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# Responses to the Ten Questions

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## RESPONSES TO THE TEN QUESTIONS

Shane Harris<sup>†</sup>

### 10. WHAT IS THE MOST IMPORTANT ISSUES TO AMERICAN NATIONAL SECURITY?

#### THE FUTURE OF JOURNALISM IN THE AGE OF WIKILEAKS

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As a journalist, it is my professional duty—indeed, my privilege—to ask tough questions. So I will start with one for the astute audience of law students, attorneys, and scholars reading this: Why in the world would you trust anything I have to say on the subject of the law?

When the editors of this Journal asked me to write an essay on what I see as the most important national security issue of the day, I was pretty sure they were still reeling from the previous evening's festivities at one—well, several—of the Twin Cities' finer watering holes. I was honored to be their guest at a symposium last September, which brought together eminent scholars and journalists, and I am sure I absorbed more knowledge than I contributed. You should know that I'm not a lawyer. Nor am I a law student. But I live in Washington, D.C., where you can't swing a cat without hitting one or the other. So I hope my daily proximity to so many qualified lawyers, both in my work life and my private one, gives me some street-cred for addressing your audience.

I've been writing about national security for the past ten years

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as an author and journalist. So, it is through that lens that I'll address the topic. And I suggest that the most important national security issue is one I'm grappling with on a daily basis, and that is confusing me more than it ever has: What is a journalist?

It might seem like a parochial question if you are not a member of the press, and it is certainly a self-serving one. But here is why it bears on the broad subject of this Journal. As I sit in my office today, most reporters are speculating that the Justice Department is working to indict Julian Assange, the founder of WikiLeaks, for stealing or publishing U.S. government secrets. If that happens, people in my profession will get very nervous, because if the Government prosecutes Assange for publishing classified intelligence reports and diplomatic cables, what is to stop it from prosecuting the reporters who wrote about them, too, and who also published some of the documents? If that happens, we will not be able to do our job, which is, quite simply, to inform the public about the conduct of its government, including its successes and, more urgently, its failures. Right now, I cannot think of many more important national security matters than that.

I am not qualified to assess whether the Government can prosecute Assange or a reporter for disclosing secrets. But asking questions is my job. Answering them is yours. And I think the answer is under-examined. That makes it good territory for people in your profession, I would say. This is a foundational issue for our society, and it is imperiled today.

## I. JOURNALISTS AND THEIR SOURCES PURSUED

Why do I think that? Let me answer with a premise, based on my own reporting and the work of other journalists over the past year or so: the Obama administration has shown remarkably little tolerance for leaks of classified information to the press. We are tempted in my business to call this a war on leakers, but I will dispense with the rhetorical flourishes and let the facts tell the story.

To date, the Obama administration has indicted five people for revealing classified information related to intelligence programs and the conduct of national security.<sup>1</sup> That's more than

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1. Shane Harris, *Plugging the Leaks*, WASHINGTONIAN, July 21, 2010, <http://www.washingtonian.com/articles/people/16336.html>; Greg Miller, *Former*

any administration in history. Many of these people could arguably be called whistleblowers, and I think they undoubtedly contributed to greater public understanding of government affairs, and in some cases, of waste and abuse.

In January, a former CIA officer named Jeffrey Sterling became the latest member of this club, indicted for revealing secrets about covert operations against Iran to a reporter, who has been confirmed as the *New York Times*' James Risen.<sup>2</sup> A prosecutor subpoenaed Risen to testify before a grand jury about his confidential sources for his 2006 book, *State of War*, which chronicles Bush- and Clinton-era intelligence blunders, including a CIA operation that may have actually assisted the Iranians in building a nuclear weapon.<sup>3</sup>

These are stories the public should hear. But in its zealous pursuit of leakers, the Justice Department is threatening the reporters who bring them to light. In the Risen case, prosecutors trampled their own guidelines about when it is permissible to compel reporters' testimony. The Government has subpoenaed Risen twice in two years.<sup>4</sup> The first subpoena, issued in 2008, expired with the term of a grand jury, but the Obama administration revived it.<sup>5</sup> As I reported last year in *Washingtonian* magazine, that subpoena was arguably unnecessary because the Government had already identified someone whom investigators believed was Risen's source.<sup>6</sup> Judge Leonie Brinkema was unwilling to reauthorize the Bush-era subpoena against Risen unless federal prosecutors obtained Attorney General Eric Holder's approval, a sign of her own misgivings about the Government's pursuit of a reporter.

