ARTICLES

PUNISHING THE PUBLISHING OF CLASSIFIED MATERIALS: THE ESPIONAGE ACT AND WIKILEAKS

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In 2010 Bradley Manning, a private first class in the United States Army, leaked various classified documents to an organization called WikiLeaks.[1] WikiLeaks, under the direction of its founder and editor-in-chief Julian Assange, subsequently posted those documents on its website. This set off a firestorm of debate about whether the government should be able to prosecute members of the media who publish classified materials.[2] Manning's recent conviction for crimes related to his leaking of the classified documents (for which he has been sentenced to 35 years in prison)[3] has reignited that debate, as some speculate that Assange could be the government's next target. Indeed, as recently as March 30, 2013 a Department of Justice spokesperson confirmed that

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[1] Since this time, Manning has since changed her identity to Chelsea E. Manning. *See* Adam Gabbatt, *'I am Chelsea Manning,' says jailed soldier formerly known as Bradley*, GUARDIAN (Aug. 22, 2013), http://www.theguardian.com/world/2013/aug/22/bradley-manning-woman-chelsea-gender-reassignment.

[2] Charlie Savage, *U.S. Weighs Prosecution of WikiLeaks Founder, but Legal Scholars Warn of Steep Hurdles*, N.Y. TIMES, Dec. 2, 2010, at A18.

[3] Charlie Savage, *Manning Sentenced to 35 Years for a Pivotal Leak of U.S. Files*, N.Y. TIMES, Aug. 22, 2013, at A1.

an investigation into WikiLeaks' employees remains ongoing.[4]

That Manning is confined to a prison cell while Julian Assange has not even been charged with a crime raises an obvious, yet complicated, question—why should Manning receive such a harsh punishment for leaking classified information to several WikiLeaks employees while WikiLeaks employees are subject to no punishment for exposing that same information to the entire world? This question is of particular importance because the issue of news organizations publishing classified information potentially harmful to United States national security does not appear to be going away. The recent revelations by Edward Snowden and the *Guardian* regarding classified National Security Agency information-gathering programs underscores this fact.[5] As does WikiLeaks' own response to the news of Manning's conviction, which defiantly claimed that there will be "a thousand more Bradley Mannings"[6] leaking increasingly more classified information.

So, if Manning has been convicted under the Espionage Act, does that mean WikiLeaks employees could be subject to the same fate? Despite the fact that a government investigation into WikiLeaks is going on its third year, discussions surrounding the potential use of the Espionage Act to prosecute media members like Julian Assange have been muddled at best. Specifically, neither government officials nor academics have carefully addressed: (1) the sections of the Espionage Act that prohibit the publishing of classified materials and (2) the First Amendment implications of using the Espionage Act to punish such activities. This article addresses both these issues using the potential prosecution of Julian Assange as a case study. In doing so, it concludes that the First Amendment allows the government to prosecute those who publish classified materials under the Espionage Act in certain narrow circumstances. However, in the case of Assange, more information is needed than is publicly known regarding both his state of mind in publishing the classified documents as well as the nature of those documents before determining whether Assange may be held criminally liable under the Espionage Act.

I. FACTS OF THE CASE

In 2006 Julian Assange founded a "not-for-profit media organization" called WikiLeaks whose "goal is to bring important news and information to the public."[7] Unlike most media organizations, WikiLeaks focuses on publishing pri-

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[4] Philip Dorling, *Assange prosecutor quits while accuser sacks lawyer*, SYDNEY MORNING HERALD (Mar. 28, 2013), *available at* http://www.smh.com.au/national/assange-prosecutor-quits-while-accuser-sacks-lawyer-20130328-2gwjk.html.

[5] Devlin Barrett & Danny Yadron, *Contractor Says He Is Source of NSA Leak*, WALL ST. J., June 10, 2013, at A1.

[6] *Statement by Julian Assange on Today's Sentencing of Bradley Manning*, WIKILEAKS (Aug. 21, 2013, 5:21 PM), http://wikileaks.org/Statement-by-Julian-Assange-on,267.

[7] *About*, WIKILEAKS, http://wikiLeaks.org/About.html (last visited Nov. 25, 2013).

mary source materials on the internet. To that end, WikiLeaks has created a "high security anonymous drop box" that can "accept (but does not solicit) anonymous sources of information."[8] Once information is placed in its drop box, WikiLeaks' "journalists analyse the material, verify it and write a news piece about it describing its significance to society."[9] WikiLeaks will then "publish both the news story and the original material" so that readers may "analyse the story in the context of the original source material themselves."[10]

In conformance with this practice, in July 2010, WikiLeaks published over 75,000 classified United States military reports, including six years of incident reports and intelligence documents about United States combat activities in Afghanistan.[11] The Department of Defense described this release as "potentially severe and dangerous for our troops, our allies and Afghan partners" because it revealed intelligence sources and methods as well as military tactics.[12] WikiLeaks has made several subsequent releases of classified government documents, one of which included thousands of confidential United States diplomatic cables.[13] The Department of State described such releases as an "attack on America's foreign policy interests . . . [and] the international community—the alliances and partnerships, the conversations and negotiations, that safeguard global security and advance economic prosperity."[14]

Many in the media also criticized WikiLeaks' actions.[15] Even newspapers that had previously been working with WikiLeaks to expose classified information were quick to publicly denounce the manner in which WikiLeaks conducted its publication. Those newspapers, including *Der Spiegel,* the *Guardian*, the *New York Times*, *Le Monde* and *El Pais* released a joint statement saying "[w]e cannot defend the needless publication of the complete data—indeed, we are united in condemning it."[16] The stated reason for this collective denunciation was that, as the *Guardian* explained, WikiLeaks published these documents "without redactions, potentially exposing thousands of individuals named in the

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] Charlie Savage, *Gates Assails WikiLeaks Over Release of Reports*, N.Y. TIMES, July 30, 2010, at A8.

[12] *Id.*

[13] *See, e.g.*, James Ball, *WikiLeaks publishes full cache of unredacted cables*, GUARDIAN (Sept. 2, 2011, 7:55 AM), *available at* http://www.guardian.co.uk/media/2011/sep/02/wikileaks-publishes-cache-unredacted-cables.

[14] Hillary Rodham Clinton, U.S. Sec'y of State, Remarks to the Press on Release of Purportedly Confidential Documents by Wikileaks (Nov. 29, 2010), http://www.state.gov/secretary/rm/2010/11/152078.htm.

[15] Haroon Siddique, *Press freedom group joins condemnation of WikiLeaks' war logs*, GUARDIAN (Aug. 13, 2010, 12:36 AM), *available at* http://www.guardian.co.uk/media/2010/aug/13/wikileaks-reporters-without-borders.

[16] Ball, *supra* note 13.

documents to detention, harm or putting their lives in danger."[17]

The person who claimed responsibility for providing these documents to WikiLeaks was Manning, a former private first class and a low-level intelligence analyst in the United States Army, who gained access to these documents because of a security "loophole."[18] Manning maintained that his actions were not done with the intention of hurting the United States, but instead to "spark a debate about foreign policy" by showing the public "what happens and why it happens."[19] Despite these supposedly benevolent intentions, Manning was convicted of several Espionage Act violations (among other crimes) and sentenced to 35 years in prison.[20]

Various government officials have called for Julian Assange, the founder and editor-in-chief of WikiLeaks, to be brought to the United States and put on trial as well.[21] Assange has admitted that the decision to post the classified information on WikiLeaks' website was ultimately his, though he insists there is no "significant chance of innocents being negatively affected."[22] Nevertheless, the Department of Justice and the Department of Defense have stated publicly that a criminal investigation of WikiLeaks has begun and could lead to charges under the Espionage Act.[23] As of March 30, 2013 a Department of Justice spokesperson confirmed that an investigation remains ongoing.[24]

II. HISTORY AND PAST APPLICATIONS OF THE ESPIONAGE ACT

Until the early twentieth century, those who disclosed government secrets were prosecuted under generally applicable statutes criminalizing treason and theft of government property.[25] Then, shortly after the United States entered

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[17] Ball, *supra* note 13.

