

Wikifreak-out: The Legality of Prior Restraints on WikiLeaks' Publication of Government Documents

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INTRODUCTION

*The liberty of the press is essential to the security of [the] state.*¹

While the public may agree that the press is essential to a secure America, there have long been differing understandings of who and what constitutes press deserving of First Amendment protection.² In 2007, a U.S. military Apache helicopter gunned down two Reuters' news journalists in Baghdad after mistaking them for armed insurgents.³ After the attack, Reuters news agency tried, unsuccessfully, to obtain the on-board Apache video of the incident by making a Freedom of Information Act request.⁴ In 2010, WikiLeaks obtained the video and supporting documents “from a

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1. MASS. CONST. art. XVI.

2. Justice Potter Stewart assumed the press to be “an institution,” meaning an “organized private business that is given explicit constitutional protection” under the press clause. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975). Chief Justice Warren Burger took the contrary view that the “very task of including some entities within the ‘institutional press’ while excluding others . . . is reminiscent of the abhorred licensing system of . . . England—a system the First Amendment was intended to ban.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 797–802 (1978) (Burger, C.J., concurring).

3. David Alexander & Phillip Stewart, *Leaked U.S. Video Shows Death of Reuters’ Iraqi Staffers*, REUTERS (Apr. 5, 2010, 8:39 PM), <http://www.reuters.com/article/idUSTRE6344FW20100406>. The pilots of the Apache mistook the reporter’s camera for a rocket-propelled grenade launcher. *Id.* Ten others were killed in the incident. *Id.*

4. Dean Yates, *Reuters Seeks U.S. Army Video of Staff Killed in Iraq*, REUTERS (July 11, 2008, 12:44 PM), <http://www.reuters.com/article/idUSL0539996520080711>; *Collateral Murder*, WIKILEAKS (Apr. 5, 2010, 10:44 AM), <http://www.collateralmurder.com>.

number of military whistleblowers.”⁵ The video revealed the questionable legality of the killings after previously being described by the U.S. military as in accordance with its “Rules of Engagement.”⁶ WikiLeaks’ new and unorthodox method may be more effective than traditional news gathering and dissemination, but does it achieve this effectiveness by stepping outside the bounds and protections traditionally afforded to the press?

As WikiLeaks continues to disseminate increasingly controversial and confidential government documents, the government pushback will continue to grow.⁷ Recognizing this, Supreme Court Justice Sonia Sotomayor recently “said that the [C]ourt is likely to have to rule on the issue of balancing national security and freedom of speech due to WikiLeaks posting [the Afghan War Diary].”⁸ Since then, Joe Lieberman introduced the SHIELD Act, which would make it a “crime to publish information ‘concerning the identity of a classified source or informant of an element of the intelligence community of the United States.’”⁹

5. *Collateral Murder*, *supra* note 4.

6. See Adam Entous, *U.S. Iraq Command: No Current Plans to Reopen Attack Probe*, REUTERS (Apr. 8, 2010, 2:16 AM), <http://www.reuters.com/article/idUSTRE63649P20100408>. “Human rights lawyers and other experts who have viewed the footage say they are concerned about how the helicopter fliers operated, particularly in opening fire on a van that arrived on the scene after the initial attack and whose occupants began trying to help the wounded.” *Id.*

7. For example, in December 2010, two days after Joe Lieberman called on any “organization that is hosting WikiLeaks to immediately terminate its relationship with them,” Amazon.com stopped hosting the WikiLeaks website. Jeremy Pelofsky, *Amazon Stops Hosting WikiLeaks Website*, REUTERS (Dec. 2, 2010, 1:00 PM), <http://www.reuters.com/article/idUSTRE6B05EK20101202>. In January 2011, the U.S. Justice Department subpoenaed Twitter seeking the “account activity of several people linked to [WikiLeaks].” Scott Shane & John F. Burns, *U.S. Subpoenas Twitter Over WikiLeaks Supporters*, N.Y. TIMES (Jan. 8, 2011), <http://www.nytimes.com/2011/01/09/world/09wiki.html>.

8. David Batty, *WikiLeaks War Logs Posting ‘Will Lead to Free Speech Ruling’*, GUARDIAN (Aug. 27, 2010), <http://www.guardian.co.uk/media/2010/aug/27/WikiLeaks-war-logs-free-speech-supreme-court>.

Justice Sotomayor’s comments came during a visit to Denver University, where she declined to answer a student’s question in regards to national security and free speech because she expects to have to rule on the constitutionality of legislation provoked by WikiLeaks’ operation. *Id.* The Afghan war Diary is discussed *infra* Part I at 6.

9. S. 4004, 111th Cong. § 2 (2010); Kevin Poulsen, *Lieberman Introduces Anti-WikiLeaks Legislation*, WIRED (Dec. 2, 2010), <http://www.wired.com/threatlevel/2010/12/shield/>. SHIELD stands for “Securing Human Intelligence and Enforcing Lawful Dissemination.” *Id.*

There is no Supreme Court precedent on the constitutionality of criminalizing the publication of leaked classified information, as the SHIELD Act proposes to do, because the U.S. government has never prosecuted anyone for doing so.¹⁰ The closest precedent is *New York Times v. United States (Pentagon Papers)*,¹¹ where the Court held as unconstitutional the government's effort to enjoin the *New York Times* from publishing a leaked copy of a top-secret government study of the Vietnam War.¹²

Since WikiLeaks' only objective is to publish great quantities of leaked documents,¹³ its operation may seem distinguishable from *Pentagon Papers*. However, the similarities between the two operations are compelling and justify the extension of *Pentagon Papers*' First Amendment precedent to WikiLeaks.

Moreover, the media and the press are undergoing a period of great change¹⁴ and this must be considered alongside any legal analysis. With this in mind, this Note argues that any future attempts by the government to prevent WikiLeaks' publication of leaked confidential documents, whether through injunctions or statutory criminalization, would be unconstitutional unless the requisite national security benchmark established by *Pentagon Papers* is met.¹⁵

Part I of this Note examines the history of WikiLeaks, the current condition of the media, and the history of *Pentagon Papers*. Part II discusses why WikiLeaks' publication is comparable to that of the *New York Times* in *Pentagon Papers*. Part III of this Note proposes that WikiLeaks must be afforded the same First Amendment protection as was the *New York Times* in *Pentagon Papers*.

10. *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 17 (2010) [hereinafter *Espionage Act WikiLeaks: Hearing*] (statement of Geoffrey R. Stone, Professor and Former Dean, University of Chicago Law School), available at <http://www.law.uchicago.edu/files/files/StoneStatementWikiLeaks.pdf>.

11. *N.Y. Times v. United States*, 403 U.S. 713 (1971). This Note uses *Pentagon Papers* to refer to the case and the history of the case and uses Papers to refer to the actual documents themselves.

12. *Id.* at 17–18.

13. See *infra* Part I.A.

14. See *infra* Part I.B.

15. See *infra* Parts II, III.

I. HISTORY

A. *WikiLeaks' History*

WikiLeaks is a global internet-based organization¹⁶ that publishes anonymous submissions of corporate and government documents otherwise unavailable to the public, usually because they are confidential.¹⁷ WikiLeaks believes that document leaks are vital to improve transparency of government and corporations because it subjects them to greater scrutiny that will ultimately reduce corruption and lead to stronger democracies in those institutions.¹⁸

WikiLeaks considers the media vital to achieving that necessary transparency¹⁹ and considers itself part of the media.²⁰ At the same time, however, WikiLeaks argues that it is filling a role that traditional media cannot and that it provides a “new model for journalism.”²¹ Not only does it write news stories about the submissions it receives, it also publishes the original documents for its readers to inspect.²² In furtherance of its mission, WikiLeaks encourages other news outlets to run its stories to increase awareness of the original documents.²³

16. *About, What is WikiLeaks*, WIKILEAKS, <http://wikileaks.org/About.html> (last visited Jan. 31, 2012).

