Zimbabwean government announced that Tsvangirai would not be prosecuted. See Clemence Manyukwe, *WikiLeaks: Tsvangirai Escapes Prosecution*, FIN. GAZETTE (July 18, 2011, 10:57 AM), <http://www.financialgazette.co.zw/top-stories/9069-wikileaks-tsvangirai-escapes-prosecution.html>.

184. See Jose de Cordoba, *U.S. Ambassador to Mexico Resigns Following WikiLeaks Flap*, WALL ST. J. (Mar. 19, 2011), <http://online.wsj.com/article/SB10001424052748704021504576211282543444242.html>. The U.S. ambassador to Mexico was not the only diplomat who was forced to

been traced to the cables, and it is unclear whether the disclosures will have any long-term effect on U.S.–Mexico relations.<sup>185</sup>

Koh's letter to Assange also warned of the indirect effects that the disclosures would have on diplomatic confidences,<sup>186</sup> as did Secretary of State Hillary Clinton in a news conference immediately after the cable release began.<sup>187</sup> As a result, this claim also asserts that internal communications between U.S. diplomats and the State Department will be less forthright for fear of later exposure, and foreign sources will be less likely to disclose information or share opinions with American diplomats for fear that the U.S. will be unable to protect its statements and identities from disclosure.<sup>188</sup> This claim concerns marginal, though perhaps significant, effects on diplomatic discourse and deliberation as engaged in by participants; as such, it is not one for which evidence can easily be marshaled except through the statements of those who are current or former State Department employees.<sup>189</sup> Nevertheless, courts tend to defer to such claims made by the executive branch regarding information about national security and diplomatic efforts.<sup>190</sup>

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resign or was reassigned as a result of leaked cables. *See* LEIGH & HARDING, *supra* note 12, at 225.

185. Mexican president Felipe Calderon pushed for the ambassador's firing, claiming that the cables harmed U.S.–Mexico relations, but it is unclear whether his efforts reflected his sincere conclusion about the disclosure's effects or if instead they were aimed at a domestic audience as he prepared for a contested reelection campaign in 2012. *See* de Cordoba, *supra* note 184; Mary Beth Sheridan, *Calderon: WikiLeaks Caused Severe Damage to U.S.–Mexico Relations*, WASH. POST (Mar. 3, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/03/AR2011030302853.html>.

186. *See* Koh Letter, *supra* note 181.

187. *See Remarks to the Press on Release of Purportedly Confidential Documents by Wikileaks*, U.S. DEPT OF STATE (Nov. 29, 2010), <http://www.state.gov/secretary/rm/2010/11/152078.htm> (transcript of press conference by Secretary Clinton in which she complains that WikiLeaks “undermines our efforts to work with other countries to solve shared problems” and characterizes the leaks as attacking “the international community—the alliances and partnerships, the conversations and negotiations, that safeguard global security and advance economic prosperity”); *see also Clinton Condemns Leak as “Attack on International Community,”* CNN (Nov. 29, 2010), [http://articles.cnn.com/2010-11-29/us/wikileaks\\_1\\_julian-assange-wikileaks-disclosure?\\_s=PM:US](http://articles.cnn.com/2010-11-29/us/wikileaks_1_julian-assange-wikileaks-disclosure?_s=PM:US) (reporting on Secretary Clinton's press conference).

188. *See* George Packer, *The Right to Secrecy*, NEW YORKER (Nov. 29, 2010), <http://www.newyorker.com/online/blogs/georgepacker/2010/11/the-right-to-secrecy.html>; James P. Rubin, *The Irony of WikiLeaks*, NEW REPUBLIC (Dec. 1, 2010), <http://www.tnr.com/article/politics/79531/the-irony-wikileaks-american-diplomacy-hard-left>.

189. *See, e.g.,* Samuel Witten, *The Effects of WikiLeaks on Those Who Work at the State Department*, OPINIO JURIS (Dec. 18, 2010, 5:49 PM), <http://opiniojuris.org/2010/12/18/the-effects-of-wikileaks-on-those-who-work-at-the-state-department/> (providing an extensive discussion of the effects of WikiLeaks on State Department employees by a former deputy legal adviser and principal deputy assistant secretary of state for population, refugees, and migration).

190. *See, e.g.,* *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (stating that government can protect information under the state-secrets doctrine if it can show “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged”). Under FOIA, courts give “substantial weight” to government

But to say that courts are willing to defer to claims of anticipated effects made by the executive branch is not the same as concluding that such effects in fact occur. This distinction is significant because later statements by cabinet secretaries have suggested that these effects may not have occurred and may not be expected to occur in the future. In a news conference soon after the start of the diplomatic-cable disclosures, Secretary Gates confidently declared that the releases would have little effect on diplomatic relations,<sup>191</sup> and a few days later, Secretary Clinton also significantly downplayed her concerns after she attended an Organization for Security and Cooperation in Europe (“OSCE”) meeting where she spoke with foreign leaders who assured her that diplomatic relations would continue as before.<sup>192</sup> Several commentators even hypothesized that the cables’ release might in fact *improve* diplomatic relations, insofar as they revealed the similarity between the United States’ public and private statements,

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officials’ affidavits regarding the threats to national security that agencies foresee if they are forced to disclose requested documents; under these circumstances, FOIA exemptions 1 (for properly classified information) and 3 (for information specifically exempted by Congress in other statutes) apply. See *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980). On judicial deference to executive branch claims of national security, see David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 304–05 (2010), and James R. Ferguson, *Government Secrecy After the Cold War: The Role of Congress*, 34 B.C. L. REV. 451, 452 (1993) (decrying the Supreme Court’s “reluctance to evaluate the factual basis of secrecy claims in foreign policy” and complaining that the Court “largely has withdrawn from any significant role in determining the proper limits of government secrecy”).

191. *DOD News Briefing with Secretary Gates and Adm. Mullen from the Pentagon*, U.S. DEP’T OF DEF. (Nov. 30, 2010), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4728> [hereinafter *Gates News Briefing*] (transcript of press conference). *But see* Marc Ambinder, *WikiLeaks Did “Significant Damage” to Diplomacy, State Official Says*, NAT’L J. (Dec. 1, 2010), <http://www.nationaljournal.com/whitehouse/wikileaks-did-significant-damage-to-diplomacy-state-official-says-20101201> (quoting an anonymous State Department official disagreeing with Secretary Gates’s statement, stating that the disclosures are “going to complicate U.S. diplomacy and international cooperation for a long time after the headlines stop”).

