RIGA GRADUATE SCHOOL OF LAW

The Principle of Freedom of Press in the Context of National Security: Case Studies of Investigative Journalism

BACHELOR THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

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ABSTRACT

The principle of the freedom of press in the context of national security is a challenge when it comes to the balance between individual liberties of investigative journalists, and the right of the nation to protect its national security. The author creates this research question: how do the judicial authorities in democratic nations, reconcile the imperative of national security with the principle of press freedom, in cases concerning investigative journalism?

The aim of the research is to highlight the importance of the principle of press freedom within healthy democratic political communities, through specific caselaw of investigative journalism; and to investigate the approach by judicial authorities when the principle is challenged by national security concerns. Through landmark cases, the results indicate that judicial authorities use the principle of proportionality when weighting the right of journalistic individual liberties against national security interests of the State.

Keywords: freedom of press; national security; investigative journalism; the principle of proportionality; Pentagon Papers; United States Constitution; theoretical; socio legal.

Summary

Chapter one, “Freedom of the Press or Media as a Fundamental Principle,” examines the concept of the principle of the freedom of the press, its historical roots, and legal frameworks such as the United States Constitution First Amendment and Article 11 of the Charter of the Fundamental Rights of the European Union. As the cornerstone of human rights and a fundamental component of democracy, it focuses on the freedom of the press to report on news that is of public interest without interference from the government. The chapter examines the history of censorship, which began initially with the church, and then transferred to the State. The primary distinction between regulation and censorship is that the latter became an instrument of balancing, whereas the former, as it was originally understood, suppressed all forms of written expression. *Near* v. *Minnesota* made clear that censorship differs from regulation in that it permits the press to publish even when it violates its liberties, and then uses legal means to censor later on if needed.

Chapter two, “The Interplay between Freedom of the Press and National Security” examines the main tenets of democracy: transparency, accountability and citizenship rights. These aspects assist in the public of the nation to have an intellectual discourse, and to be able to participate in governmental processes, in turn leading to a robust democracy. The relationship between press freedom, national security, and democracy is also explored historically, starting with ancient Greece and Rome, moving on to the Enlightenment period and its ideas of free thought, the 19th and 20th centuries and the growth of the media, and ending with cases like Edward Snowden and the difficulties of disseminating information about national security via the Internet. Before discussing press freedom during times of conflict, the chapter discusses the recent decline of democracy and the rise of authoritarian regimes. The main instances include World Wars I, II, and the Cold War Era, which show how nations like the United States suppressed the media under the pretense of "national security" to protect their military secrets. Lastly, the chapter mentions the concept of national security and how it is used by States, as well as the legal safeguards, such as an independent judiciary and the three-prong test.

The third chapter, "Investigative Journalism: Case Studies," starts out by explaining the distinction between investigative and journalism before going into historical case examples that demonstrate how the courts struck a compromise between the interests of press freedom and national security. *Branzburg* v. *Hayes* was an example of how the government placed national security above the reporter’s privilege of journalists. The Julian Assange case serves as a contemporary illustration of how little legislation there is around the dissemination of information online. The case is still ongoing, but it is strongly debatable whether the United States will be able to prosecute Assange based on the Espionage Act. *Goodwin* v. *United Kingdom* set a precedent that the protection of journalistic sources can outweigh the state's interests. The Pentagon Papers case, which at the time involved the Vietnam War, served as an example of how national security cannot always be invoked as a justification for preventing the press from publishing material of public interest.

The thesis, which is divided into three chapters, aims to address the subject of how democratic nations' judicial systems strike a compromise between the objectives of national security and the free press. The thesis looks at the idea of proportionality in the context of judicial decision-making by analyzing significant instances, history, ideas, and the interpretation of certain laws.

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INTRODUCTION

The principle of the freedom of the press in the context of national security has implications for democracy, security and individual fundamental rights. Press freedom is a fundamental right that must be protected from capricious censorship. A healthy democracy must protect this right to have a citizenry that is educated by non-biased information, which will allow for an educated public discourse. Freedom of the press allows for transparency, as well as for accountability. Journalism then becomes a lynchpin for providing the above-mentioned aspects by acting as a watchdog which reports on any wrongdoings by delving deep into their research and reporting on matters of public interest. Nevertheless, the intersection between press freedom and national security becomes a complex issue with its own challenges.

The ability of journalists to report on matters of national security progresses the right of the public to have access to crucial information so they can critically participate in democratic processes. If the press is censored under the guise of national security, there are chances of government secrecy and a lack of transparency, which undermines the very principles of democracy. Journalism plays an important role of uncovering issues, such as government overreach, abuses of power, or human rights violations that could be censored under the pretext of national security. Historically, the development of press freedom shows an ongoing conflict between regulation and censorship. Case studies of investigative journalism provide beneficial insights into the balance between state interests and individual liberties. Examining case studies of investigative journalism allows for the author to explore the governments duty of protecting national security, and the duty of the press to keep the public informed on issues of interest. More importantly, the challenges that journalists face when reporting on issues of national security can help the reader think about the broader aspect of press freedom and censorship. With the recent worldwide democratic backsliding, surveillance technology, and threats to journalists' lives, this topic is now more relevant than ever. The author must comment that the topics relevance can be seen in today's global landscape, which is also characterized by growing authoritarianism, such as press censorship by Russia in the ongoing war with Ukraine, where Russia is stifling any decent war reporting.[1] With the spread of social media, government accountability and press freedom had improved in some countries and weakened in others.[2]

The research problem of this thesis is: how do the judicial authorities in democratic nations, reconcile the imperative of national security with the principle of press freedom, in cases concerning investigative journalism? The author aims to highlight the importance of the principle of press freedom within healthy democratic political communities, through specific caselaw of investigative journalism; and to investigate the approach by judicial authorities when the principle is challenged by national security concerns. The objectives to reach the aim is to analyse legal frameworks, review judicial precedents and approaches, to highlight where the judicial authorities successfully navigated between freedom of press and national security. The author will use both the non-doctrinal (socio-legal), and the doctrinal (theoretical) approaches. When examining legal instruments such as the United States Constitution and the Charter of the Fundamental Rights of European Union, the author will use an analytical approach to

[1] Anton Troianovski and Valeriya Safronova, "Russia Takes Censorship to New Extremes, Stifling War Coverage," *New York Times,* March 4, 2022, available on: https://www.nytimes.com/2022/03/04/world/europe/russia-censorship-media-crackdown.html . Accessed on: April 10, 2024.

[2] Korhan Kocak and Ozgur Kibris, "Social Media and Press Freedom," *British Journal of Political Science,* 53 (2022): abstract, accessed April 10,2024, doi:10.1017/S0007123421000594.

evaluate the reasoning behind each drafting process. This analysis is important to comprehend the scope of these legal protections.

In chapter 2, the scope of democracy as a political realm, will be examined using more of the non-doctrinal approach analytical method, to showcase the relationship between press freedom, democracy, and national security over time. The key concepts of "investigative journalism", "freedom of the press", and "national security" will be systematically interpreted. It is the only method that truly determines the meaning of a law (a word, rule, or concept) by analyzing it solely in its statutory or other legal context, that is, in one or more legal acts of the same legal system (a statute, regulation, administrative act, or judicial decision).[3] The interpretation of these key concepts is crucial to understanding how they will be interpreted within the legal sphere. The historical, or qualitative methodology, will involve a systemic examination of the evolution of the freedom of the press and its relationship with national security, to draw insights and patterns within the historical narrative. This approach will examine how press freedom and national security rules change during wartime by finding the patterns within WW1, WW2, and the Cold War Era. When evaluating and contrasting the judicial work in real practice, Chapter 3 focusing on case studies, will employ both doctrinal and non-doctrinal techniques, notably comparative and empirical approaches to study the methodology used in each court decision.

The author sets limitations on which countries the focus will be on. The scope of the research will mainly focus on the United States and United Kingdom, with a brief mention of other European countries for supplementary material. The author set this scope for several reasons. United States and United Kingdom have well-established legal frameworks, that specifically protect the freedom of the press; both countries have a rich history in press freedom and many landmark cases that balance national security concerns with journalists' freedoms; and comparing the United States and United Kingdom to many other democratic countries, they are generally more transparent and provide easier access to information. This accessibility makes thorough investigation and analysis easier.

This thesis comprises of three chapters. The first chapter will explore press freedom as a general concept and examine the difference between the legal nuances of regulation versus censorship. The chapter will generally mention the relationship of press freedom and national security before delving into the drafting process behind the United States Constitution First Amendment, and Article 11 of the Charter of the Fundamental Rights of the European Union. Chapter two will touch on the principles of democracy before going into the historical evolution of the relationship between democracy, press freedom, and national security. The author will further examine how rules on press censorship change during war time. The cha pter will conclude with legal safeguards that are necessary to balance the competing interests, such as the three-prong test, that prevents abuse of national security claims. The final chapter will examine caselaw from the United States and United Kingdom, which involves the role of investigative journalism on matters of national security concern. The author will analyse how each judicial decision attempted to balance national interests with press freedom, and gain insight behind each legal decision made by the court.

[3] Ivan L. Padjen, "Systematic Interpretation and the Re□systematization of Law: The Problem, Co□requisites, a Solution, Use," *International Journal for the Semiotics of Law* 37(2019): accessed: May 1, 2024, https://doi.org/10.1007/s11196-019-09672-x .

1. Freedom of the Press or Freedom of the Media as a Fundamental Principle

1.1 Press Freedom as a General Concept and its Legal Scope: Censorship vs. Regulation

Freedom of the press is defined as: **"**the right of newspapers, magazines, etc., to report news without being controlled by the government".[4] Press freedom is seen as the cornerstone of human rights and democracy[5] for it permits reporters, and other media organizations to disseminate information without excessive interference, which is essential for a robust democracy. It is essential to individual autonomy and an indispensable element for the attainment of truth.[6] This freedom makes it possible for governments to maintain accountability and transparency in all their acts. The legislative protections that journalists and media outlets enjoy, serve as a major foundation for press freedom. Statutes, constitutional protections, and court precedents all play a crucial role in preventing government censorship of press freedom. The reader needs to be aware that the original concept of freedom of expression gave rise to the notion of press freedom. [7]

Although the two freedoms have a somewhat different scope of legal protections, they are still interrelated. For instance, while the right to free speech might permit someone to express oneself in writing, the right to freedom of the press grants journalists additional legal safeguards that enable them to report on matters of public concern, such as the reporters' privilege and shield laws which generally are meant for the journalists to not disclose their materials.[8] *What* [emphasis added] might have an impact on press freedom is another crucial factor. The coverage of certain viewpoints can be significantly impacted by the political or economic framework. The fact that many media outlets do not want to report stories that are too controversial, or disturbing is one of the crucial factors, in turn "…a great range of opinion and analysis outside the narrow mainstream rarely sees the light of [day]".[9]

Censorship, and regulation of the press need to be carefully examined to further on determine the nuances which affect the reasons behind both. Although censorship existed

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[4] Merriam-Webster, "Freedom of the Press," *Merriam-Webster Dictionary*, accessed April 10, 2024, available on: https://www.merriam-webster.com/dictionary/systematic.

[5] "According to Article 10 of the Human Rights Act and Article 11 of the EU Charter of Fundamental Rights, '*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers*.'" " Press Freedom: One of the Pillars for Democratic Societies," *Media Literacy for Citizenship*, accessed April10, 2024, available on: https://eavi.eu/press-freedom-one-of-the-pillars-for-democratic-societies/ .

[6]Judith Lichtenberg, "Foundations and Limits of Press Freedom," *Philosophy & Public Affairs* 16, no.4 (1987), p. 329, available on: https://www.jstor.org/stable/2265278.

[7] Arguments in favour of press freedom are also arguments in favour of broader freedom of expression. However, anything that upholds press freedom does not automatically support speech freedom, for at least two connected reasons that we will discuss below. First, there may be grounds for restricting press freedom due to factors inherent in the principle of free speech itself. The argument that the modern mass media may stifle ideas and suppress information rather than promote it is based on this. Second, the modern press is mostly made up of huge, intricate institutions that are fundamentally different from people and from the early press, which is significantly responsible for the development of the idea of press freedom. Arguments in favour of individual or small-scale publication freedom of expression do not always support the same liberties for the mass media. However, proponents of press freedom today frequently adapt the new forms to the traditional ones. *Ibid.,* p.333.

[8] "Guide to Legal Rights in the U.S," *Committee to Protect Journalists* ,available on: https://cpj.org/2020/09/guide-to-legal-rights-in-the-u-s/. Accessed April 1, 2024.

[9] Lichtenberg, *supra* note 6, p.330.

during the very early ages, and initially through the church, it eventually transferred to the State, and became more prominent when the press became printed and available in large quantities to the public.[10] The word 'censor' is derived from the Latin verb *censere*, which means "to evaluate, to examine, to check".[11] Yet, the words 'evaluate', 'examine', and 'check' do not necessarily propose that the press should be completely controlled. There are two types of censorship: preventative, and punitive. The former deals with preventing the expression before it goes public, while the latter is *after* [emphasis added] the expression is made public.[12] One may wonder who could be the censoring party? It can be anyone, beginning with the authors and concluding with the government, which is this thesis' primary focus.