[18] Thom Shanker, *Loophole May Have Aided Theft of Classified Data*, N.Y. TIMES, July 9, 2010, at A10.

[19] *Id.*

[20] Charlie Savage, *Manning Acquitted of Aiding the Enemy*, N.Y. TIMES, July 31, 2013, at A1.

[21] *See, e.g.*, Dianne Feinstein, Op-Ed., *Prosecute Assange Under the Espionage Act*, WALL ST. J., Dec. 7, 2010, at A19.

[22] Interview by John Goetz and Marcel Rosenbach with Julian Assange, Founder and Editor in Chief, WikiLeaks (July 26, 2010), http://www.commondreams.org/headline/2010/07/26-0.

[23] *See* Ellen Nakashima & Jerry Markon, *WikiLeaks founder could be charged under Espionage Act*, WASH. POST (Nov. 30, 2010, 12:13 AM), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112905973.html; Savage, *supra* note 2.

[24] Dorling, *supra* note 4.

[25] *See* Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 940 (1973).

World War I, Congress enacted the Espionage Act of 1917[26] in order to target those who provide classified information to persons not authorized to receive it. The relevant sections of the Espionage Act have been codified in 18 U.S.C. §§ 793–798.

While the constitutionality of various sections of the Espionage Act remains unresolved, the government has used the Act to convict numerous government employees who have leaked classified information. The Supreme Court has upheld one such conviction,[27] and in several other instances the Fourth Circuit—the Circuit within which a grand jury has been convened to decide whether a prosecution against Julian Assange will go forward[28]—has done the same.[29]

In the more recent case of *United States v. Rosen*,[30] the government decided to go beyond prosecuting government employees who leak classified information. Instead, the government attempted to prosecute several non-government employees to whom information was leaked and who subsequently communicated that information to a third party. After a lengthy pre-trial period the government eventually dropped the charges, perhaps demonstrating the difficulty in prosecuting non-government employees under the Espionage Act.[31] However, the attempted prosecution was itself an important development as it presents the following question: if non-government employees to whom classified information is leaked can be prosecuted for subsequently communicating that information to others, should those in the media not be similarly prosecuted when they receive classified information and subsequently publish it for the whole world to see? While Judge Ellis' decision in *Rosen* remains the most complete explanation by any federal court of what is required to prosecute a non-government employee for disclosing classified information (both under the Espionage Act and the Constitution), it remains unclear whether the same analysis would apply to a member of the media who publishes such information.

While the United States has never prosecuted members of the media who publish classified materials under the Espionage Act,[32] it has threatened to do

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[26] Espionage Act of 1917, ch. 106, § 10(i), 40 Stat. 422 (codified as amended at 18 U.S.C. §§ 793–98 (2012)).

[27] Gorin v. United States, 312 U.S. 19 (1941).

[28] Ed Pilkington, *WikiLeaks: US opens grand jury hearing*, GUARDIAN (May 11, 2011, 7:33 PM), *available at* http://www.guardian.co.uk/media/2011/may/11/us-opens-wikileaks-grand-jury-hearing.

[29] *See, e.g.*, United States v. Morison, 844 F.2d 1057 (4th Cir. 1983); United States v. Truong, 629 F.2d 908 (4th Cir. 1980); United States v. Dedeyan, 584 F.2d 36 (4th Cir. 1978).

[30] 445 F. Supp. 2d 602 (E.D. Va. 2006).

[31] Baruch Weiss, *Prosecuting WikiLeaks? Good Luck*, WASH. POST, Dec. 5, 2010, at B2.

[32] *See* JENNIFER K. ELSEA, CONG. RESEARCH SERV., R41404, CRIMINAL PROHIBITIONS ON THE PUBLICATION OF CLASSIFIED DEFENSE INFORMATION 16 (2010); William H. Freivogel, *Publishing National Security Secrets: The Case for "Benign Indeterminancy"*, 3 J. NAT'L

so. For example, during World War II the *Chicago Tribune* published an article disclosing details about the Japanese naval fleet. The article revealed "the United States had broken Japanese naval codes," which was not only a "devastating breach of security," but also "threatened to extend the war indefinitely and cost the lives of thousands of American servicemen."[33] In response, the Department of Justice convened a federal grand jury to consider potential violations of the Espionage Act. However, in the end "the government balked at providing jurors with yet more highly secret information that would be necessary to demonstrate the damage done," thereby ending the potential for any criminal prosecution.[34]

Another more recent example arose when the *New York Times* published an article revealing that the National Security Agency was conducting a warrantless electronic surveillance program.[35] That article exposed what the Bush Administration considered an important national security program and Attorney General Alberto Gonzales stated publicly that criminal prosecutions under the Espionage Act were "a possibility."[36] However, again, the government eventually decided against pursuing any prosecutions.

The only case in which the government actually brought an action under the Espionage Act against a media organization was *New York Times v. United States*[37] (commonly known as *Pentagon Papers*). *Pentagon Papers* came about when a government employee named Daniel Ellsberg leaked a classified historical study of the United States' Vietnam policy to the *New York Times* and the *Washington Post*. Because Ellsberg leaked this information while the United States was still at war in Vietnam, the government claimed that the study's publication "would pose a 'grave and immediate danger to the security of the United States.'"[38] As such, the government sought an injunction against any publication of the study's contents.[39]

Beyond any inherent danger in publishing the study, the government also claimed that an injunction was justified because any such publication would be

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SECURITY L. & POL'Y 95, 96 (2009); Geoffrey R. Stone, *WikiLeaks, the Proposed SHIELD Act, and the First Amendment*, 5 J. NAT'L SECURITY L. & POL'Y 105, 113 (2011).

[33] Gabriel Schoenfeld, *Has the New York Times Violated the Espionage Act?*, COMMENTARY (Mar. 2006), *available at* http://www.commentarymagazine.com/article/has-the-%e2%80%9cnew-york-times%e2%80%9d-violated-the-espionage-act/.

[34] *Id.*

[35] James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

[36] Adam Liptak, *Gonzales Says Prosecutions of Journalists Are Possible*, N.Y. TIMES, May 22, 2006, at A1.

[37] 403 U.S. 713 (1971) (per curiam).

[38] Brief for Petitioner at 7, N.Y. Times v. United States, 403 U.S. 713 (1971) (Nos. 71-1873, 71-1885), 1971 WL 167581, at *7.

[39] *Id.* at 3.

a crime.[40] As Attorney General John Mitchell explained in his letter to the *New York Times*, the documents "contain information relating to the national defense of the United States and bear a top secret classification. As such, publication of this information is directly prohibited by the provisions of the espionage law, United States Code, Section 793."[41] Even the *New York Times*' own lawyers told the publisher "it would be a criminal offense to publish any of the [classified] material" and "advised the *Times* to return the documents and cancel the project."[42]

While the Supreme Court was only asked to decide whether to enjoin the newspapers from publishing the classified study, several justices discussed the potential for criminal sanctions as well. For example, Justice Stewart concluded that "[u]ndoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases."[43] Similarly, Justice Marshall found that "[a]t least one of the many statutes in this area seems relevant to these cases."[44]

Justice White's concurring opinion also examined several sections of the Espionage Act. He first noted that "[t]he Criminal Code contains numerous provisions potentially relevant to these cases."[45] He then stated the more forceful conclusion that while "the Government mistakenly chose to proceed by injunction . . . 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."[46] This opinion was not only joined by Justice Stewart, but Chief Justice Burger also noted in his dissenting opinion that "I am in general agreement with much of what Mr. Justice White has expressed with respect to penal sanctions."[47]

Not all of the opinions suggested that the Espionage Act could be used against the press. Both Justices Douglas and Black found that the Espionage Act was not only inapplicable under the facts as presented in the record, but also that any statute criminalizing the actions at issue would be unconstitution-

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[40] United States v. N.Y. Times Co., 328 F. Supp. 324, 327 (S.D.N.Y. 1971) ("The Government has asserted a statutory authority for the injunction, namely 18 U.S.C. § 793"); Brief for Respondents, N.Y. Times v. United States, 403 U.S. 713 (1971) (No. 71-1885), 1971 WL 167582, at *11 ("When the Government filed suit against the Times less than two weeks ago, it relied principally on 18 U.S.C. § 793(d). By the time it filed suit against the Post a few days later, it had shifted reliance to § 793(e).").

