4-17-2013

# Opposing Interests: How Wikileaks Forces a Redrawing of the Battle Lines Between the First Amendment and National Security

Brian Mitchell Perkins

# OPPOSING INTERESTS: HOW WIKILEAKS FORCES A REDRAWING OF THE BATTLE LINES BETWEEN THE FIRST AMENDMENT AND NATIONAL SECURITY

by

Brian Mitchell Perkins

A Thesis

Submitted in Partial Fulfillment of the

Requirements for the Degree of

Master of Arts

Major: Journalism

The University of Memphis

May 2013

## Abstract

Perkins, Brian Mitchell. MA. The University of Memphis. May/2013. Opposing Interests: How Wikileaks Forces a Redrawing of the Battle Lines Between the First Amendment and National Security. Major Professor: David Arant, PhD.

The mainstream press and the United States government have found harmony in the still relatively undefined rules regarding the balance between national security and free press. While the government tried a handful of individuals and groups under the Espionage Act in the early 20th century, the press has avoided such trials. Even during the Pentagon Papers case, the government only sought an injunction against publication, which was ultimately not supported by the Supreme Court of the United States.

The 21st century presents a new set of challenges for this unwritten peace. *Wikileaks* may be the proverbial guinea pig in determining how the balance between national security and an informed public will be interpreted in the new, digital century.

This thesis explores what charges the organization could face, what an impact such a precedent could have on the future of journalism, and how the American public may be better served with a legislative, rather than judicial, solution.

## Table of Contents

## Introduction

Vice-President Joe Biden calls the leader of this organization "a high-tech terrorist."[1] Bob Beckel, a deputy assistant Secretary of State in the Carter Administration, called for his assassination: "[T]here's only one way to do it: illegally shoot the son of a bitch."[2] Representative Pete King (R-NY) called for Secretary of State Hillary Clinton to label the organization "a foreign terrorist organization."[3]

These calls for retribution and assassination are not directed at al-Qaeda, Osama bin Laden, or some other violent extremists. They are directed at an organization responsible for the creation of a website dedicated to providing "an innovative, secure and anonymous way for sources to leak information to our journalists."[4]

*Wikileaks* and its founder Julian Assange have been under fire from many in the United States and other governments around the world following the release of thousands of secretive documents, including portions of a cache of over 250,000 diplomatic cables dating back to the 1960s.[5] The organization became a well-known entity in the United

---

[1] MacAskill, Ewen, "Julian Assange Like a High-Tech Terrorist, says Joe Biden," *The*

[2] "Illegally Killing Assange: 'A Dead Man Can't Leak Stuff'," *Huffington Post*, December 7, 2010, http://www.huffingtonpost.com/2010/12/07/fox-news-bob-beckel-calls_n_793467.html.

[3] O'Brien, Michael, "Republican Wants Wikileaks Labeled as Terrorist Group," *The Hill*, November 29, 2010, http://thehill.com/blogs/blog-briefing-room/news/130863-top-%20republican-designate-wikileaks-as-a-terrorist-org.

[4] Wikileaks, "About," accessed July 21, 2012, http://wikileaks.org/About.html.

[5] Shane, Scottt and Andrew Lehren, "Leaked Cables Offer Raw Look at U.S.Diplomacy," *The New York Times,* November 28, 2010, http://www.nytimes.com/2010/11/29/world/29cables.html?_r=1.

States in 2010 when it released a leaked video, "Collateral Murder," that shows an American military helicopter "open[ing] fire on people on a street in Baghdad."[6]

Later that year, *Wikileaks* collaborated with established newspapers around the world, including *The New York Times* and *The Guradian,* to begin releasing portions of the cache of diplomatic cables.[7] The White House called the release "reckless and dangerous,"[8] while Assange calls the actions of his organization "free press [activism]" and "a new way of doing journalism."[9] In light of Assange's aim for the organization, Beckel's comment becomes even more radical; a former deputy assistant Secretary of State, on national television, called for the assassination of a man that claims to be running a journalism organization, which is not exactly what one thinks of when he hears the word "terrorist."

The fact of the matter is that the rest of the world is not quite sure what to make of *Wikileaks*. Critics consider the organization a rogue outlet seeking to bring a dose of anarchy to the so-called established powers.[10] Supporters may argue the organization is a new form of citizen journalism that tries to connect sources and whistleblowers with

---

[6] Bumiller, Elisabeth, "Video Shows U.S. Killing of Reuters Employees," *The New York Times,* April 5, 2010, http://www.nytimes.com/2010/04/06/world/middleeast/06baghdad.html?_r=1&ref=world.

[7] "Leaked Cables Offer Raw Look at U.S. Diplomacy."

[8] *Ibid.*

[9] "Julian Assange, The Man Behind Wikileaks," *CBS News,* January 30, 2011, http://www.cbsnews.com/stories/2011/01/26/60minutes/main7286686_page6.shtml?tag=contentMain;contentBody.

[10] Benkler, Yochai, "A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate," *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 46 (2011): 313.

those ready to publish instantly on the Internet.[11] In light of the vitriol that is being directed at this organization, it is important to understand where *Wikileaks* and other non-traditional journalists and news organizations fit within the commonly understood frameworks of news organizations, free press, social responsibility, and even the legal system.

Further, if *Wikileaks* represents the vanguard of an emerging amateurized press, will courts be sought more frequently to address tension between national security and the First Amendment? How can our political and legal systems establish norms or regulations that prevent the dissemination of information that will present a "clear and present danger" without having a chilling effect on all of the press in reporting information that is needed for an informed public? Should such norms be established?

This thesis examines the U.S. government's ability to successfully prosecute Julian Assange, or other members of *Wikileaks*, for publication of national security documents. First, this document will explore federal statutes, such as the Espionage Act of 1917, and the literature related to publication of classified government documents. Then, it will examine legal precedents set by landmark court cases such as *Near v. Minnesota, Schenck v. United States,* and *New York Times v. United States* to understand how the Supreme Court of the United States has ruled in the past and just how much ambiguity remains in the tension between free press and national security. Finally, these legal concepts will be used to analyze the current *Wikileaks* controversy.

---

[11] Lewis, Kyle, "Wikifreak-out: The Legality of Prior Restraints on Wikileaks' Publication of Government Documents," *Washington University Journal of Law & Policy*, Vol. 38 (2012): 420.

## Literature Review

Government leaks are nothing new to the United States or other countries around the world, for that matter. In fact, government officials have been suspected of using leaks for strategic and political purposes for years.[1] Steven Aftergood, director of the Project on Government Secrecy at the Federation of American Scientists, told NPR, "Classified information [may be] disclosed not only to undermine or challenge policy, but to explain it, to defend it and to interpret it for the public."[2]

Despite describing itself as a group of journalists, *Wikileaks* confesses an activist role in seeking "transparency in government activities […] to reduced corruption, better government and stronger democracies."[3] This inherent activism, along with its existence as an Internet-based organization with the sole purpose of publishing government secrets, does distinguish *Wikileaks* from traditional American news sources such as *The New York Times* or *Washington Post.* Additionally, *Wikileaks* serves as both a symbolic and very real expression of the expanded ability for data and information to be spread across the globe on the Internet. That expanded ability is made possible by the constantly evolving technology and the newly developed tools for socialization on the web.[4] For government agencies, this expansion makes the task of keeping secrets much more difficult. These

---

[1] Gjelten, Tom, "Does Leaking Secret Documents Damage National Security?" *National Public Radio,* June 12, 2012, http://www.npr.org/2012/06/12/154802210/does-leaking-secrets-damage-national-security.

[2] *Ibid.*

[3] Schmitt, Eric, "In Disclosing Secret Documents, Wikileaks Seeks 'Transparency'," *The New York Times,* July 25, 2010, http://www.nytimes.com/2010/07/26/world/26wiki.html?ref=Wikileaks.

[4] Shirky, Clay, *Here Comes Everybody: The Power of Organizing without Organizations,* New York: Penguin, 2008.

tools have reduced the cost of publication and, therefore, have increased the numbers of publishers.[5] Further, the Internet has made it difficult for the government to control, or even influence, the way that leaked documents are published.

> The dramatic improvement in our social tools, by contrast, makes our control over those tools much more like steering a kayak. We are being pushed rapidly down a route largely determined by the technological environment. We have a small degree of control over the spread of these tools, but that control does not extend to our being able to reverse, stop, or even radically alter the direction we're moving in. Our principal challenge is not to decide where we want to go but rather to stay upright as we go.[6]

Inspecting the reaction of government officials to *Wikileaks*, the vitriol and anger may be a reflection of fear and a sense of lost control in this new digital era.

More important than understanding why the organization is perceived as a threat and as an enemy of state, rather than as a news organization, is the concern that the perception of *Wikileaks* as a criminal organization makes a potential prosecution more likely in the future—a case that could set a precedent for journalists across the country. A quick glance at federal statutes and case history reveals a great deal of ambiguity in regards to publication of classified documents—an ambiguity that may be fitting considering the delicate balance of conflicting interests in free press and national security.

---

[5] *Ibid.*

[6] *Ibid.*

Alexander Bickel, a Yale law professor who argued the case for *The New York Times* in the Pentagon Papers case, suggested that the seeming victory in that case may in fact have come at a cost.[7] "Those freedoms that are neither challenged nor defined are the most secure […] [conflict and contention] endanger an assumed freedom, which appeared limitless because its limits were untried. We extend the legal reality of freedom at some cost in its limitless appearance."[8]

Any attempt to prosecute *Wikileaks* may implicate other media organizations and force an establishment of definitive rulings on publication of national secrets that some members of the judiciary have seemingly been hoping to avoid. In *United States v. Progressive, Inc.,*[9] District Judge Warren, faced with ruling on whether or not to allow publication of an article that explains how a hydrogen bomb is built, wrestled with the responsibility of protecting the rights of the press, while also potentially saving lives.

> The Court is faced with the difficult task of weighing and resolving these divergent views. A mistake in ruling against *The Progressive* will seriously infringe cherished First Amendment rights. If a preliminary injunction is issued, it will constitute the first instance of prior restraint against a publication in this fashion in the history of this country, to this Court's knowledge. Such notoriety is not to be sought. It will curtail defendants' First Amendment rights in a drastic and substantial fashion. It will infringe upon our right to know and to be informed as well. A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot.[10]

---

[7] McCollam, Douglas, "The End of Ambiguity: From Sourcing to Secrets, a Series of Untidy Compromises Between the Government and the Press are Eroding, Leaving Reporters Increasingly Boxed in," *Columbia Journalism Review,* Vol. 45 Issue 2 (2006): 24.

[8] *Ibid.*

[9] *United States v. Progressive*, 467 F. Supp. 990 (1979).

[10] *Ibid.,* 996.