One basic principle is the *noninterference* or *non-censorship principle*: "[o]ne should not be prevented from thinking, speaking, reading, writing, or listening as one sees fit."[13] This is related to the democratic principle that a free and democratic country ought to be able to converse about a wide range of subjects. This is where the idea of regulation can be introduced. When does censorship stop and regulation start? In *Near* v. *Minnesota,*[14] Chief Justice Evan Hughes emphasized the distinction between prior censorship and regulation, and highlighted that even if the press will abuse its freedoms, the proper response is to address the issue after, through legal avenues. His majority opinion shed light that the press should operate without government censorship, while also recognising the need for possible regulation after.

Regulation is meant to allow democratic ideas to be expressed without government interference and for the public to carefully examine all sides of a story. Free speech does not imply that we should tolerate hate speech that is unfiltered, or that we should permit interview subjects to incite racial animosity.[15] It also does not imply that speech is easy or unrestricted.[16] Despite its name, there is a cost to free speech, and that is that our editors, viewers, and regulators will always be watching and scrutinizing what we do.[17] The regulatory frameworks could be licensing, content restrictions, defamation laws,[18] or promoting self-regulation and a code of ethics, proposed at the School of Journalism conference.[19] This balance of impartial

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[10]Jürgen Wilke, "Censorship and Freedom of the Press," *in European History Online (EGO),* published by the Leibniz Institute of European History (IEG), (2013), available on: http://ieg-ego.eu/en/threads/european-media/censorship-and-freedom-of-the-press#section_1. Accessed March 2, 2024.

[11] *Ibid.,* para.2.

[12]"Defining Censorship," accessed April 22, 2024, available on: https://media.okstate.edu/faculty/jsenat/censorship/defining.htm.

[13] Lichtenberg, *supra* note 6, p.334.

[14] "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity" opinion by Blackstone. *Near* v. *Minnesota*, 283 U.S. 697 (1931

[15] Richard Sambrook, "Regulation, Responsibility and the Case against Censorship," Index on Censorship 1 (2006),p.167, accessed April 30, 2024, available on Sage Journals, doi: /pdf/10.1080/03064220500532545.

[16] *Ibid.*

[17] *Ibid.*

[18] *Virtual Knowledge Center to End Violence Against Women and Girls*, in UN Women, " Understanding How This Works," last edited (July, 2020), available on: https://www.endvawnow.org/en/articles/2007-understanding-how-this-works.html. Accessed May 1, 2024.

[19] "The point of most intense and general interest in the conference was the adoption of a code of ethics for journalism which has since been described by the Editor and Publisher of New York, a leading professional magazine, as striking 'the highest note that has been sounded in American journalism. 'This code was passed unanimously, and a subsidiary motion was passed that it should be given fullest publicity in order that the public may 'check us up if we fail to observe it.'"Eric W. Allen, "The Social Value of a Code of Ethics for Journalist," *The Annals of the American Academy of Political and Social Science* 101 (1922): p. 170, available on: http://www.jstor.org/stable/1014605.

public regulation is made possible by the regulations, which also prohibit the intentional dissemination of inaccurate or misleading information, or the misuse of free expression.

A noteworthy case is *Crown* v. *John Peter Zenger*, which took place during the colonial era and involved Peter Zenger, who at the time of the New York Gazette was just a licensed printer.[20] Zenger was sued for publishing libel, and although he was not the writer, the understanding was that if he did not print the paper, it would not be published.[21] Libel during that time was considered injurious information of any establishment of the law, or of any public man of the law.[22] The Governor, Corby, at the time, attempted to hider the publication by using governmental censorship, yet at the trial, the jury found Zenger 'not guilty'.[23]

> It is important to note that the Zenger case did not establish a legal precedent for…freedom of the press. Rather, it influenced how people thought about these subjects and led, many decades later, to the protections embodied in the United States Constitution…[as well as other legal acts].[24]

1.1.2 Balancing Press Freedom and Regulatory Interest of National Security

One such regulatory interest that keeps tension in the freedom of the press arena, is national security. The meaning of national security as a whole, which reads, "the safety of a nation against threats such as terrorism, war, or espionage," is exclusive to the Google lexicon".[25] Yet, it may be one of the only, somewhat tangible, understandings of this concept when used in relation to press freedom restrictions. When weighed against other interpretations of national security, it takes on the form of an analysis of its potential relevance to a particular problem. National security is a perplexing term because security is used to refer to so many different things that there is no consensus on what it actually means and, as a result, no shared understanding of the idea.[26] Security includes undoubtedly more than just national survival but the specifics are frequently left ambiguous and undefined.[27] It is a notion that gets much more delicate and sensitive during conflict.

In the context of this thesis, governments occasionally contend that press censorship is necessary to prevent the dissemination of sensitive material that might jeopardize the governments security or national interests. One example is the case of Edward Snowden, who was a former National Security Agency (NSA) employee, and a whistleblower who leaked information to a journalist regarding the secret and extensive surveillance programs done by the NSA.[28] As the government commented, "…the information is to be used to the injury of the

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[20] *Crown* v. *Zenger* (1935), in *Historical Society of the New York Courts*, accessed April 1, 2024, available on: https://history.nycourts.gov/case/crown-v-zenger/ .

[21] *Ibid.*

[22] *Ibid.*

[23] *Ibid*., para. 12.

[24] *Ibid.*

[25] "National Security," *Google search,* accessed May 1,2024, available on: https://www.google.com/search?client=firefox-b-d&q=national+security+definition .

[26] Melvyn P. Leffler, "National Security," *The Journal of American History* 77, no. 1 (1990): p.144, https://www.jstor.org/stable/2078646 . Accessed April 1, 2024. Leffler continued on to point out that a nation's power is based on its political stability, social cohesion, and economic productivity, according to proponents of the national security approach, which recognizes that power plays a crucial role in how nations behave and the operation of the international system.

[27] *Ibid.*

[28] Iain Munro and Kate Kenny, "Whistleblower as activist and exile: The case of Edward Snowden," *Organization*, (2023), available on: Sage Journals. https://doi.org/10.1177/13505084231194824 . Accessed April 1, 2024.

United States".[29] Though it is still pending, the Snowden case is one of the more recent instances of how the government has used national security to potentially punish Snowden to further its interests based on national security arguments.

If applied too broadly, this idea may hinder openness and make it difficult to hold the government accountable. For governments, society, and press freedom around the world, national security is a difficult and continuous problem.

1.2 Historical Origins of Press Freedom

Freedom of the press has a long history of evolution that is continuing. The Virginia Declaration of Rights is a significant historical accomplishment since it was the first text to include press freedom as a constitutional right.[30] Additionally, the freedom of the press (not even the freedom of assembly or the freedom of speech) was protected by the Virginia Declaration of Rights of 1776 which stated: "[t]hat the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments".[31] The author points out that the Virginia Declaration of Rights was ratified prior to the United States, from here on out U.S., becoming the nation that it is today. Chronologically speaking, the Virginia Declaration of Rights predated the next phase, which was the Bill of Rights that was being added to the U.S. Constitution. Freedom of the press, when it became a principle more recognised, was mainly attributed to the Bill of Rights that was added to the U.S. Constitution. This addition by James Madison, then a member of the U.S. House of Representatives, was mainly because it was observed that the Constitution could not regulate the powers of the government.[32]

Initially, Madison wanted to reword some parts of the Constitution, yet some members stated that Congress had no right to alter the wording of the Constitution, and proposed Madison changes as a list of amendments; initially, 17 amendments were proposed, yet only 10 amendments were approved and ratified.[33]

The anti-federalists believed that any powers that were not explicitly stated in the Constitution then belonged to the people and the individual governments, or States.[34] The Bill of Rights addition made it possible for these anti-federalists to think that the rights and individual safeguards that were not previously addressed in the document, would now be more clearly expressed. The First Amendment of the Bill of Rights states:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[35]

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[29] Jessica Blusiewicz, "The Case of Edward Snowden: a different path," published by University of Virginia, p.19, available on: https://journals.library.cornell.edu/tmpfiles/CIAR_8_1_3.pdf .Accessed April 1, 2024.
[30] David S. Bogen, The Origins of Freedom of Speech and Press, *Maryland Law Review* 42, no.3 (1983): p.429.
[31] Ashutosh Bhagwat, "The Democratic First Amendment," *Northwestern University Law Review* 110, no. 5 (2016): p.1104.
[32]Bill of Rights Institute, "Bill of Rights: The First Ten Amendments," available on: https://billofrightsinstitute.org/primary-sources/bill-of-rights . Accessed April 2, 2024.
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*

Eventually, the most notable modern concept of freedom of the press resided in the First Amendment of the U.S. Constitution which reiterated that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[36] It is also important to recognise that press freedom has had a challenging past, marked by ambiguities and a lack of respect until a certain century. Until the 20th century, it left the "…scope of press freedom to state courts and legislatures."[37] It took some time before the idea of press freedom started to grow and expand its limits. To understand the ever-evolving history of press freedom,

> it is important to understand not only the expansion of formal constitutional rights but also how those rights have been shaped by such factors as… the broader political and cultural relations between politicians and the press.[38]

1.3 National Legal Instrument: The United States Constitutions First Amendment and the Principle of Reporters' Privilege Origins (Legal Commentary)

The author draws attention to the fact that, in discussing a constitutional right, she is citing a particularly U.S. as an example because of this nations historical roots in press freedom. As mentioned in the previous sub-chapter, the Virginia Declaration of Rights gave the first constitutional right of the freedom of the press.[39] Since Britain was still in power at the time the U.S. was still not a formed nation, significant British influences must be considered to comprehend the events that led to the creation of the U.S. Constitution. The development of press freedom through British colonial rule in America, to the eventual modern First Amendment is one of the lengthiest ones and deserves its own analysis. To fully understand the progression of the principle of freedom of the press, one must understand the process and meaning behind the drafting.

The concept of free speech began with "parliamentary privilege" which asserted that free speech in Parliament was a given right.[40] This was followed by the English Bill of Rights which stated,

> [t]hat the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament.[41]

The American colonies sought to emulate the Parliament by attempting to obtain this privilege for themselves. Although at first this right of speech was restricted to the assembly, the colonists considered this to be a fundamental freedom in society.[42] Concerning the First Amendment, the parliamentary privilege proposed that the protection of speech was necessary for a healthy political process.[43]

The idea of "prior restraints" in Britain, meaning that the government had to obtain licenses from publishers before anything was published; or even close down publishing houses

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[36]Sam Lebovic, "Freedom of the Press," in *American History*, (2019), https://doi.org/10.1093/acrefore/9780199329175.013.444. Accessed April 1, 2024.
[37] *Ibid.*
[38] *Ibid.*
[39] Bogen, *supra* note 30.
[40] *Ibid*., p.433.
[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid*., p. 435.

if it felt threatened, was a secondary idea that influenced the protection of the freedom press.[44] This may be the earliest instance of how governments restricted journalistic freedom using the vague and still-undefined definition of "threat to a government", or what is now called "national security."

> Although some people may have understood the term "freedom of the press" only in the limited sense of an absence of prior restraint, the First Amendment encompassed a broader concept.[45]

In creating the Virginia Declaration of Rights and the First Amendment, the U.S., as a young nation, considered the British governments' subsequent removal of "prior restraint" and concluded that their government should not have the authority to restrict press freedom.

The U.S. Constitution is the supreme law of the U.S., and replaced the Articles of Confederation[46] when it was ratified in 1788.[47] The main purpose of establishing the Constitution was for the government to be allowed to remain to make national decisions, without risking the abuse of fundamental rights.[48] One major way the Constitution achieved this, was by establishing a system of checks and balances in which the government was separated into three separate branches, which all had the power to balance each other in order for one of the branches to not gain full supremacy.[49]

This section will focus on the fundamental right that was written in the First Amendment of the Constitution.

