MEMORANDUM

TO: Free University of Tbilisi

FROM: Chris Ray, Kerri Russ, and Megan Williams, under the supervision of Associate Professor Craig Martin, Washburn University School of Law

RE: Freedom of Expression and Article 314 of the Constitution of Georgia

DATE: 3 April 2013

INTRODUCTION

You have asked us to provide research and analysis on how American constitutional law principles and doctrine might inform an analysis of Article 314 of the Criminal Code of Georgia (Espionage). Article 314 reads,

> 1. Collecting, keeping of the object, document, information or any other data containing the state secret of Georgia or transferring thereof to a foreign country, foreign organization or their representative, or extortion or transference of other information by commission of the surveillance of a foreign state or a foreign organization to the detriment of the interests of Georgia…[1]

As will be explained below, from an American constitutional perspective, Article 314 may limit protected constitutional freedoms, and in particular the right to freedom of speech, in ways that he U.S. courts would find impermissible. The law purports to limit the possession and transfer of information, based on the content of that information, and yet the specific terms of the provision are both excessively broad and vague. As such it potentially impinges upon speech that is beyond that which is necessary to achieve the government objective, chilling speech that is

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[1] Article 314, *Espionage*. [translation available on-line at the UNHCR, at: http://www.unhcr.org/refworld/pdfid/404c5dc11.pdf , and on the homepage of WIPO at: http://www.wipo.int/wipolex/en/text.jsp?file_id=209027] (It is thus our understanding that this is an official translation of the provision, though we retain several questions regarding its accuracy, for reasons we can discuss in our video conference).

well outside of the scope of provision, and moreover, because of its vagueness it is likely to leave persons potentially subject to the law with little guidance as to what conduct is permitted and what is not, and is susceptible to arbitrary enforcement by the authorities.

In the memo that follows we provide a very brief overview of the First Amendment, and how the doctrines of overbreadth and void-for-vagueness are employed in analyzing laws that are alleged to abridge the right to freedom of expression. In the course of doing so, we consider the language of Art. 314 and how it might fare if subjected to analysis under those doctrines. As well, we provide some comparison between the language of Art. 314 and analogous provisions of the *Espionage Act* of 1917, and how the courts have approached constitutional challenges to that law.

THE FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH

1. United States Constitution First Amendment

The First Amendment in the Bill of Rights provides for, among other things, freedom of speech.[2] It bears certain similarities to the corresponding guarantee of free speech in Article 19 of the Georgian Constitution.[3]

The right to freedom of speech under the First Amendment is in many respects the most robustly defended right in the U.S. Constitution. Nonetheless, while it may appear from the text that that freedom of speech may be an absolute or unlimited right under the First Amendment, the Supreme Court of the United States has identified certain qualifications, and has elaborated the grounds for justifying some limits upon the freedom. Without exploring these in detail here,

[2] "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."

[3] "Everyone has the right to freedom of speech, thought, conscience, religion, and belief."

it is sufficient for our purposes to note that where the government seeks to place restrictions on expression based on the content or meaning thereof, the law or policy that is imposing the limitation on the expression in question will require the most persuasive justification if challenged and subjected to judicial review. Put another way, such a law will be subjected to the most searching scrutiny by the courts, in what has come to be known as the "strict scrutiny standard".[4] Under this standard the government must show that the limitation of the expression in question serves a compelling government interest, and that it is either necessary to achieve that objective, in the sense that there is no other alternative means of achieving the objective, or at a minimum that the law is narrowly tailored to serve that compelling interest. This latter analysis entails the application of a "least restrictive means" test, meaning that the government must establish that there was no other means of achieving the objective that would have been less restrictive of the constitutional right, than the limitation on expression that is under challenge.[5]

2. The *Espionage Act* and Article 314

In beginning our consideration of how the language of Article 314 might be analyzed through the lens of Frist Amendment jurisprudence and doctrine, it is instructive to compare it to the language of the analogous provisions of the U.S. *Espionage Act* of 1917.[6] As stated above, Article 314 relates to protecting the state secrets of Georgia and "other information" that may harm the interests of Georgia. The *Espionage Act* similarly relates to the protection of national security and prohibits both attempts to obtain and to willfully disclose information relating to national security to persons not authorized to receive it. For our purposes the provision that is most germane is in paragraph (d), which provides that:

[4] *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 639 (1994).

[5] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

[6] Pub.L. 65024, 40 Stat. 217, 18 U.S.C.

