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Leaks, Leakers, and Journalists: Adding Historical Context to the Age of WikiLeaks

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Leaks, Leakers, and Journalists: Adding Historical Context to the Age of WikiLeaks

by
SANDRA DAVIDSON*

I.	Introduction	27
II.	Bradley Manning and the Release of WikiLeaks Material Online	28
III.	Classified Means Classified, But Unclassified Can Also Count: <i>Snepp</i> , <i>Marchetti</i> , Plame-Wilson, <i>The Progressive</i>	35
IV.	Morison: A Counterpart to Manning with Big-Friend Support	43
V.	<i>Pearson v. Dodd</i> and <i>Bartnicki v. Vopper</i>	48
VI.	<i>Branzburg v. Hayes</i>	54
VII.	The Danger of Applying <i>Branzburg</i> 's Logic to <i>Bartnicki</i> and <i>New York Times</i> <i>v. United States</i>	58
VIII.	Franklin, Rosen, and Weissman; Risen and Lichtblau; Drake and Sterling	65
IX.	National Security	72
X.	Secrecy and Precedents in the Age of WikiLeaks	80
XI.	Conclusion	87

I. Introduction

Traditionally, the United States has been unforgiving to those who leak its secret, sensitive information to the public. Its attitude toward those who publish information provided by leakers—especially those who try to protect the identity of their sources—is also often hostile.

The fate of Pfc. Bradley Manning will unfold in the shadow of previous American experiences with leaks and leakers. Manning is the U.S. soldier suspected of disgorging unprecedented amounts of

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classified military and diplomatic reports to WikiLeaks. WikiLeaks, in turn, published the documents on its website and in conjunction with news media outlets around the world.¹

The purpose of this article is to sketch the historical context in which Manning (or whoever actually leaked the documents), WikiLeaks, and the news organizations associated with them find themselves.

This article begins by reviewing how Manning reportedly obtained the documents he gave to WikiLeaks, how authorities were led to him, and his treatment since his arrest. It then reviews several decades of legal action surrounding leaks, leakers, and journalists in the United States. Throughout, this article suggests similarities and differences between Manning's case and previous cases.

This article thus provides an overview of how much of the territory in which the legal community finds itself in the age of WikiLeaks is without reference point in the past. It also suggests how much of what is happening is an evolution from previous incidents, and how the past might prove instructive today.

II. Bradley Manning and Release of WikiLeaks Material Online

On July 25, 2010, WikiLeaks released an avalanche of secret U.S. military intelligence and incident reports from the Afghanistan war,² in one of the largest leaks of classified data in U.S. history. WikiLeaks gave three major publications—*The New York Times*, London's *Guardian* newspaper, and *Der Spiegel* in Germany—access

1. News media and journalists have been unusually quick to release book-length reports on WikiLeaks, Bradley Manning, and the drama surrounding the release of material throughout 2010. See, e.g., DAVID LEIGH AND LUKE HARDING, WIKILEAKS: INSIDE JULIAN ASSANGE'S WAR ON SECRECY (2011); THE NEW YORK TIMES STAFF, OPEN SECRETS: WIKILEAKS, WAR, AND AMERICAN DIPLOMACY (2011); GREG MITCHELL, BRADLEY MANNING: TRUTH AND CONSEQUENCES (2011); MITCHELL, THE AGE OF WIKILEAKS: FROM COLLATERAL MURDER TO CABLEGATE (AND BEYOND) (2011). News specials have also proliferated; see *CNN Presents Wiki Wars* (CNN television broadcast June 12, 2011), available at <http://all-shares.com/download/g14394321-cnn-presents-wiki-wars-the-mission-of-julian-assange-hdtv-xvi-af.avi.html>, and *WikiSecrets* (PBS Frontline television broadcast May 24, 2011), available at <http://www.pbs.org/wgbh/pages/frontline/wikileaks/etc/transcript.html>.