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[50]

When interpreting the words of the amendment which specifically state "… or abridging the freedom of speech, or of the press…",[51] one can only assume that the State shall have no right whatsoever to censor any type of speech or press. Nevertheless, we must remember that there are multiple ways of interpreting the law, one of which is using Travaux Préparatoires,[52] more commonly known as preparatory works. Although they can be criticized as being only a secondary source of interpretation, it is important to note that the U.S was in "… favour of

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[44] *Ibid*., p. 440.
[45] *Ibid*. p.440.
[46] Articles of Confederation (1777), in *National Archives*, available on: https://www.archives.gov/milestone-documents/articles-of-confederation . Accessed March 3, 2024.
[47] The White House, "The Constitution," available on: https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/ . Accessed March 6, 2024.
[48] *Ibid.*
[49] *Ibid.*
[50] Constitution of the United States: First Amendment, in *Constitution Annotated:Analysis and Interpretation of the U.S. Constitition*, available on: https://constitution.congress.gov/constitution/amendment-1/ . Accessed March 2, 2024.
[51] Lebovic, *supra* note 36.
[52] "The Travaux Préparatoires," *The Free Dictionary*, available on: https://legal-dictionary.thefreedictionary.com/travaux+preparatoires . Accessed March 2, 2024. It is frequently acceptable to refer to preparation materials when interpreting treaties, usually when there is a question. A treaty may occasionally specifically mention a foundation report, which may be used as assistance. In the UK, the similar concept was just recently established to allow for the use of Law Commission findings that urge legislation or even Parliamentary discussions when constructing statutes when there is ambiguity.

according to equal weight to travaux…"[53] The First Amendment with its guarantee of the freedom of the press, can still be broad and open to interpretation. Therefore, Travaux Préparatoires can help better understand the legislative intent behind the drafting.

The drafters of the Constitution wanted it to become "…like a colossal merger, uniting a group of states with different interests, laws, and cultures."[54] In this way, the drafters moved away from a simple organization of states that made decisions with only their interests in mind, and united the people and the union into a citizen community. The Constitution "…vested the power of the union in the people."[55] This phrase must be seen as vesting all of the ultimate authority of the nation to the people themselves, who then are essentially entrusted with governing the nation. This associates to the concept of democracy, where the nation finds its legitimacy from the consent of its citizens. By particularly tying this to the First Amendment and the idea of press freedom, it becomes evident that the press should not be restrained when it comes to scrutinising the government, as this democratically permits openness and responsibility on the part of the government. This freedom is intended to enable the public to obtain information so they may engage in reasoned and objective discussion. Nevertheless, there remains a grey area when the government imposes speech restrictions and limits press freedom in the name of "national security" interests.

The U.S. Constitution Travaux Preparatoires are inaccessible, however, there are several legal opinions and commentaries by scholars, on the purpose of the First Amendment by the founding fathers. As David Yasky theorises, the fact that there is complete silence on which restrictions can be placed on the State regarding the concept of free speech and press, is no coincidence.[56] In fact, the founders *wanted* [emphasis added] the State to regulate free speech and found that it was completely appropriate.[57]

Yasky refers to the book by Levy, *Legacy of Suppression,* in which Levy states that the concept of the liberal free speech back in the founding days of the First Amendment are hugely different from the contemporary view of it nowadays.[58]

> Levy argued that the Founders considered only prior restraints on speech to violate the First Amendment; they saw post-publication punishment as permissible.[59]

In the contemporary world, Levy's argument would present certain critical challenges to the notion of the freedom of the press, as well as the connection to national security. The fact that the original founders allowed for post-publishment punishment allows for the risk of stifling any investigative journalistic ideas that could potentially hold the government accountable for any of their actions. Furthermore, in the context of national security, this form of "regulation"

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[53]John F. Murphy, *The United States and the Rule of Law in International Affairs* (New York: Cambridge2004), p.40.
[54]The Constitution on the United States, in *National Archives*, available on: https://www.archives.gov/founding-docs/constitution . Accessed March 2, 2024.
[55] *Ibid.*
[56] David Yassky, "Eras of the First Amendment," *Columbia Law Review* 91, no. 6 (1991): pg 1706.
[57] However, Yassky mentions that there was a legacy of suppression during the early 19th century where states used libel statutes, even criminal ones, to imprison individuals who were criticising the government (Yassky, p. 1707). This is a strong point when examining how the evolution of the concept of free speech has been slowly evolving. *Ibid.*
[58] *Ibid*.,p.1707.
[59] *Ibid*., Yassky footnote 22.

may allow for excessive government control which would enable censorship, as well as suppression of important information that could be vital for the public to know.

This begs to question whether the forefathers did not understand the notion of liberty as allowing for the public to have complete access to all information.[60] "The Founders did not believe that liberty depended upon the inclusion in public debate of all possible points of view".[61] As a result, this would be a violation of democratic ideals pertaining to press freedom and citizens' right to make their own critical decisions. Additionally, it should be noted that the "...[f]ounders maintained that each state had to determine for itself how much speech to permit"[62] when considering how each State will handle specific freedom of speech and press court matters in the future. This implies that there may be a small discrepancy in the degree of press freedom.

Allowing each State to set its own standards in determining when the freedom of press must be censored, does not allow for a consistent defence of fundamental rights and becomes even more vague when the problem of national security concern arises.

The First Amendment protecting the freedom of the press cannot be fully examined without briefly mentioning the concept of "reporter's privilege".[63] Essentially, the reporters' privilege protects the confidentiality of the sources that the journalists use. Although not all Circuit Courts in the U.S. upheld this concept, 49 states have enacted shield laws, which are legislations that specifically protect reporter's privilege.[64] Furthermore, the U.S. Department of Justice has created guidelines that protect journalists and media from being subpoenaed in order to reveal their sources or to be arrested themselves in the 28 C.F.R. § 50.10(c)(4)(iii).[65] Specifically this Code of Federal Regulations(C.F.R) recognises that democracy is based on the dissemination of information that is crucial or important for the public to know, and having an independent press, free of government restrictions is essential for this.[66] This is especially important when journalists use confidential sources when imparting information about governmental operations. Nonetheless, while this Federal Code of Regulations aims at protecting journalists and media outlets, it does provide for some exceptions such as national security or ensuring public safety, in example from an impeding terrorist attack.[67]

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[60] *Ibid.,*p.1707.
[61] *Ibid.*
[62] It is interesting to note that Yassky believed that since the states individually were more close to its citizens than the federal government, then they should be more easily held accountable to the public. The author notes that this concept of decentralization is still relevant today since local media frequently acts as a watchdog by getting closer to neighbourhood issues. Federal safeguards and interventions, however, might guarantee uniform standards and prevent violations at the state level *Ibid*., p.1708.
[63] Koningisor stated that the press is afforded certain evidentiary protections by federal circuits.The underlying theory supporting these safeguards has changed throughout time, but the most prevalent defense of the reporter's privilege in the modern era is that disclosing private information would drive away sources. This would therefore stop information from reaching the press and, consequently, the general public. Christina Koningisor,"The De Facto Reporter's Privilege," *The Yale Law Journal* 127, no. 5 (2018): p.1180, accessed March 20, 2024. http://www.jstor.org/stable/45222572.
[64]Margot Harris, " Is it Finally Time for a Federal Shield Law?," in *News Media Alliance* (2018), available on: https://www.newsmediaalliance.org/fed-shield-law-2018/ . Accessed March 22, 2024.
[65]28C.F.R.§50.10(c)(4)(iii), in *Legal Information Institute*, available on: https://www.law.cornell.edu/cfr/text/28/50.10 . Accessed March 20, 2024.
[66] *Ibid.*
[67] *Ibid.*

1.4 Regional Legal instrument: Charter of the Fundamental Rights of the European Union Article 11 (Travaux Préparatoires)

Article 11 of the Charter of the Fundamental Rights of the European Union,[68] from here on out CFEU, is also an important continuation in the evolvement of the freedom of the press. If the First Amendment, influenced by the British rule, was the groundbreaking initiative, the CFEU also has a shared commitment to democratic principles. The CFEU which came into force on December 2009, reflects the main principles that are important to the European Union, from here on out EU, and the Charter places the individual at the center of importance, whereas the EU allows for the individual areas of freedom, security, and justice.[69] The Charter wants to safeguard these values while respecting the different cultures, values, and goals of the people of the Union as well as the Member States of the Union.[70] One of the essential points of the Charter is to maintain the security of these fundamental rights while there are societal changes, as well as technological and scientific developments.[71] Furthermore, just as the principles in the First Amendment served as guidance to other jurisdictions, the CFEU contributes to the freedom of the press beyond the borders of EU,[72] and becomes a reference point for international standards. Examining the CFEU is crucial because it provides greater scope for understanding press freedom, particularly when examining case law from jurisdictions other than the U.S.

Article 11 of the Charter states,

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers;
>
> 2. The freedom and pluralism of the media shall be respected.[73]

Paragraph 2 of the Article was added during the drafting of the Praesidium proposal, which originally stated "[f]reedom of press and information shall be guaranteed with due respect for transparency and pluralism."[74]

Nonetheless, when considering the drafting of the Charter, there are some nuances. One of the proposed amendments aimed at adding a paragraph that specifically aimed at due regard

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[68] Charter of the Fundamental Rights of the European Union, 2000 OJ C 364 1, art.11, 26.10.2012. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12012P%2FTXT. Accessed March 4, 2023.
[69] *Ibid*.
[70] *Ibid.*
[71] *Ibid.*
[72] Cedric Ryngaert and John Vervaele, "Core values beyond territories and borders: the internal and external dimension of EU," available on: https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/Core-values-beyond-territories-and-borders.-The-internal-and-external-dimension-of-EU-regulation-and-enforcement.pdf . Accessed March 4, 2024. *See also*, T. van den Brink, M. Luchtman, and M. Scholten*, Sovereignty in the Shared Legal Order of the EU: Core Values of Regulation and Enforcement,* (Antwerp: Intersentia,2015, 1st ed.), pp. 299-324.
[73]EU Charter of Fundamental Rights: Article 11, in *European Union Agency for Fundamental Rights*, available on : https://fra.europa.eu/en/eu-charter/article/11-freedom-expression-and-information . Accessed March 30, 2024.
[74] Niall Coghlan and Marc Steiert (editors), *The Charter of Fundamental Rights of the European Union: the travaux préparatoires and selected documents*, European University Institute (2021), p.2420.

to freedom of the press that included transparency and pluralism,[75] terms which did not have specific limitations in Article 11 of the Charter.

> Some amendments aim to add to the Article the final sentence of Article 10(1) of the ECHR, which states that freedom of expression does not prevent States from subjecting broadcasting companies to a system of authorization.[76]

This proposed drafting amendment was aimed at focusing on clarifying the protections that would be afforded to the media within the EU, an important factor that is crucial to the protection of fundamental rights, as well as possibly leveraging these rights against the context of safeguarding national security issues. However, when there is a matter that can be supported by a national security concern, the original proposal to add the last sentence to Article 10(1) of the European Convention on Human Rights,[77] from here on out ECHR, raises some questions regarding the control of media outlets and the journalistic press. However, the CFEU was developed in a very precise and nuanced manner.

Foremost, the Convention was not sure whether to have the CFEU list all of the fundamental rights, or only those over which the EU had a competency over; in the long run, after many discussions, it was decided to list a whole catalogue of all the fundamental rights.[78] It is vital to mention that this fear of a full catalogue of rights came from the Member States who feared that their state sovereignty might be jeopardised.[79] One of the main reasons was that "… considering the global impact of the Charter, a reduced coverage of fundamental rights could have negative effects".[80] This drafting detail, the inclusion of a wide array of fundamental rights, signifies and emphasizes, their importance within the EU legal framework. Likewise, the effect on a global scale demonstrates that the EU would respect rights, such as freedom of the media, not only within its borders but also as a guiding model in its' dealings with other nations and international organizations.

In regard to the freedom of the media, the wording of the final Article, which stated "shall be respected", was highly disputed by some journalists who had concerns over the efficiency of it.[81] They preferred the original proposal which stated "shall be guaranteed", since it appeared to be a more powerful term.[82] Nevertheless, Article 11 provides even greater protection for this freedom when compared, for instance, to ECHR. This is because there is simply no section on the regulation of media freedom in Article 10 of the ECHR, which served as the foundation for Article 11 of the Charter.[83]

> The word "respected" in Article 11 does not limit protection, but caters to the fact that the Union, according to the principle of subsidiarity, has no competence to "guarantee"

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[75] *Ibid*.
[76] *Ibid.*
[77] Article 10: Freedom of Expression, *Equality and Human Rights Commission* (June 2021), available on:https://www.equalityhumanrights.com/human-rights/human-rights-act/article-10-freedom-expression . Accessed on: March 20, 2024.
[78] The Charter of the Fundamental Rights of the European Union, *Friedrich Ebert Stiftung*, available on: https://library.fes.de/fulltext/bueros/seoul/01679/grundrechtscharter2001-full-text.htm .Accessed March 20, 2024.
[79] Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights," *European Constitutional Law Review* 8, no. 3 (October 2012): p. 376.
[80] Charter, *supra* note 78.
[81] *Ibid.*
[82] *Ibid.*
[83] *Ibid.*

> freedom of the media. Therefore, Article 11 is mostly a classical protection against interference by the Union, national constitutional standard remains explicitly protected.[84]

Although Article 11 does not define or classify the many types of media or expression freedoms, that does not imply that one type of freedom is protected more or less than others. However, when drafting this fundamental right, the drafting convention was already aware and reliant on some ECHR cases which offered more stringent protection to forms of expression which concerned matters of public interest or any ideas on political issues.[85]

There are other legal instruments, such as Article 19 of the Universal Declaration of Human Rights, from here on out UDHR, which has an almost identical statement concerning the freedom to seek and impart information without restraint.[86] The other legal instrument worth mentioning, even for the simple comparison of the narrowness or broadness of protection, is Article 17, section 3(b) of the International Covenant on Civil and Political Rights, from here on out ICCPR, which mainly states the same but adds that there are responsibilities that may be invoked when there is concern for the protection of national security.[87] The former may be considered as more broad, while the latter allowing for some specific distinctions. To further this concept there must be recognition of the fact that peace, democracy, development, and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.[88]

To emphasize the importance of the principle of freedom of press, one could look at the current preamble of UDHR which focuses on "…the equal and inalienable rights of all members of the human family and that it is the foundation of freedom".[89]

Moving on to a slightly more in-depth analysis of the ICCPR, we can note that Article 19 is not absolute, national security being a reason for its restrictiveness. Specifically, all restrictions "…must be 'necessary in a democratic society,'" which allows for a proportional judgment when it comes to specific limitations.[90] Nonetheless, these limitations are not clear since it is up to the Human Rights Court, from here on out HRC, or other arbiters to decide which limitation is within its rights and which one is not.[91] To add, the vagueness and the broadness of the limitation of Article 19 of the ICCPR allows for the government to suppress information. Its language has led to varying interpretations and applications by different countries, and criticisms persist regarding its effectiveness in safeguarding this fundamental right.