> Whoever, having authorized possession or control of a document or photograph, relating to the national defense, or information relating to the national defense, which information the possessor had reason to believe could be used to the injury of the United States, and who willfully delivers it to any person not entitled to receive it, or willfully retains it and fails to deliver it to the officer or employee entitled to receive it.[7]

While considered by many to be quite broad and not without problems of ambiguity, this provision of the *Espionage Act* does contain, in contrast to Article 314 of the Criminal Code of Georgia, certain delimiting words that help narrow the scope of speech and conduct that may fall within the statute. In particular, and as will be discussed in more detail in the sections that follow, such qualifying phrases as "national defense," "reason to believe could be used to the injury of the United States," "willfully delivers," "not entitled to receive it," and "willfully retains," operate to limit the scope of the provision. These terms provide guidance as to what conduct will be determined to violate the law, and what kind of information is covered by the law. In particular it restricts the kind of information in question to that which relates to national defense, and the kind of information that a reasonable person in the position of the possessor would believe could be used to cause injury to the United States if disclosed. Moreover, the addition of the term "willfully" establishes the requirement to prove that the person either disclosed to someone not authorized to receive it, or retained the information, with some level of knowledge as to its nature, and with some intent to cause the likely injury to the national interest.

In contrast, Article 314 does not contain similar delimiting words. First, it is unclear what exactly is the compelling state interest that the provision is designed to achieve. While the first part of the provision, with its reference to state secrets would suggest that it is aimed at protecting national security, but the much broader reference to potential harm to state interests

[7] 18 U.S.C. § 793(d).

suggests that the objective may be much broader than that. This is important, because under an American constitutional analysis, the state interest will affect how the term "other information" is interpreted, and will determine whether the provision is sufficiently narrowly tailored to the compelling state interest. Thus, if the state interest is described as protecting national security, the clause relating to the disclosure of "other information" to the detriment of the interests of Georgia, would likely be found to limit rights to an extent that is not necessary for achieving that objective. On the other hand, if the state interest is defined as protecting Georgia's state interests in a much more general sense, it will not likely be sufficiently important to justify the extensive limitation on the freedom of speech. In essence, as will be discussed further below, Article 314 is potentially over-inclusive, and therefore unconstitutional under American jurisprudence.

Second, the exact meaning of the language of Article 314, at least in its English translation, is somewhat uncertain. The first clause, which prohibits the possession of or transference to a foreign entity any information that contains "state secrets", seems to apply to Georgian citizens or residents. That is, the subject of the prohibition is anyone who purports to possess or transfer state secrets, which would include and in most scenarios be Georgian citizens or residents. But the subject of the second clause is much more uncertain. It appears to prohibit the extortion or transference of "other information" though the commission of surveillance by foreign entities. In other words, the actor here appears to be the foreign entity that is employing methods of surveillance to either extort or otherwise effect the transfer of information. This potential change in subject of the two clauses within the same sentence could arguably also affect the nature of the relationship between "state secrets" and the content of "other information". Moreover, there is room for argument as to how the final qualifier "to the detriment of the interests of Georgia" operates – does it qualify only the transfer of other

information by means of foreign surveillance, the transfer of any "other information" more generally, or does it qualify the entire paragraph, including the possession and transfer of state secrets? This uncertainty profoundly affects the potential scope of the provision, as well as creates ambiguity as to what kind of information is covered, who is subject to the provision, and precisely what kind of conduct is implicated, which will be discussed further below.

OVERBREADTH DOCTRINE

As mentioned earlier, the extent to which a law that potentially impinges on speech is also determined to be overly broad will be a factor in considering the law's constitutionality. A statute is overbroad if "its sweep has a chilling effect on constitutionally protected conduct, even though the statute does not directly forbid protected activity."[8] Under the First Amendment, a statute is overbroad when it "infringes on expression to a degree greater than justified by the legitimate governmental need which is the valid purpose of the statute."[9] In *The United States v. Morison,*[10] a case that involved First Amendment challenges to the *Espionage Act* of 1917 discussed above, the court found three situations in which the overbreadth doctrine can be applied: 1) when the governmental interest sought to be implemented is too insubstantial, or at least insufficient in relation to the inhibitory effect on First Amendment freedoms; 2) the means employed bear little relation to the asserted governmental interest; and 3) the means chosen by the legislature do in fact relate to a substantial governmental interest, but that interest could be achieved by a "less drastic means"—that is, a method less invasive of free speech interests.[11]

