Accepting WikiLeaks as Press
Brett Ferrante

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I. Introduction

WikiLeaks, a non-profit website dedicated to promoting complete transparency in global governments and corporations, has been the subject of much scrutiny. The site facilitates whistleblowing and allows insiders of organizations to easily submit confidential documents to the website. Since 2006, the website has gained notoriety for leaking diplomatic cables, a video of innocent reporters being shot in Iraq, confidential emails regarding climate research, details of a U.S. Intelligence mission to take down the website, and much more.¹ The United States has had trouble protecting itself from the WikiLeaks, as the United States constitution and precedents set by the United States Supreme Court may protect the website’s right to exist. While Supreme Court cases such as New York Times Co. v. United States may seem to protect the site’s right to facilitate whistleblowers, other statutes, such as the Espionage Act, imply that the site’s actions put U.S. lives at risk during wartime and are therefore unconstitutional.

Though the existence of WikiLeaks is inconvenient for the United States government, the site cannot be taken down. Opponents of the site claim that it is in violation of The Espionage Act of 1917. However, the press is exempt from The Espionage Act, and WikiLeaks must be defined as such. With emerging modes of communication such as the Internet, it is irresponsible to not define WikiLeaks as press, as this sets a precedent by which journalists are not protected when using emerging methods of gathering information. So long as the information that WikiLeaks publishes is true and legally obtained, it must receive First Amendment protection.

II. History of WikiLeaks

WikiLeaks was established in 2006. The site is recognized as being founded by Julian Assange, who has stated that the site aims to provide complete transparency to the public as a means of creating a well-informed populace. In an interview with Time Magazine, Assange stated:

I think this disclosure of diplomatic information, which is often third-hand, will allow people to understand more clearly these sort of broad activities of the U.S. State Department, which acts not, of course, in the interest of the U.S. people but in the interest of the State Department. It will allow people of other countries to see that.

This belief in complete transparency has gotten WikiLeaks into trouble numerous times, as those that the site exposes do not subscribe to the same philosophy. In 2008 the site was taken to court by Bank Julius Baer in Bank Julius Baer & Co. Ltd. et al. v. Wikileaks et al. In the case, Bank Julius Baer sued WikiLeaks and its domain provider, Dynadot, for allegedly posting confidential and forged banking documents. They alleged that the publishing of these documents violated "consumer banking and privacy protection law, under both foreign and American law." As a result, Dynadot was forced to lock the WikiLeaks domain. After the case, Bank Julius Baer and Judge Jeffrey White, who imposed the injunction, came under much scrutiny. While the case was only over the specific documents pertaining to the bank, the injunction effectively cut off

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4 id.
6 id.
7 id.
8 id.
access to documents on the site that had no relation to the bank. As a result, the injunction was challenged by organizations such as the American Civil Liberties Union, the Electronic Frontier Foundation, and more. On February 29, 2008, the ruling was overturned and the injunction on the website was lifted. \(^\text{10}\)

The website returned to the spotlight in 2010 when it released a video titled “Collateral Murder.” The video depicts U.S. Soldiers accidentally murdering Reuters journalists and Iraqi civilians. \(^\text{11}\) The video was released in two versions; one being 17 minutes, the other 39 minutes. WikiLeaks and Julian Assange came under much scrutiny for the name and editing of the video. \(^\text{12}\) Opponents of the video claimed that it did not give an accurate depiction of the area that the video takes place in or the motives of the soldiers. \(^\text{13}\) The name “Collateral Murder” was also attacked for being sensationalist. \(^\text{14}\) Shortly after the release of the video, WikiLeaks began publishing a series of 251,287 diplomatic cables from the United States State Department. \(^\text{15}\) The leak became known in the media as “Cablegate.” \(^\text{16}\) Subsequently, U.S. Soldier Bradley Manning was identified as the source of both the “Collateral Murder” leak as well as the diplomatic cables. \(^\text{17}\) Manning was subsequently arrested for treason and is expected to go to trial in February

\(^{\text{10}}\) id.


\(^{\text{13}}\) id.


\(^{\text{16}}\) id.