17. *Id.* It is a non-profit organization established in 2007. *Id.* WikiLeaks is actually a misnomer. A wiki is a “website that allows the creation and editing of any number of interlinked web pages via a web browser using a simplified markup language or a WYSIWYG [What You See Is What You Get] text editor.” *Wiki*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Wiki> (last modified Jan. 31, 2012).

18. WIKILEAKS, *supra* note 16. WikiLeaks relies on technology to accomplish this goal. *Id.* (“Scrutiny requires information. Historically, information has been costly in terms of human life, human rights and economics. As a result of technical advances particularly the internet and cryptography—the risks of conveying important information can be lowered.”).

19. However, WikiLeaks also notes that in the “years leading up to the founding of WikiLeaks, . . . the world’s publishing media [became] less independent and far less willing to ask the hard questions of government, corporations and other institutions.” *Id.*

20. *Id.*

21. *Id.*

22. *Id.* WikiLeaks is able to publish the original documents because of its non-profit status. *See id.* It is not interested in competing with other news outlets and therefore does not hoard information to maintain exclusivity and to turn a profit. *See id.*

23. *Id.* Other media outlets have recognized WikiLeaks as a site that could completely change the news. *See, e.g.,* Paulina Reso, *5 Pioneering Web Sites That Could Totally Change the News*, N.Y. DAILY NEWS (May 20, 2010), http://www.nydailynews.com/money/2010/05/20/2010-05-20_5_pioneering_web_sites_that_could_totally_change_the_news.html.

WikiLeaks claims to engage in “principled leaking”—publishing only those documents that expose gross government and corporate dishonesty.²⁴ To this end, WikiLeaks extensively tests the veracity of the submitted documents and has correctly identified the veracity of every document it has published so far.²⁵ WikiLeaks verifies each document by checking for signs of forgery, independently verifying facts within the document, and sometimes submitting the document for collaborative review by a larger group, “like a local dissident community.”²⁶

Since its modest beginnings in 2007, WikiLeaks has published increasingly controversial and relevant corporate and government documents.²⁷ In 2007, WikiLeaks published the U.S. Army Guantanamo Bay detention center Standard Operating Procedures for Camp Delta.²⁸ In 2008, WikiLeaks published documents implicating a Swiss bank in a host of money laundering activities at its Cayman Island branch.²⁹ During the 2008 Presidential election, WikiLeaks

24. WIKILEAKS, *supra* note 16. WikiLeaks doesn’t explicitly define “principled leaking.” *See id.* However, it uses *Pentagon Papers* as an example of a situation in which leaking documents is appropriate. *Id.*; *see also infra* notes 59–68 and accompanying text.

25. WIKILEAKS, *supra* note 16. WikiLeaks also argues that even reputable, traditional newspapers have published documents in the past that turn out to be inaccurate or forgeries. *Id.*

26. *Id.* WikiLeaks starts with a series of questions: “Is [the document] real? What elements prove it is real? Who would have the motive to fake such a document and why?” *Id.* Next, it typically conducts a “forensic analysis of the document, determine[s] the cost of forgery, means, motive, opportunity, the claims of the apparent authoring organization, and answer[s] a set of other detailed questions about the document.” *Id.* Finally, WikiLeaks “may also seek external verification of the document” by a team of journalists who investigate the details. *Id.*

27. *See id.*

28. Ryan Singel, *Sensitive Guantánamo Bay Manual Leaked Through Wiki Site*, WIRED (Nov. 14, 2007), <http://www.wired.com/politics/onlinerights/news/2007/11/gitmo>. The document is not classified, however it is marked “FOR OFFICIAL USE ONLY.” JOINT DET. OPERATIONS GRP., U.S. ARMY, CAMP DELTA STANDARD OPERATING PROCEDURES (2003), available at <http://www.comw.org/warreport/fulltext/gitmo-sop.pdf>. The document includes “schematics of the camp, detailed checklists of what ‘comfort items’ such as extra toilet paper can be given to detainees as rewards, six pages of instructions on how to process new detainees, instructions on how to psychologically manipulate prisoners, and rules for dealing with hunger strikes.” Singel, *supra*.

29. Julian Assange & Daniel Schmitt, *Bank Julius Baer vs. WikiLeaks*, WIKILEAKS (Jan. 23, 2008), http://www.wikileaks.org/wiki/Bank_Julius_Baer_vs._Wikileaks. Bank Julius Baer, the Swiss bank implicated in the documents, sued WikiLeaks in California state court. *See* Press Release, WikiLeaks.org Down After Ex-Parte Legal Attack by Cayman Islands Bank (Feb. 18, 2008), available at http://www.wikileaks.org/wiki/Wikileaks.org_under_injunction. The court issued a permanent injunction, shutting down the Wikileaks.org domain name. *Id.*; *see also*

published the contents of Sarah Palin's Yahoo email account, which suggested that she used the account to send work-related emails in order to evade public records laws.³⁰ In late 2009, WikiLeaks published 570,000 pager messages sent by New Yorkers and government officials in response to the September 11, 2001 attack on the World Trade Center.³¹ In March of 2010, WikiLeaks published a U.S. Army Intelligence Report ironically concluding that WikiLeaks itself "poses a significant 'operational security and information security' threat to military operations."³²

In July 2010, WikiLeaks published the Afghan War Diary (War Reports), containing over 90,000 U.S. military documents relating to the war in Afghanistan.³³ The leaked documents "reflect a ground-level view of developments [in Afghanistan between 2004 and 2009]."³⁴ The documents detailed how, due to the war in Iraq, the

Bank Julius Baer & Co. v. WikiLeaks, 535 F. Supp. 2d 980 (N.D. Cal. 2008). However, the same judge later vacated the injunction citing First Amendment and prior restraint concerns and questions about legal jurisdiction. Philip Gollner, *Judge Reverses Ruling in Julius Baer Leak Case*, REUTERS (Feb. 29, 2008, 6:26 PM), <http://www.reuters.com/article/idUSN2927431720080229>.

30. Kim Zetter, *Group Posts E-mail Hacked From Palin Account*, WIRED (Sept. 17, 2008), <http://www.wired.com/threatlevel/2008/09/group-posts-e-m/>; see also Lisa Demer, *Alaskans Question Palin's E-mail Secrecy*, JUNEAU EMPIRE (Sept. 16, 2008), http://www.juneauempire.com/stories/091608/sta_333013278.shtml. "An index of the e-mails in her inbox, which includes sender, subject line and date sent, indicates that Palin received numerous e-mails from her aides in the governor's office, some of which could be work-related." *Id.*

31. *570,000 Pager Messages from 9/11 Released*, MSNBC.COM (Nov. 25, 2009), http://www.msnbc.msn.com/id/34149853/ns/us_news-security/. Some of the messages were between private individuals and others between government officials, such as those sent from the Pentagon and New York City first responders. Jennifer Millman, *Analysis of 9/11 Pager Data Paints Chilling Picture*, NBC N.Y. (Dec. 1, 2009), <http://www.nbcnewyork.com/news/local-beat/Analysis-of-911-Pager-Data-Paints-Chilling-Picture-78219132.html>.