[8] *McKinnon Bridge Co.*, 514 F. Supp. at 547

[9] *Drake*, 818 F. Supp. 2d at 919

[10] 604 F. Supp. 655 (D. Md. 1985)

[11] *Id.*

The *Morison* case is also applicable here. Article 314 can be distinguished from the language of the *Espionage Act* that was subject to judicial review in *Morison* because the term "other information" as it appears in Article 314 does not have any of the limitations or delimiting words that characterize § 793(e). Subsection (e) describes specific actions that may lead to prosecution, and gives specific categories of items, the obtaining of which may lead to prosecution. Further, Article 314 could be argued to fall within the scope of each of the three criteria set out in *Morison* for triggering a finding of overbreadth.

While a government interest in its state secrets is likely compelling, it is unclear how and to what extent "other information" actually relates to state secrets. "Other information" is found in a clause that applies to things that are "to the detriment of the interests of Georgia." The interests of Georgia are not defined, nor are any circumstances given that would provide some guidance to a court on what precisely might be "to the detriment" of Georgia. Further, even though "other information" seems to apply to foreign organizations, this still does not narrowly tailor "other information" enough so that it meets a compelling state interest of state secrets. As it stands,, "other information" could pertain to virtually any kind of information that might, in some circumstances, be used in a manner that would be inconsistent with the interests of the state. This is arguably broader than state secrets, to the extent that any compelling interest may or may not exist. Second, the term "other information" is minimally related to the interest of the state in protecting its secrets. Although "other information" in this context refers to transferring information by foreign states and organizations that are to the detriment of Georgia, it is not sufficiently related to state secrets, because "the detriment of the interests of Georgia" could be broader than just state secrets. Finally, conceding the fact that protection of state secrets is a

legitimate governmental interest, the legislature could easily have chosen a "less drastic means"—all it has to do is define what it means by "other information."

Furthermore, as it stands, the effect that this provision could have would be severely chilling, precisely because "other information" could have an extremely broad and ill-defined scope, even when read in its context. The term "other information" is not itself defined anywhere in the Criminal Code, and it does not appear to be any term of art. Its meaning is not much clarified or narrowed from interpreting it within the context of the rest of the clause. From the plain meaning of the text, the words "collecting, keeping of the object, document, information, or any other data" apply only to the phrase "containing the state secret of Georgia." Even though "other information" must necessarily relate to foreign organizations, and thus its meaning and content is thereby qualified, because the state interest is not sufficiently defined, "other information" could pertain to information that relates to a broad range of situations in which a foreign organization is engaging in actions, such as trade for example, that may be to the detriment of Georgia – but activities that involve information that does *not* fall into scope of the term "state secrets," and activities that would *not* be considered linked to national security. The information relating to the conduct of such foreign organizations would nonetheless still fall within the scope of the statute, precisely because "other information" is over-inclusive, ill-defined, and excessively broad.

VOID-FOR-VAGUENESS DOCTRINE

The extent to which the phrase is "ill-defined" also relates to another constitutional doctrine, called the "void-for-vagueness" doctrine, which is employed in cases involving

freedom of speech under the First Amendment, [12] and due process under the Fifth and Fourteenth Amendments. [13] It is based on the idea that it is unfair to punish people for the alleged violation of laws the scope of which is uncertain, and moreover that vague laws may chill or discourage constitutionally protected activity, because people may not engage in certain activities for fear that the conduct may fall within the prohibitions of an ambiguous law.[14] The doctrine establishes that laws must be sufficiently clear and intelligible that persons will have fair notice as to what actions violate the law.[15]

The void-for-vagueness doctrine mainly focuses on notice and enforcement; however, it is also important for directing legislative bodies to set out rules and/or procedures for enforcement of the laws.[16] By allowing vague laws, one would be leaving it up to the judiciary and police force to determine what constitutes a violation of the law, instead of the legislative body that is responsible for enacting the laws.[17] Such enforcement could lead to police officers or courts to subjectively prohibiting First Amendment, and other constitutionally protected liberties.[18]

To avoid being unconstitutionally vague, a criminal statute must define the offense with sufficient clarity that ordinary people will know what actions are prohibited and "in a manner

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[12]U.S. CONST. amend. I. Although this provision states that "Congress" may not abridge the freedoms, it has been found to apply to the state governments through the Fourteenth Amendment. *See* GEORGIA CONST. art. 19(1) (stating "[e]veryone has the right to freedom of speech, thought, conscience…").