[41] STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 1283 (5th ed. 2011).

[42] *Id.* at 1282.

[43] *N.Y. Times*, 403 U.S. at 730 (Stewart, J., concurring).

[44] *Id.* at 745 (Marshall, J., concurring).

[45] *Id.* at 735 (White, J., concurring).

[46] *Id.* at 737 (White, J., concurring).

[47] *Id.* at 752 (Burger, J., dissenting).

al.[48] For their part, Justices Brennan,[49] Harlan,[50] and Blackmun[51] refrained from discussing whether the Espionage Act could be used to impose criminal sanctions against the press. However, this still leaves a majority of the Court that was open to allowing the Espionage Act to be used against members of the media who publish classified information.

III. SECTIONS OF THE ESPIONAGE ACT APPLICABLE TO PUBLISHING

As discussed in Part II, the Espionage Act has traditionally been used to prosecute government employees who leak classified information to people outside the government. Then, in *United States v. Rosen,* the government decided to go beyond prosecuting government employees who leak information and prosecute those non-government employees to whom information was leaked and who subsequently passed that information along to a third party. In *Rosen*, the defendants were indicted under 18 U.S.C. § 793(e).[52]

Section 793(e) states in pertinent part that "[w]hoever having unauthorized . . . control over any document . . . relating to the national defense . . . willfully communicates . . . the same to any person not entitled to receive it . . . [s]hall be fined under this title or imprisoned not more than ten years, or both."[53] Under this section, the prohibited action is the communication of classified information. However, it is unclear whether WikiLeaks, in putting classified documents on its website, actually "communicated" anything within the meaning of § 793(e).

In *Pentagon Papers* the government originally argued that § 793(e) may be used against members of the press when they publish classified information.[54] Judge Gurfein, the district court judge who initially heard the case, summarily rejected that claim. As he explained, "the internal evidence of the language of

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[48] *Id.* at 720 (Douglas, J., concurring) ("[The First Amendment] leaves, in my view, no room for governmental restraint on the press. There is, moreover, no statute barring the publication by the press of material which the Times and the Post seek to use."); *id.* at 715–18 (Black, J., concurring) ("I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment . . . [T]he representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law [abridging the freedom of the press].").

[49] *See id.* at 724–27 (Brennan, J., concurring).

[50] *See id.* at 752–59 (Harlan, J., dissenting).

[51] *See id.* at 759–63 (Blackmun, J., dissenting).

[52] United States v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2006). As was noted earlier, the charges were dropped before trial. Weiss, *supra* note 31. However, Judge Ellis' opinion still stands for the proposition that non-government employees to whom classified information was leaked may be prosecuted using § 793(e) if they subsequently communicate that information to a third party.

[53] 18 U.S.C. § 793(e) (2012).

[54] *See* Brief for the Respondents, *supra* note 40.

the various sections indicated that newspapers were not intended by Congress to come within the purview of Section 793."[55]

Judge Gurfein's main rationale was that the term "publication" did not appear in § 793(e). While the government contended that the term "communicates" includes the act of publication, Judge Gurfein pointed out that §§ 794, 797 and 798 distinguish between "communication" and "publication." Furthermore, when the original § 793 was being debated there was a proposed provision that would have "prohibit[ed] the publishing or communicating of . . . information relating to the national defense."[56] Congress voted down that proposal and decided instead to include only "communicating," thus excluding the term "publication."[57] Therefore, Judge Gurfein concluded that a "careful reading of the section would indicate that [§ 793(e)] is truly an espionage section where what is prohibited is the secret . . . communication to a person not entitled to receive it" and as such does not cover the act of publishing by a media organization.[58]

When the Supreme Court took up the case, several Justices discussed § 793(e)'s potential applicability to members of the press. Justice Douglas, with Justice Black joining the opinion, found that "no statute bar[s] the publication by the press of the material which the *Times* and the *Post* seek to use," specifically citing § 793(e).[59] In reviewing both the statutory language and the legislative history, Justice Douglas found that "Judge Gurfein's holding in the *Times* case that this Act does not apply to this case was therefore preeminently sound."[60]

The only other Justices to discuss § 793(e) were Justices Marshall and White, and their analyses were far less definitive on the matter. Justice Marshall simply noted that "Judge Gurfein's view of the statute is not, however, the only plausible construction that could be given" and cited Justice White's opinion.[61] For his part, Justice White discussed the applicability of § 793(e), but ultimately explained that "[t]he District Court ruled that 'communication' did not reach publication by a newspaper. . . . I intimate no views on the correctness of that conclusion."[62] Justice White instead focused on §§ 794, 797, and 798, all of which make specific reference to "publishing."[63]

Besides the indecisive dicta of Justices Marshall and White, there has not been a single judicial pronouncement contradicting Judge Gurfein's conclusion that the act of publishing is not included within the term "communicates" as

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[55] United States v. N.Y. Times Co., 328 F. Supp. 324, 329 (S.D.N.Y. 1971).

[56] *Id.* at 329.

[57] *Id.* at 328–29.

[58] *Id.* at 328.

[59] N.Y. Times v. United States, 403 U.S. 713, 720 (Douglas, J., concurring).

[60] *Id.* at 722.

[61] *Id.* at 745 (Marshall, J., concurring).

[62] *Id.* at 738 n.9 (White, J., concurring).

[63] *Id.*

used in § 793(e). Furthermore, commentators who have undertaken an in-depth review of the Espionage Act's various sections are in agreement with Judge Gurfein's conclusions.[64] Therefore, any prosecution of WikiLeaks for publishing the classified documents likely would have to be done using sections of the Espionage Act that make specific reference to the act of publishing.

Sections 794, 797 and 798 all explicitly reference "publication." Given the type of information WikiLeaks published, the two sections that are potentially applicable to Assange are §§ 794(b) and 798(a).[65] Section 794(b) provides that:

> Whoever, in time of war, with intent that the same shall be communicated to the enemy . . . publishes . . . any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces . . . of the United States, or [other specific types of information relating to the public defense], which might be useful to the enemy, shall be punished by death or imprisonment for any term of years or for life.[66]

The information published by WikiLeaks seems to fall at least within "information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces" during "time of war."[67] To secure a conviction the government would still have to prove that the information "might be useful to the enemy" and that Assange, in deciding to publish the information, had the "intent that the same shall be communicated to the enemy."[68] Putting aside these questions of fact, § 794(b) on its face could be used to prosecute Assange.

Alternatively, § 798(a) provides that:

> Whoever knowingly and willfully . . . publishes . . . in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information— . . .
> (3) concerning the communication intelligence activities of the United States or any foreign government; or

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[64] *See* Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 395–96 (1986) ("The legislative history of [§ 793(d)–(e)] indicates that Congress did not understand them to criminalize conduct engaged in for publication purposes."); Edgar & Schmidt, *supra* note 25, at 998–1058 (providing a detailed explanation of why the text and legislative history of §793(e) suggest that it was not meant to criminalize the act of publication).