Judge Warren went so far as to extend the time for a compromise to be reached between *The Progressive* and the government, that at the end of his ruling he allowed for the two parties to attempt to resolve the dispute with a panel of five mediators, "so as to simultaneously moot the case and set a desirable precedent for the future."[11]

Today, members of the United States Congress do not necessarily share Judge Warren's restraint and concern about setting dangerous precedents. In July 2012, *The Sydney Morning Herald* reported that the United States Justice Department is continuing its criminal investigation into Julian Assange.[12] Senator Dianne Feinstein, a member of the Senate Intelligence Oversight Committee, continued calls for Assange to be prosecuted for espionage, saying, "He has caused serious harm to US national security, and he should be punished accordingly."[13] Attempts to bring about a resolution through legislation or the judicial system in the current political climate may jeopardize the rights of not only non-traditional outlets like *Wikileaks,* but also members of the traditional press.

Complicating matters further is the blurring of the line between professionals and amateurs in the journalism field. The Internet and the many social tools that have developed within it have changed the way that people communicate and interact. Clay Shirky wrote that "most of the barriers to group action have collapsed, and without those barriers, we are free to explore new ways of gathering together and getting things

---

[11] *Ibid.,* 997.

[12] Dorling, Phillip, "US Senator Calls to Prosecute Assange," *The Sydney Morning Herald,* July 2, 2012, http://www.smh.com.au/national/us-senator-calls-to-prosecute-assange-20120701-21b3n.html.

[13] *Ibid.*

done."[14] Shirky goes on to describe one of those barriers as the transaction costs of publishing and public expression, saying that the "result is the mass amateurization of efforts previously reserved for media professionals."[15]

The Internet has created a virtual world where anyone can publish—seemingly cost free. Whether one uses tools like Facebook or Twitter, or creates a website using Webs.com, one can transmit messages, pictures, and documents around the world relatively easily. This has created a network of amateur journalists, not necessarily affiliated with a news organization, changing the fundamental question about publishing, as Shirky puts it, "from 'Why publish this?' to 'Why not?'"[16] Yochai Benkler refers to this wave of new actors as the creation of a "networked fourth estate."[17] This network of decentralized production led Benkler to draw an analogy to the entrance of cable news networks. "If the first Gulf War was the moment of the twenty-four-hour news channel and CNN, then the Iranian Reform movement of 2009 was the moment of amateur video reportage, as videos taken by amateurs were uploaded to YouTube, and from there became the only significant source of video footage of the demonstrations available to the major international news outlets."[18] In that sense, this decentralized method of production is supporting, and at times competing with, the traditional, professional members of the press. *Wikileaks*, in creating a digital network to collect and disseminate secret

---

[14] *Here Comes Everybody*, 22.

[15] *Here Comes Everybody*, 55.

[16] *Here Comes Everybody*, 60.

[17] Benkler, Yochai, "A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate," *Harvard Civil Rights-Civil Liberties Law Review,* 46 (2011).

[18] *Ibid.*

government documents, is a preeminent example of the power of these decentralized networks and how they work outside of the typical institutionalized framework.

Digital organizations such as *Wikileaks*, which lack many of the traditional internal and external safeguards that so-called "professional" members of the press embody, may be more difficult to predict and difficult to control. In addition, the very nature of the Internet, in which information can very rarely be "unpublished," increases the danger of uninhibited distribution of national secrets.[19] In fact, David Corneil argues that the so-called Streisand effect, in which attempts to censor information on the Internet actually attract more attention to a document than would otherwise be the case, makes attempts to censor and prosecute even more dangerous than the initial leak.[20] Indeed *Wikileaks* presents a 21st century problem, and our laws seem to be based on 20th century technology.

Another challenge of this decentralization is the lack of understanding and acceptance by members of the traditional institutions. Susan Milligan, a political writer, wrote in an opinion piece for *US News and World Report* that while "on its face, technology can be hugely democratizing[…] too many people have lost the ability to distinguish between speaking the truth to power and just being an irresponsible jerk. This

[19] Childs, William G., "When the Bell Can't be Unrung: Document Leaks and Protective Orders in Mass Tort Litigation," *The Review of Litigation* 27*,* no. 4 (2008)*,* http://digitalcommons.law.wne.edu/cgi/viewcontent.cgi?article=1029&context=facschol (accessed September 9, 2012); Corneil, David, "Harboring Wikileaks: Comparing Swedish and American Press Freedom in the Internet Age," *California Western International Law Journal* 41*,* no. 2 (2011), www.lexisnexis.com/hottopics/lnacademic (accessed August 28, 2012).

[20] Corneil, David, "Harboring Wikileaks: Comparing Swedish and American Press Freedom in the Internet Age," *California Western International Law Journal* 41*,* no. 2 (2011), www.lexisnexis.com/hottopics/lnacademic (accessed August 28, 2012).

is how we've come to endure *Wikileaks*…"[21] Senator Dianne Feinstein echoed those statements in the Wall Street Journal saying, "But [Asssange] is no journalist. He is an agitator intent on damaging our government, whose policies he happens to disagree with, regardless of who gets hurt."[22]

Assange and the entire *Wikileaks* operation have been the target of these kinds of accusations, despite the fact that even the Pentagon has announced that the repercussions of the leaked documents have hardly been damaging to US interests.[23] Secretary of Defense Robert Gates said in 2010, "Is this embarrassing? Yes. Is it awkward? Yes. Consequences for U.S. foreign policy? I think fairly modest."[24] Indeed, much of the rhetoric surrounding the leaks seems to have more to do with the organization that released the documents, rather than the content. *Salon's* Glenn Greenwald noted this point when he replaced each appearance of the word "Assange" with "New York Times" in a statement issued by Dianne Feinstein.[25] The edited statement read as follows, "'I believe [The New York Times] has knowingly obtained and disseminated classified

---

[21] Milligan, Susan, "Wikileaks is High-Stakes Paparazzi, Not Journalism," *US News and World Report,* November 29, 2010, http://www.usnews.com/opinion/blogs/susan-milligan/2010/11/29/wikileaks-is-high-stakes-paparazzi-not-journalism.

[22] Feinstein, Dianne, "Prosecute Assange Under the Espionage Act," *Wall Street Journal,* December 7, 2010, http://online.wsj.com/article/SB10001424052748703989004575653280626335258.html.

[23] DOD News Briefing with Secretary Gates and Adm. Mullen from the Pentagon, November 30, 2010, accessed July 21, 2012, http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=4728.

[24] *Ibid.*

[25] Greenwald, Glenn, "Dianne Feinstein Targets Press Freedom," *Salon*, July 2, 2012, http://www.salon.com/2012/07/02/dianne_feinstein_targets_press_freedom/.

information which could cause injury to the United States,' […] '[It] has caused serious harm to US national security, and [] should be prosecuted accordingly.'"[26] Greenwald's point is that considering *The New York Times,* among other news organizations, collaborated with and published the same documents that *Wikileaks* released, those organizations have committed the same offenses.

Clearly there is a great deal of tension in the conflicting interests of an informed public and national security. These tensions only grow stronger in times of national emergency. Turning to the legislature to address this tension would allow for a national debate on what the role of the press should be in terms of publishing national defense information. While court cases often arise from the urgency of national crises, when fear and other emotional responses can cloud one's view of the larger issues at play, a debate in Congress would allow for a comprehensive exploration of the tension. Further, it would provide clarity for journalists, both professional and non-professional, so that one can freely publish without threat of restraint *or* retribution. The chilling effect of the ambiguity that surrounds the tension between press and national security, alongside the very public calls for retribution against the press, may become the de facto law of the land and discourage members of the press from pursuing stories that involve foreign policy and activities during wartime.

[26] *Ibid.*

## Research Questions

**RQ 1**

Given what is known about the circumstances of the *Wikileaks* case, would the courts find Julian Assange and *Wikileaks* to be a news publisher like the *New York Times*?

**RQ 2**

If *Wikileaks* and Julian Assange were judged to be a news publisher like the *New York Times*, are *Wikileaks* and other news publishers subject to prosecution for publishing leaked state secrets under the Sedition Act or other federal law?

**RQ 3**

Given what is known about the circumstances of the *Wikileaks* case, could the government successfully prosecute Julian Assange and *Wikileaks* for possession and theft of state secrets rather than as a publisher, much like it did with Daniel Ellsberg?

## Method

To answer these questions, this thesis examines the reported actions that led to *Wikileaks'* disclosure of United States government documents. *Wikileaks'* actions will be compared to what traditional members of the press, such as the *New York Times,* did in receiving and publishing the leaked government documents. Next, this thesis explores the legal precedents and federal statutes that pertain to publication. Then, legal precedents pertinent to *Wikileaks'* situation will be examined and applied to the *Wikileaks* facts.

This document will conclude with an evaluation of what legal avenues the government may have in prosecuting *Wikileaks* for publishing, as well as the legal protections afforded to the organization under the First Amendment. Finally, consideration will be given to the ramifications for traditional and non-traditional members of the press that a *Wikileaks* prosecution may pose.

## Analysis

### Would the Court find *Wikileaks* to be a news publisher like the *New York Times?*

In short, Supreme Court precedent suggests that the law does not distinguish between various publishers. The legal protections under the First Amendment will extend to *The New York Times*, as well as an individual's personal blog. The same can be said for the legal ramifications of a publisher's activities. This means that any ruling against Assange, or his network, will likely have far reaching implications for publishes large and small.

The question of whether or not *Wikileaks* should be considered a bona fide news operation is arguably one of the most significant questions in terms of whether or not the government will attempt to pursue a criminal prosecution of members of the organization. At the same time, it may have the least impact on the court case itself. Criminal prosecution is only being discussed because *Wikileaks* is perceived to be somehow different that the traditional press, like the *New York Times.* Yet, at the same time, this perceived difference in status will likely not have a significant bearing on the outcome of a prosecution.

It should not go unnoticed that public officials are calling for prosecution of Julian Assange and his organization, but not for punishing the *Times*.[1] In fact, the US Government response has taken a toll on *Wikileaks'* bank accounts. Several American companies, including PayPal and MasterCard, have stopped allowing donations to be made to the organization. A vice president with PayPal, Osama Bedier, acknowledged that his company stopped allowing transactions to *Wikileaks* following a State

[1] See Feinstein.

Department letter that classified the organization's activities as illegal.[2] To date, Julian Assange says actions by companies like MasterCard have cost his organization over $50 million.[3] The State Department has not written such letters to the *Times,* and PayPal continues to do business with The Grey Lady. In that sense, the perceived difference between the two organizations is having a very significant impact on *Wikileaks.*

While many public officials are attempting to distinguish between *Wikileaks* and real journalists, the Supreme Court has already ruled that the freedom of the press does not simply apply to institutions. In *Lovell v. City of Griffin,* Chief Justice Hughes wrote the opinion for the court, making it clear that newspapers are not the only entity protected by the First Amendment.[4] "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its connotation comprehends every sort of publication which affords a vehicle of information and opinion."[5] *Lovell* suggests that *Wikileaks* should be afforded the same protections and liabilities as *The New York Times*.

If that is the case, the courts cannot seek to punish *Wikileaks* for its publications on the basis that it does not meet some standard to be considered for First Amendment protections. In that sense, it would likely not do the prosecution any good to attempt to

---

[2] Bosker, Bianca, "PayPal Admits State Department Pressure Caused It To Block WikiLeaks," *The Huffington Post,* December 8, 2010, http://www.huffingtonpost.com/2010/12/08/paypal-admits-us-state-de_n_793708.html.