2. The reports are known as the Afghan War Diary or the Afghan War Logs. See *Afghanistan: The War Logs*, GUARDIAN (July 25, 2010 5:00 PM), available in part at <http://www.guardian.co.uk/world/datablog/2010/jul/25/wikileaks-afghanistan-data>.

to the files before releasing them online, and the three news organizations prepared several reports to coincide with the release.³

Two months prior, WikiLeaks released “Collateral Murder,” a video showing a U.S. air attack that killed twelve people in Baghdad.⁴ WikiLeaks released hundreds of thousands of additional military and

3. See *A Note to Readers—Piecing Together the Reports, and Deciding What to Publish*, N.Y. TIMES, July 26, 2010, at A8, available at <http://www.nytimes.com/2010/07/26/world/26editors-note.html>. See also Ki Price, *The Man Who Spilled the Secrets*, VANITY FAIR, Feb. 2011, at 92. On *The Guardian’s* sifting through the information, see, e.g., *CNN Presents Wiki Wars*, *supra* note 1. On July 26, 2010, *Der Spiegel* announced: “In an unprecedented development, close to 92,000 classified documents pertaining to the war in Afghanistan have been leaked. *Der Spiegel*, *The New York Times* and *The Guardian* have analyzed the raft of mostly classified documents. The war logs expose the true scale of the Western military deployment . . .” Matthias Gebauer et al., *Explosive Leaks Provide Image of War from Those Fighting It*, SPIEGEL ONLINE, July 25, 2010, <http://www.spiegel.de/international/world/0,1518,708314,00.html>. And *The Guardian* gave a blow-by-blow account of the release of the documents. See *Afghanistan War Logs: As it Happened*, GUARDIAN, July 26, 2010, <http://www.guardian.co.uk/world/blog/2010/jul/26/afghanistan-war-logs-wikileaks>. On October 22, 2010, the Iraq War Logs hit the Internet. On the value of the WikiLeaks’ War Logs, Dean Baquet, the Assistant Managing Editor of the *New York Times*, said: “It was a remarkable insight. I mean, it was an unvarnished, rich portrait of the daily conduct of two wars. I would argue that you came away with stuff you didn’t get in the Pentagon Papers because of the—the rawness of the information, the sheer day-to-day mundane life of war.” *The Guardian* even created a “Datablog: every death mapped” of Iraqi deaths. *Iraq War Logs: How Civilians Have Paid Heaviest Price: Leaked Military Files Analyzed by the Guardian Reveal Secret U.S. Tally of Iraqi Deaths*, GUARDIAN, Oct. 22, 2010, <http://www.guardian.co.uk/world/video/2010/oct/22/iraq-war-logs>. And *Der Spiegel* said:

In the greatest leak in the history of the United States military, WikiLeaks is publishing 391,832 classified documents on the Iraq war on the Internet. The field reports from soldiers cast a new light on the war—documenting in a unique way how the highly armed American military was helpless in the conflict for years.

Spiegel Staff, *The WikiLeaks Iraq War Logs: Greatest Data Leak in US Military History*, SPIEGEL ONLINE, Oct. 22, 2010, <http://www.spiegel.de/international/world/0,1518,724845,00.html>. Assange wanted to cloak himself in First Amendment protection by having *The New York Times* publish first. He said: “We insisted on bringing in *The New York Times*. We also insisted on *The New York Times* publishing first. So if there was any debate before a jury about, had it been published first in a foreign publication or a U.S. publication, it would be very clear it was published first in a U.S. publication.” *WikiSecrets*, *supra* note 1. On Assange’s strategy to receive First Amendment protection, see, e.g., David Carr, *Behind War Logs, A New Kind of Alliance*, N.Y. TIMES, July 26, 2010, <http://mediadecoder.blogs.nytimes.com/2010/07/26/behind-war-logs-a-new-kind-of-alliance/>.