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*CIA Officer Jeffery A. Sterling Charged in Leak Probe*, WASH. POST, Jan. 6, 2011, [http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604001.html?wprss=rss\\_world&sid=ST2011010604303](http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604001.html?wprss=rss_world&sid=ST2011010604303); *State Department Analyst Charged with Leaking Information About North Korea*, TELEGRAPH, Aug. 28, 2010, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/7969120/State-Department-analyst-charged-with-leaking-information-about-North-Korea.html>.

2. Indictment, United States v. Sterling, No. 1:10CR485 (E.D. Va. Dec. 22, 2010), available at <http://www.fas.org/sgp/jud/sterling/indict.pdf>.

3. JAMES RISEN, *STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION* (2006).

4. Charlie Savage, *Ex-C.I.A. Officer Named in Disclosure Indictment*, N.Y. TIMES, Jan. 6, 2011, [http://www.nytimes.com/2011/01/07/us/07indict.html?\\_r=2](http://www.nytimes.com/2011/01/07/us/07indict.html?_r=2).

5. Harris, *supra* note 1.

6. *Id.*

In December, the Justice Department indicted Sterling and he was arrested.<sup>7</sup> And with that revelation came the news that Risen had successfully quashed his subpoena a month earlier. How did he do it? By arguing that the subpoena was not necessary, according to his attorney. Not necessary now, or when it was issued.

Justice Department guidelines are clear. Prosecutors are only supposed to subpoena reporters for their sources if they have no other way of identifying a suspected leaker, and only if it is essential to establishing one's guilt or innocence.<sup>8</sup> But we know now that it was not essential to subpoena Risen in the Sterling case.

Risen told me his victory was "an important ruling for press freedom." It was also hard earned. But it is a harbinger of battles to come. This case, as well as the administration's whole approach to staunching leaks, raises troubling signs that the Justice Department is feeling so emboldened that it is willing to bend, maybe even break its own rules. It continues to amaze and depress me that so few reporters, or lawyers, have caught on to the trend here. In the course of reporting about Risen's case, a senior official at the Justice Department warned me to tread lightly. "Remember, we're out for scalps," this official said. This wasn't a joke. Just by writing about Risen's case, this official made clear I was taking a risk.

## II. WIKILEAKS MUDDIES THE WATERS

Now, as if the legal environment weren't foreboding and tenuous enough for journalists, along comes WikiLeaks.<sup>9</sup> The virtual organization founded by ex-computer hacker Assange bills itself as a whistleblower group. It's important to assess what exactly WikiLeaks is, because if Assange is indicted, journalists will need to distance themselves from his group if they want to avoid being entangled in his legal troubles. I wish that were not so, but here we

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7. Josh Gerstein, *NYTer Risen: I Didn't Burn Source*, POLITICO (Jan. 6, 2011, 3:51 PM), [http://www.politico.com/blogs/joshgerstein/0111/NYTer\\_Risen\\_I\\_didnt\\_burn\\_source.html](http://www.politico.com/blogs/joshgerstein/0111/NYTer_Risen_I_didnt_burn_source.html).

8. 28 C.F.R. § 50.10 (2010).

9. Ellen Nakashima & Jerry Markon, *WikiLeaks Founder Could Be Charged Under Espionage Act*, WASH. POST, Nov. 30, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112905973.html>.

are.