[3] Prentice, Alessandra and Croft, Adrian, "WikiLeaks' Assange Blames U.S. Right for Funding Block," Reuters, November 27, 2012, http://www.reuters.com/article/2012/11/27/net-us-wikileaks-eu-idUSBRE8AQ0G920121127.

[4] *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

[5] *Ibid.,* 452.

define *Wikileaks* as a non-member of the press. While the distinction may serve the government's interest in the court of public opinion, it is a battle that it likely would not win in the court of law.

**Are publishers subject to prosecution for publishing leaked state secrets?**

The courts may have no need to distinguish between traditional members of the press and new actors like *Wikileaks.* The Supreme Court has consistently denied the existence of an absolute right to First Amendment protections. In a general sense, the court has been clear that the First Amendment is to prevent prior restraint, but is not necessarily intended to grant immunity to publishers after publication. Further, federal courts have resisted the view that the press has special rights that are not afforded to ordinary citizens. In that case, publishers are just as liable for violating federal law, such as the Espionage Act, as an individual citizen.

In 1907, Justice Oliver Wendell Holmes declared in *Patterson v. Colorado* that "the main purpose of such constitutional provisions is 'to prevent all previous restraints upon publications' […] not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[6] Holmes continued to draw a distinction between prior restraint and punishment after publication by saying, "the preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false."[7]

[6] *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

[7] *Ibid.,* 462.

In *Schenck v. United States* (1919), Holmes went further to set a standard for prosecution for publication.[8] The *Schenck* case was one of the first to address First Amendment issues with the Espionage Act of 1917, with Justice Holmes famously establishing the "clear and present danger" test.[9]

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.[10]

Interestingly, this case represents strengthening of First Amendment protections relative to the *Patterson* ruling. While Holmes, writing for a unanimous court, upheld the Schenck conviction for encouraging opposition to the draft, he established that times of war bring about greater restrictions on free speech.[11] This "clear and present danger" clause, while relatively vague, at least forces the court to weigh the competing interests of free speech and national government interest.

The question that arises for *Wikileaks* is whether or not the United States is in a time of war. The United States has forces in active fighting zones and has been fighting the so-called "War on Terror," but Congress has yet to make an official declaration. The quote above from Holmes says that speech can be limited "so long as men fight," but one has to presume that he never imagined an indefinite, undeclared conflict like the one the United States finds itself in today.

---

[8] *Schenck v. United States*, 249 U.S. 47 (1919).

[9] *Ibid.*

[10] *Ibid.,* 52.

[11] *Ibid.*

Further, Holmes wrote this famous decision, but seemed to split from the Court in subsequent rulings.[12] The first dissent was written later in 1919, a mere months after the *Schenck* ruling, in *Abrams v United States.*[13] In this case, the court found that "the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots…" and upheld the conviction.[14] Holmes disagreed with the finding, writing, "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country."[15] Holmes is searching for a much more stringent evaluation of clear and present danger, arguing that there can be meaningful debate about the execution of war without the speech meeting the standard of criminal.

In *Schaefer v. United States,* Holmes joined Brandeis in concurring with the convictions that were reversed, but dissented in arguing that the other three judgments should also be reversed.[16] The court found that three of the defendants were indeed responsible for publishing false information, but Brandeis and Holmes argued that

[12] See *Abrams v United States,* 250 U.S. 616 (1919)*, Schaefer v. United States,* 251 U.S. 466 (1920)*, Gitlow v. People of New York,* 268 U.S. 652 (1925)*, Whitney v. California,* 274 U.S. 357 (1927).

[13] *Abrams v. United States*, 250 U.S. 616 (1919).

[14] *Ibid,* 623.

[15] *Ibid.,* 628.

[16] *Schaefer v. United States,* 251 U.S. 466 (1920).

"to prosecute men for such publications reminds me of the days when men were hanged for constructive treason."[17] Brandeis, with Holmes, begins to push back on the portion of clear and present danger that argues for restricting speech in time of war.

> Nor will this grave danger end with the passing of the war. The constitutional right of free speech has been declared to be the same in peace and in war. In peace, too, men may differ widely as to what loyalty to our country demands; and an intolerant majority, swayed by passion or by fear, may be prone in the future, as it has often been in the past, to stamp as disloyal opinions with which it disagrees. Convictions such as these, besides abridging freedom of speech, threaten freedom of thought and of belief.[18]

In just two years, a pair of cases had already begun to test the limits of the "clear and present danger" test. Holmes, the architect of the test, had dissented from the court opinion and joined Justice Brandeis in a qualified concurring opinion. It was clear that Holmes had a different vision in mind of what constituted "clear and present danger" and when that could be used as justification for punishment for publication.

In 1925, the Court upheld a New York state statute that penalized "advocating, advising, or teaching the overthrow of organized government by unlawful means" in *Gitlow v. The People of New York.*[19] The court also broke new ground in upholding the statute because it was an exercise of the state's right to ensure self-preservation.[20] "When the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the

---

[17] *Ibid.,* 493.

[18] *Ibid., 494-495.*

[19] *Gitlow v. The People of New York,* 268 U.S. 652, 654 (1925).

[20] *Ibid.,* 668.

prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition."[21]

In other words, the Court argued that when a legislative body has crafted a law that ensures the continuity and security of the legitimate government, as an exercise of the police authority of the state, the Court need not question whether or not the speech will actually bring about the evils that the statute hopes to prevent, as long as the speech falls within the confines of the statute. The Court is showing great deference to the legislature, determining that "the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."[22]

Once again, Holmes and Justice Brandeis pen a dissenting opinion. Holmes writes that he believed the decision in *Abrams* departed from his clear and present danger doctrine.[23] Holmes continued to write in opposition of how his doctrine was being applied, in this case arguing that the text in question presented no "present danger of an attempt to overthrow the government by force…"[24] Holmes desired a more conservative interpretation of danger.

> It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration.

---

[21] *Ibid.,* 670.

[22] *Ibid.,* 671.

[23] *Ibid.,* 673.

[24] *Ibid.,* 673.

> If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.[25]

While Holmes may have intended for the clear and present danger test to set a high threshold for restricting speech, the majority of the court continued to uphold many of the rulings involving the Espionage Act and other statutes restricting speech—even years after World War I had ended.

In *Near v. Minnesota,* the Court reaffirmed the right to freedom from prior restraint, while also making it clear that the amendment is not intended to prevent prosecution after publication.[26] In writing the court opinion, Chief Justice Hughes stated, "Punishment for the abuse of the liberty accorded to the press is essential for the protection of the public, and the common-law rules that subject a libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the constitutional protection of such liberty."[27]

The *Near* case dealt with a Minnesota statute that publishers may be enjoined from publication if it frequently publishes scandalous material and is found "guilty of a nuisance."[28] The statute did allow for publishers to continue printing if it could prove to the court that future publications were "true and published 'with good motives and for justifiable ends.'"[29]

---

[25] *Ibid.,* 673.

[26] *Near v Minnesota,* 283 U.S. 697 (1931).

[27] *Ibid.,* 715.

[28] *Ibid.,* 702.

[29] *Ibid.,* 710.

Hughes addressed this by writing, "If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship."[30]

Still, the *Near* decision is not a clear victory for freedom from publication punishment. Chief Justice Hughes made it clear that the First Amendment is meant only to prevent *prior restraint.* He addressed mostly libelous publications when he wrote, "The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all."[31] Still, he extended this a bit further by writing, "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 consequences for his own temerity."[32] This seemingly leaves an opening for a much broader interpretation.

In 1951, the Supreme Court would once again visit the debate between a state legislature's right to pronounce some types of speech as unwelcome and a broad protection granted by the First Amendment. In *Dennis v. United States*, Chief Justice Vinson argued that even Holmes and Brandeis did not intend for "clear and present danger" to become "crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case. Speech is not an absolute, above and beyond control by the legislature when its judgment, subjected to review here, is that certain kinds of speech

[30] *Ibid.,* 721.

[31] *Ibid.,* 714.

[32] *Ibid.,* 714.

are so undesirable as to warrant criminal sanction."[33] Again, Vinson is giving the legislative bodies authority to determine what types of speech may and may not be permissible—a fairly broad power in regards to free speech.

The *Dennis* case applied the "clear and present danger" rule and found that overthrow of the government was in fact a substantial government interest worth infringement of speech.[34] However, the justices noted that while that evil was not necessarily imminent, the government had a right to act preemptively. "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required."[35]

This indicates that a legislature may determine that certain publications pose such a threat to the stability of the government, that such publication may not enjoy First Amendment protections. This is the justification used for the creation of the Atomic Energy Act[36] and the very specific limits that have been made on the ability to publish information pertaining to the government's nuclear activities.

---

[33] Dennis v United States, 341 U.S. 494, 508(1951).

[34] *Ibid.,* 509.

[35] *Ibid.,* 509.

[36] 42 U.S.C. § 2274: Whoever, lawfully or unlawfully, having possession of, access to, control over, or being entrusted with any document, writing, sketch, photograph, plan, model, instrument, appliance, note, or information involving or incorporating Restricted Data--

(a) communicates, transmits, or discloses the same to any individual or person, or attempts or conspires to do any of the foregoing, with intent to injure the United States or with intent to secure an advantage to any foreign nation, upon conviction thereof, shall be punished by imprisonment for life, or by imprisonment for any term of years or a fine of not more than $ 100,000 or both;

(b) communicates, transmits, or discloses the same to any individual or person, or attempts or conspires to do any of the foregoing, with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation, shall, upon conviction,

Through the two rulings in *Dennis* and *Abrams*, it seems that the court has limited its own role in applying a broad interpretation of the First Amendment in the case where a legislative body has acted. A court could very well rule that the Espionage Act is similar in nature, and therefore publication of information related to defense activities is afforded no such protection due to the decision by Congress to pass the act.

To this point, the Court had not yet directly addressed the rights of news publishers when distributing information related to national security. In *Schenck,* the court established that in times of war there are certain limits to First Amendment protections. The "clear and present" danger test was intended to help establish those rare cases in which the First Amendment did not protect speech. Still, *Schenck, Abrams,* and *Schaefer* mostly dealt with opinion speech, rather than what we would consider today to be news coverage. *Schaefer* comes the closest to dealing with news content, but certainly does not include the publication of national security information. *Near* makes it clear that the First Amendment is meant as a protection against *prior restraint;* it is not clear if that means there is little or no protection from punishment after publication.

Interestingly, just a few years after *Near*, the Court would hand down a decision striking down a special publishing tax in the State of Louisiana.[37] In *Grosjean v. American Press Co.*, the court justified striking down the tax by arguing that using means other than prior restraint may in fact be infringing upon First Amendment rights. "It is impossible to concede that by the words 'freedom of the press' the framers of the

---

be punished by a fine of not more than $ 50,000 or imprisonment for not more than ten years, or both.