2013. After the release of "Collateral Murder" and the diplomatic cables, server providers began to drop WikiLeaks, and sources of electronic funding including PayPal, Mastercard, Visa, and Bank of America began to deny payments made to the website. Julian Assange's assets at PostFinance were also frozen. The United States government also began to ban access to WikiLeaks for all employees at this time. At the time of this writing, Assange resides in the Ecuadorian Embassy in London, where he has been granted asylum. Most recently, WikiLeaks has released emails of Syrian Political Figures.

III. The Espionage Act of 1917

The Espionage Act of 1917 was established during World War I. The act prohibits any speech, including distribution or publishing of confidential information that will be "used to the injury or the United States or to the advantage of a foreign nation." Corporal Bradley Manning was found guilty of section e of the act, which states that "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" and uses it "to the injury of the United States or to the advantage of any foreign nation" is to be found guilty. Many argue that WikiLeaks, as well as Assange, are guilty for this crime and should also be penalized. The section states if one who has unauthorized access to confidential wartime documents that could be used to harm the United States or give an enemy of the United States any advantage fails to return this information to the United States or distributes it to unauthorized personnel, they "Shall be fined under this title or imprisoned not more than ten years, or both." 

The Espionage Act was tested for the first time in 1919 with Schenck v. United States. In a unanimous decision, the United States Supreme Court found Charles Schenck guilty under the act for handing out leaflets that claimed conscription was unconstitutional. The case established "clear and present danger" test, which set a precedent of prohibiting speech that was likely to cause violence. This test was later updated with the more rigorous "imminent lawless action test" in Brandenburg v. Ohio. The new test requires speech to be prohibited only if it is sure to immediately cause injury to others or the nation.

The Espionage Act does not apply to the press, because this would be a form of prior restraint.

IV. Prior Restraint

Prior restraint is the act of halting the flow of information. In New York Times Co. v. United States, the United States Supreme Court stated "Any system of prior restraints of

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26 id.
27 id.
28 Schenck v. United States, 249 U.S. 47 (1919)
expression comes to this court bearing a heavy presumption against its constitutional validity."\textsuperscript{30}

The United States Supreme Court protected the right of \textit{The New York Times} and \textit{The Washington Post} to publish confidential documents pertaining to the Vietnam War known as The Pentagon Papers. In a 6-3 decision the court ruled that there was not enough justification for prior restraint, with Justice Black stating "that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment."\textsuperscript{31} Justice Hugo Black added, "the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy."\textsuperscript{32}

Despite the decision in \textit{New York Times Co. v. United States}, there are scenarios in which prior restraint is constitutional. In \textit{CBS v. Davis}, the United States Supreme court stated that prior restraint is constitutional when "there is clear and convincing evidence that the publication will cause great and certain harm that cannot be addressed by less intrusive measures or when the news media clearly engaged in criminal activity to obtain the information being restrained."\textsuperscript{33}

V. Publishing of Truthful Information

In \textit{Pentagon Papers}, the newspapers won not only because they were exempt from the Espionage Act, but because the published information was true. In \textit{Bartnicki v. Vopper}, the United States Supreme Court ruled that the press is allowed to publish information that has been illegally obtained so long as the press did not obtain it illegally.\textsuperscript{34} The court asserted that protecting the press' First Amendment rights was more important than the privacy rights of the

\textsuperscript{30} New York Times Co. v. United States, 503 U.S. 713 (1971)
\textsuperscript{31} id.
\textsuperscript{32} id.
\textsuperscript{33} CBS v Davis, 510 U.S. 1315 (1994)
\textsuperscript{34} Bartnicki v. Vopper, 532 U.S. 514 (2001)
plaintiff. In Smith v. Daily Mail Pub. Co., Daily Mail Publishing Co. was charged for publishing the name of a juvenile offender. The Supreme Court ruled that this violated the first and fourteenth amendments for “prohibiting truthful publication of alleged juvenile delinquent’s name, lawfully obtained by newspapers by monitoring police band radio frequency and interviewing eyewitnesses.”

In Oklahoma Pub. Co. v. District Court, the United States Supreme Court ruled that a pretrial order that prevented the news media from publishing a photograph of an 11-year old child taken at an open hearing was a violation of the First and Fourteenth Amendments. Oklahoma juvenile proceedings are the be private “unless specifically ordered by the judge to be conducted in public,” but because there was no protest to the press being present at the hearing or taking the photograph, it was ruled as legally obtained.