192. *Clinton: WikiLeaks Won’t Hurt U.S. Diplomacy*, CBS NEWS (Dec. 2, 2010), <http://www.cbsnews.com/stories/2010/12/01/world/main7105891.shtml> (quoting Secretary Clinton as saying that at the OSCE meeting, “I have not . . . had any concerns expressed about whether any nation will not continue to work with and discuss matters of importance to us both going forward”); see also LEIGH & HARDING, *supra* note 12, at 245–46 (describing the State Department’s retreat from its complaints about WikiLeaks’ dire effects).

increasing American diplomats' credibility<sup>193</sup>—a sentiment echoed in part by Defense Secretary Gates.<sup>194</sup>

If taken seriously, the interest in preventing the adverse “effects” on diplomacy makes little sense if it needs to be calibrated in any meaningful way. By their initial statements about disclosure’s certain effects, Secretary of State Clinton and Legal Advisor Koh made plain that they strongly preferred that the cables not be disclosed, at least in the manner and at the time that WikiLeaks disclosed them. But their preferences do not reveal whether those disclosures actually affected or will affect American diplomatic interests, nor do they prove, by themselves, that the risks of their disclosure outweigh the gain.<sup>195</sup> And again, to the extent that the Pentagon Papers provides any historical guide, the deputy under secretary of state who testified in the *New York Times* litigation that the disclosures made confidential diplomacy impossible ten years later conceded that the Court’s decision in the newspapers’ favor was “probably” correct and that abstract free-press values were more important than the harms to diplomatic efforts claimed by State Department officials.<sup>196</sup>

### 3. WikiLeaks’ Effects on Intra-Governmental Information Sharing

After the WikiLeaks disclosures, government agencies reviewed their use of classified databases and began to implement various security measures to prevent future leaks.<sup>197</sup> The measures that drew the most attention were

193. See Hamish Barwick, *WikiLeaks a Boon for US Government: Former Obama Campaign Adviser*, COMPUTERWORLD (June 8, 2011), [http://www.computerworld.com.au/article/389459/wikileaks-boon\\_us\\_government\\_former\\_obama\\_campaign\\_adviser/](http://www.computerworld.com.au/article/389459/wikileaks-boon_us_government_former_obama_campaign_adviser/); Gideon Rachman, *America Should Give Assange a Medal*, FIN. TIMES (Dec. 13, 2010), <http://www.ft.com/cms/s/0/61f8fab0-06f3-11e0-8c29-00144feabdco,so1=1.html>; James Traub, *The Sunshine Policy*, FOREIGN POLY (Dec. 10, 2010), [http://www.foreignpolicy.com/articles/2010/12/10/the\\_sunshine\\_policy](http://www.foreignpolicy.com/articles/2010/12/10/the_sunshine_policy). This observation has been shared by at least one assistant secretary of state. See *Internet Freedom: Promoting Human Rights in the Digital Age—A Panel Discussion*, U.S. SEC’Y OF STATE (Mar. 4, 2011), <http://www.state.gov/g/drl/rls/rm/2011/162490.htm> (quoting Assistant Secretary of State Michael Posner, who, after complaining about the disclosures, proudly stated that “one of the salutary aspects [of the diplomatic-cable disclosures] is it does reveal the inner workings of a government that’s actually paying attention to human rights every day”).

194. *Gates News Briefing*, *supra* note 191.

195. See, e.g., Editorial, *WikiLeaks and the Diplomats*, N.Y. TIMES (Nov. 29, 2010), <http://www.nytimes.com/2010/11/30/opinion/30tue1.html> (noting the need for diplomatic privilege over communications but concluding that “[t]he documents are valuable because they illuminate American policy in a way that Americans and others deserve to see”).

196. Abrams, *supra* note 178, at 72.

197. Jim Garamon, *Officials Condemn Leaks, Detail Prevention Efforts*, U.S. DEP’T DEF. (Nov. 28, 2010), <http://www.defense.gov/news/newsarticle.aspx?id=61861>; Adam Levine, *Previous WikiLeaks Release Forced Tighter Security for U.S. Military*, CNN (Nov. 28, 2010), [http://articles.cnn.com/2010-11-28/us/wikileaks.security\\_1\\_documents-security-gaps-computer-system?s=PM:US](http://articles.cnn.com/2010-11-28/us/wikileaks.security_1_documents-security-gaps-computer-system?s=PM:US); Ellen Nakashima & Jerry Markon, *WikiLeaks Founder Could Be Charged Under Espionage Act*, WASH. POST (Nov. 30, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112905973.html>; Roberts, *supra* note 12, at 21–24.

those involving information sharing between federal agencies.<sup>198</sup> The National Commission on Terrorist Attacks upon the United States (“Commission” or “9/11 Commission”) had denounced organizational stovepipes that had developed within units of agencies and across agencies—that is, bureaucratic and technological impediments to the flow of information going out of and coming into agencies, resulting in units that did not have current or sufficient information to perform their tasks—and, the Commission concluded, that contributed to the failure of counterterrorism agencies to prevent the 9/11 attacks.<sup>199</sup> Without access to documents obtained or developed by one agency, employees and units working on similar or related projects were uninformed about the development of the terrorist threat.<sup>200</sup> In a post-9/11 response, agencies began to take concerted steps to make information relevant to counterterrorism efforts available throughout the federal government.<sup>201</sup> In the wake of the WikiLeaks disclosures, many both within and outside the government charged that the effort to share information had left data networks insecure and classified information vulnerable to theft and leaking.<sup>202</sup> WikiLeaks’ alleged source for its major U.S. leaks, Pfc. Bradley Manning, apparently downloaded the video and document caches that he

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198. See, e.g., Christopher Beam, *Unfair Share*, SLATE (Nov. 29, 2010, 6:07 PM), <http://www.slate.com/id/2276188/>; Joseph Straw, *WikiLeaks’ Information-Sharing Fallout*, SECURITY MGMT., <http://www.securitymanagement.com/article/wikileaks-information-sharing-fallout-008244> (last visited Dec. 24, 2011); Sean Reilly, *WikiLeaks Fallout Leads to an Info-Sharing Clampdown*, FED. TIMES (Dec. 5, 2010), <http://www.federaltimes.com/article/20101205/IT03/12050306/>.

199. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 419–23 (authorized ed. 2004).

200. Massimo Calabresi, *State Pulls the Plug on SIPRNet*, SWAMPLAND (Nov. 29, 2010), <http://swampland.time.com/2010/11/29/state-pulls-the-plug-on-siprnet/>; Felix Stalder, *Contain This! Leaks, Whistle-Blowers and the Networked News Ecology*, EUROZINE (Nov. 29, 2010), <http://www.eurozine.com/pdf/2010-11-29-stalder-en.pdf>; Joby Warrick, *WikiLeaks Cable Dump Reveals Flaws of State Department’s Information-Sharing Tool*, WASH. POST (Dec. 31, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/30/AR2010123004962.html>.