[65] While 18 U.S.C. § 797 prohibits the publication of certain materials, it only applies to visual representations of those military installations or pieces of equipment that the President has deemed "vital" under 18 U.S.C. § 795. 18 U.S.C. § 797. Therefore, based on the facts currently in the public record, § 797 does not cover any of the documents published by WikiLeaks. *Id.*

[66] *Id.* § 794(b).

[67] *Id.*

[68] *Id.*

> (4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—
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> Shall be fined under this title or imprisoned not more than ten years, or both.[69]

As was the case with § 794(b), the information published by WikiLeaks seems to fall at least within "classified information . . . obtained by the process of communication intelligence . . . ."[70] Again, to secure a conviction the government would have to prove additional facts, mainly that Assange "knowingly and willfully" caused the materials to be published in a "manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States . . . ."[71] Aside from proving these additional facts, the statute on its face appears to apply to Assange's actions.

The discussion above suggests that, taken at face value, certain sections of the Espionage Act could be used to prosecute Assange for his role in publishing classified documents. Even though the language of § 793(e) ("communication") likely would not be interpreted to cover the act of publishing, §§ 794(b) and 798(a) specifically use the term "publishes." Therefore, while the nature of the published information and the scienter requirements of §§ 794(b) and 798(a) would require proof at trial, the language of these sections would otherwise cover Assange's actions.

IV. First Amendment Safeguards for Individuals and the Press

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[72] In the case of Assange, the question is what level of protection do these words afford him? An analysis of Supreme Court precedent suggests that Assange is entitled to the same First Amendment protections as those who are part of the mainstream press. There are two reasons for this.

First, the general trend in First Amendment jurisprudence is to provide all persons the same protections regardless of whether they are members of the press. As Chief Justice Burger explained in *First National Bank of Boston v. Bellotti,*[73] "although certainty on this point is not possible, the history of the [Free Press] Clause does not suggest that the authors contemplated a 'special'

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[69] *Id.* § 798(a).

[70] *Id.*

[71] *Id.*

[72] U.S. Const. amend. I.

[73] First National Bank of Boston v. Bellotti, 435 U.S. 765, 798 (1978) (Burger, C.J., concurring).

or 'institutional' privilege" for the press.[74] In keeping with this reading of history, the Supreme Court has long since established that members of the press are subject to the same laws as everyone else:

> The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and nondiscriminatory taxes on his business.[75]

There have been some who take the opposing view. For example, Justice Stewart famously argued that the Free Press Clause requires increased protections for the press as an institution.[76] According to this "institutional press theory," such protections were envisioned by the Framers because of the pivotal role the press plays in a republic:

> In setting up the three branches of the Federal Government, the Founders deliberately created an internally competitive system. . . . The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches. . . . The relevant metaphor . . . [is that] of the Fourth Estate.[77]

However, even if the courts were to adopt certain enhanced protections for the press, there is a second reason why Assange would be afforded those same protections: Assange qualifies as a member of the press. From a practical standpoint, it is difficult to distinguish between WikiLeaks and traditional media organizations. Alternative online news sources have increasingly been accepted as legitimate news gathering organizations.[78] WikiLeaks believes that it is part of this trend, as it employs "journalists" and publishes stories that "bring im-

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[74] *Id.* (citing David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 88–99 (1975)).

[75] Assoc. Press v. NLRB, 301 U.S. 103, 132–33 (1937); *see also* Branzburg v. Hayes, 408 U.S. 665, 682–83 (1972) ("It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.").

[76] Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633–34 (1975) ("If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy. . . . By including both [free speech and free press] guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two.").

[77] *Id.* at 634.

[78] For example, some bloggers receive press passes to participate in presidential news conferences. *See* Peter Baker, *How a Blogger's News Conference Query Came About*, N.Y. TIMES (June 26, 2009), http://www.nytimes.com/2009/06/26/us/politics/26baker.html?_r=0.

portant news and information to the public."[79] Therefore, as the executive editor of the *New York Times* explained, "[i]t's very hard to conceive of a prosecution of Julian Assange that wouldn't stretch the law in a way that would be applicable to us . . . American journalists . . . should feel a sense of alarm at any legal action that tends to punish Assange for doing essentially what journalists do."[80]

More importantly, the Supreme Court has shown little willingness to distinguish between different members of the media when describing the protections required by the First Amendment. Put simply, "the First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms."[81] For this reason the Court has refused to distinguish between those who disseminate news as individuals and those who are part of established media organizations.[82] Therefore, it is of little importance that Assange acted alone or as part of a small and somewhat unconventional news organization.

Similarly, the Court has refused to focus on the medium through which the information is disseminated. For example, the Court has applied the same First Amendment protections to radio commentators as it has print journalists, making it clear that information need not be "published" at all, let alone in paper form, to qualify for the protections guaranteed the press under the First Amendment.[83] Instead, in addressing the potential use of criminal sanctions against the press, the Court has focused entirely on the nature of the disseminated material and the circumstances surrounding its dissemination.[84] Therefore, the remain-

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[79] WIKILEAKS, *supra* note 7.

[80] Sam Gustin, *Times Editor Alarmed by Prospect of WikiLeaks Prosecution*, WIRED (Feb. 3, 2011, 10:24 PM), http://www.wired.com/threatlevel/2011/02/wikileaks-keller/.

[81] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring); *see also id.* at 801 ("The very task of including some entities within the 'institutional press' while excluding others . . . is reminiscent of the abhorred licensing system . . . the First Amendment was intended to ban.").

[82] *See* Lovell v. City of Griffin, 303 U.S. 444, 450–52 (1938) (finding that freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."); *see also* Branzburg v. Hayes, 408 U.S. 665, 705 (1972) ("The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public . . . .").

[83] *Compare* Bartnicki v. Vopper, 532 U.S. 514 (2001) (holding that the imposition of sanctions violated the First Amendment as applied to a radio commentator), *with* Fla. Star v. B.J.F., 491 U.S. 524 (1989) (holding that the imposition of sanctions violated the First Amendment as applied to a newspaper).

[84] *See Bartnicki*, 532 U.S. at 528 ("[In *Pentagon Papers*], the attention of every Member of this Court was focused on the character of the stolen documents' contents and the conse-

der of this article will operate under the assumption that Assange is entitled to the same First Amendment protections that have been afforded other members of the press in prior Supreme Court cases.

V. PROHIBITING THE PUBLICATION OF INFORMATION

The Supreme Court has at various points considered whether the First Amendment permits the government to sanction the press for the publication of truthful information. For the purposes of examining the actions of Assange, the most instructive cases are *Florida Star v. B.J.F.*[85] and *Bartnicki v. Vopper.*[86] In both cases a statute prohibited media outlets from disseminating certain categories of information. While the Court found that those statutes violated the First Amendment, the Court's analysis left open the question of whether the government could proscribe the publication of certain information under a different set of circumstances.

In *Florida Star,* a newspaper obtained the name of a rape victim from a police report which an officer had left in the police station's press room.[87] The paper subsequently published that name in violation of a Florida statute that made it unlawful to publish the name of a sexual offense victim.[88] The rape victim brought suit against the newspaper and was awarded compensatory and punitive damages.[89]

On appeal the Supreme Court held that the statute violated the First Amendment as applied to *The Florida Star*, emphasizing that the newspaper had obtained the information lawfully and the topic was a matter of public importance.[90] However, the Court also went out of its way to note that "[w]e do not hold that truthful publication is automatically constitutionally protected."[91] As the Court explained, "[o]ur cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily."[92]

About a decade later the Court granted certiorari in *Bartnicki*. In that case,

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quences of public disclosure"); Dennis v. United States, 341 U.S. 494, 544 (1951) (Frankfurter, J., concurring) ("We have frequently indicated that the interest in protecting speech depends on the circumstances of the occasion."); Schenck v. United States, 249 U.S. 47, 52 (1919) (holding what speech is protected under the First Amendment "depends on the circumstances in which it was done").