32. Declan McCullagh, *U.S. Army Worried About WikiLeaks in Secret Report*, CNET NEWS (Mar. 15, 2010), http://news.cnet.com/8301-13578_3-20000469-38.html. WikiLeaks director, Julian Assange, argued that the report "did not point to anything that has actually happened as a result of the release It contains the analyst's best guesses as to how the information could be used to harm the Army but no concrete examples of any real harm being done." Stephanie Strom, *Pentagon Sees a Threat from Online Muckrakers*, N.Y. TIMES (Mar. 17, 2010), <http://www.nytimes.com/2010/03/18/us/18wiki.html>.

33. *Morning Edition: Leaked Documents Offer Window Into Afghan War* (NPR radio broadcast July 26, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=128766771&ft=1&f=2100536>.

34. See *id.* The documents were low-level reports and were not top secret. *Id.* The "reports are field reports reflecting news from intelligence agents on the ground, reports from Afghan

effort in Afghanistan was short of resources and vague on objectives.³⁵ The documents also revealed more controversial items, including information on how Pakistan's intelligence service has Taliban connections, which has undermined U.S. interests in the past.³⁶

WikiLeaks quickly followed the Afghan War Diary release with the release of the Iraq War Logs (War Reports)³⁷ in October 2010, which includes over 400,000 military documents related to the Iraq War.³⁸ Again, almost all the documents were low-level "secret US army field reports."³⁹ The documents revealed, among other things, that a "US helicopter gunship . . . killed Iraqi insurgents after they tried to surrender," and, although the U.S. military claimed to not officially record civilian casualties, the Logs detail that 66,081 of the 109,000 deaths were "non-combatant deaths."⁴⁰

The media had a mixed reaction to the War Reports, both as to how they affected U.S. politics and whether WikiLeaks was acting journalistically in publishing the documents.⁴¹ While the BBC's Frank Gardner characterized the leaks as "a remarkable insight into a war that—at least up until December 2009—now appears to have been going worse than we were told,"⁴² *Time*'s Aryn Baker argued

army sources, from informants—paid informants, unpaid informants—very much a ground's eye view of the war." *Id.*

35. Editorial, *Our View on Afghanistan: War Leaks Confirm What You Already Know*, USA TODAY (July 27, 2010), http://www.usatoday.com/news/opinion/editorials/2010-07-27-editorial27_ST_N.htm.

36. *See id.* Additionally, the documents revealed that the "Afghan government, military and police have repeatedly shown themselves to be incompetent, corrupt and unreliable." *Id.*

37. This Note will refer to both the Afghan War Diary and Iraq War Logs collectively as the War Reports.

38. *See* Nick Davies, Jonathan Steele & David Leigh, *Iraq War Logs: Secret Files Show How US Ignored Torture*, GUARDIAN (Oct. 22, 2010), <http://www.guardian.co.uk/world/2010/oct/22/iraq-war-logs-military-leaks>.

39. *Id.*

40. *Id.* The War Reports detail how "US authorities failed to investigate hundreds of reports of abuse, torture, rape and even murder by Iraqi police and soldiers whose conduct appears to be systematic and normally unpunished." *Id.*

41. Nicholas Sabloff & Doug Sarro, *WikiLeaks Afghan War Diary Reactions*, HUFFINGTON POST (July 26, 2010), http://www.huffingtonpost.com/2010/07/26/wikileaks-afghan-war-docu_n_659441.html (aggregating the opinions of a broad range of news commentators working for a broad range of news sources).

42. Frank Gardner, *WikiLeaks Row Is the Last Thing NATO Needs*, BBC (July 26, 2010), <http://www.bbc.co.uk/news/world-10765129>.

that although “there might be some quality nuggets of new information buried in the usual morass of false leads, biased reporting and pure inaccuracy . . . there is still no smoking gun.”⁴³

From the journalistic perspective, Alexis Madrigal of the *Atlantic* argues that “the publication of these documents will be seen as a milestone in the new news ecosystem.”⁴⁴ The *Washington Post*’s Richard Cohen echoed this sentiment, arguing that “WikiLeaks has done [the Obama administration] a favor—speaking the unspeakable, and not in the allegedly forked tongue of the mainstream media but in the actual words of combat soldiers.”⁴⁵ However, Susan Milligan, writing for *U.S. News & World Report*, argued that “WikiLeaks does not operate according to the standard of the public’s right, or need, to know” but rather . . . “has information, and uses it to advance its own power, irrespective of whether the disclosures enhance democracy or national security.”⁴⁶

43. Aryn Baker, *The Afghan War Leaks: Few Surprises, but Some Hard Truths*, TIME (July 26, 2010), <http://www.time.com/time/world/article/0,8599,2006453,00.html>. The *Economist* noted that, “the documents [are] oddly reassuring: they indicate that American forces, in their internal communications, recognize how grim the situation is, and are not living in an unrealistic fantasy world.” *At Least They Know the War Isn’t Going Well*, ECONOMIST (July 26, 2010), http://www.economist.com/blogs/democracyinamerica/2010/07/afghanistan_war_logs. Marc Ambinder of the *Atlantic* argued, “The U.S. government will assess the story on several levels. One is political: will the information change the nature of U.S. relationships with allies, particularly the French and the Poles, who are implicated in some of the civilian deaths? The answer there is probably no. Will it raise skepticism in Congress? Absolutely.” Marc Ambinder, *Assessing WikiLeaks’s Raw Data*, ATLANTIC (July 25, 2010), <http://www.theatlantic.com/politics/archive/2010/07/assessing-wikileaks-raw-data/60376/>.

44. Alexis Madrigal, *WikiLeaks May Have Just Changed the Media, Too*, ATLANTIC (July 25, 2010), <http://www.theatlantic.com/technology/archive/2010/07/WikiLeaks-may-have-just-changed-the-media-too/60377/>. He added,

[T]he truth is that we don’t really know what Wikileaks is, or what the organization’s ethics are, or why they’ve become such a stunningly good conduit of classified information.

In the new asymmetrical journalism, it’s not clear who is on what side or what the rules of engagement actually are. But the reason Wikileaks may have just changed the media is that we found out that it doesn’t really matter. Their data is good, and that’s what counts.

Id.

45. Richard Cohen, *WikiLeaks, Telling Us the Obvious in Afghanistan*, WASH. POST (July 27, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/26/AR2010072603587.html>.

46. Susan Milligan, *WikiLeaks Is High-Stakes Paparazzi, Not Journalism*, U.S. NEWS & WORLD REP. (Nov. 29, 2010), <http://politics.usnews.com/opinion/blogs/susan-milligan/2010/>

The U.S. government denounced the release of the classified military documents. National Security Advisor James Jones released a statement that the United States “strongly condemns the disclosure of classified information by individuals and organizations which could put the lives of Americans and our partners at risk, and threaten our national security,” while simultaneously recognizing the sensitive situation created when the Pakistan documents were disclosed.⁴⁷

B. Journalism Is Transforming

The Internet and other emerging technologies are transforming journalism.⁴⁸ Currently, journalism is in a phase of “creative destruction” or “disruptive innovation.”⁴⁹ This is partly in response to changing consumer habits, with many consumers no longer reading multiple articles from a single source or newspaper.⁵⁰ Additionally,

11/29/wikileaks-is-high-stakes-paparazzi-not-journalism. Mulligan added that the “news organizations which reported the WikiLeaks information cannot be held to the same standard; once the documents were out there (or scheduled to be released online), it was impossible for media outlets to ignore them. Further, the documents are better discussed in context, as newspapers have done.” *Id.*

47. Press Release, The White House, Office of the Press Sec’y, Statement of Nat’l Sec. Advisor Gen. James Jones on WikiLeaks (July 25, 2010) [hereinafter Press Release, Jones on WikiLeaks], available at <http://www.whitehouse.gov/the-press-office/statement-national-security-advisor-general-james-jones-wikileaks>. He added,

The United States and Pakistan have also commenced a Strategic Dialogue, which has expanded cooperation on issues ranging from security to economic development Yet the Pakistani government—and Pakistan’s military and intelligence services—must continue their strategic shift against insurgent groups. The balance must shift decisively against al Qaeda and its extremist allies.