2.THE INTERPLAY BETWEEN FREEDOM OF THE PRESS AND NATIONAL SECURITY

[84] *Ibid.*

[85] Olivier de Shutter, *Commentary of the EU Charter of Fundamental Rights* (European Commission, 2006), pp.116-117.
[86] Universal Declaration of Human Rights, GA, Res. 217A (III), U.N. Doc. A/RES/217(III) (1948), art. 19, p.40, available on: https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf . Accessed March 30, 2024.
[87] International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 171, art. 17.
[88] Jack Donnelly, *Universal Human Rights in Theory and Practice*, (London:Cornell, 2013), p.217.
[89] UDHR, *supra* note 86.
[90] Sarah Joseph, "A Rights Analysis of the Covenant on Civil and Political Rights," *Journal of International Legal Studies* 5, no. 1 (Winter 1999): pg.78.
[91] *Ibid.*

2.1 Democratic Principles

Without first describing the aspects of democracy that are crucial to press freedom and national security, this chapter cannot be considered properly established. Democracy has been politically heralded since this vital model became the "modern" way of protecting our very human fundamental rights. Nonetheless, if before democracy was battling between 'plain' and 'popular', it now is "…the subject of broad consensus and its promotion is high on the agenda of international bodies".[92]

Democracy is identified by a few key principles and by institutions that realize them. The starting point for democracy is the "…dignity of the individual person".[93] As liberal as this concept may sound, it is important to note that democracy is also a way for governments to make decisions on policies, meanwhile the public also bears the responsibility of following certain rules and participating in the creation of them.[94] The fundamental tenet of democracy is that the people have the right to form and influence their government through educated decision-making, which is a crucial component that is impacted by such factors as press freedom. One of the most important aspects of democracy is *citizenship rights* [emphasis added]. If this right is the starting point of democracy, an ability of the citizen to have influence over their government and their rights, there is a necessity for other fundamental rights that need to be afforded.[95] Some of these main rights include the right to freedom of expression, and of independent media that is not impeded by the government to impart information.[96] "Democracy is thus inseparable from fundamental rights and freedoms…"[97]

When discussing democracy, we must look at some other important principles that define it. The author will refer to the Universal Declaration on Democracy which was adopted by the Inter-Parliamentary Council at its 161st session in 1997 in Cairo.[98] In its principles of democracy it begins by reaffirming that this concept should be a universal goal, "…irrespective of cultural, political, social and economic differences".[99] The elements and exercises of democracy focus on fostering well-organized institutions that allow for active societal engagement in the democratic process, which would be free to "…*be regulated fairly and impartially* [emphasis added] and must avoid any discrimination, as well as the risk of intimidation by state and non-state actors".[100] This concept of democracy also includes *transparency* [emphasis added] of the democratic processes,[101] and access to information. The scope of these principles highlights the importance of freedom of expression, as well as the press, since they are gateways for information, allowing the public to discuss, debate, and form opinions by critically evaluating the information that they are provided with. This allows for *accountability* [emphasis added] since democracy relies on press freedom to hold governments accountable to the public.[102] When considering the interactions between media regulations,

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[92] Cherif Bassiouni and David Beetham, *Democracy: Its Principles and Achievement,* (Geneva: Inter-Parliamentary Union, 1998), p.i.
[93] *Ibid.,* p.21.
[94] *Ibid.*
[95] *Ibid.,* p.22.
[96] *Ibid.*
[97] *Ibid.*
[98] *Ibid.*
[99] *Ibid.,* p. iv.
[100] *Ibid.*
[101] Corneliu Bjola and Stuart Murray (edited by), *Secret Diplomacy: Concepts, Contexts and Cases,* (London and New York: Routledge,2016), p.71.
[102] *Ibid.*

journalistic reporting freedom, and how these freedoms are essential to maintaining a democratic society, these concepts provide a useful framework. Nonetheless, writers of the 20th century were quick to regard

> [f]reedom as the most important political value, but they realized that boundaries to individual liberty had to be established in order to protect other values such as security.[103]

The author must mention the democratic backsliding that has been happening in the last 10-15 years. Retrenchments from democracy have been observed in an increasing number of countries worldwide in recent years.[104] Autocratic leaders are rising to power through democratic elections, often with some support from the population, and they are assaulting institutions and norms from inside.[105] For example, the U.S. saw erosion from liberal democracy starting in the year 2016,[106] and "[t]he UK has now declined to have a lower quality of democracy than the average in Western Europe".[107] The "collapse of the separation of powers", is a process that legislatures are key to, providing the political underpinnings for attacks on other democratic elements, even worse, this process is hard to spot and stop until it is too late.[108] If autocrats are successful in gaining more power, they have "…endless opportunities to influence the media".[109]

In analysing this, it is easy to imagine how democratic backsliding may seek to undermine the independence of the media. The erosion of press freedom allows for autocrats to sway narratives and evade accountability. This can jeopardise national security by limiting the flow of information and stifling critical analysis from the public, such as vital information about government policies or the governments' relations with other nations.

2.2 Historical Evolution between Democracy, Press Freedom and National Security

The author must include a historical summary of the development of national security, press freedom, and democracy, as well as how these three have interacted with one another. Over centuries there have been an evolution between these three concepts that reflects the social, political, and technological developments.

As early as ancient Greece there were instances of freedom of speech, of course not as we know it in modern day, but still relevant. *Parrhesia* in ancient Athens meant that the man had the ability to say what he thought and participate in the affairs of his city.[110] Too many individuals ignore that the concept of censorship in the West has its roots in ancient Greece and Rome.[111] Book burning, imprisonment and exile were common ways to censor the freedom of

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[103] Anthony H. Birch, *Concepts and Theories of Modern Democracy,* 2nd ed., (London and New York: Routledge, 2002), p.121.
[104]Stephan Haggard and Robert Kaufman," The Anatomy of Democratic Backsliding", *Journal of Democracy* 32, no.4 (2021): p. 27.
[105] *Ibid.*
[106] *Ibid*., *see* table, p.28.
[107] Toby James, "UK Democracy Under Strain: Democratic Backsliding and Strengthening", in *Unlock Democracy* (2023), p.13.
[108] Haggard and Kaufman, *supra* note 104.
[109] *Ibid.,* p. 32.
[110] Han Baltussen and Peter J. Davis, *The Art of Veiled Speech: Self-Censorship from Aristophanes to Hobbes,* (Pennsylvania: University of Pennsylvania Press, 2015), p. 40.
[111] *Ibid.*

the press, books at that time, if the government thought that it was a threat to their state or status.[112] The author will then refer the reader to the first chapter, where the example of the British monarchy in censoring press, if they spoke against the government or any official, to supress dissent and promote national security. This era prioritized state security over individual rights. The Enlightenment era, during the 17th and 18th centuries, saw writers justifying an open press as a medium for public dialogue and championing democratic ideals and individual rights.[113]

Throughout the 19th and 20th centuries, there was the expansion of literacy, mass media, and the emergence of investigative journalism which scrutinized the actions of the government. One case to mention during this time was *Regina* v. *Shayler*.[114] David Shayler was a British intelligence officer, who was charged under the Official Secrets Act for disclosing classified information to the press.[115] The prosecution stated that the information which Shayler disclosed contained matters in relation to national security and intelligence.[116] Shayler, on the other hand, alleged that there were malpractices and inefficiencies within the UK's intelligence system that the public had the right to know.[117] Nonetheless, he was found guilty and "…the restriction on Shayler's freedom of expression was justified in order to protect national security".[118] Shayler's case raised significant challenges and questions in regard to the balance of freedom of the press and national security concerns. Currently, technological advancements and the rise of the internet and social media have become a source for the suppression of the freedom of the press. Cases of Edward Snowden[119] have sparked ethical debates on the issue of press freedom in the digital age.

2.2.1 Balance between Freedom of Press and National Security

As the author mentioned in the previous section, democracy has become a model to strive for in worldwide political communities. Yet, the relationship between democracy, press freedom, and national security is complex and many-sided. In its essence, democracy values transparency, the free flow of information and independent press, among other things. At the same time, national security concerns may create restrictions on certain type of information to protect the nations safety and its interests. Although governments must give justification for any speech or media restrictions based on national security, in practice, this restriction is one of the main obstacles to media freedom.[120] This compels the reader to think about the extent of those democratic values in relation to press freedom, and how selected journalistic liberties can be curtailed in the name of national security. Let us define what constitutes a threat to a nation in terms of national security.

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[112] *Ibid*., p.6.
[113] David A. Copeland, *The Idea of a Free Press: The Enlightenment and Its Unruly Legacy,* (Library of Congress: Northwestern University Press, 2006), p.18. *See also Crown* v. *Zenger*.
[114] *Regina* v. *Shayler*, [2002] UKHL 11.
[115] *Ibid.*
[116] *Ibid.*
[117] *Ibid.*
[118] *R* v *Shayler,* in *Law Teacher* (2024), available on: https://www.lawteacher.net/cases/r-v-shayler.php . Accessed April 9, 2024.
[119] *United States* v. *Snowden*, No. 1:19-cv-01197 (E.D. Va. Sept. 17, 2019).
[120] Media Defence, "Module 9: National Security, Limiting Media Freedom on Grounds of National Security," available on: https://www.mediadefence.org/ereader/publications/introductory-modules-on-digital-rights-and-freedom-of-expression-online/module-9-national-security/limiting-media-freedom-on-grounds-of-national-security/. Accessed March 1st, 2024.

> A threat to national security includes the use or threat of force against the country's very existence or its territorial integrity [;] [t]he threat can be external or internal.[121]

Depending on the scope and seriousness of the threat a country faces, different national security issues arise. Due to variations in historical legacies, constitutional frameworks, and cultural ideals, democratic countries respond to national security problems differently in law and policy.[122] "National security policy encompasses the decisions and actions deemed imperative to protect domestic core values from external threats."[123] The security of a state and its maintenance is one of the basic functions of any nation.[124] It is assumed that anxieties of foreign threats stem from ideological beliefs, as well as actual threats in the external environment.[125] The breadth and depth of government restrictions on journalistic freedom are strongly influenced by the level of conflict. There is a difference between when a democratic country uses national security in terms of press freedom when it is at peace, versus when it is at war. For example, when at peace the press might be less restricted when reporting on certain issues, while if it is at war, the government might be afraid of espionage or the release of classified information, therefore censoring the press. Democratic governments may utilize censorship, monitoring, or restrictive legislation to suppress dissent and manage information flow at times of increased security risks or war engagements. "It then becomes not merely a curtailment of individual liberty, but a matter of national security".[126]

While U.S was forming into a nation, Sweden on December 2nd, 1766, became one of the first countries on the European continent to originate with protecting the freedom of press.[127] Although this might seem irrelevant, the wording of their legal act speaks volumes. The Freedom of the Press Act took away the "…government's role as a censor of printed matter, and it allowed for the official activities of the government to be made public".[128] Therefore this allowed for journalists to disseminate information without the fear that they would be punished, or that this information would not be able to reach the public. As John Milton stated, "…[t]ruth and understanding are not such wares as to be monopoliz'd and traded in by tickets and statutes, and standards".[129] This sets a precedent for not allowing the government to restrict information because it could in some way not align with their interests or principles.