201. See, e.g., *What Is ISE?*, INFO. SHARING ENV’T, <http://ise.gov/what-ise> (last visited Dec. 24, 2011) (detailing organization built from defense, intelligence, homeland security, foreign affairs, and law enforcement agencies in order to “provide[] analysts, operators, and investigators with integrated and synthesized terrorism, weapons of mass destruction, and homeland security information needed to enhance national security and help keep our people safe”).

202. See, e.g., Phil Stewart, *Analysis: WikiLeaks May Set Back U.S. Intelligence Sharing*, REUTERS (Nov. 29, 2010), <http://www.reuters.com/article/2010/11/29/us-wikileaks-intelligence-idUSTRE6AS67F20101129> (“This is a colossal failure by our intel community, by our Department of Defense, to keep classified information secret. . . . This database should never have been created. Hundreds of thousands of people should not have been provided access to it.” (quoting then-U.S. Representative Peter Hoekstra, who at the time was a member of the House Permanent Select Committee on Intelligence) (internal quotation marks omitted)).

passed along to WikiLeaks via the Department of Defense's SIPRNet network, to which he had access.<sup>203</sup>

In response to the leaks, the State Department disconnected itself from Defense's SIPRNet, thereby securing its information from potential leaks by non-State Department employees and removing the agency from at least part of its information-sharing commitment with Defense.<sup>204</sup> By inhibiting diplomatic and military agencies' ability to share data that one may gather but others may find useful, the State Department's action appears to demonstrate an adverse effect on WikiLeaks' disclosures of government functions.<sup>205</sup> At the same time, however, numerous commentators have criticized the lax data-security and security-clearance measures that allegedly allowed Manning to copy the data he ultimately released to WikiLeaks.<sup>206</sup> This criticism suggests that a combination of needed technological and administrative reforms can more securely and effectively enable information sharing than the systems that existed before WikiLeaks—steps that Secretary Gates claimed the Department of Defense was taking in response to the disclosures and that State Department representatives also claimed to be undertaking.<sup>207</sup>

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203. Kevin Poulsen & Kim Zetter, *U.S. Intelligence Analyst Arrested in WikiLeaks Video Probe*, THREAT LEVEL (June 6, 2010, 9:31 PM), <http://www.wired.com/threatlevel/2010/06/leak/>.

204. Calabresi, *supra* note 200.

205. See, e.g., Beam, *supra* note 198 ("The scandal will probably have all kinds of chilling effects."); Stewart, *supra* note 202 ("James Clapper, the director of national intelligence who is tasked with promoting greater cooperation within the U.S. intelligence community, hinted last month that leaks in Washington were already threatening sharing."); Straw, *supra* note 198 ("Even so, the risk [of leaks] can be mitigated, and that's likely to mean less sharing, observers acknowledge."); Jaikumar Vijayan, *WikiLeaks Incident Shouldn't Chill Info-Sharing, Ex-CIA Chief Says*, COMPUTERWORLD (Aug. 4, 2010), [http://www.computerworld.com/s/article/9180130/WikiLeaks\\_incident\\_shouldn\\_t\\_chill\\_info\\_sharing\\_ex\\_CIA\\_chief\\_says](http://www.computerworld.com/s/article/9180130/WikiLeaks_incident_shouldn_t_chill_info_sharing_ex_CIA_chief_says) ("What WikiLeaks did was very harmful' and will likely lead to new dictates on how information is shared." (quoting Robert Rodriguez, former Secret Service agent and founder of the Security Innovation Network)).

206. See, e.g., Aliya Sternstein, *Countering WikiLeaks Could Stifle Information Sharing*, NEXTGOV (Nov. 29, 2010), [http://www.nextgov.com/nextgov/ng\\_20101129\\_9475.php](http://www.nextgov.com/nextgov/ng_20101129_9475.php); Straw, *supra* note 198; Vijayan, *supra* note 205.

207. See *Information Sharing in the Era of WikiLeaks: Balancing Security and Collaboration: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. (2011) (forthcoming) (statement of Patrick F. Kennedy, Under Secretary of State for Management, U.S. Department of State), available at [http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=0c531692-c661-453a-bc97-654be6eb7d00](http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=0c531692-c661-453a-bc97-654be6eb7d00); Terri Moon Cronk, *DOD Takes Steps To Secure Classified Data*, U.S. DEP'T DEF. (Mar. 11, 2011), <http://www.defense.gov//News/NewsArticle.aspx?ID=63142>; *Gates News Briefing*, *supra* note 191. For an argument that the information sharing that developed after the post-9/11 reforms was ineffective, see AMY B. ZEGART, *SPYING BLIND* 186–88 (2007).

#### 4. WikiLeaks' Effects on the American Public

Arguments about the beneficial effects of transparency begin with the assumption that the public will pay attention to, understand, and act or threaten to act on the government information they receive.<sup>208</sup> When the public's actions and the connection between those actions and disclosed information are clear, these effects are easy to identify. In the case of the WikiLeaks disclosures, however, even the precise nature of the disclosed information—and especially whether the disclosed documents reveal new, significant information—is deeply contested. To some American commentators, especially those on the left who were critical of the Bush administration and have grown increasingly wary of the Obama administration, the WikiLeaks disclosures have been exceptionally revelatory. In order to support their claim, a number of WikiLeaks advocates in late 2010 and early 2011 developed lists of the most important events and issues that the disclosures illuminated, lists too long and varied to recount here.<sup>209</sup> The sheer number and breadth of these disclosures should prove WikiLeaks' value and certain effect. Because these commentators generally assume that increased transparency causes or should cause increased public knowledge, popular political engagement, and better government, they concluded that the scale of the WikiLeaks disclosures and the sheer amount of information the disclosures revealed should make it more likely that the public will learn, act, and respond.<sup>210</sup> If disclosure's effects are self-evident

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208. See *supra* text accompanying notes 88–90.