Id.

48. “In the last 8 years, we’ve gone from zero bloggers to more than 70 million, and news is broken over Twitter feeds and cell phones instead of on local broadcast networks.” *The Future of Journalism: Hearing Before the Subcomm. on Commc’ns, Tech., and the Internet of the S. Comm. on Commerce, Sci., and Transp.*, 111th Cong. 3 (2009) (statement of Sen. John F. Kerry, Chairman, Subcomm. on Commc’ns, Tech., and the Internet of the S. Comm. on Commerce, Sci., and Transp.).

49. *Id.* at 21 (statement of Steve Coll, President & CEO, New Am. Found. & Former Managing Editor, *The Washington Post*); *id.* at 57 (Statement of Arianna Huffington, Co-founder and Editor-in-Chief, *The Huffington Post*) (arguing that “[d]igital news is a classic case of disruptive innovation.”). There are both creative forces affecting journalism, like minimal barriers to entry that have “opened American public discourse to countless new voices,” and destructive forces, like blog repackaging of first-generation reporting. *Id.* at 21–22.

50. *See id.* at 18 (statement of Marissa Meyer, Vice President, Search Prods. & User Experience, Google). “[T]he structure of the Web has caused the basic unit, the atom of

“it’s important to remember that the future of journalism is not dependent on the future of newspapers.”⁵¹ Instead, new media and online journalism have proven able to out-innovate newspapers and progress journalism. For example, new media, unlike traditional media, “is particularly well suited to obsessively follow a story until it breaks.”⁵²

It is unclear, however, in what ways journalism and the press will be transformed once this period of innovation slows.⁵³ “For the first time in modern media history, the technologies of production, the technologies of distribution, the cultural practices of consumption, and cultural practices of production are all in flux.”⁵⁴ Scholars note that in this time of flux and innovation, journalists “need to find ways of engaging forms and sources of news that defy traditional conceptions of journalism.”⁵⁵

C. History of the Pentagon Papers

In early May 1971, public disapproval of the ongoing war in Vietnam led to the May Day Protests, a mass multi-day march on

consumption for news, to migrate from the full newspaper to the individual article. With online news, a reader is much more likely to arrive at a specific article rather than, say, the home page.” *Id.* Additionally, readers “acquire news from aggregators and abandon its point of origin; namely, the newspapers themselves.” *Id.* at 29 (statement of David Simon, Former Reporter, *The Baltimore Sun* (1982–95) & *Blown Deadline Prods.* (1995–2009)).

51. *Id.* at 56 (statement of Arianna Huffington, Co-Founder & Editor-in-Chief, *The Huffington Post*).

52. *Id.* at 57 (explaining that traditional media “failed to serve the public interest by missing . . . the two biggest stories of our time, the runup to the war in Iraq and the financial meltdown”).

53. See JIM MACNAMARA, *THE 21ST CENTURY MEDIA (R)EVOLUTION* 212 (2010) (“The result [of this technological and cultural innovation] is a swelling tumultuous torrent that becomes unstoppable and which sometimes has unpredictable results.”).

54. *Id.* (“[R]ather than being sponges passively soaking up the products of the television and the newspaper, the luxury of choice the internet offers empowers both the sender and the receiver . . . the politician and the voter, or the activist and the curious seeker of alternative ideas.”) (quoting MARTIN HIRST & JOHN HARRISON, *COMMUNICATION AND NEW MEDIA* 354 (2007)).

55. Theodore L. Glasser, *Structure and Nature of the American Press*, in *THE PRESS* 333, 335 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005). “Not all news and political intelligence need to come in distinct, clearly labeled packages in order to contribute to public information.” Carolyn Marvin & Philip Meyer, *What Kind of Journalism Does the Public Need?*, in *THE PRESS*, *supra*, at 400, 407. Additionally, the digital revolution has transformed the character of the information’s presentation. *Id.* at 401.

Washington opposing the war.⁵⁶ By the time May Day began, Daniel Ellsberg had already leaked the Pentagon Papers (Papers)⁵⁷ to the *New York Times*.⁵⁸ The Papers, officially titled “History of United States Decision Making Process on Vietnam Policy, 1945–1967,” was a comprehensive top-secret document that candidly detailed how the United States entered, and was militarily and politically involved in, the Vietnam War.⁵⁹ After helping write the Papers and aiding the Lyndon B. Johnson administration in escalating the war in 1965,⁶⁰ Ellsberg was now passionately opposed to America’s presence in Vietnam.⁶¹ Ellsberg leaked the Papers hoping that they would help expose government deception and end the Vietnam War, which they eventually did.⁶²

56. DANIEL ELLSBERG, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* 376–81 (Viking 2002). The organizers of the May Day Protests vowed: “If They Won’t Stop the War, We’ll Stop the Government.” *Id.* at 376. Protesters marched in the streets and intentionally blocked traffic throughout Washington. *Id.* at 378. The police used tear gas to break up the protesters. *Id.* The protests resulted in thirteen thousand arrests. *Id.* at 381.

57. This Note uses the term “Papers” to refer to the collection of documents at issue in *Pentagon Papers*.

58. Ellsberg leaked the documents to the *New York Times* in March 1971. *Id.* at 368–75.

59. See *INSIDE THE PENTAGON PAPERS* 12–50 (John Prados & Margaret Pratt Porter eds., 2004). “[T]he project started after [Secretary of Defense] Robert McNamara ‘asked for classified answers to about one hundred . . . ‘dirty questions.’” *Id.* at 15 (quoting Leslie H. Gelb).

They were the kind of questions that would be asked at a heated press conference: Are our data on pacification accurate? Are we lying about the number killed in action? Can we win this war? Are the services lying to the civilian leaders? Are the civilian leaders lying to the American people?

Id.

60. Ellsberg writes, “From early September 1964 U.S. . . . [o]fficials just below the president were waiting for something to retaliate to and [were] increasingly ready to provoke an excuse for attack if necessary.” ELLSBERG, *supra* note 56, at 65. President Johnson, however, reiterated that he did not want a “wider war,” and the military responded to Vietcong attacks with “reprisals” of relatively equal force. See *id.* at 66–67 (internal quotation marks omitted). After one such Vietcong attack, John McNaughton, the U.S. Assistant Secretary of Defense to Robert McNamara, instructed Ellsberg to gather “atrocious details” for the explicit purpose of convincing Johnson to “launch systematic bombing.” *Id.* at 68 (internal quotation marks omitted).

61. After supporting the effort in Vietnam and actively helping the Department of Defense to attempt to win the War, Ellsberg had a change of heart after reading the full Papers. See *id.* at 254–56. Ellsberg writes, “To say that we had ‘interfered’ in what is ‘really a civil war,’ . . . screened a more painful reality . . . [that] it was a war of foreign aggression, American aggression.” *Id.* at 255.

62. *Id.* at 413–21.