[37] *Grosjean v. American Press Co.,* 297 U.S. 233 (1936).

amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship; for this abuse had then permanently disappeared from English practice."[38]

The court found that the tax was a "deliberate and calculated device" to limit the circulation of information.[39] Citing Judge Cooley, the court went on to write, "'The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.'"[40] This calls for a much more absolute reading of the First Amendment, specifically in regards to public information. Simultaneously, it provides priority status for the protection of press rights in regards to information vital to an informed public. Those protections can often come in conflict with national security in times of war.

Additionally, could the same ruling be said of the Espionage Act? Without an exemption for the publication of information that is of public interest, the act seems to broadly inhibit the press' ability to report on the conduct of the military during a time of war. The Espionage Act, at least as it has been interpreted in previous cases, may in fact prevent free and general discussion of military conduct during war. For, what is of more concern to the public than the execution and government activities during the war?

---

[38] *Ibid.,* 248.

[39] *Ibid.,* 250.

[40] *Ibid.,* 250.

Moreover, in *Yates v. United States,* the court argued that it has long recognized a difference between "advocacy of abstract doctrine and advocacy directed at promoting unlawful action."[41] While the court was addressing the application of The Smith Act, it would be reasonable for the court to make a similar distinction when dealing with the Espionage Act. In the *Yates* ruling, the court is clearly attempting to prevent an overly broad interpretation of advocating. The Espionage Act contains a similarly vague wording in addressing "information that the possessor has reason to believe could be used to the injury of the United States."[42] The court could find that there is a distinction between information that is of value to the public debate versus information that is solely used to directly attack the country. Such an interpretation would significantly narrow the meaning of injury of the United States and prevent a number of potential conflicts between the press and national security. In the case of *Wikileaks*, it may make it significantly more difficult to argue that releasing cables from past communications or video of past military activities poses a significant threat of injury to the country in the present or future.

The Supreme Court finally directly addressed the competing interests of free speech and national security concerns in *New York Times v. United States*. *New York Times* addressed questions about prior restraint of the press from publishing leaked documents related to the Vietnam War—the so-called Pentagon Papers.[43] In this case, the United States government sought an injunction against *The New York Times* and

---

[41] *Yates v. United States,* 354 U.S. 298, 318 (1957).

[42] 18 U.S.C. § 793.

[43] *New York Times v. United States,* 403 U.S. 713 (1971).

*Washington Post* to prevent the papers from publishing classified documents.[44] In evaluating the Pentagon Papers' release solely in the prism of prior restraint, the court found in favor of *The New York Times* 6-3, but was only able to agree on a brief per curiam opinion.[45] The concurring and dissenting opinions are as plentiful as they are varying and leave plenty of doubt as to what the precedent should be from this case.

Justice White, echoing the sentiments of Justice Hughes in *Near,* concurred with the Court decision. However, he cautioned that the Court ruling did not mean that the press had free rein in publishing government secrets. He went so far as to say the government made the mistake of seeking an injunction rather than a criminal prosecution.

> What is more, terminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do. Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.[46]

White also pointed out several cases that applied to the Pentagon Papers case and that might also apply to a potential *Wikileaks* prosecution. He added, "section 798 also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic systems or communication intelligence

---

[44] *Ibid.*

[45] *Ibid.*

[46] *Ibid.,* 733.

activities of the United States[.]"[47] He added, "I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint."[48]

Justice Black's opinion is perhaps the closest to First Amendment absolutism. "Paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell[...]The press was protected so that it could bare the secrets of government and inform the people."[49] Further, Black took aim at his colleagues, finding it "unfortunate that my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment."[50]

Justice Douglas, who also wrote his own opinion, joins Black in viewing the First Amendment in its most absolute terms. Douglas, in a concurring opinion, argued that the Internal Security Act of 1950, which amended this chapter, makes it clear that § 793 does not apply to the press.

> "Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect."[51]

---

[47] *Ibid.,* 736.

[48] *Ibid.,* 737.

[49] *Ibid.,* 717.

[50] *Ibid.,* 715.

[51] *Ibid.*, 722.

Justice Blackmun, in dissent, criticized the frantic pace forced upon the case, before claiming that what was needed was a standard for balancing free press and national security.

> "What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent. Such standards are not yet developed. The parties here are in disagreement as to what those standards should be. But even the newspapers concede that there are situations where restraint is in order and is constitutional."[52]

Overall, it is clear that the majority stood opposed to prior restraint. Still, three dissenting justices (Harlan, Burger, and Blackmun) were willing to completely suppress the document, while two of the concurring justices (White and Stewart) were open to criminal prosecution for the publication of the documents. The justices seemed open to criminal cases against *The New York Times* and *The Washington Post*.

If the First Amendment is indeed interpreted as only a prohibition on prior restraint, and not a guaranteed immunity for reporters covering stories of public interest, the ability of reporters to uncover secretive government activities is in jeopardy. Members of the media, as well as *Wikileaks*, may not be able to seek First Amendment protections from federal statutes such as the Espionage Act.

More recently, however, some court rulings have been willing to exempt members of the press from prosecution when the reporter's actions are related to newsgathering and are, in and of themselves, legal. Herein lies another murky area of the law. In *Bartnicki v. Vopper,* it was found that the First Amendment still protected publication of information of public importance that was lawfully discovered, even if the

[52] *Ibid.,* 761.

information was stolen by a third-party, so long as the reporter did not participate in the crime.[53] "We think it clear that […] a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."[54]

However, some courts have debated on what is and is not "participation" on the part of the reporter. In *Boehner v. McDermott*, the appellate court initially found that if the recipient met with the party who stole the material, unlike the anonymous drop-off in *Bartnicki,* then the recipient of the information knowingly accepted a document that was stolen.[55]

> *"*It is the difference between someone who discovers a bag containing a diamond ring on the sidewalk and someone who accepts the same bag from a thief, knowing the ring inside to have been stolen. The former has committed no offense; the latter is guilty of receiving stolen property, even if the ring was intended only as a gift."[56]

When the court heard the case once again en banc, the court found that there was no fundamental difference from *Bartnicki.*[57] In other words, knowing the person that committed the illegal act does not itself make the reporter's acceptance of the material illegal and, therefore, without First Amendment protections. However, what if the reporter offers anonymity—or as *Wikileaks* does—a means of secretly turning over classified documents?

---

[53] *Bartnicki v. Vopper,* 532 U.S. 514 (2001).

[54] *Ibid.,* 535.

[55] Lee, William E., "Probing Secrets: The Press and Inchoate Liability for Newsgathering Crimes," *American Journal of Criminal Law, Vol 36, Issue 2, Spring 2009* ;Boehner v. McDermott *(Boehner II),* 441 F.3d 1010, 1017, *vacated and reh'g en banc granted,* 441 F.3d 1010 (2006) e*n banc,* 484 F.3d 573 (D.C. Cir. 2007).

[56] *Ibid.,* 150.

[57] Lee, William E., "Probing Secrets: The Press and Inchoate Liability for Newsgathering Crimes," *American Journal of Criminal Law, Vol 36, Issue 2, Spring 2009.*

In the *Wikileaks* case, federal prosecutors have obtained logs of online instant message conversations in which Bradley Manning, the former military official accused of leaking documents to *Wikileaks*, allegedly admits to communicating with Julian Assange.[58] In those logs, Manning seemingly acknowledges communicating with Assange and that Assange gave him access to a special server for uploading the files.[59] In the first *Barnicki* ruling, the alleged communication with Manning may have been enough to conclude that Assange conspired to steal the documents and therefore had no legal right to publish. A more narrow ruling could perhaps argue that providing a server is assisting with the theft of the documents. Even that kind of ruling would have major impacts on even traditional reporters, as offering an email address may be considered aiding in the theft of a document.

A recent district court judge seems to go a step further in striking down the idea that examining documents is even a necessity of an informed press and public. In fact, he went so far as to say mere possession by a reporter may in and of itself be a violation of the Espionage Act, regardless of how it was obtained. In *United States v. Rosen*, a federal judge in Virginia ruled that the federal government could prosecute non-employees for possession of national defense documents.[60] In rejecting a motion to dismiss the case, Judge Ellis wrote that "their position is that once a government secret has been leaked to

---

[58] Savage, Charlie, "U.S. Tries to Build Case for Consipracy by Wikileaks," *The New York Times,* December 15, 2010, http://www.nytimes.com/2010/12/16/world/16wiki.html?_r=4&.

[59] Poulsen, Kevin, and Zetter, Kim, "'I Can't Believe What I'm Confessing to You': The Wikileaks Chats," *Wired.com*, June 10, 2010, http://www.wired.com/threatlevel/2010/06/wikileaks-chat/.

[60] *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006), http://www.fas.org/sgp/jud/rosen080906.pdf.

the general public and the first line of defense thereby breached, the government has no recourse but to sit back and watch as the threat to the national security caused by the first disclosure multiplies with every subsequent disclosure. This position cannot be sustained."[61] This ruling indicates that even though Manning may be charged with the initial leaking of the government documents related to the ongoing conflicts in Iraq and Afghanistan, that does not prevent the government from pursuing prosecutions of the media members that then possessed the information. Judge Ellis continued, "[B]oth common sense and the relevant precedent point persuasively to the conclusion that the government can punish those outside of the government for the unauthorized receipt and deliberate retransmission of information relating to the national defense."[62]

Ellis attempts to provide some limitations to this ruling by arguing that "this conclusion rests on the limitation of §793 to situations in which national security is genuinely at risk."[63] In citing the ruling in *Morison,*[64] Ellis added, "[T]o take a hypothetical example, without this limitation the statute could be used to punish a newspaper for publishing a classified document that simply recounts official misconduct in awarding defense contracts. As demonstrated by the concurrences in *Morison,* such a prosecution would clearly violate the First Amendment."[65] Ellis argued that the government must prove that the information relates to national defense, that the government classified the information, and that the person violating the provision knew

---

[61] *Ibid.,* 637.

[62] *Ibid.,* 637.

[63] *Ibid.,* 639.

[64] *United States v. Morison,* 844 F. 2d 1057 (1988).

[65] *United States v. Rosen,* 445 F. Supp. 2d 602, 640.

the information may harm the national security.[66] Ellis argued that the government should have to prove that the information could do harm to national security; however, *Gorin* ruled just the opposite, saying that proof of harm is not required. In either case, the reporter or publisher with possession of these documents may be left to guess whether or not a judge will find that the documents are a danger to the national security and not a case of embarrassment. In a potential sign that the limiting factor could prove reasonable, the prosecution ended up dropping the charges in *Rosen*, potentially finding the limiting factor laid out by Ellis as too difficult to overcome.[67]

Judge Ellis makes several references to the limitations set forth by Judge Wilkinson's concurring opinion in *United States v. Morison.*[68] Judge Wilkinson argued that "the First Amendment interest in informed popular debate does not simply vanish at the invocation of the words 'national security' […] elections turn on the conduct of foreign affairs and strategies of national defense […]"[69] Wilkinson goes on to describe the inherent tension between an informed public and the ability to maintain security operations. While agreeing with the Court's opinion to uphold the conviction of a former

[66] *Ibid.* 640.