[13]U.S. CONST. amend. V; U.S. CONST. amend. XIV. This limitation is set upon the federal government through the Fifth Amendment and the state and local governments through the Fourteenth Amendment. *See* GEORGIA CONST. art. 18(2) (stating "[d]eprivation of liberty or other restriction of personal liberty without a court decision shall be impermissible.").

[14]Note, *The Void-For-Vagueness Doctrine In The Supreme Court*, 109 U. Pa. L. Rev. 67, 81 (1960).

[15]*FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

[16]*Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

[17]*Id.* at 358 n.7 (citing *United States v. Reese*, 92 U.S. 214, 221 (1876)).

[18]*Id.* at 358 (citing *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965)).

that does not encourage arbitrary and discriminatory enforcement."[19] If a person is unable to reasonably determine what actions are prohibited, the imposition of criminal liability for breach of the law will constitute a violation of due process.[20] Where no statutory definition of a term exists, courts look to the common usage of words for their meaning.[21] To begin the analysis necessary to determine whether a statute is unconstitutionally vague, one first examine the plain language of the statute.[22]

In order for a legal provision to be sufficiently clear, key terms need to be adequately defined so that the law cannot be enforced in an arbitrary or discriminatory manner. This may require the inclusion of legal criteria for determining the meaning of ambiguous words or using a common definition so a person of ordinary intelligence would be able to determine the meaning of the term. The *Kolender* test, which is a two-step analysis, is commonly used in assessing the ambiguity of legal provisions.[23]

In the case itself, the defendant challenged the constitutionality of a criminal statute that "requires persons … provide a credible and reliable identification …requested by a peace officer…" on the basis that the term "credible and reliable" was too vague a clause to define which forms of identification would or would not be valid.[24] The court held that the statute was indeed unconstitutionally vague, and that it would encourage arbitrary enforcement because it did not define the terms "credible" and "reliable" to enable an ordinary person to determine what

[19] *Id.* at 356.

[20] *United States v. Harriss*, 347 U.S. 612, 617 (1954).

[21] *United States v. Charlestain*, No. 12-80054, 2012 WL 1952292, slip op. at 3 (S.D. Fla. May 3, 2012).

[22] *United States v. Hunt*, 526 F.3d 739, 743 (11th Cir. 2008).

[23] *Kolender v. Lawson*, 461 U.S. 352 (1983).

[24] *Id*. at 354.

type of identification would come within the purview of the statute.[25] The court reasoned that the statute did not provide any standards or guidelines for defining what a person potentially subject to the law would need to do in order to meet the requirements of the law.[26] The court found that since the statute did not provide such sufficiently clear standard or guidelines, it also provided the police with total discretion for determining whether any particular conduct was within or outside the scope of the provision, and thus ran a significant risk of being arbitrarily enforced.[27] The court found that although the legislature had a "weighty concern" in enacting this particular statute, legislation still must be within "constitutional standards for definiteness and clarity."[28]

In considering how this test might apply in the analysis of Article 314 of the Criminal Code of Georgia, it could be argued that the plain language within the provision does not sufficiently describe what specific actions are prohibited by the law, and thus what conduct is outside of the scope of the provision. As discussed above, the provision refers to both "state secrets of Georgia" and "other information." The term "state secret" itself is not defined within the Criminal Code (though we recognize that it may be defined in other related statutes, and thus may be a term of art as it is used here). But as we discussed in the foregoing section on overbreadth, the term "other information" is not a term of art, is not defined, and is insufficiently described or qualified by other terms in the clause to provide it with sufficiently specific meaning. On the plain meaning of the text, it may be understood to mean any information that may be determined to be to the detriment of the interests of Georgia. How, or in what field of

[25] *Id.* at 361.

[26] *Id.* at 357.

[27] *Id.* at 359.

[28] *Id.* at 361.

activity it would be to the detriment is not specified. The only other qualifiers is that the prohibition appears to be limited to the transference (or extortion) of such information "by commission of surveillance of a foreign organization". The precise meaning of this clause is also unclear, and as discussed above, the very subject of the verbs in this provision is uncertain.