Ellsberg chose to leak the Papers to the *New York Times* due to its prestige and status as a paper of record.⁶³ After receiving the Papers, the *Times* “senior officials and editors” met to decide whether to print the Papers and discussed questions of logistics, legality, and national security.⁶⁴ The *Times*’ editors had, on the one hand, a “source of unimpeachable integrity on a subject of major concern to . . . all Americans,” but, on the other hand, the journalists had to use their judgment to determine the extent to which publication would adversely affect national security.⁶⁵ The *Times* pushed on with its preparation and made the final decision to publish the Papers on June 10, 1971.⁶⁶ In preparation for publication and due to security concerns, the *Times* rented several hotel suites where a team of reporters and editors worked to write commentaries and select the text and documents for publication.⁶⁷

On June 13, 1971, the *Times* published the first of what was to be a multipart report on the Papers.⁶⁸ President Richard Nixon was not immediately retaliatory, but thirty-six hours later,⁶⁹ Nixon “authorized the Justice Department to sue the *Times* and to seek a

63. *Id.* at 365. Ellsberg’s friendship with Neil Sheehan who worked at the *Times* was also an integral factor in his decision. *See id.* at 365–66. Ellsberg added that the *Times* was “the only journal of record, the only paper that printed long accounts, such as speeches and press conferences, in their entirety . . . Only the *Times* might publish the entire study, and it had the prestige to carry it through.” *Id.* at 365.

64. INSIDE THE PENTAGON PAPERS, *supra* note 59, at 54–56. The *Times* questioned whether to publish the Papers all at once, in a few installments, or in many installments. *Id.* at 54. The “key question” was then put to the group: “journalistically, did the story warrant defying the government and possible government legal action; did the documents in fact betray a pattern of deception, of consistent and repeated deception by the American government[?]” *Id.* (quoting Harrison Salisbury). There was agreement that this is what the Papers showed. *Id.*

65. *Id.* at 54–55. “The *Times* also had before it earlier cases of national security leaks where it had gone along with the government only to have *that* course emerge as the error.” *Id.*

66. *See id.* at 55.

67. ELLSBERG, *supra* note 56, at 375; INSIDE THE PENTAGON PAPERS, *supra* note 59, at 55. “Supervising the reporters would be editor James L. Greenfield, one of the participants in the key April 20 publication conference.” *Id.* at 56. Four reporters, one researcher, and one biographer worked on preparing the publication for the newspaper itself, while several more editors, researchers, and assistants were added to work on preparing a version for publication as a book. *Id.*

68. *See* DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE 66 (1996).

69. *Id.* at 66–67. Nixon initially “decided that his administration should do nothing to interfere with the *Times*’s publication plans and take no action to identify the source of the leak.” *Id.* at 67.

prior restraint barring it from publishing further excerpts from the [Papers].⁷⁰ On June 15, the Justice Department filed a demand for an injunction in federal district court in New York.⁷¹

D. New York Times v. United States

District Judge Murray Gurfein granted a five-day temporary restraining order against the *Times*, stopping further publication of the Papers until he decided whether to grant the injunction on June 19, 1971.⁷² In response, Ellsberg distributed portions of the Papers to seventeen other newspapers across the nation, which then continued to publish portions of the Papers.⁷³ Although the Justice Department pursued injunctions against some of them, including the *Washington Post*, whose case was consolidated with that of the *New York Times*, it eventually gave up, realizing the futility of an attempt to prevent the dissemination of the Papers.⁷⁴

The government claimed it was entitled to an injunction against the *Times* because the Papers were “properly classified” and contained information that, if published, would be harmful to national security.⁷⁵ It further argued that “the *Times* had already published

70. *Id.* “Furthermore, Attorney General John Mitchell had sent the *Times* a telegram requesting it to cease its publication of the classified documents,” which it declined to do. *Id.*; ELLSBERG, *supra* note 56, at 387.

71. ELLSBERG, *supra* note 56, at 387. Ellsberg notes, “The Nixon Justice Department was making a pioneering experiment, asking federal courts to violate or ignore the Constitution or in effect to abrogate the First Amendment. It was the boldest assertion during the cold war that ‘national security’ overrode the constitutional guarantees of the Bill of Rights.” *Id.*

72. *United States v. N.Y. Times Co.*, 328 F. Supp. 324 (S.D.N.Y. 1971).

73. See ELLSBERG, *supra* note 56, at 402–03; see also THE MOST DANGEROUS MAN IN AMERICA: DANIEL ELLSBERG AND THE PENTAGON PAPERS (Kovno Communications 2009). The newspapers included the *Washington Post*, the *Boston Globe*, the *Chicago Sun-Times*, the *St. Louis Post-Dispatch*, and eleven papers owned by Knight, including the *Los Angeles Times*. ELLSBERG, *supra*, at 403.

74. See ELLSBERG, *supra* note 56, at 403; see also RUDENSTINE, *supra* note 68, at 141–42 (arguing to Judge Gurfein that the government’s effort to keep the papers secret was moot because they were already being published by other papers). Senator Mike Gravel of Alaska even used his chairmanship on an obscure subcommittee to call a night meeting, which only he attended, and then placed his single vote to have the Papers be entered into the public record. INSIDE THE PENTAGON PAPERS, *supra* note 59, at 60.

75. See RUDENSTINE, *supra* note 68, at 153–54. At the June 18, 1971 hearing before Judge Gurfein, the government argued that its “concern in this matter was ‘fundamental’ and involved military, defense, intelligence and diplomatic matters.” *Id.* at 139, 146.

information [from the Papers] that was ‘harmful to the interests of the United States’” and its relations with other countries.⁷⁶ The government focused on the harmful effects of publishing sensitive military matters pertaining to war plans that were contained in the Papers.⁷⁷ The theme of the entire argument was that publication of the Papers would, as Nixon stated, “g[i]ve aide and comfort to the enemy,” resulting in a lengthening of the Vietnam War and further troop casualties.⁷⁸ Finally, the government argued that current espionage laws forbade the publication of the Papers by the *Times*.⁷⁹

The *New York Times* denied it was forbidden by espionage laws to publish the Papers⁸⁰ and argued that enjoining further publication of the Papers would be an unconstitutional prior restraint.⁸¹ Lawyers for the American Civil Liberties Union (ACLU)⁸² also called for the Papers to be allowed because “a primary purpose of the First Amendment was to ensure an ‘informed citizenry,’ which [is] the

76. *Id.* at 146. The government offered examples of political embarrassment by our allies because of information in the Papers and concern that this would cause our allies to be reluctant to help with sensitive matters in the future. *Id.* at 163.

77. *Id.* at 154–66. For example, one witness testified that the Papers included “‘signal intelligence, electronics intelligence, [and] communication intelligence,’ that revealed that the United States was not only reading the other side’s ‘traffic’ but how it was able to read it.” *Id.* at 155.

78. *Id.* at 154–66; see also THE MOST DANGEROUS MAN IN AMERICA: DANIEL ELLSBERG AND THE PENTAGON PAPERS, *supra* note 73.

79. *United States v. N.Y. Times Co.*, 328 F. Supp. 324, 328 (S.D.N.Y. 1971). The government relied on 18 U.S.C. § 793 subsections (d) and (e). *Id.*

80. *Id.*

81. RUDENSTINE, *supra* note 68, at 166–67 (containing statements made by Norman Dorsen on behalf of the American Civil Liberties Union). Additionally, Joel M. Gora, who helped create an amicus curiae brief for the ACLU, presented a separation of powers argument in addition to the prior restraints argument. Joel M. Gora, *The Pentagon Papers Case and the Path Not Taken: A Personal Memoir on the First Amendment and the Separation of Powers*, 19 CARDOZO L. REV. 1311, 1314–21 (1998). Gora stated:

At the core of the cluster of claims was the concept that the primary and substantive power belonged to Congress, that the president’s substantive powers were limited, and that the president could neither usurp significant powers from Congress nor impose serious obligations on the judiciary in his attempt to deal with the national security breach.

INSIDE THE PENTAGON PAPERS, *supra* note 59, at 122.