[67] Adler, Jonathan and Michael Berry, "A Troubling Prosecution: United States v. Rosen Has its Thorns," *National Review,* August 21, 2006, http://www.nationalreview.com/articles/218521/troubling-prosecution/jonathan-h-adler.

[68] *United States v. Rosen,* 445 F. Supp. 2d 602.

[69] *United States v. Morison*, 844 F. 2d 1057, 1081 (1988).

intelligence officer who gave photographs of Soviet naval stations to the press, Wilkinson also made it clear, "This prosecution was not an attempt to apply the espionage statute to the press for either the receipt or publication of classified materials."[70]

Note that Wilkinson explicitly confirms that this opinion was not an attempt to apply the Espionage Act to the reporting activities of the press. Yet in the Rosen proceedings, government attorneys do not eliminate the possibility of such a criminal prosecution. The government lawyers added, "There plainly is no exemption in the statutes for the press […]."[71] They acknowledge, "Stating this, we recognize that a prosecution under the espionage laws of an actual member of the press for publishing classified information leaked to it by a government source, would raise legitimate and serious issues and would not be undertaken lightly, indeed, the fact that there has never been such a prosecution speaks for itself."[72]

It seems that there is an implication in this statement that though no federal statute exists to provide protection for reporting activities, there are special considerations for the press. However, what if public officials choose to discriminate between press and non-press? Could there be a distinction made between *Wikileaks* and *The New York Times*?

*Times* editor Bill Keller is concerned about that very item. In an email to GigaOM, an online media and technology blog, Keller wrote, "I would regard an attempt to criminalize WikiLeaks' publication of these documents as an attack on all of us, and I

---

[70] *Ibid.,* 1085.

[71] Pincus, Walter, "Press Can Be Prosecuted For Having Secret Files, U.S. Says," The Washington Post, February 22, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/02/21/AR2006022101947.html.

[72] *Ibid.*

believe the mainstream media should come to his defense."[73] Don't forget that in *Lovell*, the Court ruled that the First Amendment applies to pamphlets as well as newspapers, so if the First Amendment is being used as a means to protect news institutions, it must be applied equally to non-professional publishers.[74]

In *Dennis v United States,* Justice Frankfurter argued in a concurring opinion that there needs to be more clarity in how we determine what is fit for publication and what is not.[75] One of Justice Frankfurter's key points is that the terminology in the clear and present danger is oversimplified.[76] "It were far better that the phrase be abandoned than that it be sounded once more to hide from the believers in an absolute right of free speech the plain fact that the interest in speech, profoundly important as it is, is no more conclusive in judicial review than other attributes of democracy or than a determination of the people's representatives that a measure is necessary to assure the safety of government itself."[77] Frankfurter went on to call for Congress to balance the tension between the competing interests of national security and free speech.

---

[73] Ingram, Matthew, "The NYT's Bill Keller on WhyWe Should Defend WikiLeaks," *GigaOM*, July 25, 2012, http://gigaom.com/2012/07/25/the-nyts-bill-keller-on-why-we-should-defend-wikileaks/.

[74] *Lovell v City of Griffin.*

[75] *Dennis v. United States*, 341 U.S. 494 (1951).

[76] *Ibid.,* 544.

[77] *Ibid.,* 544.

"Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. The nature of the power to be exercised by this Court has been delineated in decisions not charged with the emotional appeal of situations such as that now before us."[78]

Clearly these recent rulings raise the prospect that the court could try to determine that *Wikileaks* is a different type of actor than the *New York Times.* A less slippery slope would seem to involve a ruling based upon the content, rather than the publisher. The courts may be better served ruling that those documents were not appropriate for publication, by any entity, rather than attempting to draw different precedents for the professional and amateur press. In the strictest sense, as there is no federal exemption from prosecution for any member of the press, it is very possible for *Wikileaks*, and other publishers, to be prosecuted for publication of national secrets.

**Could the government successfully prosecute *Wikileaks* for possession and theft of state secrets rather than as a publisher?**

A more direct and perhaps less legally complex prosecution may involve treating Assange and his colleagues as leakers, rather than publishers. The government would likely look to the Espionage Act to charge Assange or other members of *Wikileaks.* The government would be able to charge Assange for illegal possession and distribution of classified documents. This strategy would side-step many First Amendment challenges that go along with publication, because there are no federal protections for newsgathering activities.

[78] *Ibid.,* 525.

A similar charge was made during the famed Pentagon Papers publication. While the government only sought to prevent newspapers from publishing the documents, it sought criminal charges against Daniel Ellsberg for violation of the Espionage Act for actually providing the Pentagon Papers to the press.[79]

The crux of the charges against Ellsberg was not the leak itself, as the indictment did not "attempt to deal specifically with Ellsberg's turning the secret documents over to *The New York Times*," but rather the possession of photocopies of the document and conversion "to his own use."[80] To understand the threat that the United States government perceived Daniel Ellsberg to be, one must examine the lengths to which it went to ensure Ellsberg's arrest.

In transcribed remarks published in the Hastings Law Journal, the Honorable Stephen Trott, a former deputy district attorney in Los Angeles, recalls a criminal case surrounding the break-in of Daniel Ellsberg's psychiatrist's office.[81]

> Needless to say, when Ellsberg released these papers, the White House went into some kind of damage control mode. As a result of the release of these papers to the New York Times [*sic*] by Ellsberg, a Special Investigations Unit called "Room 16" was formed in the White House […]. Very quickly [John] Hunt, who was ex-CIA, and [G. Gordon] Liddy, who was ex-FBI, came up with the idea of breaking into the psychiatrist's office, stealing the file and, as Young said in a memo to Ehrlichman, "giving it to Colson so he can put it in the Detroit News."

---

[79] Nimmer Melville B., "National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case," *Stanford Law Review,* 26 (1974): 311, accessed April 14, 2011, http://www.jstor.org/stable/1227790.

[80] Aarons, Leroy F., "Ellsberg Indicted on 2 Counts in Los Angeles," *Washington Post,* June 29, 1971, accessed April 14, 2011, http://pqasb.pqarchiver.com/washingtonpost_historical/access/144648092.html?FMT=ABS&FMTS=ABS:AI&date=Jun+29%2C+1971&author=By+Leroy+F.+AaronsWashington+Post+Staff+Writer&pub=The+Washington+Post%2C+Times+Herald++(1959-1973)&edition=&startpage=A12&desc=Ellsberg+ Indicated+on+2+Counts+in+Los+Angeles.

[81] Fred Altschuler, "Perspectives on Watergate Panel: Memories of the Ellsberg Break-In," *Hastings Law Journal,* 51 (2000): 765, accessed April 14, 2011.

> They thought they could start a campaign to trash the reputation of Ellsberg who was about to go on trial in federal court for the unauthorized and felonious criminal release of classified information. This is how nasty this whole thing was.[82]

These extreme actions taken by the government would ultimately lead to the dismissal of charges against Mr. Ellsberg. "Judge Byrne, because of that and some other gross missteps on the part of the government in connection with the prosecution of Daniel Ellsberg, threw out the Ellsberg case on the ground of outrageous government conduct. So Daniel Ellsberg walked."[83]

It is worth noting that the dismissal for Ellsberg was hardly considered a complete victory. Melville B. Nimmer, who represented the ACLU as amicus curiae in the Ellsberg case, maintains, "This ambivalence was caused by Judge Byrne's refusal to rule on the defendants' motion for judgment of acquittal, a ruling which would have reached the merits of the Government's case. Such a ruling had not been sought solely to exonerate the defendants; the broader objective was to clarify the scope of the Government's right to suppress dissemination of documents in which the Government claims a national security interest."[84]

In other words, the Ellsberg case serves only a limited purpose in detailing what success a prosecution may have in convicting *Wikileaks* members of the Espionage Act. It is not insignificant, however, that the charges were brought. It makes exploration of the statutes mentioned in the charges crucial in understanding what crimes may or may not have been committed.

---

[82] *Ibid,* 766-767.

[83] *Ibid.,* 767.

[84] "National Security Secrets v. Free Speech," 311.

In the present case involving *Wikileaks*, Pfc. Bradley Manning is currently facing charges from the US Army for "aiding the enemy" along with "21 further offences of illegally disclosing classified information."[85] Because Manning is a member of the military, he is facing charges under the Uniform Code of Military Justice.[86]

However, despite the fact that Manning is the initial leaker of the government documents, members of *Wikileaks* may theoretically be prosecuted under the same charges as Ellsberg. The government would likely look to 18 U.S.C. § 793 (e)[87] and 18 U.S.C. § 641[88] for criminal charges—the same charges made against Daniel Ellsberg.[89] 18 U.S.C. § 793 (e) makes it criminal to simply have "unauthorized possession" of a

---

[85] Adams, Richard, "US Army to Charge Bradley Manning with 'Aiding the Enemy,'" *The Guardian*, March 2, 2012, http://www.guardian.co.uk/world/2011/mar/02/bradley-manning-charges-aiding-enemy?INTCMP=ILCNETTXT3487.

[86] *Ibid.*

[87] 18 U.S.C. § 793 (e): Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it

[88] 18 U.S.C. § 641:
Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted--
Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of $ 1,000, he shall be fined under this title or imprisoned not more than one year, or both.
The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

[89] "National Security Secrets v. Free Speech," 312.

document related to the national defense. As many of the recently released documents relate to the execution of United States military action in Afghanistan and Iraq, it would also likely be easy to conclude that those documents are "relating to national defense" and were "willfully communicate[d], deliver[ed, and] transmitted."[90] Again, in *New York Times,* Justice Douglas attempted to argue that the press is explicitly exempt from § 793; would another Court read the 1950 amendment the same way?

There have been two proposals in Congress, one in the House of Representatives and another in the Senate, to amend the Espionage Act (18 U.S.C § 793). Representative Peter King proposed 112 H.R. 703, also known as the Securing Human Intelligence and Enforcing Lawful Dissemination (SHIELD) Act on February 15, 2011.[91] Senator John Ensign proposed a nearly identical bill in the Senate on February 10, 2011.[92] The bills would amend the Espionage Act to clarify or add to the definitions of some terms used in the bill, as well as expand the scope of the law. One of the key changes is the addition of "transnational threat" in the first sentence after "or to the advantage of any foreign nation."[93] The intent here is to expand the meaning of the law, so it will not be interpreted solely as a means to prevent spying by operatives of one government against the United States.

[90] 18 U.S.C. § 793 (e).

[91] 112 H.R. 703.

[92] 112 S. 315.

[93] *Ibid.*

While the Pentagon has already weighed in by referring to the damage done by the release of documents as "fairly modest,"[94] in *Gorin v. United States,* the Court found that there need not be *proof* of injury to the United States to convict under the Espionage Act.[95] For the Court, Justice Reed wrote, "Nor do we think it necessary to prove that the information obtained was to be used to the injury of the United States. The statute is explicit in phrasing the crime of espionage as an act of obtaining information relating to the national defense 'to be used…to the advantage of any foreign nation.'"[96] Reed added that it did not matter if the foreign nation was considered friend or foe.[97]

The addition of "transnational threat," along with the *Gorin* ruling, would suggest simply that information that may be used to the advantage of a terrorist group, such as the Taliban in Afghanistan, would fall under the purview of this statute. To make sure that point is clear, the proposed bill describes transnational threat.