Each States' response to challenges to its government, values, and basic existence is outlined in its national security regulations. What could be more particular than the things that

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[121] Article 19, "Freedom of Expression and National Security: A Summary," (December 7, 2020), available on: https://www.article19.org/resources/foe-and-national-security-a-summary/. Accessed April 10, 2024.
[122] Leffler, *supra* note 26, p.143.
[123] *Ibid.*
[124] Simultaneously, security is perceived as a procedure wherein the organization and status of security are susceptible to dynamic modifications in accordance with inherent shifts in security circumstances.
Therefore, there is no such thing as security that is guaranteed to last forever. Put differently, security as a process refers to the ongoing efforts of people, local groups, governments, and international organizations to establish the ideal level of security. Henryk Wyrebek, "National Security Challenges and Threats," *Wiedza Obronna* 279, no.2, p. 114.
[125] Leffler, *supra* note 26, p. 144.
[126] Byron Price, "Governmental Censorship in War-Time," *The American Political Science Review* 36, no. 5 (1942): p. 837.
[127] J. M, Cunningham, "A Brief History of Press Freedom," *Encyclopedia Britannica*, May 3, 2018, available on: https://www.britannica.com/story/250-years-of-press-freedom. Accessed April 1, 2024.
[128] *Ibid.*
[129] *Ibid.*

instil a sense of dread in every State?[130] The government's response to issues requiring a delicate balancing act between preserving the fundamental right to freedom of the press and preserving national security has become increasingly difficult, particularly in light of the expanding platforms that now include the internet in addition to print and television. There is also concern about reporters and journalists who work within corporations that focus mainly on being profitable, leading to debates on the neutrality of the information.[131] In the U.S., both fact and rumor are protected.[132] If we look at media as a business that focuses on profitability or reporting without neutrality or in-depth analysis, how should the governments be expected to respond?

The first reference will be to the U.S. government which is composed of three branches: legislative, executive, and judicial. The judicial branch's independence is protected and most of the federal judges do not explain publicly why they ruled in a certain. [133] It is important to mention that this is not the case in all judicial legal systems. For example, in Canada, it is common practice for federal judges to hold public conferences and comment on their decisions.[134] In the U.S. legal system, we are then left with the legislative and executive branches which are meant to control the presidential responses as well as the responses from one or both houses, respectively.[135]

Critically speaking, the legislative branch's authority to hold public hearings and judge the opinions of the judges is an important issue to consider as to how the government in its response, specifically in the U.S. system, can potentially use this avenue to censure or regulate the media on the basis of a "national security". Nonetheless, the opinions of the many experts present in these deliberations can present powerful insights that allow the policy-makers to make informed decisions to keep the balance between press freedom and national security.

2.2.2 War Powers and Press Freedom: Evolving Rules and Regulations

Another interesting concept to consider is how rules on the freedom of information change in times of conflict. Theoretically, in times of war and especially for the preservation of the democratic principles, it is extremely important to allow journalists to report without restrictions and government interference. Nevertheless, studies must analyse whether journalists act as "faithful servants", and promote their own government's interests; or they are "watchdogs" who perform the non-biased duty of investigative journalism to inform the public (yet, risking undermining the government war efforts).[136] The Council of Europe writes, "[i]n conflict situations and wars, the role of the media is critical in providing the public with accurate and timely information".[137]

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[130] Kim Lane Scheppele, "The International Standardization of National Security Law," *Journal of National Security Law & Policy* 4 (2010), p.437.
[131] Harvey Rishikof, "Piercing the Fog: National Security, Media and the Government," in *International Law Studies*, vol. 83 (2007): p. 179.
[132] *Ibid.,* p. 180.
[133] *Ibid.,* p.181.
[134] *Ibid.*
[135] *Ibid.*
[136] Marc Jungblut, "Content Analysis in the Research Field of War Coverage," in *Standardisierte Inhaltsanalyse in der Kommunikationswissenschaft – Standardized Content Analysis in Communication Research*, (Wiesbaden: Springer 2023), p. 127.
[137] Council of Europe, *Freedom of Expression in Times of Conflict* (Council of Europe Publishing, date of publication: unknown), available on: https://www.coe.int/en/web/freedom-expression/freedom-of-expression-in-times-of-conflict . Accessed on March 30, 2024.

There is a legitimate need to evolve the rules that should be followed by war journalists; the rules need to be clear and succinct so as to protect the integrity of national security, yet at the same time allow for the freedom of the press. Although there are some legal instruments, such as United Nations Security Council Resolution 1738, which in turn mentions the Additional Protocol 1 of the Geneva Convention which aims to protect journalists working in armed conflicts,[138] those instruments still remain vague. The protection of these journalists does not clearly specify under which criteria the government can restrict the investigative journalist's freedom of expression. State or non-State actors need to be held accountable if they censor the freedom of these journalists disproportionately or deliberately.

It is important to first mention World War One, from here on out WW1, World War Two, from here on out WW2, and the Cold War Era. The guise of "national security" became prominent in WW1, where U.S. imposed strict censorship of information under the power of the Espionage Act of 1917.[139] Officially, it was meant to punish any individual who passed information on national defence to the benefit of other nations. Unofficially, it became a tool to start punishing the press and journalists under the guise of national security. One such case was *Frohwerk*, where two German publishers wrote articles that criticized the war.[140]

> While no proof was found that the speech in these cases was likely to invoke imminent, significant harm, the Court nonetheless convicted the speakers…In the context of war time, the Court was willing to find that even mild speech without an incendiary purpose would pose a clear and present danger in the United States.[141]

During WW2, a similar strategy was imposed. U.S., in an emergency action, had established the Office of Censorship after its attack on Pearl Harbor, which oversaw American newspapers, magazines, and other forms of media.[142] It was crucial because it set a standard for how the U.S. government would handle journalistic freedom in times of war.[143] Although the office was able to censor information in the name of national security, since many journalists supported the American war efforts, it did not cause much upheaval from their side.[144] This is in comparison to Nazi Germany, which censored journalists in order to further their propaganda, and justified this censorship under the pretext of maintaining order and national security. The *Reicht* Press Law of 1933, or *Reichspressegesetz* von 1933, began regulating the press by making it controlled or regulated by the State, and it must serve the State.[145] Further, the journalists had to be licensed and not spread "false information" or would face severe punishment.[146]

One such case of how the German courts handled journalism was the case of Carl von Ossietzky, who was a German journalist.[147] Ossietzky was imprisoned for six months and

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[138] United Nations Security Council, "Resolution 1738: Protection of Civilians in Armed Conflict," S.C. Res. 1738, U.N. Doc. S/RES/1738. December 23, 2006. doi:10.1017/S0020782900006112.
[139] Emily Posner, "The War on Speech in the War on Terror: An Examination of the Espionage Act Applied to Modern First Amendment Doctrine," in *Cardozo Arts and Entertainment* 25 (2007): p. 720.
[140] *Ibid.,* p. 724.
[141] *Ibid.*
[142] Holly C. Shulman, "Secrets of Victory: The Office of Censorship and the American Press and Radio in World War II," *Journal of American History* 88, Issue 4 (2002): p. 1590.
[143] *Ibid.*
[144] *Ibid.*
[145] Cedric, Larson, "The German Press Chamber," *The Public Opinion Quarterly* 1, no. 4 (1937): p. 70.
[146] *Ibid*., p.62.
[147] Istvan Deak, *Weimar Germany's 'Homeless Left': The World of Carl von Ossietzky*, (New York:Columbia University Publishing, 1964), p. 2.

claimed to be a traitor of the state because he exposed the secrets of German rearmament.[148] This shows how the German government invoked national interests and security when censoring and imprisoning journalists that spoke out against Hitler's regime. Although Nazi Germany was not a democracy during that time, it is a stark comparison between how U.S., then a democracy, and Germany under authoritarian rule, changed the rules of the press in times of war.

During the Cold War Era, U.S. being a democracy, invoked restrictions on the press in the name of national security. One such case is *United States* v. *Progressive, Inc,*[149] in where investigative journalist, Robert Morland, wrote an article for the Progressive magazine, describing the building of the hydrogen bomb.[150] The government received a restraining order on the publication arguing that it was a threat to national security due to the classified information being exposed.[151] Progressive on the other hand stated it was violating First Amendment rights.[152] The Courts opinion mainly relied on *Near* v. *Minnesota*[153] and reasoned that the article might assist other countries to build nuclear weaponry.[154]

In practice, journalists consistently face challenges, such as harassment, censorship, and even arbitrary detention.[155] In times of conflict, it is a ripe time for the dissemination of biased or false information, therefore the role of journalists becomes even more crucial since they can provide a neutral and factual stance on the situation, thus allowing the public to have the position to form intellectual and rational opinions. To expand the importance of journalistic freedom in times of war, it is crucial to remember that during war and conflict, there may be grave human rights violations, and the only way they can be exposed is if the journalists can have access to information and are also being protected, in example how it occurred in Nazi Germany.

In times when information is becoming more of a valuable source, journalists have been faced with more alarming forms of censorship.[156] Statistically speaking, at the end of 2022, there were reportedly 363 reporters jailed according to the Committee to Protect Journalists.[157] Some of the "justifications" used were terrorism, anti-state propaganda, state treason, and defamation which shows how influential individuals, as well as States themselves, weaponize the law in order to suppress information that might scrutinize their actions.[158] This connects us back to using national security as a justification to censor information. There is no doubt that

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[148] *Ibid.,* p.3.
[149] *United States* v. *Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).
[150] The managing editor of the journal sent a copy of Morland's piece, "The H-Bomb Secret - How We Got It, Why We're Telling It,"to the DOE in order to have its technical accuracy confirmed. The Department of Energy examined the article and found that it included restricted data, the publishing of which would be against the Atomic Energy Act. Janet M. Nesse, "*United States* v. *Progressive, Inc*.: The National Security and Free Speech Conflict," *William and Mary Law Review* 22, Issue 1, (1980): p. 142.
[151] *Ibid.*
[152] *Ibid.*
[153] *Near* v. *Minnesota*, 283 U.S. 697 (1931).
[154]*Near* v. *Minnesota*, in which the Supreme Court first mentioned the national security exception to First Amendment protection. *Ibid.,* p. 143.
[155] Posner, *supra* note 139.
[156]Joel Simon, Lauría L, Carlos and Ona Flores, "Weaponizing the Law: Attacks on Media Freedom." *Thomas Reuters Foundation,* (2023), available on: https://www.trust.org/documents/weaponizing-law-attacks-media-freedom-report-2023.pdf . Accessed April 20, 2024.
[157] *Ibid.*
[158] *Ibid.*

when this justification was approved by the international laws and community, it was meant to "…serve a legitimate purpose".[159]

However, as the document states, the "catch-all" justification of public order and a threat to national security is becoming the main tool to prosecute and convict journalists.[160] Usually, the issue arises because some States do not want to expose their corruption or allow for the international community or even a domestic one to see that the public may be unhappy with their political regime. Of course, in extreme cases such as war, there is the danger of covering up human rights violations or violations of the laws of war to the world.

2.3 Legal Safeguards Against Abuse of National Security Claims

Legal safeguards against abuse of national security are an important aspect when it comes to the protection of democratic principles, as well as the independence and the protection of the rights of journalists to impart information, especially if it is factual and non-biased. International and national laws safeguard the freedom of press, which includes investigative journalism. However, it may also be restricted, but only in accordance with certain stringent guidelines that the State must substantiate.[161]

In order to meet these requirements, a three-prong test is used which clearly identifies what the State is responsible for proving:

> 1.Restrictions must be clearly set out in law, in a way that is understandable, accessible, and specific, so that individuals know what actions are covered. There must be safeguards in place against abuse of the law, such as judicial scrutiny;
> 2. Restrictions must genuinely be for the purpose of protecting national security and must have the demonstrable effect of protecting that aim. So, restrictions purported to be for protecting national security, but which in fact just stifled journalistic reporting, do not meet this test.
> 3. Restrictions must be necessary, meaning the restricted expression is a serious threat to national security and limiting the expression is the least restrictive way of addressing this threat.[162]

When considering this test, one may state that it clearly defines what justifications may be used when restricting the right to information of freedom, especially in cases that concern national security. It is visible that it attempts to promote transparency, as well as proportionality when States attempt to restrict the free flow of information based on protecting national security. Nonetheless, the test may have some limitations in the sense that the government could censor or limit the freedom of information under the guise of national security. In connection with investigative journalism, some aspects of this test can become problematic when the journalists potentially report on something that is of public interest if the above-mentioned restrictions are interpreted broadly. Furthermore, it could be commented that the term "necessary" in the third part of the text can be construed by different standards, potentially infringing on the right of journalists to report on important issues.