82. The District Court denied the ACLU’s motion to intervene in the case. RUDENSTINE, *supra* note 68, at 140. However, Judge Gerstein did allow Norman Dorson, an ACLU attorney, a brief argument. *Id.* at 166–67.

basis of the democratic process.”⁸³ The ACLU added that “nothing so diminishes democracy as secrecy” because “[s]elf-government is meaningful only with an informed public.”⁸⁴ The *New York Times* echoed these points and added that “all the dangers identified by the assistant secretary of defense were hypothetical . . . and fell far short of the Constitution’s requirements for a prior restraint.”⁸⁵

Judge Gurfein’s District Court opinion denied the injunction⁸⁶ as an unconstitutional prior restraint and relied heavily on *Near v. Minnesota*,⁸⁷ the only Supreme Court case that spoke to the issue of prior restraints on publication.⁸⁸ Judge Gurfein first argued that the First Amendment’s purpose was to “preserve an untrammelled press as a vital source of public information.”⁸⁹ Next, Judge Gurfein noted that *Near* indicated that a prior restraint was allowable only in limited circumstances where there were immediate national security concerns.⁹⁰ He ruled that this case presented “no sharp clash” between the competing interests, holding that the security breach only presented “embarrassment . . . [that] we must learn to live with.”⁹¹

83. *Id.*

84. *Id.*

85. *Id.* at 167. The *New York Times* additionally argued that the government could not reliably conclude that publication of the Papers would injure the government but rather wanted the injunction to avoid political embarrassment. *Id.*

86. Gurfein did continue the temporary restraining order until the government could receive a stay from the court of appeals. *United States v. N.Y. Times Co.*, 328 F. Supp. 324, 331 (S.D.N.Y. 1971). This ultimately barred the *New York Times* from printing the Papers until the Supreme Court made its ruling. *See id.*

87. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

88. *Id.* at 330–31. Additionally, Judge Gurfein “decided that the government could not prevail simply by proving that the documents were properly classified and that the *Times*’s right to publish the papers was not affected by how it got them.” RUDENSTINE, *supra* note 68, at 173.

89. *N.Y. Times Co.*, 328 F. Supp. at 331 (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (internal quotation marks omitted)). *Times* further states that the

newspapers, magazines, and other journals of the country . . . have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.

Id. (quoting *Grosjean*, 297 U.S. at 250).

90. *See id.* Examples of publication that would permit prior restraint included “actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.” *Id.* (internal quotation marks omitted).

91. *Id.* Judge Gurfein also opined that our national security depended on the freedom of

Judge Gurfein concluded that “[t]here is no greater safety valve for discontent and cynicism about the affairs of Government than freedom of expression in any form.”⁹²

The Court of Appeals for the Second Circuit reversed.⁹³ After allowing the government to supplement the record with a special appendix that offered additional citations to the Papers,⁹⁴ the Second Circuit remanded the case to the district court for determination of whether the additional citations presented an immediate national security threat warranting an injunction against publication by the *Times*.⁹⁵ The *New York Times* appealed the ruling to the Supreme Court, which granted certiorari.⁹⁶

The Supreme Court reversed the Second Circuit and affirmed the district court’s judgment in a per curiam decision.⁹⁷ The two-paragraph opinion of the court began by asserting that “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”⁹⁸ The opinion concluded that the “Government ‘thus carries a heavy burden of showing justification for the imposition of such a restraint,’” which it had not met.⁹⁹ The six concurring opinions offered additional insight into the Court’s rationale behind its ruling.

In Justice Black’s concurrence, he argued that an injunction against publication involved a “flagrant, indefensible, and continuing violation of the First Amendment” because the “history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.”¹⁰⁰ Black opined that, contrary to the

the press. *Id.* (“The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions.”).

92. *Id.* (“This has been the genius of our institutions throughout our history. It is one of the marked traits of our national life that distinguish us from other nations under different forms of government.”).

93. *United States v. N.Y. Times Co.*, 444 F.2d 544 (2d Cir. 1971) (per curiam) (6–3 decision).

94. RUDENSTINE, *supra* note 68, at 217, 236–37.

95. *N.Y. Times Co.*, 444 F.2d at 544.

96. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

97. *Id.* Six concurring opinions and three dissenting opinions were filed. *Id.*

98. *Id.* at 714 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

99. *Id.* (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

100. *Id.* at 715, 717 (Black, J., concurring).

government's position, freedom of the press was established for the express purpose of exposing the secrets of the government in order to inform the public.¹⁰¹

Justice Douglas, while echoing the concerns of Justice Black,¹⁰² also argued that the applicable section of the Espionage Act only imposed criminal liability for "communication" of such materials and did not bar the *New York Times* from publishing the Papers.¹⁰³ In dismissing the government's argument that "communicates" is a broad enough term to include publishing, Douglas reasoned that Congress had distinguished between communicating and publishing in various sections of the Espionage Act, showing its intent not to include publication as a criminal offense.¹⁰⁴ Importantly, Douglas reasoned that Congress remained "faithful to the command of the First Amendment" because the Espionage Act specifically asserted that it was not intended to limit freedom of speech or the press.¹⁰⁵

101. *Id.* at 717.

Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.

Id.

102. *See id.* at 720 (Douglas, J., concurring). Douglas started his concurrence by writing that the "First Amendment provides that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.' That leaves, in my view, no room for governmental restraint on the press." *Id.*

103. *Id.* at 720–21. Justice Douglas focused on the statutory language in Title 18 U.S.C. § 793(e) that provides

[w]hoever having unauthorized possession of, access to, or control over any document, writing . . . or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates . . . the same to any person not entitled to receive it . . . [s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

Id. (alteration in opinion) (quoting 18 U.S.C. § 793(e)).

104. *Id.* at 721–22. For example, "Section 797 applies to whoever 'reproduces, publishes, sells, or gives away' photographs of defense installations." *Id.* at 721 (quoting 18 U.S.C. § 797).

105. *See id.* at 722. 18 U.S.C. § 793 states in § 1(b):

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

Id.

In his concurrence, Justice Brennan focused on the fact that the government had provided no evidence that the publication of the Papers would undoubtedly “prejudice the national interest.”¹⁰⁶ Therefore, the injunction would be improper because the First Amendment does not tolerate prior restraints “predicated on surmise or conjecture that untoward consequences may result.”¹⁰⁷ Justice Stewart, complementing this notion, argued that the injunction could not stand because the government had not presented evidence to prove that publication would “result in direct, immediate, and irreparable damage to our Nation or its people.”¹⁰⁸

II. ANALYSIS

Pentagon Papers sets a high prior restraint benchmark that the government must clear in order to enjoin WikiLeaks’ publication of specific documents.¹⁰⁹ The Court held that the government has very limited authority when it comes to the dissemination of classified government documents.¹¹⁰ Further, the First Amendment “arguably overprotects” the right to publish.¹¹¹ This is apparent in Justice

106. *Id.* at 725 (Brennan, J., concurring). The government instead argued that the publication of the Papers “could,” “might,” or “may” negatively affect national security in various ways. *Id.*

107. *Id.* at 725–26. Brennan argued that only when government presents proof that “publication [will] inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can [the Constitution] support even the issuance of an interim restraining order.” *Id.* at 726–27.

108. *Id.* at 730 (Stewart, J., concurring). Stewart also noted “that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.” *Id.* at 729.

109. *Supra* notes 96–107 and accompanying text.