4. See COLLATERAL MURDER, <http://www.collateralmurder.com/> (last visited May 15, 2011). Although WikiLeaks opened in 2007, “Collateral Murder” was the website’s most prominent release of material. See, e.g., Noam Cohen and Brian Stelter, *Iraq Video Brings Notice to a Web Site*, N.Y. TIMES, Apr. 6, 2010, <http://www.nytimes.com/2010/04/07/world/07wikileaks.html>.

diplomatic documents by year's end,⁵ including the Iraq War Logs. In April 2011 it released secret files on the military prison in Guantanamo Bay, Cuba.⁶ And on August 24, 2011, WikiLeaks announced it would release 35,000 more diplomatic cables.⁷

In keeping with a policy of protecting their sources, WikiLeaks and its leader, Julian Assange,⁸ have not said how they obtained the documents.⁹ The website did say, however, that WikiLeaks had offered Manning legal assistance.¹⁰

5. WIKILEAKS, <http://www.wikileaks.ch> (last visited Oct. 11, 2011). The second batch of military documents, from Iraq, are known to WikiLeaks as the Iraq War Logs, although some organizations, such as *The New York Times*, now refer to the collective set of Iraq and Afghanistan reports as The War Logs. WikiLeaks again allowed *The New York Times*, *Guardian*, and *Der Spiegel* early access to the Iraq documents, but it also granted early access to other global media, including France's *Le Monde* newspaper and the Qatar-based Al Jazeera network. See, e.g., David Leigh, *Iraq war logs: WikiLeaks v. Washington*, *GUARDIAN UNLIMITED*, Oct. 22, 2010. See also, Price, *supra* note 3, at 92. On the 251,287 diplomatic documents, see, e.g., Scott Shane & Andrew W. Lehren, *State's Secrets: Leaked Cables Offer a Raw Look Inside U.S. Diplomacy*, *N.Y. TIMES*, Nov. 29, 2010, at A1. For more general information on Wikileaks and its activities, see Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 *HARV. C.R.-C.L. L. REV.* 311 (2011).

6. WIKILEAKS, <http://wikileaks.ch/gitmo/> (last visited Oct 11. 2011).

7. See, e.g., Amy Goodman and Juan Gonzalez, *WikiLeaks Releases Tens of Thousands of New Classified U.S. Diplomatic Cables*, *DEMOCRACY NOW!*, Aug. 26, 2011, http://www.democracynow.org/2011/8/26/headlines/wikileaks_releases_tens_of_thousands_of_new_cables; Melissa Jeltsen, *WikiLeaks: 35,000 Diplomatic Cables To Be Released* *HUFFINGTON POST* (Aug. 26, 2011), <http://www.huffingtonpost.com/2011/08/24/wikileaks-35-diplom>. For more on what perhaps precipitated the timing of this WikiLeaks dump, see *infra* note 19.

8. See, e.g., Raffi Khatchadourian, *No Secrets*, *NEW YORKER*, June 7, 2010, at 40 (an extensive profile of Assange and his forming of WikiLeaks).

9. Eric Schmitt, *In Disclosing Secret Documents, WikiLeaks Seeks 'Transparency'* *N.Y. TIMES*, July 26, 2010, at A11. See also Gaviria and Smith, *supra* note 1 (Assange says that WikiLeaks' software design prevents identification of sources. WikiLeaks' technology does not collect sources, in line with Assange's principle that, in his words, "the best way to keep a secret is to never have it.") On September 1, 2011, Assange did seem to say that David Leigh of *The Guardian* had pointed at Manning.

10. Schmitt, *supra* note 9. Manning also received public support from Daniel Ellsberg, who leaked the Pentagon Papers in 1971, the last dramatic leak case that faced the U.S. government prior to the War Logs. Cf. *New York Times v. United States*, 403 U.S. 713 (1971). "Bradley Manning has been defending and supporting our constitution," Ellsberg said. Chris McGreal, *Campaign to Free Soldier who Leaked Afghan War Logs*, *GUARDIAN*, Sept. 16, 2010, at 24. Ellsberg also supported Assange. He flew to London to appear at a news conference with Assange shortly after the leak of the Iraq war documents. Pentagon demands for Assange to return any classified materials he possessed, according to Ellsberg, were couched in the same careful language that he heard after release of the Pentagon Papers. "Secrecy is essential to empire," Ellsberg commented. John F. Burns and Ravi Somaiya, *WikiLeaks Founder Gets Support in Rebuking U.S. on Whistle-Blowers*, *N.Y. TIMES*, Oct. 24, 2010, at A12, available at <http://www.nytimes.com/2010/10/24/world/24london.html>.