209. See, e.g., Glenn Greenwald, *What WikiLeaks Revealed to the World in 2010*, SALON (Dec. 24, 2010, 4:25 AM), [http://www.salon.com/news/opinion/glenn\\_greenwald/2010/12/24/wikileaks](http://www.salon.com/news/opinion/glenn_greenwald/2010/12/24/wikileaks) (providing a list of disclosures and media coverage of them that shows “the breadth of the corruption, deceit, brutality and criminality on the part of the world’s most powerful factions”); Greg Mitchell, *Why WikiLeaks Matters*, NATION (Jan. 13, 2011), <http://www.thenation.com/article/157729/why-wikileaks-matters> (listing eighteen “revelations,” concerning events from all over the world); Joshua Norman, *How WikiLeaks Enlightened Us in 2010*, CBS NEWS (Dec. 31, 2010), [http://www.cbsnews.com/8301-503543\\_162-20026591-503543.html](http://www.cbsnews.com/8301-503543_162-20026591-503543.html) (providing a list of “the more impactful WikiLeaks revelations . . . , grouped by region,” that the author describes as having “many major implications for world relations”); Rainey Reitman, *The Best of Cablegate: Instances Where Public Discourse Benefited from the Leaks*, ELECTRONIC FRONTIER FOUND. (Jan. 7, 2011), <https://www.eff.org/deeplinks/2011/01/cablegate-disclosures-have-furthered-investigative> (describing in detail five cables that “brought much-needed light to government operations and private actions which, while veiled in secrecy, profoundly affect the lives of people around the world and can play an important role in a democracy that chooses its leaders”).

210. See Greenwald, *supra* note 209 (expressing anger that “many citizens and, especially, ‘journalists’” responded with anger at WikiLeaks rather than at the culpable government officials whose misdeeds the site exposed); Mitchell, *supra* note 209 (noting the public’s mixed response to the WikiLeaks disclosures, based in part on the mainstream media’s characterization of them and WikiLeaks); Norman, *supra* note 209 (praising WikiLeaks and recounting its disclosures for teaching the public “about the hidden forces that drive our world”); Reitman, *supra* note 209 (praising WikiLeaks for “hav[ing] contributed significantly to public and political conversations all around the world”).

and guaranteed, the very existence of large disclosures of new, important information must create beneficial effects.

For WikiLeaks' skeptics and critics, however, the disclosures had limited informational value. The information WikiLeaks revealed may have provided additional details to general information widely known by engaged elites,<sup>211</sup> such commentators argued, but it did not provide evidence of any significant government misconduct or abuses of power.<sup>212</sup> Because of the likelihood that the disclosures had already, or would certainly, harm foreign policy and American interests, WikiLeaks failed the rough, intuitive balancing test those critics applied. The disclosures offered only a minimal gain in public knowledge, but they posed a significant risk to the state, diplomacy, and national security.<sup>213</sup>

The opinions of elite commentators who are highly attentive to foreign policy, international events, and the current news cycle neither necessarily reflect nor shape American public opinion. The general public's response to WikiLeaks is difficult to gauge. But the limited and often flawed findings of public-opinion polls provide at least a glimpse of the extent of the public's interest in and understanding of the disclosures. These polls, which have trended downward over time, have found that the public is not especially interested in WikiLeaks and that a strong majority of the American public dislikes it.<sup>214</sup> Whereas at least one poll conducted in late July and early August 2010 (after the leak of documents from the Afghanistan conflict) showed a nearly even split in public opinion about the value of WikiLeaks and about the extent of the public's interest in its disclosure,<sup>215</sup> by the end of the year (following the diplomatic-cable releases), WikiLeaks' popularity and public interest in the site dropped considerably. Multiple polls taken in December 2010 showed strong majorities that both disapproved of the site

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211. See, e.g., Peter Beinart, *Why the WikiLeaks Drama Is Overblown*, DAILY BEAST (Nov. 28, 2010, 9:03 PM), <http://www.thedailybeast.com/blogs-and-stories/2010-11-29/wikileaks-diplomatic-document-dump-is-banal-sabotage>; Leslie H. Gelb, *What the WikiLeaks Documents Really Reveal*, DAILY BEAST (July 25, 2010, 9:45 PM), <http://www.thedailybeast.com/blogs-and-stories/2010-07-26/wikileaks-what-the-documents-reveal/>; Andrew Sullivan, *The Starr Report of American Foreign Policy?*, ATLANTIC (Nov. 29, 2010, 1:57 AM), <http://www.theatlantic.com/daily-dish/archive/2010/11/the-starr-report-of-american-foreign-policy/179234>.

212. Floyd Abrams, *Why WikiLeaks Is Unlike the Pentagon Papers*, WALL ST. J. (Dec. 29, 2010), <http://online.wsj.com/article/SB10001424052970204527804576044020396601528.html>.

213. See *id.*; Beinart, *supra* note 211; Sullivan, *supra* note 211.

214. The polls have generally not asked about the public's interest in and knowledge of the substance of the disclosures themselves. Instead, the questions are posed in a manner similar to much of the public debate surrounding the site—as a meta-conversation about WikiLeaks' significance as an institution and idea.

215. *Mixed Reactions to Leak of Afghanistan Documents*, PEW RES. CTR. FOR THE PEOPLE & THE PRESS (Aug. 3, 2010), <http://people-press.org/report/641/> (finding 47% of those questioned believed that the release of the State Department cables harmed the public interest and 42% believed that it served the public interest, while 63% said they had heard a little or nothing at all about it).

and thought it did more harm than good to the public interest.<sup>216</sup> One poll that broke down its results by party and ideological affiliation found that Democrats and Republicans disapproved of the site in roughly equal numbers and that even 64% of self-identified “Liberals” expressed disapproval.<sup>217</sup> As a possible explanation for this disinterest, the Pew Center’s study of news coverage and public interest in the major events and issues of 2010 found decreasing interest in and coverage of the wars in Afghanistan and Iraq in general.<sup>218</sup>

Even conceding the limits of public-opinion polling, it is difficult to conclude based on this data that WikiLeaks has made a significant positive impact on the general public’s engagement with and knowledge about the state and politics.<sup>219</sup> If we assume, with WikiLeaks’ proponents, that the site has disclosed important and unknown information about outrageous American governmental policy and misconduct, and if we assume, with transparency proponents and according to WikiLeaks’ reformist theory, that information disclosures increase public knowledge and political engagement, then one would expect to find widespread discontent organized around popular political movements in the U.S. as a result of WikiLeaks’ disclosures. But the only insurgent movement in the November 2010 election cycle was the “Tea Party” faction of the Republican Party, which has focused more on the size and cost of government than on the