It is more accurate to call WikiLeaks a disseminator of secret information. That primary activity doesn't make WikiLeaks a whistleblower group. And it doesn't make Assange and his associates journalists, either. To claim status as a journalist, one must adhere to certain standards of the craft of reporting, which in the case of publishing classified information requires you to verify the authenticity of the information you're writing about, and to obtain a response from the party whose secrets you're planning to spill. Some of my colleagues might quibble with the term "require" (after all, we have no professional bar or credentialing organization, and unlike federal prosecutors, our professional guidelines aren't enshrined in law). But I have worked at five publications over the past twelve years, and at none of them would I have been permitted to write about military intelligence reports or diplomatic cables, as WikiLeaks has, without first calling the military or the State Department for a comment. I would also not have been allowed to simply publish the material with no additional context. And my own professional standards would require me to give the Government a chance to convince me that publishing this information would harm national security (officials have never succeeded in the times that we have had those discussions, but I always listen).

So, count me in the group that says WikiLeaks is not a journalistic organization. Now the tough questions.

*The New York Times* clearly is doing journalism. So are *The Guardian* and *Der Spiegel*, which along with the *Times* were given access to WikiLeaks' document cache and reported stories about it. But these organizations also coordinated with WikiLeaks to receive and write about the documents. Does that make the news outfits complicit in WikiLeaks' receipt of those government secrets? I do not think so, but that is a question being debated right now in Washington, both in Congress and within the Justice Department.

There is another important question here. Was WikiLeaks actually a passive recipient of secrets—as journalists sometimes are—or did Assange conspire with one accused leaker, Private First Class Bradley Manning, to remove classified information from a military computer network and provide it to Assange's group? Clearly WikiLeaks solicits anonymous contributions of information. But so do journalists. And although sources sometimes come to us

out of the blue, normally we go to great lengths to convince them to violate their oaths of secrecy by telling us what they know or handing over sensitive documents. Obviously, I hope prosecutors conclude that the *New York Times* and others are not a part of any conspiracy—nor do I believe they are—and that there are reasons not to indict these news organizations for their work. But given what I have seen from this administration, I will not bet that prosecutors are on my side.

I have not studied these questions in sufficient detail to form an answer that would stand up in a courtroom. And I hope never to have to do so. Besides, it is my job to ask questions. I will stick to what I am good at. I humbly suggest that the answers are important for you all to seek out and refine. And I hope you do so thoughtfully and swiftly.

### III. UNCLEAR LAWS, UNCERTAIN FUTURE

As background to that task, I will offer some closing thoughts about my initial question.

A journalist is someone who reports information after verifying its authenticity, who asks for and publishes responses to it, and perhaps most importantly, who makes editorial judgments about what to publish and what not to publish. This can mean deciding not to reveal the names of intelligence sources in a confidential report. It can mean something as mundane as leaving out a quotation that is too long. But the point is, journalists make choices. They do not publish indiscriminately. They seek to explain, not simply to expose.

Perhaps the question of whether the Government can prosecute journalists for publishing secrets should take these characteristics into account. It should certainly draw a distinction between the theft of information and the receipt of it. As it is currently drafted, the Espionage Act—which former Attorney General Alberto Gonzales contemplated using against reporters who revealed classified intelligence programs—does not account for these very different activities.<sup>10</sup> Some have speculated that the Government could indict Assange under the statute.<sup>11</sup> If that happens, the ambiguity and confusion of the Espionage Act will

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10. 18 U.S.C. § 793 (2010).

11. Nakashima & Markon, *supra* note 9.

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only add to the tension journalists are feeling now.

So I leave this for the lawyers to argue. I hope these basic observations are at least instructive. And I hope you'll forgive the self-centered nature of the question, but the implications go to the heart of what my profession does and to the proper functioning of a democratic society. The media is operating in perilous times. And with apologies for the flourishes, and for sounding stereotypically pessimistic, I think the future looks dark.