The U.S. government was less reserved than WikiLeaks and Assange. Not long after WikiLeaks released the Afghanistan files, the government declared Manning a “person of interest” in the leak.¹¹ The government had already arrested him on suspicion of leaking the helicopter video and diplomatic documents,¹² and he was in custody

In his December 10, 2010 interview with Amy Goodman on *Democracy Now!*, Ellsberg said of the WikiLeaks case:

Well, in this case, as in the Pentagon Papers, I do give The New York Times credit for working with these materials and presenting material to their readers. And in fact . . . if they [government authorities] find a crime, or if they invent a crime or pass a . . . criminal law that would cover WikiLeaks, it will cover *The New York Times*, and you, *Democracy Now!*, and anyone who presents news that in part reflects leaks . . . unauthorized disclosures from within the government.

Actually, the wording of the Espionage Act, which . . . was not intended for this purpose . . . is so broad that it applies to readers of this classified information . . . [T]hey’d have to return their copy of The New York Times, I guess, to the Justice Department. That actually is in line with what the government has been saying right now, directing its employees that they cannot download WikiLeaks or The New York Times sites that reports the WikiLeaks onto their computers at work or at home . . .

We’re in an absurd position here with a close down of public discussion of official matters, very similar to that of China. In fact, I even wonder whether there’s a rule that absurd in China.

Daniel Ellsberg’s interview with Amy Goodman, DEMOCRACY NOW! (Dec. 10, 2010), http://www.democracynow.org/2010/12/10/whistleblower_daniel_ellsberg_julian_assange_is.

11. David S. Cloud, *Army Officer a ‘Person of Interest,’* L.A. TIMES, July 28, 2010, at A6.

12. Elisabeth Bumiller, *Army Broadens Inquiry Into Disclosure of Reports to WikiLeaks*, N.Y. TIMES, July 31, 2010, at A4. Significant controversy surrounds how the military came to know of Manning and arrest him on May 26, 2010.

In June 2010, *Wired* published extensive excerpts of an instant-message conversation allegedly between Manning and Adrian Lamo, a “former hacker.” Lamo eventually told the FBI and the Army about his chats with Manning.

The excerpts portray Manning as confessing to stealing data from government computers while serving in Iraq, including the “Collateral Murder” video and diplomatic cables, which he then passed to WikiLeaks. “i can’t believe what im confessing to you,” Manning allegedly wrote. The logs apparently include Manning’s descriptions of how he acquired the data:

(01:54:42 PM) Manning: i would come in with music on a CD-RW [a rewritable CD]

(01:55:21 PM) Manning: labelled with something like “Lady Gaga”... erase the music . . . then write a compressed split file

(01:55:46 PM) Manning: no-one suspected a thing

(01:55:48 PM) Manning: =L kind of sad

when WikiLeaks released the Afghanistan files and subsequent material.¹³

As well as Manning and Lamo discussing the lax security surrounding the supposedly highly secret material:

(01:56:36 PM) Lamo: from a professional perspective, i'm curious how the server they were on was insecure
 (01:57:19 PM) Manning: you had people working 14 hours a day . . . every single day . . . no weekends . . . no recreation . . .
 (01:57:27 PM) Manning: people stopped caring after 3 weeks
 (01:57:44 PM) Lamo: i mean, technically speaking
 (01:57:51 PM) Lamo: or was it physical
 (01:57:52 PM) Manning: >nod<
 (01:58:16 PM) Manning: there was no physical security
 (01:58:18 PM) Lamo: it was physical access, wasn't it
 (01:58:20 PM) Lamo: hah
 (01:58:33 PM) Manning: it was there, but not really
 (01:58:51 PM) Manning: 5 digit cipher lock . . . but you could knock and the door . . .
 (01:58:55 PM) Manning: *on
 (01:59:15 PM) Manning: weapons, but everyone has weapons
 (02:00:12 PM) Manning: everyone just sat at their workstations... watching music videos / car chases / buildings exploding . . . and writing more stuff to CD/DVD . . . the culture fed opportunities