Nonetheless, concerning access to information, States must not only use the three-part test but they must also further show:

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[159] *Ibid.*
[160] *Ibid.*
[161] Article 19, *supra* note 121.
[162] *Ibid.*

1. States must set out in legislation specific and narrow categories of information which are restricted – they can't create a blanket restriction on access to any information linked to national security;
2. The public interest in knowing the information must be the primary consideration when determining the legality of its restriction – so laws should include clauses on assessing the public interest value;
3. Any denial of access to information on national security grounds must be able to be reviewed by an independent judicial authority, with access to the information at issue;
4. Information which is already in the public domain cannot be restricted.[163]

The above-mentioned principles are based on the Johannesburg Principles on national security, freedom of expression, and access to information which were adopted on October 1st, 1995 "…by a group of experts in international law, national security, and human rights…"[164]

Another legal safeguard is independent judicial review and since this thesis focuses on national as well as international case law, one of the main legal safeguards against abuse of national security claims comes from Article 72 of the Rome Statute of the International Criminal Court, from here on out, ICC.[165] National security concerns may be posed about virtually any "military, economic, political, scientific, technological and other aspects of foreign developments that pose actual or potential threats to national interests".[166]

Although the text can become vague at times, the general viewpoint at the Rome Conference was that "…ICC should accommodate legitimate national security concerns but that it should also be enabled to oppose abusive claims for confidentiality".[167] Article 72 also aims to make the Court the final decision maker, instead of the State, when there are claims for non-disclosure or confidentiality based on national security concerns.[168] Nonetheless, there is a slight issue of the binding competence of this Statute. If the documents for non-disclosure based on national security are not yet in the hands of the Court, the Court cannot force the State to disclose them if they have a legitimate interest in preserving national security.[169] The Court *can* report the State to the United Nations Security Council for non-compliance, but that is as far as it can go.[170]

The broadness of the concept of national security then becomes subject to abuse when the State decides to withhold information from the public, allowing for non-transparency and potential lack of accountability. In this matter, investigative journalism plays a crucial role in uncovering this hidden information that the States keep hidden under the guise of national security.

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[163] *Ibid.*
[164] Article 19, "Johannesburg Principles on National Security, Freedom of Expression and Access to Information." (1996), available on: https://www.article19.org/resources/johannesburg-principles-national-security-freedom-expression-access-information/. Accessed April 20, 2024.
[165] Rome Statute of the International Criminal Court, Art. 72, p.47.

[166] Another legal safeguard can be narrowly defined laws that should be specifically tailored to address *specific* threats. Therefore, we can mention the possibility of amending Article for a narrower reading that was proposed in the ICTY Appeals Chamber in *Blaski.* Sabine Swoboda, "Confidentiality for the protection of national security interests," in *International Review of Penal Law,* vol.81, no.1-2 (2010), pp. 209-229, accessed March 28, 2024, https://doi.org/10.3917/ridp.811.0209 .
[167] *Ibid.*
[168] *Ibid.*
[169] *Ibid.*
[170] *Ibid.*

While Article 72 of the ICC is already attempting to focus on the unbiased way of the Court to be the final arbiter for the decision of non-disclosure by the State, the broadness of the Article makes it difficult for the States not to find an escape.

3. INVESTIGATIVE JOURNALISM: CASE STUDIES

3.1 The Legal Landscape of Investigative Journalism and The Principle of Proportionality

Journalism is "the collection, preparation, and distribution of news and related commentary and feature materials through such print and...newspapers, magazines, [etc]…"[171] To delve deeper, investigative journalism, can be described as unravelling information that is hidden purposefully by a government or person in power, or in a worst-case situation in a place where there is much chaos and information is being hidden behind "mass of facts and circumstances".[172] Therefore, we can be in agreement that investigative journalism, either by independent journalists, media outlets, press or non-governmental organizations (NGOs) is an important aspect when it comes to public awareness. Nonetheless, investigative journalism according to the Global Investigative Journalism Network is not a task that is achieved lightly or easily.[173] There is an overall agreement of the most important components for investigative journalism: in-depth, systematic, and original research.[174] An investigative journalism handbook published by UNESCO goes as far as to allow "…using both secret and open sources and documents".[175]

The OECD Survey on investigative journalism pointed out that journalists felt more uncomfortable when reporting due to threats or an actual legal action or even criminal action due to exposing classified information.[176] Although each country has their own constitutional practices, Sweden is one of the EU countries which with the effect of its historical origins on press freedom, offers one of the strongest protections. The constitutional rules in Sweden in regard to press freedom arise from the fundamental principle that,

> [F]reedom of expression is a guarantee for the free influence of public opinion…and also a way for the public to exercise control over the public administration.[177]

There is a vast legal landscape that concerns investigative journalism. Two of the main legal protections are access to information laws, and anti-SLAPP laws.

Let the author begin with the access to information laws and their general meaning. In short, the law of access to information is based on the fundamental freedom of expression and

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[171] "Journalism," *Encyclopedia Britannica,* available on: https://www.britannica.com/topic/journalism . Accessed May 1, 2024.
[172] Global Investigative Journalism Network. What is Investigative Journalism? Available on: https://gijn.org/about-us/investigative-journalism-defining-the-craft/ . Accessed April 29, 2024.
[173] *Ibid.*
[174] *Ibid.*
[175] *Ibid.*
[176]OECD (2018), "The Role of the Media and Investigative Journalism in Combating Corruption," p.6, available on:https://www.oecd.org/daf/anti-bribery/The-role-of-media-and-investigative-journalism-in-combating-corruption.pdf . Accessed March 6, 2024.
[177] *Ibid*., p. 10.

the "…right of every individual to seek and obtain information held by public authorities".[178] Historically speaking, Sweden was the initiator of such a law when it passed the Freedom of the Press Law in 1776;[179] it took two centuries before a similar law passed.[180] Formal international recognition of such law was given by the InterAmerican Court of Human Rights in the case of *Claude Reyes and Others* v. *Chile.*[181] The case bases upon a complaint against the state of Chile on the grounds of freedom of thought and expression where the State refused to give out information to the inquiring defendants.[182] In continuation, the Court found that the information needed to be disclosed to the individuals according to the American Convention.

Another example is of the Freedom of Information Act in U.S. The FOIA of 1967 in U.S. focuses on the allowance of information of government activities by individuals of society, yet once again it has restrictions such as national security.[183]

Another notable law are the anti-SLAPP laws, which stand for "strategic lawsuits against public participation" and they provide for a way to quickly dismiss lawsuits which are meritless.[184] It is important to note that these laws vary state by state in U.S. In EU, these laws are still in progress, yet, the Committee have voted in favour of the EU wide protection against meritless lawsuits.[185]As one reporter stated

> SLAPP lawsuits are a threat to the rule of law and seriously undermine the fundamental rights to expression, information and association. They are a form of legal harassment and an abuse of the justice system that is used increasingly by powerful individuals and organisations to avoid public scrutiny. The aim of a SLAPP is not to win the case, but to intimidate and deter many journalists and activists from making information known to the public, thus resulting in self-censorship. Our courts should not be seen as a playground for powerful individuals, companies and politicians and should not be abused for personal gain.[186]

As for current 2024 year, specifically in EU, there have been an overwhelming vote against SLAPP lawsuits. Journalism, activism, and other types of public participation will finally be protected from baseless, costly, and time-consuming lawsuits.[187]

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[178]Free Press Unlimited. Right to Access to Information, available on: https://kq.freepressunlimited.org/themes/enabling-environment/media-law-and-policy/right-to-access-to-information/ . Accessed April 2, 2024.

[179]Lennart Weibull, "Freedom of the Press Act of 1766," *Encyclopedia Britannica*, accessed on: April 2, 2024, available on: https://www.britannica.com/topic/Freedom-of-the-Press-Act-of-1766.

[180] Free Press Unlimited, *supra* note 178.

[181] *Ibid.*

[182] Inter-American Court of Human Rights, *Case of Claude-Reyes et al*. v. *Chile,* Judgment (September 19, 2006), Series C No. 151.

[183] FOAI. What is FOIA? available on: https://www.foia.gov/about.html . Accessed March 30, 2023.

[184] Reporters Committee for Freedom of the Press. Anti-SLAPP Legal Guide, available on: https://www.rcfp.org/anti-slapp-legal-guide/ . Accessed March 28, 2024.

[185] European Parliament News. Anti-SLAPP: EU Protection against legal actions that silence critical voices, available on: https://www.europarl.europa.eu/news/en/press-room/20230626IPR00818/anti-slapp-eu-protection-against-legal-actions-that-silence-critical-voices. Accessed April 1, 2024.

[186] *Ibid.*

[187]Nathalie Weatherald, "Anti-SLAPP law gets final seal of approval from EU Parliament," in *Euractiv* (February 2024), available on: https://www.euractiv.com/section/media/news/anti-slapp-law-gets-final-seal-of-approval-from-eu-parliament/. Accessed March 4, 2024.

The principle of proportionality[188] is a legal concept that is crucial to examine for future analysis of court decisions in the following landmark cases. "proportionality" in itself is

> a general principle in law that is underpinned by the need for fairness and justice. It is the idea that an action should not be more or less severe than is necessary and that competing interests in this regard should be carefully balanced.[189]

Although this principle is not always explicitly stated in the U.S. courts, there are equivalent concepts in legal doctrines. The U.S. uses strict scrutiny, intermediate scrutiny and rational basis review to ensure that governmental actions are not excessive in their intended purpose.[190]

> Strict scrutiny[191] requires the *government* to prove that:
>
> - There is a *compelling state interest* behind the challenged policy, and
> - The law or regulation is *narrowly tailored* to achieve its result;
>
> [Intermediate scrutiny][192]
>
> - Serve[s] an *important government objective*, and
> - [Is] *substantially related* to achieving the objective; and
>
> Under the rational basis test, the person *challenging the law* (not the government) must prove either:
>
> - The government has *no legitimate interest* in the law or policy; or
> - There is *no reasonable, rational link* between that interest and the challenged law.[193]

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

Branzburg v. *Hayes*[194] is an important case regarding the principle of the freedom of the press. Not only is it a historically landmark case, but it also involved two investigative journalists. In a 5-4 majority vote, the U.S. Supreme Court ruled that the First Amendment did not protect journalists from revealing their confidential sources to the grand jury if there was state interest involved.[195] The facts of the case are as follows: three journalists in three separate cases refused to testify in front of the grand jury in regards of the anonymity of their sources. Branzburg was investigating the different methods of drug synthesis and drug activities in Kentucky; Pappas was reporting on Black Panther activities (although he had not written anything on it); and

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[188] The origins of this principle were in Europe and are mainly related to the EU framework. The ECJ and Strasbourg Court of Human Rights began to develop this principle in assessing the actions of public authorities Dobrinka Taskovska, "On Historical and Theoretical Origins of the Proportionality Principle - A Contribution towards a Prospective Comprehensive Debate on Proportionality," *Iustinianus Primus Law Review* 3, no. 1 (2012): p. 2..

[189]"Proportionality" definition, *LexisNexis glossary*, accessed April 10, 2024, available on: https://www.lexisnexis.co.uk/legal/glossary/proportionality.

[190] Brett Snider, Esq., "Challenging Laws:3 Levels of Scrutiny Explained," in *FindLaw*, last updated (May 12, 2020), accessed March 6, 2024, available on: https://www.findlaw.com/legalblogs/law-and-life/challenging-laws-3-levels-of-scrutiny-explained/.

[191] *Ibid*., "This high level of scrutiny is also applied whenever a 'fundamental right' is being threatened by a law".

[192] *Ibid*., "As with strict scrutiny, intermediate scrutiny also places the burden of proof on the government".

[193] *Ibid.*

[194] *Branzburg* v. *Hayes*, 408 U.S. 665, *(*1972).

[195]*Branzburg* v. *Hayes*, 408 U.S. 665, *(*1972). In *Oyez*. Available on: https://www.oyez.org/cases/1971/70-85 . Accessed April 20, 2024.

Caldwell had interviewed the Black Panther leaders and investigated their covert activities and motivations behind them for his journalistic stories.[196]

Let the author mention that Black Panthers in U.S were an African-American revolutionary group that initially promoted the rights of African Americans in U.S., but then progressed to violent acts and even threats against the President, which in a sense threatened national security and public peace at the time.[197] Let the author quickly remind the reader of reporters privilege which was mentioned in the first chapter, and which was considered to be the addition to the First Amendment of the U.S. Constitution that protected journalists and the confidentiality of their sources.