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216. See, e.g., 60 MINUTES & VANITY FAIR, 60 MINUTES/VANITY FAIR POLL 1 (conducted Dec. 17–20, 2010), available at [http://www.cbsnews.com/htdocs/pdf/february\\_final\\_edition.pdf](http://www.cbsnews.com/htdocs/pdf/february_final_edition.pdf) (finding that 42% of respondents were not sure what WikiLeaks was, while only 9% considered it a “good thing” as opposed to “[d]estructive, but legal” (23%) or “[t]reasonable” (22%)); Meredith Chaiken, *Poll: Americans Say WikiLeaks Harmed Public Interest; Most Want Assange Arrested*, WASH. POST (Dec. 14, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/14/AR2010121401650.html> (discussing poll in which 68% of respondents believed the disclosures harmed the public interest and 59% thought Assange should be prosecuted for releasing the diplomatic cables); CNN & OP. RESEARCH CORP., CNN/OPINION RESEARCH POLL 2 (conducted Dec. 17–19, 2010), available at <http://i2.cdn.turner.com/cnn/2010/images/12/30/rel17n.pdf> (finding that 77% disapproved all of the disclosures and only 20% approved); *Most Say WikiLeaks Release Harms Public Interest*, PEW RES. CTR. FOR THE PEOPLE & THE PRESS (Dec. 8, 2010), <http://people-press.org/report/682/> (finding that 60% believed the release of the State Department cables harmed the public interest); Steven Thomma, *Poll: People Behind WikiLeaks Should Be Prosecuted*, MCCLATCHY (Dec. 10, 2010), <http://www.mcclatchydc.com/2010/12/10/105106/poll-people-behind-wikileaks-should.html> (reporting that 70% of respondents thought the leaks had done more harm than good and 59% thought those responsible should be prosecuted).

217. CNN & OP. RESEARCH CORP., *supra* note 216, at 3. *But see* 60 MINUTES & VANITY FAIR, *supra* note 216, at 1 (finding that although more Republicans knew about WikiLeaks than Democrats or independents, more of them considered the site “[t]reasonable” and fewer of them considered it a “good thing” than Democrats or independents).

218. *The Year in News 2010: Disaster, Economic Anxiety, but Little Interest in War*, JOURNALISM.ORG (Jan. 11, 2011), [http://www.journalism.org/analysis\\_report/year\\_news\\_2010](http://www.journalism.org/analysis_report/year_news_2010).

219. See Roberts, *supra* note 12, at 15–19 (arguing that WikiLeaks has had and will have little effect on the public).

wars in Iraq and Afghanistan or American foreign policy.<sup>220</sup> To date, no popular political movement of any significant size has formed or been energized as a consequence of the disclosures.<sup>221</sup> The same assumptions about WikiLeaks' disclosures and their effects would lead one to predict that the general public would hold the government accountable for its apparent military and diplomatic misdeeds, or at least that the fear of such a response would lead the government to respond by changing or reforming its unpopular approaches to contested issues. And yet, again, there has been no significant or even discernible movement to change existing military engagements or foreign policy in the period following the WikiLeaks disclosures, except in terms of tightening classified-information controls.<sup>222</sup> The end of the Iraq War in late 2011 appeared unrelated to WikiLeaks' disclosures about American conduct during the war;<sup>223</sup> indeed, the troop withdrawal was consistent with a pledge President Obama made in February

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220. On the "Tea Party," see JILL LEPORE, *THE WHITES OF THEIR EYES: THE TEA PARTY'S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY* (2010); KATE ZERNIKE, *BOILING MAD: INSIDE TEA PARTY AMERICA* (2010).

221. To explain the minimal effects from these disclosures, one could claim that the media, government, and major corporate interests have actively and apparently successfully worked to distract attention from WikiLeaks and to destroy its credibility. See, e.g., Kevin Gosztola, *Reflecting on the Afghanistan War Logs Released by WikiLeaks One Year Ago*, *DISSENTER* (July 25, 2011, 11:54 AM), <http://dissenter.firedoglake.com/2011/07/25/reflecting-on-the-afghanistan-war-logs-released-by-wikileaks-one-year-ago> (alleging a government-media conspiracy to suppress the impact of the disclosures); Glenn Greenwald, *The Leaked Campaign To Attack WikiLeaks and Its Supporters*, *SALON* (Feb. 11, 2011, 4:12 AM), [http://www.salon.com/2011/02/11/campaigns\\_4/](http://www.salon.com/2011/02/11/campaigns_4/) (identifying "a concerted, unified effort between government and the most powerful entities in the private sector" to destroy WikiLeaks and its supporters); Greenwald, *supra* note 69 (criticizing "a major, coordinated effort underway to smear WikiLeaks' founder, Julian Assange, and to malign his mental health—all as a means of distracting attention away from these highly disturbing revelations and to impede the ability of WikiLeaks to further expose government secrets and wrongdoing with its leaks"). Evaluating this claim is beyond the scope of this Article, although the cruel conditions of Bradley Manning's confinement during his pretrial detention (as of March 2011), as well as the disclosure that several private data-intelligence firms planned technical and public-relations attacks on WikiLeaks and its supporters complicate any effort to simply dismiss the claim as a conspiracy theory. See Steve Ragan, *Data Intelligence Firms Proposed a Systematic Attack Against WikiLeaks*, *TECH HERALD* (Feb. 9, 2011), <http://www.thetechherald.com/article.php/201106/6798/Data-intelligence-firms-proposed-a-systematic-attack-against-WikiLeaks>; Editorial, *The Abuse of Private Manning*, *N.Y. TIMES* (Mar. 14, 2011), <http://www.nytimes.com/2011/03/15/opinion/15tue3.html>. Yochai Benkler offers a nuanced version of this claim as part of his broader description of the incumbent mainstream media's "battle" against the "networked fourth estate." See Benkler, *supra* note 12, at 396–97 (criticizing "the ability of private infrastructure companies to restrict speech without being bound by the constraints of legality, and the possibility that government actors will take advantage of this affordance in an extralegal public-private partnership for censorship").

222. See *supra* Part III.C.1–3.

223. See Mark Landler, *White House Memo, A Wartime Leader Ends a War He Never Wanted*, *N.Y. TIMES* (Dec. 8, 2011), <http://www.nytimes.com/2011/12/09/world/middleeast/president-obama-ends-a-war-he-never-wanted.html> (noting the political and policy-related reasons for troop withdrawal).