> (A) any transnational activity (including international terrorism, narcotics trafficking, the proliferation of weapons of mass destruction and the delivery systems for such weapons, and organized crime) that threatens the national security of the United States; (B) or any individual or group that engages in an activity referred to in subparagraph (A).[98]

It appears the government could make an argument that *Wikileaks* itself could be considered a "transnational threat." The list of activities in subsection (a) does not read as an exclusive list. In that sense, the section appears to apply to any activity that "threatens

---

[94] DOD News Briefing with Secretary Gates and Adm. Mullen from the Pentagon, November 30, 2010, accessed July 21, 2012, http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=4728.

[95] 312 U.S. 19 (1941).

[96] *Ibid.,* 29.

[97] *Ibid.*, 29.

[98] 112 H.R. 703.

the national security of the United States." In fact, it is hard to imagine if any information about government activities is considered to be not "to the advantage of any foreign nation." If intent or actual injury is not a requisite for prosecution, the government could theoretically prosecute any individual who publishes or leaks seemingly any information related to national defense.

That said, responding to a motion for a preliminary injunction in *United States v. New York Times*, a District Court judge shed doubt on the government's contention that the words "communicates, delivers, transmits" as written in subsection (e) can be replaced by the word "publish."[99] In *New York Times v. United States,* Justice Douglas agreed, saying, "There are eight sections in the chapter on espionage and censorship, §§ 792-799. In three of those eight 'publish' is specifically mentioned […] Thus it is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act."[100]

This point may be somewhat moot. *Wikileaks* has disseminated these documents in two different ways. On one hand, the documents were made available for public consumption on the Internet—an act that may very well be considered publication and subject to exemption from the Espionage Act. However, the organization also made the documents available to other members of the press before publishing on the Internet. Could that "transmission" fall under the auspices of subsection (e)? That transmission would be nearly identical to that of Daniel Ellsberg, for which Ellsberg at least faced criminal charges. In addition, Judge Ellis writes in *United States v. Rosen,* "Congress drafted [18 U.S.C. § 793] subsection (e) to require one with unlawful possession of

[99] 328 F. Supp. 324 (1971).

[100] 403 U.S. 713, 721.

national defense information to return it to the government even in the absence of a demand for that information."[101] This implies that the transmission portion of the law may not be required to prosecute under the statute, meaning regardless of what *Wikileaks* did with the documents, simple possession without returning to the proper authorities is a crime in and of itself.

That said, these activities are very similar to what other media organizations do on a daily basis. Many publications, such as the *New York Times,* worked with *Wikileaks* to sift through the documents before they were published on the Internet. It would also be similar to the sharing of information that may be done via the Associated Press. Even an attempt to prosecute based on possessing or sharing the leaked documents may implicate members of the mainstream press.

Another charge was made against Ellsberg under 18 U.S.C. § 641, which prescribes a sentence of not more than 10 years:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under the contract for the United States or any department or agency thereof; or whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted.[102]

While there is little First Amendment protection extended to news gathering, the Ellsberg defense may lead to a few loopholes to at least present that *Wikileaks* did not knowingly receive stolen information. Nimmer argued in a brief during the Ellsberg case that the "stealing" as defined by the Supreme Court in *Morissette v. United States* did not

[101] 445 F. Supp. 2d 602, 613.

[102] 18 U.S.C. § 641.

apply to Ellsberg's actions.[103] The court found, by citing *Irving Trust Co. v. Leff,*[104] "'To steal means to *take away from one* in lawful possession without right with the *intention to keep wrongfully'* (italics added). Conversion, however, may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was lawful."[105]

Nimmer argues in the Ellsberg case law review that copying government documents, not specifically exempted, such as classified documents in 18 U.S.C. § 793 (b) is protected by 17 U.S.C. § 8.[106] Title 17, Chapter 8 of the United States Code (which has since been amended to 17 U.S.C. § 105) states that "Copyright protection under this title is not available for any work of the United States Government […]."[107] In other words, Nimmer argues that except for documents that are specifically restricted from dissemination, Title 18, Chapter 641 cannot be construed to ban copying and dissemination of government documents, as Title 17, Chapter 105 explicitly places all government documents in the public domain. Again, this may serve *Wikileaks'* purposes in claiming that it did not receive information it knew to be converted for another's use. In addition, Nimmer argues that the scope of Chapter 641 is too broad, and thereby unconstitutional. "If unauthorized reproduction of documents constitutes 'conversion'

[103] "National Security Secrets vs. Free Speech," 312.

[104] 253 N.Y. 359 (1930).

[105] 342 U.S. 246, 271-272 (1952).

[106] "National Security Secrets v. Free Speech," 321.

[107] 17 U.S.C. § 105.

under section 641, that section is clearly overbroad because then such reproduction of any governmental document could constitute an act of criminal conversion."[108]

This may be the most compelling case to be made in regard to this particular statute. Whether *Wikileaks* is considered a publisher or a leaker, the core of freedom of the press is the freedom from prior restraint on the part of the government. If 18 § 641 could be used to prevent copying of any and all government documents, it is, in a sense, preventing the publication of all documents related to government activities. This strikes at one of the principles behind the construction of the First Amendment: the creation of a free press that can inspect and monitor government actions. The ability of the press to examine government activity would be severely restrained. The proof of this would be in the same prosecution of *Wikileaks.*

However, Assange may have gone beyond just receiving and publishing the documents. In the chat logs published by *Wikileaks*, Manning acknowledges communicating with Assange. He also acknowledges that he was given a preferential access to the server so that his material would be reviewed sooner.[109] Still, the cables seem a bit vague as to the nature of Manning's relationship with Assange. There is little to indicate that Assange encouraged Manning to leak the documents, and therefore the *Wikileaks* founder may still be able to argue that he was a passive recipient, just as any reporter for *The New York Times* may have been.

However, Manning does acknowledge that some of the data was actually decrypted by Wikileaks. In the chat logs obtained by federal prosecutors and published

---

[108] "National Security Secrets v. Free Speech," 322.

[109] Poulsen, Kevin, and Zetter, Kim, "'I Can't Believe What I'm Confessing to You': The Wikileaks Chats," *Wired.com*, June 10, 2010, http://www.wired.com/threatlevel/2010/06/wikileaks-chat/

by *Wired.com,* Manning allegedly discusses a video that *Wikileaks* "has, but hasn't decrypted yet[…]."[110] Hacking and decrypting government documents may be a step further than passively receiving, and may actually make Assange culpable for the illegal possession, with the decryption accounting for the conversion of the documents.

The ramifications of such a prosecution would likely still be far reaching. Such a decisive ruling, based upon the possession of leaked documents, would threaten the ability of reporters to accept materials from sources if they are related to national security. This would have a chilling effect on any and all reporting related to national defense.

[110] *Ibid.*

## Discussion

It is clear that the courts have intended for the First Amendment to be a guarantee for the right to publish. What is less clear is whether or not that guarantee is joined by a protection from prosecution after publication. Courts have long struggled with striking the appropriate balance between a free press and national security. Even Justice Holmes, who developed the "clear and present danger" standard, seemed to disagree with its application in subsequent cases. One thing that is clear, the First Amendment was never, and will never, translate into a blanket immunity for publishers.

Perhaps the court is not the appropriate arena for this balance to be struck. As Holmes wrote in *Northern Securities v. United States,* "Great cases, like hard cases, make bad law. For great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."[1] This sounds all too familiar. Despite Pentagon assurances that the leaks were not damaging to the United States, politicians have called for the assassination of those who leaked the documents. A case involving *Wikileaks* would no doubt be a great case; it would certainly create overwhelming interest and stoke emotions, but it would likely also set an incredibly dangerous precedent.

Consider first and foremost that a prosecution of *Wikileaks,* while other news organizations that published many of the same documents are absolved, would reveal an arbitrary nature of the enforcement of the Espionage Act. If the government will seek

[1] 193 U.S. 197, 401 (1903).

charges against one organization, but not another, publishers may feel pressured into compliance with any government demands rather than face possible prosecution themselves.

One distinguishing factor between *Wikileaks* and other publishers is that the former published far more documents than any other publishers. One could argue that the sheer number of published documents indicates that the organization was doing more than simply providing context for a public debate and that it was attempting to embarrass the United States with the release of every possible secret that it could get its hands on. One could just as easily argue that there should be no secrets in how the government operates if the public is to be well informed and participate in the decision-making. More to the point, the legal ramifications of basing a ruling on having released "too many documents" raises far too many questions and only serves to enhance the ambiguity.

If the prosecution were to focus on the possession of documents, rather than the publication, the ramifications may be just as significant for the professional and amateur press. If Julian Assange were convicted for possession of the materials, that ruling could have an incredibly chilling effect on daily reporting activities. Receiving materials from a source, even classified materials, has not been used as a means for prosecution in the past. However, such a ruling may lead reporters to avoid taking such documents in the future, which would in turn lead to the disclosure of fewer details about government operations.

While the courts have consistently found that the First Amendment is not a blanket immunity for publishers, many of its rulings have cited the principle of serving the public interest. How does one determine if these leaks were critical to the public

knowledge of how the United States has conducted its foreign policy? For that matter, who should get to determine such an important, and relatively subjective, fact? The court would have to establish some sort of test to determine what was serving the public interest. However, as with the "clear and present danger test," even legal frameworks can evolve and be reinterpreted over time. Imagine trying to apply the clear and present danger test to the *Wikileaks* documents. While the Pentagon has said that the documents were mostly embarrassing, a judge may find differently. Without a consistent and well-defined standard for judging what is, for lack of a better word, newsworthy, publishers will be forced to publish at their own risk and hope for a favorable ruling if ever brought to trial.

At this time, the prevailing precedents suggest that the First Amendment only provides complete protection in the case of prior restraint. More importantly, and perhaps most likely to lead to conviction in the *Wikileaks* case, there is no shield law for newsgathering activities at the federal level. That means that even if the publication of the documents were in some way protected by the First Amendment, *Wikileaks* would still be liable for its activities in acquiring the documents that it published. The law, as written, and most standing legal precedents suggest that reporters are not entitled to special legal protections as reporters. It seems the reason that reporters haven't been charged with the Espionage Act is that the government has avoided prosecuting reporters. If the government chose to pursue prosecution of journalists for possession of or publishing classified information, the letter of the law suggests that reporters might be found guilty. Judging by the statements made by government officials about *Wikileaks,* it seems that the government is likely interested in pursuing charges.

When considering criminalizing the publication of information that relates to the public interest, it is important to consider the real intent of the First Amendment. Many court rulings have interpreted the First Amendment in a narrow way—that the intention of the Amendment is to prevent the government from removing the ability of individuals to publish. Still, what good is the right to publish if the act can be criminalized after the fact? The threat of prosecution is, in and of itself, a restraint on publication. If a *New York Times* reporter is concerned that he or she may be prosecuted for publishing a story that includes classified information, he or she may be less likely to publish the story.