[85] 491 U.S. 524, 524 (1989)

[86] *Bartnicki*, 532 U.S. at 514.

[87] *Fla. Star*, 491 U.S. at 526–27.

[88] Fla. Stat. § 794.03 (1987) (providing for civil damages against those who "print, publish, or broadcast . . . in any instrument of mass communication the name, address, or other identifying fact or information of the victim of a sexual offense"); *Fla. Star*, 491 U.S. at 526.

[89] *Fla. Star*, 491 U.S. at 529.

[90] *Id.* at 536–37.

[91] *Id.* at 541.

[92] *Id.* at 532 (citing Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931) (hypothe-

someone illegally intercepted and recorded a phone conversation of a union representative participating in contentious collective-bargaining negotiations.[93] That person then delivered the recording to a radio station and a public affairs radio commentator played it during his program.[94] The radio's playing the recording violated federal law prohibiting the intentional disclosure of illegally intercepted communications which the disclosing party knows or should know were illegally obtained.[95]

However, once again the Court found that the statute violated the First Amendment as it applied to the radio talk show host.[96] In adopting the *Florida Star* analysis, the Court emphasized that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order."[97]

The question presented in *Bartnicki* is essentially the same question that must be asked in the case of Assange and WikiLeaks—where a member of the media has received information from a source "who obtained it unlawfully, may the government punish the ensuing dissemination of that information?"[98] While the Court found that punishment of the radio commentator was unconstitutional, it again cited *Florida Star* in reiterating that not every such publication is automatically constitutionally protected.[99] Therefore, it is important to go through the *Florida Star* and *Bartnicki* analysis to see if Assange's actions are sufficiently distinguishable to allow for criminal prosecution. The Court used the same two-prong analysis in both *Florida Star* and *Bartnicki*. Each is addressed in turn.

A. *Prong One of the* Florida Star *and* Bartnicki *Test.*

The first prong of the *Florida Star* and *Bartnicki* analysis asks whether the person or organization "lawfully obtained truthful information about a matter of public significance."[100] There is no dispute that the information released by WikiLeaks was "truthful" as it consisted solely of government documents. Fur-

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sizing the "publication of the sailing dates of transports or the number and location of troops")).

[93] Bartnicki v. Vopper, 532 U.S. 514, 518–19 (2001).

[94] *Id.*

[95] 18 U.S.C. § 2511(1)(c) (2012) (providing criminal sanctions against whomever "intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection").

[96] *Bartnicki*, 532 U.S. at 541.

[97] *Id.* at 528 (quoting Smith v. Daily Mail Pub'l Co., 443 U.S. 97, 103 (1979)).

[98] *Id.* at 515

[99] *Id.* at 529 (quoting Fla. Star v. B.J.F., 491 U.S. 524, 532-33 (1989)).

[100] *Fla. Star*, 491 U.S. at 536; *see also Bartnicki*, 532 U.S. at 528.

thermore, it is difficult to argue that the information published by WikiLeaks did not shed light on "a matter of public significance" in light of the broad construction the Court has given this phrase.

For example, in *Florida Star* the Court found that publishing a rape victim's name constituted a matter of public significance because "the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities."[101] Similarly in *Bartnicki*, the Court found the recording of a personal conversation to involve a matter of public significance because "[i]f the statements about the labor negotiations had been made in a public arena—during a bargaining session, for example—they would have been newsworthy."[102] With these examples in mind it is unlikely that a court could find the information published by WikiLeaks to be something other than "a matter of public significance." WikiLeaks published documents that shed light on the United States' conduct of the wars in Iraq and Afghanistan, as well as the conduct of United States foreign policy more generally. Even if every individual piece of information was not necessarily of public significance, surely the documents still "generally . . . involve a matter of paramount public import" as described in *Florida Star*.[103]

The last issue is whether WikiLeaks can be said to have "lawfully obtained" the classified materials. At first glance, the delivery of classified documents to WikiLeaks' e-mail inbox seems quite analogous to the facts of *Bartnicki* where an illegally obtained tape recording was placed in a defendant's mail box. Therefore, as the *Bartnicki* Court found the tape recording to have been lawfully obtained in that case, so too should the classified documents be viewed as having been lawfully obtained by WikiLeaks.

One potential wrinkle in this reasoning is the fact that the Espionage Act makes it unlawful to knowingly receive or participate in the leaking of certain classified documents. For example, § 793(g) lays out sanctions for when "two or more persons conspire to violate any of the foregoing provisions of this section."[104] Similarly, § 793(c) lays out sanctions for "[w]hoever . . . receives or obtains . . . any document . . . knowing or having reason to believe . . . that it has been or will be obtained . . . by any person contrary to the provisions of this chapter."[105] These provisions create a situation where, if Assange or other WikiLeaks employees communicated with Manning before the classified docu-

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[101] *Fla. Star*, 491 U.S. at 536–37.

[102] *Bartnicki*, 532 U.S. at 525; *see also* Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 829 (1978) (holding that an article identifying judges whose conduct is being investigated involves a matter of public significance); Okla. Pub'l v. Okla. Cnty Dist. Ct., 430 U.S. 308, 308 (1977) (holding that an article identifying a juvenile alleged to have committed murder involves a matter of public significance).

[103] *Fla. Star*, 491 U.S. at 537.

[104] 18 U.S.C. § 793(g) (2012).

[105] *Id.* § 793(c).

ments were leaked, a court could view the documents as "unlawfully obtained" based on a violation of § 793(c) or (g).[106]

This has serious consequences for the vast majority of national security journalists who regularly encourage government sources to unveil classified information. Just like with WikiLeaks, the information journalists seek is almost always "truthful" and concerning "a matter of public significance." However, if asking for or encouraging the leaking of information is unlawful under § 793(c) or (g), and would therefore make the leaked information "unlawfully obtained," then any subsequent publication of that classified information would not be protected under the *Florida Star* and *Bartnicki* analysis.

However, WikiLeaks' system of obtaining information may offer some protection. WikiLeaks claims its employees "accept (but do not solicit) anonymous sources of information" through the use of an anonymous "electronic drop box" system.[107] If this is true, there would be no § 793(g) violation because no one at WikiLeaks conspired with Manning. There would also be no clear § 793(c) violation—how is a WikiLeaks employee to know upon opening an anonymous attachment that the information inside was originally collected in violation of the Espionage Act?[108] Therefore, the actions of WikiLeaks' employees likely satisfy the first prong of the *Florida Star* and *Bartnicki* analysis even when taking into account § 793(c) and (g).

B. *Prong Two of the* Florida Star *and* Bartnicki *Test*

As the information published by WikiLeaks appears to be truthful, regarding

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[106] Section 793(e) of the Espionage Act also provides sanctions for anyone who "willfully retains" certain types of national security information and "fails to deliver it to the officer or employee of the United States entitled to receive it." 18 U.S.C. § 793(e). However, the fact that willful retention of certain information is unlawful does not make the initial receipt of that information unlawful as well—obtaining information is a different act than retaining it. This does not mean that § 793(e), if constitutional, is not highly problematic for journalists. *See* Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL'Y REV. 219, 227 (2007). It simply means that § 793(e) does not affect whether the publishing of certain national security information is protected under the *Florida Star* and *Bartnicki* analysis.