2009, before the WikiLeaks disclosures began.<sup>224</sup> President Obama seemed not to have changed his policy in either country in response to the WikiLeaks disclosures; it was not until June 2011, nearly a year after the Afghanistan “War Logs” were released, that he announced a withdrawal of troops in response to economic strains and a weakened al Qaeda leadership.<sup>225</sup> The reformist claims favoring WikiLeaks thus seem unpersuasive.<sup>226</sup>

Assange’s more radical claims about his site’s revolutionary potential<sup>227</sup> are similarly unpersuasive, at least thus far in the United States. There is no evidence of the American state’s inability to function as a direct consequence of the WikiLeaks disclosures or from the threat that additional websites will adopt the WikiLeaks model. The government’s dislike of WikiLeaks and its commitment to shutting it down and punishing its principals and collaborators make clear that it perceives the site as a threat. Nevertheless, the government’s concern about its loss of control over information does not, by itself, suggest that the WikiLeaks disclosures have caused or hastened the American state’s imminent collapse.

##### 5. WikiLeaks’ International Effects

While the American public and its relationship with the government have not shown much change as a result of WikiLeaks’ major disclosures, several autocratic regimes in the Middle East and North Africa have faced major popular uprisings, at least one of which arguably was effected by several diplomatic cables that WikiLeaks released. Some observers and commentators have claimed that WikiLeaks’ disclosures directly affected Tunisia, whose president, Zine al-Abidine Ben Ali, fled the country in the face of widespread and increasingly violent protests against his corrupt, repressive regime.<sup>228</sup> The WikiLeaks cables concerning Tunisia revealed

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224. See Peter Baker, *With Pledges to Troops and Iraqis, Obama Details Pullout*, N.Y. TIMES (Feb. 27, 2009), <http://www.nytimes.com/2009/02/28/washington/28troops.html>.

225. See Mark Landler & Helene Cooper, *Obama Will Speed Pullout from War in Afghanistan*, N.Y. TIMES (June 22, 2011), [http://www.nytimes.com/2011/06/23/world/asia/23prexy.html?\\_r=2&pagewanted=all](http://www.nytimes.com/2011/06/23/world/asia/23prexy.html?_r=2&pagewanted=all).

226. Indeed, to extend the analogy between the Pentagon Papers and WikiLeaks, see *supra* text accompanying notes 65–69, 178–80, some argue that the Pentagon Papers had little direct effect on broad public opinion or civilian and military policy regarding the Vietnam War. See, e.g., RUDENSTINE, *supra* note 12, at 329–30; Roberts, *supra* note 12, at 18–19; Tofel, *supra* note 65. Even those who claim that the Pentagon Papers caused or hastened the end of the war concede the contested nature of such a claim. See Abrams, *supra* note 178, at 24. Indeed, Daniel Ellsberg himself was reportedly disappointed by the minimal impact the Pentagon Papers had on public opinion and on the Nixon administration’s pursuit of the war. See TOM WELLS, *WILD MAN: THE LIFE AND TIMES OF DANIEL ELLSBERG* 340–41, 514 (2001).

227. See *supra* Part II.B.

228. *Zine al-Abidine Ben Ali Forced To Flee Tunisia as Protesters Claim Victory*, GUARDIAN (Jan. 14, 2011), <http://www.guardian.co.uk/world/2011/jan/14/tunisian-president-flees-country-protests>.

American diplomats' contempt for Ben Ali's "system without checks" in a government whose kleptomania apparently began with the first family.<sup>229</sup> The Tunisia-related cables were translated and made available to Tunisians via locally produced websites.<sup>230</sup> According to various reports, the cables' distribution within Tunisia further radicalized an already angry and alienated citizenry, helped spur them to increasingly vehement dissent, and suggested that the U.S. would not intervene on Ben Ali's behalf.<sup>231</sup> This purported effect is a complex one, as the cables themselves revealed nothing new to protesters (who were already well aware of their government's corruption), while their influence would be difficult to isolate—indeed, their influence is contested by both Tunisians and Americans.<sup>232</sup> Rather, the cables' influence may have come from informing Tunisians of others'

229. Cable o8TUNIS679, *Corruption in Tunisia: What's Yours Is Mine*, WIKILEAKS (Aug. 30, 2011, 01:44), <http://wikileaks.ch/cable/2008/06/o8TUNIS679.html>.

230. Sofiane Ben Haj M'Hamed, *How WikiLeaks Rocked Tunisia*, INST. WAR & PEACE REPORTING (July 6, 2011), <http://iwpr.net/report-news/how-wikileaks-rocked-tunisia>. One of the sites, TUNILEAKS, <https://tunileaks.appspot.com/> (last visited Mar. 16, 2011), was published by Nawaat.org, a Tunisia-based blog collective that in March 2011 won a Google-sponsored prize awarded by the group Reporters Without Borders for its WikiLeaks coverage. See Matthew Campbell, *Tunisian Revolt Bloggers Win Google-Sponsored Web Freedom Prize*, BLOOMBERG (Mar. 11, 2011, 5:00 AM), <http://www.bloomberg.com/news/2011-03-11/tunisian-revolt-bloggers-win-google-sponsored-web-freedom-prize.html>.

231. See David D. Kirkpatrick, *Tunisia Leader Flees and Prime Minister Claims Power*, N.Y. TIMES (Jan. 14, 2011), <http://www.nytimes.com/2011/01/15/world/africa/15tunis.html?pagewanted=all> (stating that the protesters against Ben Ali "found grist for the complaints in leaked cables from the United States Embassy in Tunisia"); David Leigh & Luke Harding, *WikiLeaks: Tunisia Knew Its Rulers Were Debauched. But Leaks Still Had Impact*, GUARDIAN (Feb. 2, 2011), <http://www.guardian.co.uk/media/2011/feb/02/wikileaks-exclusive-book-extract> (describing a "genuinely extraordinary WikiLeaks effect" in which Tunisians' respect for the U.S. grew because of the cables' content, and helped give them confidence to oust a leader); see also Tom Malinowski, *Did WikiLeaks Take Down Tunisia's Government?*, in REVOLUTION IN THE ARAB WORLD: TUNISIA, EGYPT, AND THE UNMAKING OF AN ERA 57, 57–58 (Marc Lynch et al. eds., 2011) [hereinafter REVOLUTION IN THE ARAB WORLD] (noting that according to Tunisian sources, the cables shamed Tunisians, suggested that the U.S. would not protect Ben Ali against a popular uprising, and delegitimized Ben Ali and boosted his opponents' morale); Sami Ben Hassine, *Tunisia's Youth Finally Has Revolution on Its Mind*, GUARDIAN (Jan. 13, 2011, 05:00 EST), <http://www.guardian.co.uk/commentisfree/2011/jan/13/tunisia-youth-revolution> (listing WikiLeaks' revelation of "what everyone was whispering" as one among many causes of the uprising).