In short, this lack of clarity and significant ambiguity in Article 314 would likely lead to it being determined unconstitutionally vague under American constitutional analysis. It would likely fail the *Kolender* test, in that it does not sufficiently permit persons potentially subject to the law to discern with any confidence what is prohibited, and the law would be susceptible to arbitrary and discriminatory enforcement.[29]

The void-for-vagueness doctrine was raised in the *United States v. Morison* case,[30] which as discussed earlier, involved a prosecution under the *Espionage Act* of 1917. The accused in that case was prosecuted for, among other things, passing classified photographs of military weapons systems to the defense journal *Jane's Defence Weekly*. He argued that the provisions of the *Espionage Act* were impermissibly vague because, among other things, they lacked any requirement to establish intent to injure the United States, and that the term "relating to the national security" was insufficiently precise in the absence of a scienter requirement.[31] The court rejected these arguments on the basis that the provision in question, 18 U.S.C. 493(d), contained adequately precise limiting terms to give the language sufficient meaning for the purposes of both putting people on notice as to what was prohibited, and for enforcement purposes. In particular, the provision defines the documents that were subject to the provision as being those

[29] *See* section 3 below for examples of conduct Article 314 may prohibit and the subsequent affect it may have on speech and expression.

[30] *Morison, supra* note 10.

[31] Id., at 659.

"related to national defense," as well as "information relating to the national defense…which the possessor has reason to believe could be used to the injury of the United States." Moreover, the provision is further limited by the definition of the prohibited conduct: "willfully communicates, delivers, transmits,…" or causes such actions, "to any person not entitled to receive it." The court held that these terms, and particularly the word "willfully", both create sufficient scienter requirements, and limit the nature of the conduct prohibited, and the type of information that is subject to the law. It can clearly be inferred that the transmission of such information, relating to national defense, to persons not authorized to receive it, will cause injury to the national security interests of the United States, and that the person "willfully" doing so will have some understanding of that. [32]

As already discussed, Article 314 does not contain the same kind of limiting terms so as to make it sufficiently precise. There are various kinds of conduct that may fall under the purview of the law, depending on whether the government would want to prosecute the conduct, which brings in the *Kolender* aspect. For example, there are no delimiting words that would protect an "ordinary citizen", someone who does not work for the government in some capacity. A private investigator or a journalist may come across some information by their own surveillance and be prosecuted under the article. A non-government employee could be prosecuted under the article if they provide information that they came across lawfully to a foreign newspaper, like the *New York Times*, *Washington Post*, or the *Guardian.* Since these publication companies are outside of the Republic of Georgia, they could be considered a foreign organization under the article if those in charge of prosecution so choose. Under the current

[32] Id., at 658-660.

language of the statute one could be prosecuted, arbitrarily, even if the person had authorization to have the information or if the information was transferred to a foreign agent unknowingly.

THE WIKILEAKS CASE

As is quite well known, in 2010 the not-for-profit organization called WikiLeaks released hundreds of thousands of secret U.S. files on the Iraq and Afghan wars, and relating to the diplomatic relations of the United States. The documents involved sensitive subjects including abuse of Iraqi prisoners in U.S. custody, Iraqi rights violations, civilian deaths in the wars, as well as classified conversations between U.S. and foreign diplomats all over the world. The U.S. government in in the midst of prosecuting Pfc. Manning, the soldier alleged to have transferred the documents to WikiLeaks, and there has been discussion of attempting to also prosecute Julian Assange, the principal of WikiLeaks, should the United States be able to extradite him. The case has given rise to renewed interest and debate over the *Espionage Act*, and the extent to which it may implicate Constitutional rights related to free speech. While there is little doubt that the actions of Pfc. Manning fall within the scope of the prohibitions under the *Espionage Act*, and that the application of the law to his actions would not likely implicate constitutional issues, the efforts to extend the law to the actions of Julian Assange and WikiLeaks raises more complicated issues. We need not delve into those here for the purposes of discussing Art. 314, but it is quite possible that the constitutional interpretation of the provisions of the Espionage Act in the United States is not yet entirely settled.

CONCLUSION

This memo has provided a very brief discussion of how American constitutional law analysis might inform questions regarding the interpretation and validity of Article 314 of the Criminal Code of Georgia. We have done so in part by explaining the doctrines of overbreadth

and void-for-vagueness as they relate to freedom of speech rights analysis. We have explored briefly how Art. 314 might be assessed pursuant to an application of those doctrines, and we have also by way of comparison examined provisions of the Espionage Act of 1917 that are in some respects analogous to Art. 314. According to our examination, it is our view that Art. 314 would likely be determined to constitute an unconstitutional violation of freedom of speech both for being overly broad and excessively vague.