Going back to the majority opinion, the Judges stated that there is no specific privilege for journalists that goes beyond the ordinary citizen, especially if the information sought by the grand jury is somehow related to the indictments of any criminal activity and the journalists are in possession of it.[198] They also went as far as to state that

> [c]ivil and criminal laws of general applicability may affect the press and cause some mild burden on speech without violating the First Amendment…[and] [t]here is a stronger public interest in deterring crime than in preserving the flow of news.[199]

The judges who formed the majority of opinion argued that it was protecting states interest when asking for Branzburg to disclose his sources, since this could have been connected to the use and sale of drugs.[200] In concerns of the two remaining journalists investigating the Black Panther group, the majority also argued that there have been alleged gunfire on the streets and it was necessary to reveal the sources to find out who was responsible for these acts to protect national interests as well.[201] Initially the court accepted the respondents arguments and stated that

> First Amendment afforded respondent a privilege to refuse disclosure of such confidential information until there had been "'a showing by the Government of a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means'".[202]

Interestingly enough, in the final U.S. Supreme Court opinion, the dissenting judges agreed that

> journalist sources should not be stripped of the shield of confidentiality, nor should reporters. This may lead to the loss of valuable information and the chilling of public debate.[203]

Furthermore, after the decision of this case, many states have imposed specific shield laws that would protect the reporters from naming their confidential sources.[204] Firstly, since the principle of the freedom of the press carries significant importance in the U.S., this case becomes an

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[196] *Branzburg* v. *Hayes*, 408 U.S. 665, *(*1972). In *Justia* (Opinions and Dissents). Available on: https://supreme.justia.com/cases/federal/us/408/665/ . Accessed April 20, 2024.
[197] Garrett Albert Duncan, "Black Panther Party," *Encyclopedia Britannica, Accessed April 2, 2024, available on:* https://www.britannica.com/topic/Black-Panther-Party .
[198] *Branzburg, supra* note 196.
[199] *Ibid.*
[200] *Ibid.*
[201] *Ibid.*
[202] *Ibid.*
[203] *Ibid.*
[204] *Ibid.*

important landmark decision which shows the nuances of the higher courts, in this case the U.S. Supreme Court, in how judicial authorities debate on when making difficult decisions which need to protect the journalists, as well as to uphold national interests.

The journalists could be categorized specifically as investigative journalists since they were reporting not on just information, which was important for the public awareness, but also doing it in a manner where it took them some time to delve into all of the facts categorizing it as an in-depth and systematic research. Furthermore, although these specific cases were not hidden by the government, it was hidden by chaos and "mass of facts and circumstances",[205] especially in regard to the Black Panther movement and its importance during that era. Nonetheless, the Court in this case ruled in favour of the State and the preservation of national interests and placed the principle of the freedom of the press in second place.

The author found importance in this case for several reasons. Primarily it was a landmark case which shaped the legal landscape when it came to governmental authority versus the rights of journalists. The Court chose to preserve public order and deter any future criminal activity, in turn protecting their national security, above the freedom that the journalist enjoy under reporter's privilege. In fact much commentary that was written after the aftermath of the *Branzburg* decision believed that it was a full blown "…assault on the First Amendment and an unconstitutional restraint on newsmen's rights to gather and report the news".[206] Nevertheless, this case showcases the principle of proportionality in which the majority of the judges argued that the competing interest of national interest of deterring crime and the potential threats to public safety overrode those of the journalists.

3.3 The 'Assange' Case: Government Espionage or a Threat to Press Freedom?

The Julian Assange case is probably one of the most prominent and currently still ongoing cases regarding the freedom of the press, freedom of information and the context of national security. It is of great importance since currently there is no legislation that addresses this type of situation: where national security secrets were passed through the World Wide Web.[207] Mr. Assange has been indicted in the U.S. on 18 counts in connection with obtaining and disclosing national security information through his website Wikileaks, which he is the founder of.[208] The U.S. specifically pointed to Mr. Assange's illegal ways of obtaining this classified information, such as the unredacted names of political dissidents from oppressive regimes, and other classified information.[209] Mainly these reports contained information that was unsavoury for the host countries and its allies, therefore making Assange a national security threat. He is

[205] *See supra* note 172.
[206] George Michael Killenberg, "Branzburg and Beyond: A Study of the Branzburg v. Hayes Decision, Its Antecedents and Implications," in *Dissertations of Southern Illinois University* (1975): p.2, accessed on March 20, 2024, available on ProQuest, BRANZBURG AND BEYOND: A STUDY OF THE BRANZBURG V. HAYES DECISION, ITS ANTECEDENTS AND ITS IMPLICATIONS. - ProQuest .
[207] Heather M. Lacey, "Government Secrets, National Security and Freedom of the Press: The Ability of the United States to Prosecute Julian Assange," *U.Miami Nat'L Security & Armed Conflict L. Rev.* vol. 1(2010-2011): p.208.
[208] *The Government of the United States of America* v. *Julian Paul Assange*, Case No. CO/150/2021, High Court of Justice, Queen's Bench Division, Administrative Court, Royal Courts of Justice, London, December 10, 2021, before The Lord Burnett of Maldon, Lord Chief Justice of England and Wales, and Lord Justice Holroyde.
[209] *Ibid.*

currently detained in the U.K and has an extradition order against him from the U.S., and overall, he would be facing a penalty of 175 years in prison.[210]

Of course, before delving deeper, we must examine whether Assange is an investigative journalist or a journalist at all. By previous archaic understandings, he might not be fitting for this category since he is mainly an editor, publisher and a reporter, but we also need to consider the modern age of citizen journalism. This is an important aspect since if he will not be considered as a journalist, he becomes his own individual entity – and therefore would not have the protections of press freedom.[211] On the other hand, if he is considered a journalist, then he is protected as a professional who received information from government sources and would enjoy certain privileges, as well as the possibility under the protection of the First Amendment.[212] Unfortunately, this is still a topic up for debate. Nonetheless, this case still highlights the intersection of press freedom, and the fact that nowadays press comes in digital forms, and how democratic countries like the U.S. and the U.K., use Assange as a scapegoat to protect their "national security interests". A rapporteur for the United Nations, Alice J. Edwards, has pointed out that

> [o]ur international peace and security depend on that level of security. However, human rights require that we are also transparent when there are transgressions that occur, or war crimes as has been alleged in relation to some of the cables and information that were released.[213]

Ms. Edwards comment brings us back to the Travaux Preparatoirex of the First Amendment of the U.S. Constitution and Levy's quote[214] about how the drafters reasoning allowed for post-publication punishment, therefore the possibility of stifling the accountability of a government and its actions. Since the case is still ongoing, we do not have a final decisive decision from the Court, yet we can look at the U.S. District Court indictment and observe the trend in which it that it is attempting to establish. Mr Assange counts include obtaining national defence information, disclosure of national defence information, among two other charges.[215] The Court in the superseding indictment charged Assange as violating the Espionage Act (18 U.S.C. § 793) which in part states that an individual "…obtaining information respecting the national defence with intent or reason to believe that the information is to be used to the injury of the United States…"[216] Logically, the U.S used the Espionage Act to indict Mr. Assange because they believed the information that he disclosed was a threat to national security. Yet, this information leak must be assessed in the context of public interest, whether this information was uncovering wrongdoing by the government in question and meant to be for holding it accountable, or whether it had the potential to compromise intelligence operations or undermine any national defence tactics.

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[210] United Nations. "From Extradition Risks to Broader Implications: Human rights expert breaks down Assange case" (February 2024). Accessed April 5, 2024. Available on: https://news.un.org/en/interview/2024/02/1146567.
[211] International Debate Education Association. "This House believes Julian Assange is a Journalist." Accessed April 10, 2024. Available on: https://idebate.net/this-house-believes-julian-assange-is-a-journalist~b1174/ .
[212] *Ibid.*
[213] *See supra* note 210.
[214] *See supra* note 56.
[215] *United States* v. *Julian Paul Assange*, United States District Court for the Eastern District of Virginia, Alexandria Division, Criminal No. 1:18-cr-l 11 (CMH), Counts 1-18.
[216] 18 U.S. Code § 793 - Gathering, Transmitting or Losing Defense Information. *Cornell Law Institute*. Accessed April 1, 2024. Available on: https://www.law.cornell.edu/uscode/text/18/793.

In the government's perspective, Wikileaks exposure documents mainly affected the civilians who were passing secret information of the U.S. military from Iraq and Afghanistan.[217] Yet, the information leaked by Assange also included the war crimes by the U.S. in the above-mentioned countries. So how will the Court rule on this ongoing case? Do national security concerns override those of the national public awareness and the transparency of the U.S. government on their actions in Iraq and Afghanistan? The author still does not have a decisive answer to this since, Mr. Assange is still awaiting extradition from U.K to the U.S. and no final court decision has been made.

The author must point out some important aspects of this case. First, the Assange case might be an example of current democratic backsliding. It raises concerns about press freedom and government transparency. Additionally, his prolonged extradition proceedings are raising questions about the independence of judiciary and the political influence of the legal sphere, both factors leading to democratic erosion. Legal critics argue that the charges against Assange, might lead to a dangerous precent for future journalists who might want to hold governments accountable.[218] The public at large believes that WikiLeaks "…could become as important of a journalistic tool as the Freedom of Information Act,"[219] an Act that places importance on the public's right to be informed. Although it is unclear as to which tactic the U.S. will use in its legal proceedings against Assange, there are two precedent cases which might aid or impair in its efforts: the Pentagon Papers case and *United States* v. *Rosen.*[220] Under Rosen, the government needs to establish "intent" meaning they must prove that Assange intentionally attempted to damage U.S. by publishing this information.[221] The *per curiam*[222] opinion of the court of the U.S Supreme Court in *Rosen* and Pentagon Papers cases stated that "…government bears "a heavy burden of showing justification for the imposition of such a restraint"".[223] Nonetheless, the opinion was only for the injunctions made by the U.S. government. In *dicta,*[224] the majority of the court agreed that the "…newspapers could be held criminally liable for such actions".[225]

It seems that this case represents strong assertions of the First Amendment, under which the U.S will have a difficult time in restraining or censoring WikiLeaks.[226] Assange can only be held *criminally* [emphasis added] responsible

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[217] Greg Myre, "How Much did Wikileaks Damage U.S. National Security?" (2019), accessed April 2, 2024, available on:https://www.npr.org/2019/04/12/712659290/how-much-did-wikileaks-damage-u-s-national-security.
[218] *Ibid.*
[219] Lacey, *supra* note 207, p.206.
[220] *Ibid.*
[221] *United States* v. *Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006).
[222] "*Per Curiam", Merriam- Websters Dictionary*, accessed May 2, 2024, available on: https://www.merriam-webster.com/dictionary/per%20curiam . "by the court as a whole rather than by a single justice and usually without extended discussion".
[223] Lacey, *supra* note 207, (ft note 56) Id. at 714 (*per curiam*) quoting *Bantam Books, Inc*. v. *Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963).
[224] "Judicial dictum" is defined as "[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision." *Black Law Dictionary (*9th ed. 2009).
[225] Lacey, *supra* note 207, footnote 60: "The majority of the Court suggests that a criminal prosecution could be possible under various provisions of the United States Criminal Code. *See New York Times*, 403 U.S. at 724-762. The sections that the Court refers to have now been codified to include the Espionage Act of 1917".
[226] *Ibid.*

> as long as the court finds that the WikiLeaks website functions as a media outlet (or "the press"), such as the New York Times or the Washington Post, and that the actions of WikiLeaks fall within the statutory language of the Espionage Act.[227]

3.4 *Goodwin* v. *United Kingdom*, Application No. 17488/90 (1996)

Goodwin v. *United Kingdom* is also based on an investigative journalist who received leaked information from a confidential source while investigating alleged corruption and malpractice within local authority.[228] The author notes that this case is not specifically related to national security, yet it examines how the U.K. Court used the three-prong test as a legal safeguard. Goodwin, before he could publish his findings was raided by the police under the Terrorism Act of 1989.[229] The High Court and the Court of Appeals ordered Mr. Goodwin to disclose his sources and served him with a motion of being in contempt of the Court, which could have been punishable by a fine or up to two years in prison.[230] They allowed him to appeal to the House of Lords, which upheld the previous Courts decision and additionally Lord Bridge of the Court reasoned on the "…balancing exercises"[231] when it came to protecting the public interest while also protecting the interests of justice, and in this case Mr. Goodwin should have known the damaging effects to the company if he published this information and refused to disclose his source.[232]

The respondent and the government then continued with their application to the European Court of Human Rights. Dow Jones publishing stated "…that the establishment and maintenance of protection for newsgathering and news dissemination in Europe is fundamental to the growth and vitality of a free press".[233] The U.K. court examined Article 10 of the ECHR, which protects the right to freedom of expression, including freedom of the press.[234] It found that there was an interference by the government based on paragraph 1 of Article 10.[235] This case is relevant because the Court was also using the three-prong test when evaluating the interference based when it came to paragraph 2 of Article 10. In the first part of the test: "was the inference prescribed by law," the Court ruled that the measures were prescribed by law due to the U.K. domestic law, namely sections 10 and 14 of the 1981 Act; therefore since it satisfied the first part of the test, it would satisfy the second part of the test: "was there a legitimate aim".[236] When the Court got to the third part of the test however, namely 'was the interference necessary in a democratic society', it found that the government did not satisfy this part and wrote its opinion as such

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[227] "However, it is important to know that there has never been a successful prosecution of the press under the Espionage Act.79 Nevertheless, the Supreme Court dictum in New York Times v. United States provides at least theoretical legal support for such a prosecution, which may aid in the efforts of the Department of Justice". *Ibid.,* p.214,
[228] *Goodwin* v. *U.K.*, App. No. 17488/90, Eur. Ct. H.R. (1996).
[229] *Ibid.,* annex.
[230] *Ibid.*
[231] *Ibid.*
[232] *Ibid.*
[233] Robert D. Sack, "Goodwin v United Kingdom: An American view of protection for journalists' confidential sources under UK and European law," *Media Law & Practice* vol.16, no.3(1986): p.86.
[234] *Ibid.*
[235] *Ibid.*
[236] *Goodwin, supra* note 228, paras 29-36.