232. See, e.g., Robert Mackey, *Qaddafi Sees WikiLeaks Plot in Tunisia*, THE LEDE (Jan. 17, 2011, 12:30 PM), <http://thelede.blogs.nytimes.com/2011/01/17/qaddafi-sees-wikileaks-plot-in-tunisia/> (summarizing arguments of those who deny or minimize WikiLeaks' influence); Issandr El Amrani, *Twitter, WikiLeaks and Tunisia*, ARABIST (Jan. 15, 2011, 1:37 PM), <http://www.arabist.net/blog/2011/1/15/twitter-wikileaks-and-tunisia.html> (conceding only that WikiLeaks "may have played a minor atmospheric r[o]le" in the uprising). It is probably not helpful to those arguing in favor of WikiLeaks' influence that Libyan president Muammar Qaddafi, in an effort to avoid Ben Ali's fate, sought to scapegoat the site as a foreign influence in the Tunisian uprising. See Matthew Weaver, *Muammar Gaddafi Condemns Tunisia Uprising*, GUARDIAN (Jan. 16, 2011), <http://www.guardian.co.uk/world/2011/jan/16/muammar-gaddafi-condemns-tunisia-uprising>.

perceptions and knowledge about their corrupt government—information that enlightened and further energized protesters about the righteousness and likely success of their cause.<sup>233</sup> If, as has been widely reported, the Tunisian revolt in turn inspired other popular uprisings in the region,<sup>234</sup> and WikiLeaks in fact played some role in inspiring the Tunisian protesters, then the disclosures had significant direct and indirect effects (to whatever small degree) in setting potentially democratic change in motion.<sup>235</sup>

Even if one assumes that these uprisings constitute a positive development that is traceable in some material way to WikiLeaks, it is unclear how and whether one should factor such an effect into the prototypical transparency balancing test. American government-

233. See LEIGH & HARDING, *supra* note 12, at 247–49.

234. See *Introduction to Chapter 2* of *REVOLUTION IN THE ARAB WORLD*, *supra* note 231, at 41, 41 (“Tunisia was indeed a model for the region, but only in the sense that its young revolutionaries inspired others across the Arab world to launch their own uprisings.”); Hamza Hendawi, *Egyptians Denounce Mubarak, Clash with Riot Police*, ABC NEWS (Jan. 25, 2011), <http://abcnews.go.com/International/wirestory?id=12754109> (characterizing Egyptian protests as “nationwide demonstrations inspired by Tunisia’s uprising”).

235. See LEIGH & HARDING, *supra* note 12, at 211–12 (arguing that WikiLeaks has produced positive democratic externalities throughout the world). Some commentators have identified more conventional effects that WikiLeaks could have on democratic elections in Kenya and Peru, predicting that the information some released cables contained, along with the opinions of the cables’ diplomatic authors, would persuade voters to vote against certain candidates. See Juan Arellano, *Peru: WikiLeaks and the Presidential Campaign*, GLOBAL VOICES (Mar. 5, 2011, 10:01 PM), <http://globalvoicesonline.org/2011/03/05/peru-wikileaks-usa-and-their-effect-on-the-presidential-campaign/> (Jen Fumero trans.); Murithi Mutiga, *Leaked US Cables Likely To Shape 2012 Campaigns*, DAILY NATION (Mar. 5, 2011), <http://www.nation.co.ke/News/politics/Leaked+US+cables+likely+to+shape+2012+campaigns+/-/1064/1119772/-/wedgtu/-/>. In addition, several days after the beginning of the crisis at several nuclear power reactors in northeastern Japan that followed the March 2011 earthquake and tsunami, WikiLeaks released diplomatic cables via British newspaper the *Telegraph* reporting warnings that Japan had received about significant safety problems at Japanese reactors, especially in the event of an earthquake. See Steven Swinford & Christopher Hope, *Japan Earthquake: Japan Warned over Nuclear Plants, WikiLeaks Cables Show*, TELEGRAPH (Mar. 15, 2011), <http://www.telegraph.co.uk/news/worldnews/wikileaks/8384059/Japan-earthquake-Japan-warned-over-nuclear-plants-Wiki-Leaks-cables-show.html>. This kind of disclosure is a classic whistle-blowing act that can allow the Japanese public to hold their national government, regulators, and industry actors accountable for their actions. Whether they will do so, or whether the disclosures were necessary to stir public dissatisfaction, is and will be difficult to prove. But the fact that WikiLeaks could supply these cables on a just-in-time basis illustrates the profound nature of the site as a resource for the public and as a threat to government secrecy.

It is important to note, however, that WikiLeaks’ and its supporters’ claims about the site’s positive externalities are not uncontested. See, e.g., Dan Murphy, *Julian Assange: The Man Who Came to Dinner, the Man Who Saved Egypt*, CHRISTIAN SCI. MONITOR (July 5, 2011), <http://www.csmonitor.com/World/Backchannels/2011/0705/Julian-Assange-The-man-who-came-to-dinner-the-man-who-saved-Egypt> (strenuously denying Assange’s claims about WikiLeaks’ role in the Egyptian uprising); Dan Murphy, *Tunisia: That “WikiLeaks Revolution” Meme*, CHRISTIAN SCI. MONITOR (Jan. 15, 2011), <http://www.csmonitor.com/World/Backchannels/2011/0115/Tunisia-That-WikiLeaks-Revolution-meme> (questioning claims about WikiLeaks’ role in the Tunisian uprisings).

information-access law seems to take no consideration of spillover effects that take place outside American borders and affect only foreign governments.<sup>236</sup> Instead, the public interest, as understood and accounted for in the prevailing balancing test, implicitly refers to an American public interest. The idea that such beneficial effects can occur, however, is inherent in the operations and ideals of data networks that recognize no national boundaries and can be used to actively resist them, as well as in international human-rights law, which recognizes a right to receive information “regardless of frontiers.”<sup>237</sup> It therefore seems only fair to consider these effects in calculating the value of WikiLeaks’ disclosures. This conflict constitutes an additional aspect of the WikiLeaks case that confounds existing transparency laws and their limited conception of disclosure’s effects. The relevant effects for such laws are strictly national in scope and jurisdiction and concern the prerogatives and security of the nation-state as balanced against the benefits of disclosure to the state’s citizens.