In The Florida Star v. B.J.F., a rape victim who’s name had been legally obtained and published in the police reports section of the Florida Star Newspaper claimed that the publishing of her name violated a Florida statute that prohibited the publishing of the name of a sexual assault victim. The court held that because the information was truthful and legally obtained, it is a violation of the First and Fourteenth Amendment to suppress it, and stated that the case and others like it “can be distilled to yield a broader First Amendment principle that the press may never be punished, civilly or criminally, for publishing the truth.”

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35 ibid
36 ibid.
38 ibid
40 ibid
VI. Shield Laws and Reporter’s Privilege

The relationship between a reporter and a confidential source is considered to be integral to the proper functioning of the press. Reporters believe that they hold a privilege to keep their sources confidential, for if a source does not trust the press to keep his or her name secret, then the press will be unable to provide truthful information to the public.\textsuperscript{41} The idea of a reporter’s privilege was tested in Branzburg v. Hayes, in which reporter Paul Branzburg was forced to identify marijuana manufacturers and users that he witnessed while gathering information for two news articles.\textsuperscript{42} The Supreme Court held in a 5-4 decision that the First Amendment does not protect reporters from being forced to testify in court.\textsuperscript{43} In a dissenting opinion, Justice Stewart stated that reporters must have a limited First Amendment right to refuse to reveal sources, and created the Branzburg Test to outline the “heavy burden of justification” that must be present to force reporters to testify.\textsuperscript{44}

After Branzburg, many states began to adopt shield laws to protect journalists from being held in contempt of court for failing to provide a source.\textsuperscript{45} There is no federal shield law. In 2005, New York Times reporter Judith Miller was held in contempt of court for refusing to reveal the name of the informant who leaked the name of CIA operative Valerie Plame.\textsuperscript{46}

\textsuperscript{42} Branzburg v. Hayes, 408 U.S. 665 (1972)
\textsuperscript{43} id.
\textsuperscript{44} id.
In 2007 the House of Representatives attempted to pass shield law legislation that applied a modified Branzburg Test to create a federal shield law. The proposed bill defined a journalist as:

a person who regularly gathers, photographs, records, writes, edits, reports, or publishes information concerning matters of public interest for dissemination to the public for a substantial portion of the person's livelihood or substantial financial gain.\(^{47}\)

The bill did not pass the Senate. The House of Representatives attempted to pass another federal shield law in 2009, but this also failed to pass the senate.\(^{48}\)

VII. Analysis

Whether or not the actions of WikiLeaks are protected by the First Amendment hinges on whether or not the website is to be considered a member of the press. If WikiLeaks is accepted as a member of the press then it is exempt from The Espionage Act. In cases such as “Cablegate,” WikiLeaks is not alone in publishing confidential documents. Newspapers such as The New York Times published these documents as well, but are not under investigation due to the fact that they are accepted as members of the press.\(^{49}\) WikiLeaks has that same protection. As long as the information that the website publishes is true and obtained legally, it is protected by the First Amendment. Just as Branzburg established that reporters do not have any privileges on a federal level that an average citizen does not, WikiLeaks can be forced to give up whistleblowers, such as Bradley Manning, that are guilty of treason.

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\(^{47}\) H.R. 2102

\(^{48}\) H.R. 985

A. WikiLeaks as Press

There is no federal definition of a ‘journalist.’ State shield laws do define journalists, though inconsistently.\textsuperscript{50} A journalist can be defined as a full time employee for a newspaper or televised news broadcast.\textsuperscript{51} Some states exclude Internet journalists.\textsuperscript{52} The definition from H.R. Bill 2101, which defines a journalist as one who spends most of their life gathering information to relay to the public, is a suggestion for a federal definition.\textsuperscript{53} However, this definition is not absolute because the bill died in the senate.\textsuperscript{54}