[107] WikiLeaks' website insists that "[l]ike other media outlets conducting investigative journalism, we accept (but do not solicit) anonymous sources of information. . . . We do not ask for material, but we make sure that if material is going to be submitted it is done securely and that the source is well protected." WIKILEAKS, *supra* note 7.

[108] Beyond the scienter requirements of § 793(c), there is also the question of whether the Constitution protects WikiLeaks' unsolicited receipt of information from an anonymous party. The Supreme Court has held that receiving information is part of "routine news gathering" and presumptively lawful. Smith v. Daily Mail Publ'g Co., 433 U.S. 97, 103 (1979). Furthermore, the holding in *Bartnicki* suggests that the receipt of information is not unlawful simply because the receiver has reason to know that the information was originally obtained unlawfully. *See* ELSEA, *supra* note 32, at 16.

a matter of public significance and lawfully obtained, one moves to the second prong of the *Florida Star* and *Bartnicki* analysis. The second prong asks whether the statute at issue is "narrowly tailored to a state interest of the highest order."[109] In *Florida Star* and *Bartnicki* the Court recognized two important interests served by sanctioning the publication of certain information and the ability of such sanctions to be narrowly tailored to those interests.

The first interest the Court has recognized is removing part of the incentive for anyone to obtain information illegally.[110] This interest only exists where a third party illegally obtains information and intends to give it to a member of the media for circulation.[111] This was the case in *Bartnicki*, where a third party illegally recorded a private conversation and subsequently delivered that recording to a radio station.[112] In *Bartnicki*, the Government claimed that third parties would have less incentive to illegally collect information if they knew media outlets would be unlikely to publish that information for fear of prosecution.[113]

While the Court in *Bartnicki* found that deterring third parties from illegally obtaining information is an important interest, it nevertheless decided that prohibiting publication of stolen information is not a "narrowly tailored" means of achieving that interest.[114] The Court explained that generally it is "remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party."[115] While the Court admits "there are some rare occasions in which a law suppressing one party's speech may be justified by an interest in deterring criminal conduct of another . . . this is not such a case."[116] This is because "[i]n cases relying on that rationale . . . the speech at issue is considered of minimal value," for example, child pornography.[117] Instead, "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."[118]

The same analysis would apply to Assange. The information WikiLeaks pub-

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[109] Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989).

[110] Bartnicki v. Vopper, 532 U.S. 514, 529 (2001).

[111] *Id.*

[112] *Id.* at 517–18.

[113] Brief for Petitioner at *14, Bartnicki v. Vopper, 532 U.S. 514 (2001) (Nos. 99-1687, 99-1728), 2000 WL 1344079, at *14 ("[T]he ban on use and disclosure reinforces the underlying ban on illegal interception. Without barring outlets for taking advantage of illegally intercepted communications, the incentive to engage in them would be significant.")

[114] *Bartnicki*, 532 U.S. at 548–49

[115] *Id.* at 529–30.

[116] *Id.* at 530 (internal citations omitted).

[117] *Id.* at 530 n. 13 (citing New York v. Ferber, 458 U.S. 747, 762 (1982) ("[T]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest if not *de minimus*.")).

[118] *Id.* at 529.

lished shed light on United States foreign policy and the wars in Iraq and Afghanistan. As such it cannot be considered of "minimal" value under the First Amendment.[119] Furthermore, the Government has shown that it is perfectly capable of prosecuting those who leak classified information.[120] In the WikiLeaks case, Manning is currently in a military prison, has pled guilty to several charges, and still faces such other charges as "aiding the enemy" which carries the potential for life in prison or even a death sentence.[121] Therefore, it is unclear to what extent, if any, the possible prosecution of Assange would have served as a further deterrent for Manning.

The second interest recognized by the Court as a potential justification for prohibiting the publication of certain types of information is minimizing the harm caused by the disclosure of that information.[122] The Court in both *Florida Star* and *Bartnicki* found this interest to be not only "important" but also "considerably stronger" than the other identified interest of deterring conduct of a third party.[123] In determining whether prohibiting publication is a narrowly tailored means of promoting that interest, the Court in *Florida Star* and *Bartnicki* looked at three different factors—whether the statute was underinclusive, overinclusive or the least restrictive alternative.[124]

Facial underinclusiveness "raises serious doubts about whether [the statute is serving] the significant interests . . . ."[125] However, previous successful underinclusiveness challenges to statutes restricting freedom of the press have involved statutes that either "singled out one segment of the news media or press for adverse treatment"[126] or "singled out the press for adverse treatment when compared to other similarly situated enterprises."[127] The Espionage Act does neither of these things. Sections 794(b) and 798(a) do not only prohibit the

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[119] *See, e.g.*, N.Y. Times v. United States, 403 U.S. 715, 717 (1971) (Black, J., concurring) (discussing how war and international relations are matters "of vital importance to the people of this country").

[120] Scott Shane, *Obama Takes a Hard Line Against Leaks to Press*, N.Y. TIMES, June 12, 2010, at A1.

[121] Ed Pilkington, *Bradley Manning may face death penalty*, GUARDIAN (Mar. 2, 2011), http://www.guardian.co.uk/world/2011/mar/03/bradley-manning-may-face-death-penalty.

[122] *Bartnicki*, 532 U.S. at 529.

[123] *Id.* at 533; *see also* Fla. Star v. B.J.F., 491 U.S. 524, 537 (1989) (describing the government's interest in avoiding the harm caused by the publication of a rape victim's name as "highly significant").

[124] *Fla. Star*, 491 U.S. at 546–50; *see also Bartnicki*, 532 U.S. at 529.

[125] *Fla. Star*, 491 U.S. at 540.

[126] *Id.* at 549 (White, J., dissenting) (citing Smith v. Daily Mail, Publ'g Co., 433 U.S. 97, 104–05 (finding a statute underinclusive that restricted newspapers but not radio or television)).

[127] *Id.* (White, J., dissenting) (citing Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 578 (1983) (finding a statute unconstitutional that imposed a "special tax" on newspapers through taxation of paper and ink products).

publishing of certain information, but also the communicating of that information more generally.[128] As the term "communicates" would apply to all other persons and organizations, news organizations who publish information are in no way singled out for adverse treatment. Therefore, any attack against the Espionage Act for being underinclusive is likely to fail.

Overinclusiveness, or overbreadth, "invalidate[s] a statute when it 'infringe[s] on expression to a degree greater than justified by the legitimate governmental need' which is the valid purpose of the statute."[129] In *Florida Star,* the Court applied this doctrine to a statute which prohibited certain publications in order to protect an individual's right to privacy. In explaining the statute's overinclusive effect the Court held that the "problem with Florida's imposition of liability for publication is the broad sweep of the negligence *per se* standard applied. . . ."[130] As the Court explained, the First Amendment requires "case-by-case findings" that show both some level of scienter in disclosing the information and that the information disclosed was harmful to the asserted government interest.[131]

Under this standard for overinclusiveness, §§ 794(b) and 798(a) are not likely to be found overinclusive. First, §§ 794(b) and 798(a) both have scienter requirements. Section 794(b) requires "intent" that the published information be communicated to an enemy of the United States during wartime.[132] Similarly, § 798(a) requires that someone "knowingly and willingly" publish certain types of communication intelligence in a manner that harms United States interests.[133] These requirements are a far cry from the negligence per se standard struck down in *Florida Star.* Second, §§ 794(b) and 798(a) cover only a subset of information the publishing of which would be harmful to United States interests. Section 794(b) applies only to certain types of information relating to na-

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[128] 18 U.S.C. § 794(b) (2012) (providing sanctions for "[w]hoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit" certain types of specified information); *id.* § 798(a) (providing sanctions for "[w]hoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States" certain types of specified information).