#### CONCLUSION: THE CONSEQUENCES OF DISCLOSURE’S UNCERTAIN EFFECTS

WikiLeaks and its model of massive, vigilante disclosure challenges transparency law and theory’s underlying assumption about disclosure’s necessary and predictable effects in two ways. First, WikiLeaks’ ability to receive and distribute leaked information cheaply, quickly, and seemingly unstoppably allows it to bypass the legal framework that would otherwise permit courts and officials to consider and balance disclosure’s effects. For this reason, WikiLeaks threatens to make transparency’s balance irrelevant.<sup>238</sup> Second, its recent massive disclosures of U.S. military and diplomatic documents, and the uneven and unpredictable effects they have had to date, should force us to reconsider and test the assumption that disclosure produces effects that can serve as the basis for judicial and administrative prediction, calculation, and balancing. For this reason, WikiLeaks threatens transparency’s balance by disproving its assumption

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<sup>236</sup>. Indeed, American intelligence agencies are explicitly barred from disclosing documents to foreign governments or their representatives. 5 U.S.C. § 552(a)(3)(E) (2006).

<sup>237</sup>. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 19 (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml> (“Everyone has the right to . . . seek, receive and impart information and ideas through any media and regardless of frontiers.”).

<sup>238</sup>. I use the term *threaten* with the caution the term implies. WikiLeaks and its progeny may never have as much success again—after all, nearly forty years passed between the Pentagon Papers and the major WikiLeaks releases. WikiLeaks’ technological innovations (to the extent that there were any) could prove only as successful as the material to which it had access, which required the luck and courage (if one sees it as such) of Bradley Manning. To the extent that the U.S. government can keep a future Bradley Manning from having access to or being able to download such a trove of digital files, WikiLeaks’ “threat” may not be so great. I thank Steven Aftergood for this insight.

that disclosure guarantees measurable consequences that can be estimated *ex ante*.

The effects discussed in Part III lend themselves to no simple conclusion. Government officials asserted immediately after the massive disclosures began that WikiLeaks would cause untold, incalculable damage to the nation's military personnel, national security, and diplomatic efforts. Their initial claims would clearly have tipped any balance against disclosure. They eventually retreated from that prediction, however, and besides the intuitive, subjective, and unprovable claim that disclosure harms internal deliberations and international diplomacy, open sources provide no clear evidence that WikiLeaks caused significant damage to the Department of Defense or the Department of State. The agencies have been forced to revise their information-sharing technology and protocols, but the source of the WikiLeaks leak seems to demonstrate that their protocols badly needed revision—in fact, better to have WikiLeaks do so than to have a terrorist group or competing intelligence service obtain this data without the government's knowledge.

At the same time, it is equally difficult to conclude that the disclosures even approach the claims typically made by advocates of transparency's beneficial effects to the nation whose information is disclosed. Neither of Julian Assange's stated goals for WikiLeaks' vigilante transparency seems to have transpired: the United States has neither been reformed by an informed and energized public, nor has it collapsed under the weight of an insurgent popular movement. WikiLeaks does seem to have affected other nations, however, perhaps to some degree inspiring or assisting a popular uprising in Tunisia, and in so doing helping to spur broader democratic hopes and movements across North Africa and the Middle East. It is too soon to tell whether this historical development benefits those nations or the United States itself, but it appears at this time that, if true, it is WikiLeaks' most significant effect—an effect that no one could have predicted prior to WikiLeaks' disclosures and one that is not, and perhaps should not be, considered within a balancing test that an American administrator or court should use.

The implications of this conclusion are conceptually profound.<sup>239</sup> If we cannot assume or predict the existence of effects from a massive disclosure of classified documents, then a core theoretical concept and assumption for the laws governing access to government information are incoherent and conceptually bankrupt. Courts can continue to rely upon the idea that they are “balancing” various “interests,” but all they do in such instances is make

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239. One implication that lies beyond this Article's scope is that WikiLeaks illustrates the limits of a consequentialist approach to secrecy and transparency. If we cannot predict disclosure's consequences—or even predict whether it will have consequences at all—then a consequentialist or utilitarian basis for a legal regime or a legal or political theory will prove unsatisfactory, if not wholly inadequate. My thanks to David Pozen for identifying this point.

intuitive guesses as to what might happen in the wake of disclosure or its absence. In most instances where the state claims that disclosure will cause catastrophic consequences, courts will simply defer to the state.<sup>240</sup> If courts continue to balance interests, they should require more than a worried, unsubstantiated prediction—an administrative version of an *ipse dixit*—before granting a request for secrecy. A more effective approach would be to strengthen and model new entities on permanent or temporary administrative bodies that more independently and expertly decide consequential claims about disclosure’s dangerous effects—entities such as the Interagency Security Classification Appeals Panel (“ISCAP”) and the 9/11 Commission that, though imperfect, have been more effective than courts in making difficult decisions about information disclosure.<sup>241</sup> If disclosure laws must continue to rely upon the nearly impossible task of calculating effects, whenever possible they should vest authority to make that calculation in officials and institutions that can perform the task more competently than judges of general jurisdiction.

At the same time—contrary to the celebratory rhetoric of some transparency advocates—disclosure will not necessarily transform the United States or any Western democracy into a model of popular deliberation, participatory decision making, and perfect governance.<sup>242</sup> In this respect, WikiLeaks has proven that Assange’s complication of his theories of transparency’s effects was entirely prescient.<sup>243</sup> Western governments and societies are too complex and decentralized, their publics too dispersed, and their information environments too saturated for transparency, by itself, to have significant transformative potential. But one can remain committed to creating the conditions of a more transparent state and world without simply assuming and asserting transparency’s utopian effects.

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240. See Thomas S. Blanton, *National Security and Open Government in the United States: Beyond the Balancing Test*, in NATIONAL SECURITY AND OPEN GOVERNMENT: STRIKING THE RIGHT BALANCE 33, 66 (Bethany Walawender & Alyssa Colonna eds., 2003), available at <http://www.maxwell.syr.edu/uploadedFiles/campbell/events/NSOG.pdf> (“But we need to drop the idea of balancing this fundamental value [of open government] against national security. To admit the notion of balancing is to lose the debate over where to balance.”).

241. See Aftergood, *supra* note 156, at 407–09 (discussing ISCAP’s incremental successes); Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH. & LEE L. REV. 1239, 1313–17 (2008) (discussing the 9/11 Commission’s relatively successful efforts to force the Bush administration to disclose information). To clarify what I mean by “imperfect” here: while such institutions still perform the nearly impossible task of balancing impossibly abstract, conflicting goals, they do so with more expertise, input from more experienced officials, and may perform more informal negotiations than Article III courts.

242. See Fenster, *supra* note 133, at 914–36 (describing the failures of open-government laws in improving public knowledge and participation).

243. See *supra* text accompanying notes 126–32 (outlining Assange’s argument that Western governments are too “fiscalized” to change radically, but suggesting that in states like China, where pervasive censorship reigns, radical change can still be achieved).