The founders intended for the First Amendment to provide for a prosperous press that would monitor the activities of the government. James Madison wrote, "A people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[2] Thomas Jefferson wrote, "Were it left to me to decide whether we should have a government without newspapers or newspapers without government, I should not hesitate for a moment to prefer the latter."[3] Both Madison and Jefferson indicate a preference for erring on the side of publishing too much, rather than a government shrouded in secrecy.

The need for safeguards and limitations on what can be published, at least after the fact, has been established in terms of libel. Over time, courts have found that no good is served by the publication of libelous and unfounded information. Precedents have been

[2] "Accountability and Transparency: Essential Prinicples," *Democracy Web,* http://www.democracyweb.org/accountability/principles.php, accessed February 18, 2013.

[3] "The Founders Constitution: Document 8 Thomas Jefferson to Edward Carrington," *The University of Chicago Press,* http://press-pubs.uchicago.edu/founders/documents/amendI_speechs8.html, accessed February 18, 2013.

set forth that allow private citizens the ability to seek damages for such publications. The law has evolved to act as a check on the reckless publication of untruths. The law has not evolved as successfully with national security.

When dealing with national security, information can be both true and inappropriate for publication—for example, the publication of troop movements. The challenges for the courts, and reporters for that matter, is determining at what point information becomes an important part of public debate that is necessary for the establishment of a knowledgeable electorate, rather than information that will do harm to the national security. In libel, the subject of the information often determines whether or not the information is of public interest. If that is the determining factor, it could be argued that all information related to government is of public concern. If those troop movements indicate the escalation or expansion of a war, that naturally seems like a necessary part of the public debate. In the case of *Wikileaks,* a video from an American helicopter that appears to contradict military claims about an assault that killed civilians may both reveal crucial elements of troop and equipment deployment and reveal important information about the execution of the war that are matters to be debated by the public.[4] These issues are far too complex to be decided in the heat of controversy and by the broad strokes of a court ruling.

They may also be too difficult to leave open to interpretation for much longer. For much of the last century, organizations like *Wikileaks*, and even the traditional press for that matter, have been publishing at their own risk. The Espionage Act, as it is written, and the legal precedents, as they have been constructed, do not definitively provide clear

[4] McGreal, Chris, "Wikileaks Reveals Video Showing US Air Crew Shooting Down Iraqi Civilians," *The Guardian,* April 5, 2010, http://www.guardian.co.uk/world/2010/apr/05/wikileaks-us-army-iraq-attack.

exemptions for reporters who publish national secrets. Yet, the government has avoided prosecuting members of the professional press—perhaps out of fear of a precedent that would dangerously weaken the Espionage Act, or simply because there has yet to be a publication that has truly threatened the national security. In any case, the lack of a definitive precedent involving the Espionage Act and a member of the professional press has left a relative uncertainty about what rights reporters do and do not have.

David McCollam argued that for much of the late 20th century, the government and press found a degree of understanding in this unsettled area of law. In fact, the government and press have generally found common ground in the ambiguity. He argued that, historically, journalists have been allowed "to operate on the premise that so long as they didn't do anything illegal to actively obtain the classified information, they need not fear prosecution for receiving it or publishing it in a reasonably responsible matter consistent with their role under the First Amendment."[5] The government has yet to attempt to prosecute a professional reporter under the Espionage Act, while there has yet to be a news story that has directly led to a national security crisis. Even in the famed *New York Times v. United States* case, involving the Pentagon Papers, the government only sought an injunction, but not prosecution under the Espionage Act. Perhaps *Wikileaks,* in constructing and promoting a site for leaked information, is crossing the threshold into "actively" obtaining leaked information. Perhaps the act of decrypting the files goes beyond passive newsgathering and moves into active theft.

[5] McCollam, Douglas, "The End of Ambiguity," *Columbia Journalism Review, Vol 45, Issue 2 (2006),* 24, http://ducharmec.files.wordpress.com/2008/12/end-of-ambuiguity.pdf (accessed July 20, 2012).

In this argument, McCollam also seems to urge caution to those who would like to have the ambiguity resolved through the judiciary. He cites Alexander Bickel, who argued the *New York Times v. United States* case, in saying, "Those freedoms that are neither challenged nor defined are the most secure."[6] McCollam and Bickel seem to be arguing that the ambiguity creates a flexible environment for responsible parties to act.

The question then becomes whether or not that environment is sustainable in the 21st century. As the media becomes more amateurized through the use of the Internet, who is and is not a member of the press is open for interpretation. Moreover, can individuals who do not belong to an institution be trusted to responsibly report and publish classified information? The trust established between the government and the press is based upon the upholding of professional standards that creates predictable behavior. Government officials do not need to threaten professional reporters with prosecution because they trust those reporters to release the information in a fair manner and with the appropriate context.

Another cause for concern is the current administration's extremely tough stance on leaks and government whistleblowers. Since 2009, the government has charged six people with violating the Espionage Act.[7] This increased use of the law for prosecution may soon find its way towards implicating reporters.

Several United States officials have used the weight of their offices to pressure companies to cut ties with *Wikileaks*. In 2010, when Amazon decided to stop hosting the

---

[6] *Ibid.,* 24.

[7] Berger, Judson, "As Obama Administration Cracks Down on Intelligence Leaks, Watchdog Groups Cry Foul," *FoxNews.com*, February 24, 2010, accessed November 30, 2012, http://www.foxnews.com/politics/2012/02/24/obama-administration-cracks-down-on-intelligence-leaks-transparency-groups-cry/#ixzz2EEfap5Lr.

*Wikileaks* website, Senator Joe Lieberman applauded the decision, saying that it should "set the standard for other companies *Wikileaks* is using to distribute its illegally seized material. I call on any other company or organization that is hosting *Wikileaks* to immediately terminate its relationship with them."[8] Other companies followed suit, leaving *Wikileaks* without much of its infrastructure for funding.[9]

With the legality of *Wikileaks'* work in question, politicians and government can exert greater pressure on private companies to cut ties to organizations like *Wikileaks.* However, note that the government did not put similar pressure on organizations to cut ties with *The New York Times*, which published many of the same documents. Instead, the unsettled law and legal precedents have left *Wikileaks* vulnerable to extra-legal actions that can strip the organization of its ability to continue to publish these documents. The power of the First Amendment, and any other theoretical right to gather news, is greatly diminished if the government can force a publisher out of business without stepping foot into a courtroom.

At the same time, there is also a wave of new media allowing even individual citizens to transmit information around the world on the Internet. The new actors, with less structure, and, theoretically, fewer professional standards than the traditional press, will no doubt create difficulties in maintaining this status quo and fitting into this tacitly agreed upon status quo.

---

[8] MacAskill, Ewen, "Wikileaks Website Pulled by Amazon After US Political Pressure," *The Guardian,*" December 1, 2010, http://m.guardiannews.com/media/2010/dec/01/wikileaks-website-cables-servers-amazon.

[9] Prentice, Alessandra and Croft, Adrian, "WikiLeaks' Assange Blames U.S. Right for Funding Block," Reuters, November 27, 2012, http://www.reuters.com/article/2012/11/27/net-us-wikileaks-eu-idUSBRE8AQ0G920121127.

Consider that *The New York Times*, before publishing the documents that it received from *Wikileaks,* consulted with the Obama administration to ensure that the documents would not harm national security. "The Times sent Obama administration officials the cables it planned to post and invited them to challenge publication of any information that, in the official view, would harm the national interest. After reviewing the cables, the officials — while making clear they condemn the publication of secret material — suggested additional redactions. The *Times* agreed to some, but not all."[10]

Organizations that are perceived to be, in some way, less legitimate than the professional press may not be afforded an avenue to reach out to public officials. Certainly, in the case of *Wikileaks,* being considered an enemy of the state would remove the incentive to work responsibly with the government. This may actually make the publication of information that would harm the national security even more likely.

If the balance between publishers and government officials is disturbed, as seems to be the case with the documents released by *Wikileaks*, the likelihood of an eventual court case increases exponentially. It also leaves the press one potential, precedent-setting decision away from losing even the illusion of First Amendment protections for its reporting.

A conviction would likely have devastating consequences for the future of the press and for the future of the Internet. At best, the courts would draw a narrow interpretation and attempt to charge *Wikileaks* as a non-press actor and simply for

[10] "A Note to Readers: The Decision to Publish Diplomatic Documents," *The New York Times,* November 28, 2010, accessed November 30, 2012, http://www.nytimes.com/2010/11/29/world/29editornote.html.

possession and distribution of classified documents. This ruling would have devastating consequences for the sharing of information through the Internet, and perhaps on reporters' ability to inspect documents related to national defense.

Such a ruling would likely evolve into the creation of a separate "media class," which, in theory, would have greater protections than the public at large. A separate media class could be implied if the court determines that there are potential protections for news gatherers, but they do not apply because *Wikileaks* is a leaker and not a news gatherer. Such an implication has not been made in the past, as courts have refused to acknowledge special exemptions for reporters. However, the selective prosecution of only *Wikileaks* for possession of the documents that were published by other actors would easily be viewed as a double-standard. This raises the question about how one becomes a member of this protected group, which is allowed to gather information and interview sources without prosecution. What will make a reporter for the *New York Times*, in the eyes of the law, a legitimate actor for the possession, and even dissemination of information, while *Wikileaks* is not? The act of prosecutorial discretion creates two legal systems for news gathering and publishing—those that the government chooses to act against and those that it does not.

Ironically, this would likely have a chilling effect on this protected class. It would seem probable that pressure would be felt by reporters to not risk their status as members of the protected caste. Would advertisement revenue, or even circulation, determine which members were protected and which were not? This would place serious limitations on the ability of new media entities to form, while also driving media outlets to strive for popular stories, rather than those that are unpopular, but serve the public good.

Perhaps the best solution is through legislation. Perhaps an amendment could be made to the Espionage Act allowing for those that publish information publicly to be charged in civil courts in which the prosecution must prove the actions were both damaging and malicious. Consider how libel cases allow for protection of media outlets who act in good faith. Could the same not be done for those charged under the Espionage Act? A distinction could certainly be made between publishers attempting to serve the public good and individuals transmitting information directly to enemy actors.

Such a provision would encourage the responsible dissemination of information, without criminalizing the mere possession in the act of good-faith reporting. Much like when *The New York Times* conferred with government officials before publishing the *Wikileaks* documents, such a provision that allows for reporters, both professional and amateur, to attempt to responsibly release information on government activities seems to serve both interests. There would certainly be instances where time constraints may change what is "reasonable" or "not reasonable," but a panel of legal, security and media experts could convene to evaluate these cases on an as needed basis.