[129] United States v. Morison, 844 F.2d 1057, 1070 (1998) (quoting Martin H. Redish, *The Warren Court, The Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031, 1034 (1984)).

[130] *Fla. Star*, 491 U.S. at 539.

[131] *Id.* at 525 ("Moreover, the negligence *per se* standard adopted by the courts below does not permit case-by-case findings that the disclosure was one a reasonable person would find offensive and does not have a scienter requirement of any kind.").

[132] 18 U.S.C. § 794(b).

[133] *Id.* § 798(a).

tional defense that "might be useful to the enemy" during a time of war.[134] Section 798(a) similarly applies only to certain types of "communication intelligence" the publishing of which is "prejudicial to the safety or interest of the United States."[135] These required findings of harm to United States interests, when combined with the scienter standards, would seem to satisfy the "case-by-case finding" requirement of *Florida Star*.[136]

Since §§ 794(b) and 798(a) are likely neither underinclusive nor overinclusive, the last issue is whether those statutes are the least restrictive means of protecting classified information. Where the government's interest is the protection of its closely held information, any statute barring the press from publishing that information is difficult to justify. The Court has explained that where "information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts."[137] For example, in *Florida Star* the information at issue was given to the media by a member of the police force in violation of the police force's internal regulations. In reflecting on those facts the Court stated that "[w]here government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech."[138]

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[134] *Id.* § 794(b).

[135] *Id.* § 794(a).

[136] Furthermore, courts looking at § 793(d) and (e), which use similar language to §§ 794(b) and 798(a), have found that they need not succumb to a challenge of overbreadth:

> The district court's limiting instructions properly confine prosecution under [§ 793(d) and (e)] to disclosures of classified information potentially damaging to the military security of the United States. In this way the requirements of the . . . overbreadth doctrine[ ] restrain the possibility that the broad language of this statute would ever be used as a means of punishing mere criticism of incompetence and corruption in the government.

United States v. Morison, 844 F.2d 1057, 1084 (1998) (Wilkinson, J., concurring); *see also id.* at 1086 (Philips, J., concurring) ("I agree that the limiting instruction which required proof that the information leaked was either 'potentially damaging to the United States or might be useful to an enemy' sufficiently remedied [the statute's overbreadth]."); United States v. Rosen, 445 F. Supp. 2d 602, 643 (E.D.Va. 2006) (holding that § 793(d) and (e) are not overbroad because they only apply to information that "relates to the nation's military activities, intelligence gathering or foreign policy," was "closely held by the government," and "is such that its disclosure could cause injury to the nation's security").

[137] *Fla. Star*, 491 U.S. at 534 ("[M]uch of the risk [from disclosure of sensitive information regarding judicial disciplinary proceedings] can be eliminated through careful internal procedures" (citing Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 845 (1978); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975) ("[I]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure")).

[138] *Fla. Star*, 491 U.S. at 538.

Similar logic applies to the WikiLeaks publications. Manning (a government employee) had access to many of the documents he turned over to WikiLeaks because of a security "loophole."[139] The existence of a security loophole allowing a low-ranking member of the military to have access to such sensitive materials seems like a prime example where "the government had, but failed to utilize, far more limited means of guarding against dissemination."[140] The only distinction from the *Florida Star* scenario is that Manning did not turn over an individual's private information, but rather sensitive national security secrets. Perhaps national security is such an overwhelmingly important interest that the government is given more deference in the method it chooses to protect that interest.

VI. THE NATIONAL SECURITY CONTEXT

The First Amendment protects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."[141] That principle is not absolute though, and where "there are important interests to be considered on both sides of the constitutional calculus" those interests must be "balanced" against each other.[142] For example, in *Bartnicki*, the Court stated that in certain instances "privacy concerns give way when balanced against the interest in publishing matters of public importance."[143] Beyond individuals' privacy interests, the Court has found that the First Amendment outweighs various public interests as well.[144] However, as none of those interests are considered as compelling as national security, the Espionage Act could present an instance where the scales tip in the government's favor even when balanced against such a "profound national commitment"[145] as freedom of the press.

The Court has long recognized that "no governmental interest is more com-

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[139] *See* Shanker, *supra* note 18.

[140] *Fla. Star*, 491 U.S. at 538.

[141] Bartnicki v. Vopper, 532 U.S. 514, 534 (2001) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)); *see also* Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

[142] *Bartnicki*, 532 U.S. at 533–34.

[143] *Id.*

[144] *See, e.g.*, Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829 (1978) (holding that the First Amendment outweighs the state's interest in the confidentiality of a state judicial review commission); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (holding that the First Amendment outweighs the state's interest in maintaining the professionalism of attorneys); Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (holding that the First Amendment outweighs the state's interest in maintaining the professionalism of licensed pharmacists).

[145] *Bartnicki*, 532 U.S. at 534 (citing *Sullivan*, 376 U.S. at 270).

pelling than the security of the Nation."[146] Specifically in the First Amendment context, the Court recently ruled in *Holder v. Humanitarian Law Project* that Congress' decision to punish speech affecting "national security and foreign relations" is "entitled to deference," even in those cases where the First Amendment requires a heightened level of scrutiny.[147] While that case did not involve freedom of the press, it still shows the Court's willingness to curtail First Amendment protections in the national security context.[148]

The deference given to the political branches in striking the proper balance between liberty and security is clearly not unlimited. Since September 11, 2001 the Court has repeated the oft-cited statement that "[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[149] The Court has also explained that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. . . . A legislative declaration does not preclude inquiry into the question of whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution."[150]

Moreover, there is a strong argument that it is precisely in the areas of national security and foreign affairs that the need for a free press is at its apex. In *Pentagon Papers*, Justice Black explained that "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

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[146] Haig v. Agee, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation.") (citing Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964)); *see also* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724 (2010) ("Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order.").

[147] *Humanitarian Law Project*, 130 S. Ct. at 2727; *see also id.* ("It is vital in this context 'not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.'"(citing Rostker v. Goldberg, 453 U.S. 57, 68 (1981))); Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988) ("Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.").

[148] The Court in *Humanitarian Law Project* upheld a federal statute that made it a crime to "knowingly provid[e] material support or resources to a foreign terrorist organization." *Humanitarian Law Project*, 130 S. Ct. at 2729–30 (citing 18 U.S.C. § 2339B(a)(1)). The Court did so even though the definition of "material support" included certain types of speech, such as "training" or "expert advice or assistance" regarding lawful conduct. *Id.*

[149] Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)).

[150] Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 843–44 (1978); *see also Humanitarian Law Project*, 130 S. Ct. at 2727 ("We do not defer to the Government's reading of the First Amendment, even when [national security and foreign relations] interests are at stake.").

fevers and foreign shot and shell."[151] Justice Stewart elaborated on this idea in words that, with the increased power of the Executive Branch in a post-September 11 world, seem more prescient today than ever:

> [T]he Executive is endowed with enormous power in the two related areas of national defense and international relations . . . largely unchecked by the Legislative and Judicial branches. . . . In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.[152]

But an insistence that the press be free to report on specific topics does not necessarily imply an immunity for publication of specific pieces of information. The Court has explained that "[w]hen 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. . . ."[153] Similarly, the Court has stated that "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number or location of troops."[154] In fact, the Court cited this exact language in *Florida Star* in explaining why "[o]ur cases have carefully eschewed reaching this ultimate question [of whether certain prohibitions on publication may be valid], mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily."[155]

The Court's reference to "the number or location of troops"[156] seems especially applicable to WikiLeaks' situation. For example, WikiLeaks released the names, statements and locations of some Afghan informants along with information relating to their interactions with United States military personnel, some of whom remained in the theatre of war at the time of publication.[157] It is exactly this type of information the publication of which predictably put both Americans and Afghans in a heightened state of danger and that "[n]o one would

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[151] N.Y. Times v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

[152] *Id.* at 727–28 (Stewart, J., concurring); *see also* Edgar & Schmidt, *supra* note 25, at 1078 (describing the media as a "necessary counterweight to the increasing concentration of the power of the government in the hands of the Executive Branch").