110. *Espionage Act and WikiLeaks: Hearing, supra* note 10, at 18 (statement of Geoffrey R. Stone). Stone further testified that it may seem like an “an awkward, even incoherent, state of affairs” that “although elected officials have broad authority to keep classified information secret . . . the government has only very limited authority to prevent its further dissemination.” *Id.* But, he argues,

[T]he law governing public employees *overprotects* the government’s legitimate interest in secrecy relative to the public’s legitimate interest in learning about the activities of the government. But the need for a simple rule for public employees has nothing to do with the rights of others who would publish the information or the needs of the public for an informed public discourse.

Id.

111. *Id.* (emphasis omitted).

Stewart's requirement of "immediate" and "direct" harm to the "Nation or its people" before the Court will entertain a government injunction on speech.¹¹² A standard that requires proof that harm *will* result is necessary considering the government's potential to "overstate the potential harm of publication."¹¹³

Under *Pentagon Papers*, the Obama administration's conclusion that the dissemination of the War Reports "could" put the lives of Americans at risk is insufficient to uphold any potential prior restraint on that dissemination.¹¹⁴ Further, an argument that the documents are "properly classified" will fail as it did in *Pentagon Papers*.¹¹⁵ Rather, as the dicta in *Near* suggests, and as Judge Gurfein ruled, the government must successfully argue that the publication presents an imminent, grave, and immediate national security threat.¹¹⁶ Because

112. *N.Y. Times Co.*, 403 U.S. at 730. The standard is the same for a criminal prosecution, and

the distinction between prior restraint and criminal prosecution should not carry much weight. The standard applied in the *Pentagon Papers* case is *essentially* the same standard the Court would apply in a criminal prosecution of an organization or individual for publicly disseminating information about the conduct of government. The clear and present danger standard has never been limited to cases of prior restraint.

Espionage Act and WikiLeaks: Hearing, *supra* note 10, at 20 (statement of Geoffrey R. Stone).

113. *Espionage Act and WikiLeaks: Hearing*, *supra* note 10, at 19 (statement of Geoffrey R. Stone). Judging from history, this overstatement usually occurs at times of "national anxiety" and these "pressures" often "lead both government officials and the public itself to underestimate the benefits of publication" as well. *Id.*

114. See Press Release, Jones on WikiLeaks, *supra* note 47. These conjectural arguments were the same ones the government made in *Pentagon Papers*. See *supra* notes 75–79 and accompanying text.

115. See *N.Y. Times Co.*, 403 U.S. 713; RUDENSTINE, *supra* note 68, at 153–54. Further, the ACLU urges Congress to abandon its current efforts to broaden the Espionage Act and instead "to narrow the Act's focus to those responsible for leaking properly classified information to the detriment of our national security." LAURA W. MURPHY & MICHAEL W. MACLEOD-BALL, AMERICAN CIVIL LIBERTIES UNION, THE ESPIONAGE ACT AND THE LEGAL AND CONSTITUTIONAL ISSUES RAISED BY WIKILEAKS 2 (Dec.16, 2010), available at http://www.aclu.org/files/assets/ACLU_Statement_for_House_Judiciary_Committee_Hearing_on_WikiLeaks_and_the_Espionage_Act.pdf.

116. See *United States v. N.Y. Times Co.*, 328 F. Supp. 324, 331 (S.D.N.Y. 1971). Justice White agreed with this contention in his concurrence, adding that

I do not say that in no circumstances would the First Amendment permit an injunction against publishing . . . Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has

causation is hard to prove, the government may instead need to convince the Court to add modern-day situations that are per se threatened when the corollary documents are published.¹¹⁷ However, since both War Reports are so vast, the Court should only allow an injunction against the publication of the specific documents that cause the threat and not against the entire leak.¹¹⁸

With these burden of proof difficulties in mind, it is likely that the government would attempt to persuade the Court to distinguish WikiLeaks from *Pentagon Papers*.¹¹⁹

First, the government may argue that the magnitude and frequency of WikiLeaks' publication of leaks is unprecedented and in itself presents an imminent harm to national security.¹²⁰ Justice White, in concurring in *Pentagon Papers*, was comforted that prior restraint cases were infrequent, as he was sympathetic to the government's argument that the publication of the Papers would cause damage to the United States.¹²¹ If current justices carry similar sentiments, then

not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases.

N.Y. Times Co., 403 U.S. at 731 (White, J., concurring).

117. For original examples from *Near* see *N.Y. Times Co.*, 328 F. Supp. at 331. Modern "examples might include publication of the identities of covert CIA operatives in Iran or public disclosure that the government has broken the Taliban's secret code, thus alerting the enemy to change its cipher." *Espionage Act WikiLeaks: Hearing*, *supra* note 10, at 20 (statement of Geoffrey R. Stone). Additionally, although the case was later dropped, a federal district court granted a temporary restraining order to enjoin a magazine from publishing an article detailing the secrets of constructing a hydrogen bomb. *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).

118. The issue is one of proof, as Brennan suggested in his concurrence. See *N.Y. Times Co.*, 403 U.S. at 726–27 (Brennan, J., concurring). In order to provide that proof the government must narrowly tailor the specific national security concern to a specific document presenting that concern. See *id.*

119. Justice Brennan did preface his concurrence by noting that "our judgments in the present cases may not be taken to indicate the propriety, in the future, of issuing temporary stays and restraining orders to block the publication of material sought to be suppressed by the Government." *Id.* at 724–25. Justice White expressed similar sentiments. See *id.* at 732 (White, J., concurring).

120. Since its inception, WikiLeaks has released nearly 20,000 files of U.S. government documents with many files containing hundreds of thousands of reports or pages, including the Iraq War Logs with 391,832 reports. WIKILEAKS, <http://WikiLeaks.org> (last visited Jan. 31, 2012). Compare with *New York Times Co. v. United States*, 403 U.S. 713, 733 (White, J., concurring) (recognizing "the relatively few sensitive documents the Government now seeks to suppress").

121. *N.Y. Times Co.*, 403 U.S. at 733. He elaborated, "It is not easy to reject the proposition

they may be inclined to create a lower benchmark of harm that must be shown before enjoining organizations that frequently leak documents, like WikiLeaks. On the other hand, the study at the center of *Pentagon Papers* was also a lengthy 7,000 pages, suggesting that the magnitude of a leak is irrelevant.¹²² Further, the frequency of leaks being published by a single source was not a factor in the Court's analysis in *Pentagon Papers*, and there is no indication that the Court would or should read one into the First Amendment.¹²³

Second, the government may argue that WikiLeaks is neither press nor journalism and thus is not deserving of the same protections as were afforded the *New York Times* in *Pentagon Papers*.¹²⁴ However, WikiLeaks has many marks of a news outlet—a substantial editorial process, news stories based on the raw leaked data, and cooperation between itself and other publishers.¹²⁵ Additionally,

urged by the United States and to deny relief on its good-faith claims in these cases that publication will work serious damage to the country. But that discomfiture is considerably dispelled by the infrequency of prior restraint cases." *Id.*

122. *See id.* at 750. The Papers study included 47 volumes with 3,000 pages of historical analysis and 4,000 pages of original government documents. THE MOST DANGEROUS MAN IN AMERICA: DANIEL ELLSBERG AND THE PENTAGON PAPERS, *supra* note 73.

123. *See N.Y. Times Co.*, 403 U.S. at 713.

124. "Joe Lieberman and former Bush administration attorney general Michael Mukasey argue for using the Espionage Act of 1917—which has never been used against a publisher before—to prosecute Assange," which suggests the possibility that the government will argue in the First Amendment context that WikiLeaks is not a journalistic operation. *See* Ben Adler, *Why Journalists Aren't Standing Up for WikiLeaks*, NEWSWEEK (Jan. 4, 2011), <http://www.newsweek.com/2011/01/04/why-journalists-aren-t-defending-julian-assange.html>.