This decision is certainly not without its drawbacks, but it would provide a system that would offer reporters an opportunity to both pursue information that is of national significance without the threat of possible prosecution, while security officials would have an opportunity to advise reporters about information that would have significant national consequences. The tension between the competing interests of national security and a free press will never go away. There will always be information that the government will want to keep secret that members of the press, or even a single citizen, believes is worthy of public scrutiny and debate. What can be changed is the ambiguous

and unsettled nature of the repercussions for making such information public. Such a provision would remove the ability of the government to threaten prosecution over information that is not worthy of infringing on free press activities, while also providing a mechanism to ensure that the most delicate of matters is revealed publicly in a responsible and carefully considered manner.

## List of References

### Primary Sources


17 U.S.C. § 105

18 U.S.C. § 641

18 U.S.C. § 793 (e)

112 H.R. 703

112 S. 315

42 U.S.C. § 2274

*Abrams v United States,* 250 U.S. 616 (1919)

*Bartnicki v. Vopper,* 532 U.S. 514 (2001)

*Boehner v. McDermott* 441 F.3d 1010 (2006)

*Dennis v. United States*, 341 U.S. 494, (1951)

*Gitlow v. People of New York,* 268 U.S. 652 (1925)

*Gorin v. United States,* 312 U.S. 19 (1941)

*Grosjean v. American Press Co.,* 297 U.S. 233 (1936)

*Irving Trust Co. v. Leff,* 253 N.Y. 359 (1930)

*Lovell v. City of Griffin*, 303 U.S. 444 (1938)

*Morissette v. United States,* 342 U.S. 246 (1952)

*Near v Minnesota,* 283 U.S. 697 (1931)

*New York Times v. United States,* 403 U.S. 713 (1971).

*Northern Securities v. United States,* 193 U.S. 197 (1903)

*Patterson v. Colorado*, 205 U.S. 454 (1907)

*Schaefer v. United States,* 251 U.S. 466 (1920)

*Schenck v. United States*, 249 U.S. 47 (1919)

*United States v. Morison*, 844 F. 2d 1057, (1988)

*United States v. New York Times,* 328 F. Supp. 324 (1971)

*United States v. Progressive*, 467 F. Supp. 990 (1979).

*United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006)

*Whitney v. California,* 274 U.S. 357 (1927)

*Yates v. United States,* 354 U.S. 298 (1957).

**Secondary Sources**

Aarons, Leroy F., "Ellsberg Indicted on 2 Counts in Los Angeles," *Washington Post,* June 29, 1971, accessed April 14, 2011, http://pqasb.pqarchiver.com/washingtonpost_historical/access/144648092.html?FMT=ABS&FMTS=ABS:AI&date=Jun+29%2C+1971&author=By+Leroy+F.+AaronsWashington+Post+Staff+Writer&pub=The+Washington+Post%2C+Times+Herald++(1959-1973)&edition=&startpage=A12&desc=Ellsberg+Indicated+on+2+Counts+in+Los+Angeles.

Adams, Richard, "US Army to charge Bradley Manning with 'aiding the enemy,'" *The Guardian*, March 2, 2012, http://www.guardian.co.uk/world/2011/mar/02/bradley-manning-charges-aiding-enemy?INTCMP=ILCNETTXT3487.

"Accountability and Transparency: Essential Prinicples," *Democracy Web,* http://www.democracyweb.org/accountability/principles.php, accessed February 18, 2013.

Adler, Jonathan and Michael Berry, "A Troubling Prosecution: United States v. Rosen Has its Thorns," *National Review,* August 21, 2006, http://www.nationalreview.com/articles/218521/troubling-prosecution/jonathan-h-adler.

Alschuler, Fred, "Perspectives on Watergate Panel: Memories of the Ellsberg Break-In," *Hastings Law Journal,* 51 (2000): 765-770, accessed April 14, 2011.

"A Note to Readers: The Decision to Publish Diplomatic Documents," *The New York Times,* November 28, 2010, accessed November 30, 2012, http://www.nytimes.com/2010/11/29/world/29editornote.html.

Benkler, Yochai, "A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate," *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 46 (2011): 311-313, *OmniFile Full Text Mega (H.W. Wilson),* EBSCO*host*.

Berger, Judson, "As Obama Administration Cracks Down on Intelligence Leaks, Watchdog Groups Cry Foul," *FoxNews.com*, February 24, 2010, accessed November 30, 2012, http://www.foxnews.com/politics/2012/02/24/obama-administration-cracks-down-on-intelligence-leaks-transparency-groups-cry/#ixzz2EEfap5Lr.

Bosker, Bianca, "PayPal Admits State Department Pressure Caused It To Block WikiLeaks," *The Huffington Post,* December 8, 2010, http://www.huffingtonpost.com/2010/12/08/paypal-admits-us-state-de_n_793708.html.

Bumiller, Elisabeth, "Video Shows U.S. Killing of Reuters Employees," *The New York Times,* April 5, 2010, http://www.nytimes.com/2010/04/06/world/middleeast/06baghdad.html?_r=1&ref=world.

Childs, William G., "When the Bell Can't be Unrung: Document Leaks and Protective Orders in Mass Tort Litigation," *The Review of Litigation* 27*,* no. 4 (2008)*,* 565-606, http://digitalcommons.law.wne.edu/cgi/viewcontent.cgi?article=1029&context=facschol.

Corneil, David, "Harboring Wikileaks: Comparing Swedish and American Press Freedom in the Internet Age," *California Western International Law Journal* 41*,* no. 2 (2011), 477-522, www.lexisnexis.com/hottopics/lnacademic.

DOD News Briefing with Secretary Gates and Adm. Mullen from the Pentagon, November 30, 2010, accessed July 21, 2012, http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=4728.

Dorling, Phillip, "US Senator Calls to Prosecute Assange," *The Sydney Morning Herald,* July 2, 2012, http://www.smh.com.au/national/us-senator-calls-to-prosecute-assange-20120701-21b3n.html.

Feinstein, Dianne, "Prosecute Assange Under the Espionage Act," *Wall Street Journal,* December 7, 2010, http://online.wsj.com/article/SB10001424052748703989004575653280626335258.html.

Gjelten, Tom, "Does Leaking Secret Documents Damage National Security?" *National Public Radio,* June 12, 2012, http://www.npr.org/2012/06/12/154802210/does-leaking-secrets-damage-national-security.

Greenwald, Glenn, "Dianne Feinstein Targets Press Freedom," *Salon*, July 2, 2012, http://www.salon.com/2012/07/02/dianne_feinstein_targets_press_freedom/.

"Illegally Killing Assange: 'A Dead Man Can't Leak Stuff'," *Huffington Post*, December 7, 2010, http://www.huffingtonpost.com/2010/12/07/fox-news-bob-beckel-calls_n_793467.html.

Ingram, Matthew, "The NYT's Bill Keller on Why We Should Defend WikiLeaks," *GigaOM*, July 25, 2012, http://gigaom.com/2012/07/25/the-nyts-bill-keller-on-why-we-should-defend-wikileaks/.

"Julian Assange, The Man Behind Wikileaks," *CBS News,* January 30, 2011, http://www.cbsnews.com/stories/2011/01/26/60minutes/main7286686_page6.shtml?tag=contentMain;contentBody.

Lee, William E., "Probing Secrets: The Press and Inchoate Liability for Newsgathering Crimes," *American Journal of Criminal Law, Vol 36, Issue 2, Spring 2009*, 129-177, *OmniFile Full Text Mega (H.W. Wilson),* EBSCO*host*.

Lewis, Kyle, "Wikifreak-out: The Legality of Prior Restraints on Wikileaks' Publication of Government Documents," *Washington University Journal of Law & Policy*, Vol. 38 (2012): 417-440, *OmniFile Full Text Mega (H.W. Wilson),* EBSCO*host*.

MacAskill, Ewen, "Julian Assange Like a High-Tech Terrorist, says Joe Biden," *The Guardian*, December 19, 2010, http://www.guardian.co.uk/media/2010/dec/19/assange-high-tech-terrorist-biden.

---. "Wikileaks Website Pulled by Amazon After US Political Pressure," *The Guardian,*" December 1, 2010, http://m.guardiannews.com/media/2010/dec/01/wikileaks-website-cables-servers-amazon.

McCollam, Douglas, "The End of Ambiguity: From Sourcing to Secrets, a Series of Untidy Compromises Between the Government and the Press are Eroding, Leaving Reporters Increasingly Boxed in," *Columbia Journalism Review,* Vol. 45 Issue 2 (2006): 20-27, *OmniFile Full Text Mega (H.W. Wilson),* EBSCO*host*.

McGreal, Chris, "Wikileaks Reveals Video Showing US Air Crew Shooting Down Iraqi Civilians," *The Guardian,* April 5, 2010, http://www.guardian.co.uk/world/2010/apr/05/wikileaks-us-army-iraq-attack.

Milligan, Susan, "Wikileaks is High-Stakes Paparazzi, Not Journalism," *US News and World Report,* November 29, 2010, http://www.usnews.com/opinion/blogs/susan-milligan/2010/11/29/wikileaks-is-high-stakes-paparazzi-not-journalism.

Nimmer, Melville B., "National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case," *Stanford Law Review,* 26 (1974): 311-333, accessed April 14, 2011, http://www.jstor.org/stable/1227790.

O'Brien, Michael, "Republican Wants Wikileaks Labeled as Terrorist Group," *The Hill*, November 29, 2010, http://thehill.com/blogs/blog-briefing-room/news/130863-top-%20republican-designate-wikileaks-as-a-terrorist-org.

Pincus, Walter, "Press Can Be Prosecuted For Having Secret Files, U.S. Says," *The Washington Post*, February 22, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/02/21/AR2006022101947.html.

Poulsen, Kevin, and Kim Zetter, "'I Can't Believe What I'm Confessing to You': The Wikileaks Chats," *Wired.com*, June 10, 2010, http://www.wired.com/threatlevel/2010/06/wikileaks-chat/.

Prentice, Alessandra and Croft, Adrian, "WikiLeaks' Assange Blames U.S. Right for Funding Block," Reuters, November 27, 2012, http://www.reuters.com/article/2012/11/27/net-us-wikileaks-eu-idUSBRE8AQ0G920121127.

Savage, Charlie, "U.S. Tries to Build Case for Consipracy by Wikileaks," *The New York Times,* December 15, 2010, http://www.nytimes.com/2010/12/16/world/16wiki.html?_r=4&.

Schmitt, Eric, "In Disclosing Secret Documents, Wikileaks Seeks 'Transparency'," *The New York Times,* July 25, 2010, http://www.nytimes.com/2010/07/26/world/26wiki.html?ref=Wikileaks.

Shane, Scott and Andrew Lehren, "Leaked Cables Offer Raw Look at U.S.Diplomacy," *The New York Times,* November 28, 2010, http://www.nytimes.com/2010/11/29/world/29cables.html?_r=1.

Shirky, Clay, *Here Comes Everybody: The Power of Organizing Without Organizations,* New York: Penguin, 2008.

"The Founders Constitution: Document 8 Thomas Jefferson to Edward Carrington," *The University of Chicago Press,* http://press-pubs.uchicago.edu/founders/documents/amendI_speechs8.html, accessed February 18, 2013.

Wikileaks, "About," accessed July 21, 2012, http://wikileaks.org/About.html.