[153] Schenck v. United States, 249 U.S. 47, 52 (1919).

[154] Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931).

[155] Fla. Star v. B.J.F., 491 U.S. 524, 532 (1989).

[156] *Near*, 283 U.S. at 716.

[157] *See* Savage, *supra* note 2; Ball, *supra* note 13.

question"[158] the government's authority to protect.

Furthermore, prohibiting a newspaper from publishing such information as the names and locations of Afghan informants likely does not disrupt the balance between freedom of the press and national security for one main reason: the publication of such information does little, if anything, to contribute to the public discourse. As Justice Stewart explained in *Pentagon Papers*, "the basic purpose of the First Amendment" is an "enlightened citizenry," especially in the areas of "national defense and international affairs."[159] However, indiscriminately releasing the names and locations of Afghan informants does not produce a more "enlightened citizenry." Those specific pieces of information could have simply been redacted without depriving the American people of information necessary understand United States foreign policy. For precisely this reason, even many media organizations were "united in condemning" WikiLeaks' actions.[160]

But while the publication of "the number or location of troops"—or in the case of WikiLeaks, the names and locations of Afghan informants—is likely a situation where the government can prohibit publication without violating the First Amendment, most cases are not so clear cut. Often the publication of national security information both contributes to the public discourse while simultaneously threatening national security. For example, what if WikLeaks had published the statements of Afghan informants but redacted their names and locations? The government would surely claim that such a publication gave useful information to America's enemies, especially the Taliban in Afghanistan. At the same time, those statements also contributed to public discourse on United States foreign policy by providing an unvarnished account of the Afghan war. In such a case, how are courts to resolve the competing values of national security and freedom of the press?

The unsatisfying answer is that no one really knows. Some argue that Justice Stewart's concurring opinion in *Pentagon Papers* suggests that the government may prohibit the publication of classified documents on national security grounds only where the published information would create some sort of imminent threat.[161] However, the *Pentagon Papers* decision contained nine concurring opinions, many of which disagreed with Justice Stewart's conclusions. Perhaps more importantly, *Pentagon Papers* did not directly address the issue of when the government may enforce criminal prohibitions on the publication of classified national security information. Instead, the Court was reviewing the government's attempted use of a prior restraint, which receives an especially

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[158] *Near*, 283 U.S. at 716.

[159] N.Y. Times v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

[160] Ball, *supra* note 13.

[161] *See* Stone, *supra* note 32, at 117–18 (citing *N.Y. Times*, 403 U.S. at 730 (Stewart, J., concurring) ("I cannot say that disclosure of any of [the documents] will surely result in direct, immediate, and irreparable damage to our Nation or its people.")).

high level of scrutiny under the First Amendment.[162] Given the lack of precedent directly on point, it remains unclear exactly how the Court would treat a publication that both harmed national security in a way that violated the Espionage Act while simultaneously contributing to the public discourse. Unrestrained by *stare decisis*, courts today have something close to a free hand in deciding the fate of the Espionage Act as it applies to publications, if the issue ever comes before them.

VI. CONCLUSION

Through WikiLeaks, Julian Assange caused thousands of classified documents to be published online, some of which may have put United States interests in an unnecessarily heightened state of danger. Sections 794(b) and 798(a) of the Espionage Act prohibit the "publication" of this type of information. While the government has never prosecuted a member of the press for violations of the Espionage Act, this might be an appropriate case to do so if the government were able to prove certain facts beyond a reasonable doubt. For example, § 794(b) would require the government to prove Assange published information that "might be useful to the enemy . . . with intent that the same shall be communicated to the enemy."[163] Alternatively, § 798(a) would require the government to prove Assange "knowingly and willfully" published communication intelligence "in any manner prejudicial to the safety . . . of the United States."[164]

In defending himself against such charges, Assange would be entitled to the same First Amendment protections afforded other members of the press. The Supreme Court has made clear that the availability of such protections depends not on the individual involved or the medium used to publish information, but rather on the nature of the information and the circumstances of its publication. Therefore, if Assange lawfully obtained this information of public significance, §§ 794(b) and 798(a) of the Espionage Act can only be used against him if they are narrowly tailored to the interest of protecting closely held information.

With respect to narrow tailoring, the most difficult issue is whether §§ 794(b) and 798(a) offer the least restrictive means of protecting classified materials. The Supreme Court has explained that criminalizing publication is rarely the least restrictive means of protecting sensitive information. However,

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[162] *N.Y. Times*, 403 U.S. at 714 ("'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'") (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)). On this point it should also be noted that the Court made no mention of an "imminent threat" requirement when it stated, while in dicta, that "[n]o one would question but that a government might prevent . . . the publication of the sailing dates of transports or the number and location of troops." *Near,* 283 U.S. at 716.

[163] 18 U.S.C. § 794(b) (2012).

[164] *Id.* § 798(a).

the Court has also called for a balancing of interests when applying this standard, and as national security is considered the most profound of government responsibilities, Congress is likely to receive more deference in balancing that interest against freedom of the press. As specific pieces of identifying information such as names and locations do little, if anything, to contribute to the public discourse regarding government policy, legitimate national security interests likely outweigh any press interest in publishing such information. This, combined with the Court's dicta stating that the government can prohibit the publication of the number and locations of troops,[165] suggests that the First Amendment does not prohibit the prosecution of Assange for causing the publication of Afghan informants' names and locations. However, it remains unclear to what extent the government can punish Assange for publishing other information, especially if such information contributed to public discourse about United States foreign policy.

Frustratingly, at least for legal scholars, a resolution of this issue is unlikely in the foreseeable future. As has been the case in the past, the government will often refrain from prosecuting members of the media because obtaining a conviction would require divulging further sensitive information.[166] There are also political concerns. Government censorship of the press is often unpopular, or at the very least controversial, and politicians may wish to refrain from spending their precious political capital on the national security equivalent of spilt milk.[167] Even if the government were to go ahead with an Espionage Act prosecution, a conviction may prove difficult. Not only are the elements of §§ 794(b) and 798(a) difficult to prove, but also the First Amendment further constrains their application.

These factors—fear of disclosing more secrets, political pressures, and difficulty in proving the elements of the crime within the confines of the First Amendment—likely explain why no newspaper has ever been prosecuted under the Espionage Act. Thus, the United States has settled into what has been described as a state of "benign indeterminacy"[168] where the unresolved nature of this constitutional conflict allows freedom of the press to flourish.[169] The alternative would be for the government to prosecute journalists and the courts

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[165] *Near*, 283 U.S. at 716.

[166] For example, when the *Chicago Tribune* published details about the Japanese naval fleet during World War II the government did not prosecute, at least in part, for fear of revealing more closely held information. *See* Schoenfeld, *supra* note 33.

[167] *See, e.g.*, Freivogel, *supra* note 32, at 99 (discussing the "substantial" political consequences that can come with an Espionage Act prosecution).

[168] Edgar & Schmidt, *supra* note 25, at 936.

[169] Freivogel, *supra* note 32, at 119 ("It just may be that press freedom flourishes better in this disorderly state of indeterminacy than it would in a courtroom filled with ringing rhetoric about the First Amendment."); ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 80 (1975) (explaining that a "disorderly situation" may be the optimal situation for the press).

to decide on the constitutionality of the Espionage Act as applied to publishing classified information. While no one can be certain, the courts may very well find that national security trumps freedom of the press in a number of situations.