125. WIKILEAKS, *supra* note 16. C.W. Anderson, a Knight Media Policy Fellow of the New America Foundation, agrees:

WikiLeaks, for the purposes of law and public policy, is a journalistic organization. In order to have a functional legal system that privileges the kind of transparency and information we need as a democracy, you have to make the argument that WikiLeaks is journalism

If we were to say that WikiLeaks [is not journalism], we would end up in a situation where many other news entities would not be journalistic organizations either, based on what they do. It's very hard to draw that line that excludes WikiLeaks and includes the *New York Times*.

Jayshree Bajoria, *How WikiLeaks Affects Journalism*, COUNCIL ON FOREIGN REL. (Dec. 29, 2010), http://www.cfr.org/publication/23696/how_wikileaks_affects_journalism.html (interviewing C.W. Anderson, Knight Media Policy Fellow, New America Foundation). Bill Keller, the executive editor of the *New York Times*, wrote that while

I would hesitate to describe what WikiLeaks does as journalism, it is chilling to contemplate the possible government prosecution of WikiLeaks for making secrets

while defining the “press” was not an issue in *Pentagon Papers*, the Court has been unwilling to draw narrow lines as to who constitutes the “press.”¹²⁶ The Court’s past unwillingness to narrowly define the press is likely to continue as the nature of journalism remains in flux and continues to be transformed by organizations like WikiLeaks, which utilize new technologies to push journalism in new directions.¹²⁷

III. PROPOSAL

WikiLeaks must be afforded the same First Amendment protections as the *New York Times* in *Pentagon Papers*.¹²⁸ *Pentagon Papers* is the most relevant and applicable precedent in any future injunctive or criminal publishing statute litigation involving WikiLeaks.¹²⁹

public, let alone the passage of new laws to punish the dissemination of classified information, as some have advocated. Taking legal recourse against a government official who violates his trust by divulging secrets he is sworn to protect is one thing. But criminalizing the publication of such secrets by someone who has no official obligation seems to me to run up against the First Amendment and the best traditions of this country.

Bill Keller, *Dealing With Assange and the WikiLeaks Secrets*, N.Y. TIMES (Jan. 26, 2011), <http://www.nytimes.com/2011/01/30/magazine/30WikiLeaks-t.html>.

126. See Stewart, *supra* note 2. When they have tried to define press, they have done so broadly. See, e.g., Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (“[E]very sort of publication which affords a vehicle of information and opinion.”). But see Branzburg v. Hayes, 408 U.S. 665 (1972) (refusing to interpret the First Amendment to recognize a reporter’s privilege and further declined to define the press).

Some states have enacted shield or reporter privilege laws that define the press more narrowly. For example Rhode Island’s state shield law protects any “reporter, editor, commentator, journalist, writer, correspondent, newsphotographer, or other person directly engaged in the gathering or presentation of news for any *accredited* newspaper, periodical, press association, newspaper syndicate, wire service, or radio or television station.” Newsman’s Privilege Act, R.I. GEN. LAWS § 9-19.1-2 (2011) (emphasis added).

127. See *supra* notes 44, 48–55. Bill Keller thinks the impact of WikiLeaks on journalism “has probably been overblown.” Keller, *supra* note 125. But even so, he argues that “[l]ong before WikiLeaks was born, the Internet transformed the landscape of journalism, creating a wide-open and global market with easier access to audiences and sources, a quicker metabolism, a new infrastructure for sharing and vetting information and a diminished respect for notions of privacy and secrecy.” *Id.*

128. See *supra* notes 98–108.

129. *Espionage Act and WikiLeaks: Hearing*, *supra* note 10, at 17 (statement of Geoffrey R. Stone).

Arguments against applying *Pentagon Papers* to a case involving WikiLeaks must fail. Even though innovative in form, WikiLeaks is not innovative in function.¹³⁰ WikiLeaks is a publishing outlet that takes submissions from sources who have acquired, legally or illegally, classified government documents.¹³¹ Its function is no different than that of the *New York Times*, which took and published documents from a source who acquired them illegally.¹³²

The magnitude of the leaks, frequency of the leaks, and nature of the media outlet were nonfactors in *Pentagon Papers*.¹³³ They must remain so in any future WikiLeaks First Amendment cases. In *Pentagon Papers*, the Court implicitly, and correctly, recognized that the First Amendment does not discriminate based on these criteria.¹³⁴

This does not mean that the Court should find every future injunction against publication of leaked documents constitutional, no matter how threatening to national security.¹³⁵ However, *Pentagon Papers* already provides an adequate safeguard to allow injunctions against the publication of documents that are proven to pose an imminent and grave national security threat to America.¹³⁶ This benchmark should apply equally to WikiLeaks.

IV. CONCLUSION

WikiLeaks' operation is no doubt innovative in many ways, stirring great controversy.¹³⁷ However, when the layers are peeled away, WikiLeaks' operation is readily comparable to that of the traditional press.¹³⁸

Justice Sotomayor is likely correct that the Supreme Court will have to rule on the issue of national security and freedom of speech in the WikiLeaks' age, considering the continuing controversy and

130. Compare *supra* notes 17, 22, 25–40, 44, 125, 127 and accompanying text with notes 63–68 and accompanying text.

131. See *supra* note 17 and accompanying text.

132. See *supra* notes 56–63 and accompanying text.

133. See *N.Y. Times v. United States*, 403 U.S. 713 (1971).

134. See *id.*

135. See *supra* note 108 and accompanying text.

136. See *supra* note 108 and accompanying text.

137. See *supra* notes 41–47 and accompanying text.

138. See *supra* notes 3–63 and accompanying text.

possibility of the SHIELD Act's adoption.¹³⁹ However, *Pentagon Papers* provides the Court with the tools to deal with such a case.¹⁴⁰ Arguments against applying that precedent should fail not only because journalism is in a state of flux, but also because at its base level, WikiLeaks' simply publishes documents leaked by third parties, which is exactly what the *Times* did in *Pentagon Papers*.¹⁴¹ Therefore, the Court should find unconstitutional any future attempts by the government to prevent WikiLeaks' dissemination of leaked confidential documents, whether through injunctions or statutory criminalization, unless the requisite national security benchmark established by *Pentagon Papers* is met.¹⁴²

The video release of the Apache helicopter attack illustrates how Wikileaks can be more powerful than traditional media. Since Wikileaks released the video, the soldiers involved have issued a letter of "Reconciliation and Responsibility to the Iraqi People."¹⁴³ WikiLeaks' innovative form helped the public not only gain access to the video but also prompted an apology. This, after traditional media had failed.¹⁴⁴ And in doing so, Wikileaks did not step outside the bounds and protections of the First Amendment. Rather, it acted as press by publishing leaked documents, just the same as the traditional media.¹⁴⁵ The only difference is that WikiLeaks harnesses technology to effectively disseminate the news.¹⁴⁶

139. See *supra* notes 8–9 and accompanying text.

140. See *supra* Part I.D.

141. See *supra* Parts II, III.

142. See *supra* Parts II, III.

143. Josh Stieber & Ethan McCord, *Soldiers in "WikiLeaks" Unit Apologize for Violence*, TRUTHOUT (Apr. 19, 2010), <http://web.archive.org/web/20100618144725/http://www.truth-out.org/soldiers-wikileaks-company-apologize-violence58714> (archive from Jan. 11, 2011).

144. See *supra* Part I.A.

145. Compare *supra* notes 17, 22, 25–40, 44, 125, 127 and accompanying text with notes 63–68 and accompanying text.

146. This is apparent by Reuters' inability to obtain the video. See *supra* note 4 and accompanying text; see also *supra* note 127 and accompanying text.