WikiLeaks claims to employ investigative journalism to test the authenticity of each leak it receives.\textsuperscript{55} The site claims to have sent a team of journalists to Iraq to test the veracity of the “Collateral Murder” video.\textsuperscript{56} However, as the site and its employees work anonymously, these claims are difficult to verify. According to WikiLeaks, the site “correctly identified the veracity of every document it has published.”\textsuperscript{57} When WikiLeaks releases information, it does so by publishing a news story as well as the original document.\textsuperscript{58}

Though the definition of journalist outlined in H.R. 2102 is not accepted as a federal definition, it can be accepted as a suggestion of what one would be. WikiLeaks employs people to actively seek out information with the means of testing its veracity and disseminating it to the public. Some argue that this definition is a slippery slope that could lead to any blogger

\textsuperscript{51} id
\textsuperscript{52} id
\textsuperscript{53} H.R. 2102
\textsuperscript{54} id.
\textsuperscript{56} id.
\textsuperscript{57} id.
\textsuperscript{58} id.
expecting First Amendment protection. However, by breaking some of the top news stories of the world since 2007 and receiving awards from Economy Index and Amnesty International the website has proven itself to be more than just a blog.

The growing presence of the Internet on today’s society is changing journalism and communication forever. WikiLeaks has used this new technology to create a new means of facilitating whistleblowers, and this cannot be undone. Similar leak websites such as OpenLeaks and TradeLeaks now exist, and any legislation to halt sites that operate in this manner would be an infringement on the First Amendment. Any proposed law to make these sites illegal would imply that the reporter’s privilege established by shield laws and The Branzburg Test does not apply when reporters become very good at contacting confidential sources. WikiLeaks must be accepted as a member of the press, as the alternative sets a precedent for blatant violations of the First Amendment.

B. WikiLeaks and Illegally Obtained Information

As established in Bartnicki v. Vopper, the press can publish illegally obtained information so long as it is truthful and not illegally obtained by the press. Because WikiLeaks offers an easy, accessible, and confidential means by which whistleblowers can leak information, some argue that the site incites illegal activity. Whistleblowers who report to WikiLeaks instead of an institution such as The New York Times do not have to worry about reporters being forced to reveal their names by a Grand Jury because journalists employed by WikiLeaks do not even know who the whistleblowers are. However, the existence of shield laws and the Branzburg

60 Bartnicki v. Vopper, 532 U.S. 514 (2001)
test implies recognition that the press is fueled by confidential sources. Press is exempt from the Espionage Act because the prevention of the publishing of confidential information is to prevent the press from effectively doing its service to the American people. Therefore, the existence of WikiLeaks is no more an invitation for illegal activity than the press as an institution. The nature of the press is to invite whistleblowers. The WikiLeaks drop-box is no more of an invitation than the phone number for the office of The New York Times.

C. National Security and WikiLeaks

When dealing with information that will inevitably cause harm, prior restraint is justified. If WikiLeaks is to be recognized as a member of the press, it is expected to understand the responsibility that comes with this. WikiLeaks claims to redact names and delay the publishing of information to protect human lives. Assange has also requested the help of the United States Pentagon in removing the names of citizens from the Afghan War Logs. With WikiLeaks' easy and anonymous submission system, it is a very real possibility that WikiLeaks has, or will, obtained information that could cost the lives of many. However, the website has not yet released any documents that can be provably linked to violence. Many claim that "Cablegate" played a large role in creating the Arab Spring revolutions, however it cannot be proven as the inciting factor. Until WikiLeaks releases, or is prepared to release, information that will cause great

harm, the site cannot be penalized. To shut down the website before it is prepared to release such
information would be a blatantly unconstitutional use of prior restraint.

VIII. Conclusion

As long as WikiLeaks can be defined as a member of the press, it is exempt from all
charges. As a member of the press, it is excluded from The Espionage Act. WikiLeaks cannot be
charged for anything it has published as the website has obtained all of its data legally.
Arguments that the website invokes criminal activity are moot, as it is the essence of journalism
to attract confidential sources as evidenced by the existence of shield laws. The nature of
WikiLeaks is in question because it conducts its journalistic duties in a wholly new way.
Crushing this new means of gathering and disseminating information in its infancy would be to
halt the progress of information gathering, and put the future of the First Amendment in peril.
WikiLeaks must be classified as press because it is the future of press.
References


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