> The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance…The restriction which the disclosure order entailed on the applicant journalist's exercise of his freedom of expression cannot therefore be regarded as having been necessary in a democratic society, within the meaning of paragraph 2 of Article 10…[237]

Although this case does not necessarily focus on national security, *per se*, it draws attention to how investigative media, in spite of meddling from the government, can expose matters of public concern and interest. Let the author also state that the Court in the context of preserving the freedom of expression, has indirectly supported the notion of transparency and accountability, which are also essential elements of national security. A well-informed nation fostered by the ability of investigative journalists to uncover sensitive information promotes national security, i.e. by possibly uncovering trends that maybe a threat to national security and promoting public engagement in democratic processes or policies that may enhance their nations security.

The Court underlined the need of preserving freedom of expression as a pillar of democracy by using the three-prong test, in a way that there must be "…safeguards in place against abuse of the law…"[238] which also correlates to Article 10 of the European Convention on Human Rights. This case shows that, although though government actions are legal and serve justifiable purposes, they also need to be required in a democracy in order to protect the press's fundamental right to operate unhindered.

3.5 The 'Pentagon Papers' Case: Risk to Diplomatic Relations?

New York Times Co. vs. *United States*,[239] or as more commonly known as the 'Pentagon Papers' case, may be considered as one of the most prominent cases interweaving the principle of the freedom of the press, investigative journalism and national security concerns. The facts of the case are as follows: in 1971 a former military analyst, Daniel Ellsberg took thousands of pages of photocopies of a U.S. Defense department study which exposed the involvement of U.S. in the Vietnam war and sent it to a N.Y. Times journalist Neil Sheehan.[240] Let the author dissipate any of the readers doubts on whether Mr. Sheehan was an investigative journalist. By a succinct Cambridge definition, investigative journalism is "a type of journalism that tries to discover information of public interest that someone is trying to hide".[241] The UNESCO handbook for investigative journalism as mentioned previously also allows for using either open or secret documents or sources.[242] The fact that Mr. Sheehan shed light on the U.S. governments deception of the public in regard to their involvement in the Vietnam war, and in turn allowed for public awareness allows for him to be considered as an investigative journalist. Continuing with the facts, the Nixon administration went to court to block the newspapers from publishing

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[237] *Ibid*., para. 39 and 46.
[238] *Supra* note 161.
[239] *New York Times Co.* v. *United States*, 403 U.S. 713 (1971).
[240] *New York Times Co.* v. *United States*, 403 U.S. 713 (1971), Opinions and Dissents, in *Justia*, Accessed on March 30, 2024, available on: https://supreme.justia.com/cases/federal/us/403/713/.
[241] "Investigative Journalism," *Cambridge Dictionary*, accessed March 30, 2024, available on: https://dictionary.cambridge.org/dictionary/english/investigative-journalism .
[242] *Supra* note 172.

any more of these papers, yet the Supreme Court "…In a *per curiam* decision [meaning one written "by the court as a whole"] …" opposed the block.[243]

The government alleged that it has "inherent powers" to go into court and stop the publication of these papers to protect what they alleged was national security.[244] By national security, it meant several items. The government claimed that it was a revelation of military secrets, such as details about covert operations and military strategies which would supposedly endanger ongoing military operations.[245] Also, it argued that the publication of these papers would undermine public trust in the government, therefore leading to public unrest and potential danger to national security.[246] Another argument was the threat to public relations, since the Pentagon papers revealed assessments of foreign leaders, as well as U.S. relations with other countries, in turn possibly affecting foreign policy goals and again endangering national security interests.[247] Furthermore, it went as far as to state

> [T]hat the courts should take it upon themselves to "make" a law abridging freedom of the press in the name of equity, presidential power and national security.[248]

Essentially,

> Wip[ing] out the First Amendment and destroy[ing] the fundamental liberty and security of the very people the Government hopes to make "secure".[249]

The argument from the government progressed by arguing that the President's constitutional power over foreign affairs and his authority as Commander-in-Chief are the two interrelated sources of the Executive Department's authority to shield the country against publication of information whose disclosure would jeopardize national security.[250]

The *N.Y. Times* on the other hand was attempting to prove that they were the disseminator of information that the public had the 'right to know' and they relied on the First Amendment to bring that point across. Although, we understand that the First Amendment is not absolute as inferred from the *Branzburg* v. *Hayes* case,[251] this case asked for weighing the balance between the right of the press to disseminate information of public interest and the protection of national security. The Government held a heavy burden for halting the publication of such information, which it did not meet. Justice Hugo Black clearly emphasised

> [i]n the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfil its essential role in our democracy. The press was to serve the governed, not the governors… And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people… The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.[252]

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[243] *New York Times Co., supra* note 239.
[244] See supra note 140, https://supreme.justia.com/cases/federal/us/403/713/
[245] *New York Times Co., supra* note 238.
[246] *Ibid.*
[247] *Ibid.*
[248] *Ibid.*
[249] *Ibid.*
[250] *Ibid.,* para. 718, Brief for the United States 13-14.
[251] *Branzburg*, *supra* note 195.
[252] *New York Times Co., supra* note 240.

Furthermore, Judge Gurfein claimed no convincing arguments were made as to why these documents, other than in the general context of embarrassment, would significantly impact the security of the nation, meaning that this case did not present a "sharp clash" between vital security interests and the Times' rights to publish the disputed material.[253]

The U.S. Supreme Courts attempt to strike a balance between press freedom and national security in journalism illustrates the relationship that exists between preserving democratic values and safeguarding sensitive information. The statement shows the critical role that a free press plays in keeping the government responsible from preventing deception. Justice Black with a concurring opinion from Justice Douglas asserts,

> [b]oth the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.[254]

The broad assertion of "security" should not be manipulated to escape accountability[255] and the government's ability to censor the press was abolished, for the purpose that the press can criticise that same government.[256]

As John Stuart Mill correctly stated,

> …political life cannot be conducted on a sound basis unless two opposing elements combine: the element of maintenance of public order and the element of progress and reform. Competition between these two elements is the best guarantee of the preservation of what is useful in the existing system…[257]

The U.S. Supreme Court justices implicitly used the struct scrutiny test,[258] or the equivalence of the proportionality principle, when justifying their decision. Their reasoning was that the State was not able to prove a compelling interest in censoring these documents.[259] They explicitly stated that keeping "…military and diplomatic secrets at the expense of informed representative government provides *no real security* [emphasis added] for our Republic".[260] The author was able to identify parallels between the State's desire to regulate the press and how wartime circumstances force the State to censor the press more as she looked through the case. The Pentagon Papers were leaked in 1967 during the Vietnam War. [261] The State tried to argue that these documents posed a threat to national security, but the court rejected this argument, finding that the documents could not possibly have any significant impact on national security and would only have embarrassed the U.S.[262]

CONCLUSION

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[253] Rogder Citron, "The Pentagon Papers Case through the Mists of Time: Understanding the Court's 6-3 Decision in the Most Important First Amendment Case Ever," (2021), in *Justia*, accessed April 2, 2024, available on: https://verdict.justia.com/2021/06/30/the-pentagon-papers-case-through-the-mists-of-time.
[254] *New York Times Co*., *supra* note 239, para.717.
[255] *Ibid.,* para 719.
[256] *Ibid.,* para 717.
[257] Ahmad Abdel Majid, "The Crisis of Professional Responsibility in Iraqi Journalism: Avoiding Incitement to Violence and Armed Conflict," *International Review of the Red Cross 89*, no. 868 (December 2007): pg.898.
[258] *Supra* note 190. *See* "Strict scrutiny."
[259] *Ibid.*
[260] *New York Times Co., supra* note 239, para. 719.
[261] John Pratos and Margaret Pratt Porter, *Inside the Pentagon Papers*, (Kansas: University Press of Kansas, 2004), pp.51-206.
[262] *Ibid.,* p.206.

From ideas like freedom of speech and expression, the freedom of the press has developed into a fundamental principle. This principle has been championed by journalists, especially those investigating critical issues, such as government secrets and overreach. Since a well-informed populace can engage in intellectual conversation based on vital information obtained from investigative journalists on matters of public interest, press freedom is a prime example of a vibrant democracy. When the government utilizes information censorship for reasons related to national security, this fundamental freedom is put in jeopardy. The author notes that the legal landscape is a challenging one when it comes to the complex relationship between freedom of the press and national security.

The press freedom principle is a cornerstone of human rights and democracy and therefore cannot be separated from neither. It is the ability for the press to disseminate information that would be pertinent to the public, as long as it is non-biased, factual and researched along the legal and ethical standards set for journalists and newspapers. The ideas of regulation and censorship are not the same, yet interrelated. Since the beginning of the church, censorship has been used to restrict speech. Eventually, the state took over and started to regulate the press, which was starting to become increasingly prevalent. The two types of censorship are punitive and preventative, and they are used to censor material after it has already been distributed or to hinder it before it is published. The contemporary idea of free speech and free thought originated during British colonial authority in America, despite the fact that these ideas date back to ancient Greece and Rome. As the American colonies were planning to gain their independence, they began to formulate the necessary rights that their nation would need to emulate. The Virginia Declaration of Rights, which later assisted in forming the First Amendment of the U.S. Constitution, as well as the supplementary Bill of Rights, was the beginning of a codified "press freedom" right. It was the first country to make this right a constitutional right, therefore becoming the first national legal instrument to do so. In the Europe's framework, the CFEU is a regional instrument which also protects this right and bases much of its drafting process on Article 10 of the ECHR. These pillars are among the most important ones, next to other international and human rights instruments such as the ICCPR and UDHR.

This thesis underscores the importance of democratic principles such as accountability and transparency which cannot be achieved without free press. Citizenship rights are a fundamental component of democracy. These rights allow the public to decide on matters such as governmental policy, but they can only be realized if the public is well-informed. The historical relationship between democracy, press freedom and national security did not start off easy, with book burning being a common practice to silence dissent against the government. However, the Enlightenment era saw a shift in the championship of free press and individual liberties. This was followed by the 19th and 20th centuries, which saw a rise of investigative journalism and its importance on reporting on government actions, characterized by such cases as *R.* v. *Shayler.*

The relationship between press freedom and national security is complex due to the nation's ability to protect its national interest from either perceived or real, external or internal threats. National security and journalistic freedom are both fundamental rights and balancing the competing interests of both becomes a challenging issue for the judicial authorities. Moreover, during conflict or war, and depending on its intensity, the nation can censor journalistic freedoms by using the "national security" objective by arguing with reasons such as "protecting military secrets or strategies". As was seen during WW1, WW2 and the Cold War Era, there was increased censorship of the press, and even emergency acts and *ad hoc*

offices enacted, such as the Office of Censorship by the U.S. after its attack on Pearl Harbor. On a general scale, journalists face many challenges when reporting during war-time, whether it be legal, ethical or physical.

When democratic nations do apply the guise of national security to censor the press, there are legal safeguards. The three- prong test which clearly identifies what the State is responsible for proving, along with legal suggestions such as the Johannesburg Principles.[263] Independent judicial review is underscored to make sure the courts are not politically influenced. The principle of proportionality, although explicitly known in the EU legal framework, is also implicitly used in the U.S. The principles equivalent in U.S. is the strict scrutiny, intermediate scrutiny, and rational test concluded by the U.S. judiciary to balance the right of the press with the right of the government to censor the press in the name of national security. This points to the thesis research question: how do the judicial authorities in democratic nations, reconcile the imperative of national security with the principle of press freedom, in cases concerning investigative journalism? The aim of the thesis was to investigate this process behind major legal instruments through a historical and interpretive lens, examining the relationship between press freedom and national security, while evaluating the decisions in specific landmark cases. The author must note that there has been recent democratic backsliding which might have future implications on the still ongoing case of Julian Assange, as well as other future ones.

Yet, evaluating landmark cases of *Branzburg* v. *Hayes*, *Goodwin* v. *United Kingdom*, and the Pentagon Papers case, the author notes that in all circumstances the judicial authorities carefully weighed the competing interests, and placed a heavy burden on the government to prove the necessity of censoring information at the expense of the public, under the motive of national security.

The emergence of online platforms, such as Twitter, and the influence of the world wide web for information dissemination can present legal challenges for the future. The fact that there are no laws, statutes or instruments which mention how classified information could be collected or disseminated, poses a legal issue: as in the case of Edward Snowden. Furthermore, the rise of individuals who report on online platforms asks for a more clear or evolving definition of journalism. This begs for an examination of which legal frameworks can still be pertinent while exploring the possibility and the need for the evolvement of new regulatory frameworks to battle the new challenges in the modern world of digital information.

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