Kevin Poulsen & Kim Zetter, *'I Can't Believe What I'm Confessing to You': The Wikileaks Chats*, WIRED (June 10, 2010, 9:01 PM), <http://www.wired.com/threatlevel/2010/06/wikileaks-chat/>. Later in 2010, Poulsen and *Salon* blogger Glenn Greenwald engaged in an extended debate about whether *Wired* needed to release the entire log of the chat between Manning and Lamo. *Wired* had released only 25 percent of the transcript, claiming that it held back portions that “discuss deeply personal information about Manning or that reveal apparently sensitive military information.” Greenwald claimed that *Wired* needed to release the logs because Lamo had been claiming to news media that Manning did or did not tell Lamo certain things, which the logs would reveal, and which would clarify what Lamo could have told the government. See Glenn Greenwald, *The Worsening Journalistic Disgrace at Wired*, SALON (Dec. 27, 2010, 4:28 PM), http://www.salon.com/news/opinion/glenn_greenwald/2010/12/27/wired; Evan Hansen & Kevin Poulsen, *Putting the Record Straight on the Lamo-Manning Chat Logs*, WIRED (Dec. 28, 2010, 9:18 PM), <http://www.wired.com/threatlevel/2010/12/greenwald/>; Glenn Greenwald, *Response to Wired's Accusations*, SALON (Dec. 29, 2010, 8:01 AM), http://www.salon.com/news/opinion/glenn_greenwald/2010/12/29/wired_response_1; Glenn Greenwald, *Wired's Refusal to Release or Comment on the Manning Chat Logs*, SALON (Dec. 29, 2010, 8:30 AM), http://www.salon.com/news/opinion/glenn_greenwald/2010/12/29/wired_1.

13. *The New York Times*, which has perhaps worked more closely with WikiLeaks than has any other American news outlet, does not seem to be in the Administration's crosshairs, according to the paper:

Do you think that what you do is consistent with what you understand Assange and WikiLeaks did? Mr. Holder asked a reporter. “Would I have liked not to see the stuff appear? Yes. But did The Times act in a responsible way? I would say yes. I am not certain I would say that about

In early March 2011, the Army charged Manning with 22 counts, including aiding the enemy, which could carry a death sentence.¹⁴ That month, Manning was placed under “prevention of injury watch,” which required him to be stripped naked nightly until an inspection in the morning.¹⁵

After the news of Manning’s treatment broke, President Barack Obama said he had been assured by the Pentagon that Manning’s confinement met the United States’s “basic standards.”

The administration struggled to straighten its stories, however. The day before President Obama spoke, P.J. Crowley, the State

those people who were responsible for the initial leaks and the wholesale dumping of materials.”

Charlie Savage, *For Attorney General, New Congress Means New Headaches*, N.Y. TIMES, Dec. 31, 2010 at A12, available at <http://www.nytimes.com/2010/12/31/us/politics/31holder.html>. The *Times* and other media, though, have worked with Assange and WikiLeaks, not Manning. Bill Keller, the top editor at the *Times*, wrote in January 2011 that the newspaper “regarded Assange throughout as a source, not as a partner or collaborator, but he was a man who clearly had his own agenda.” Bill Keller, *Dealing with Assange and the Wikileaks Secrets*, N.Y. TIMES, Jan. 30, 2011, at 32, available at <http://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html>. The release of the War Logs prompted key U.S. senators to announce that whatever proposals for federal shield laws for journalists emerged, the proposals would specifically exclude from shield-law coverage any organization that disseminated classified or confidential material but that did not add any reporting or context. Paul Farhi, *Wikileaks is Barrier to Shield Arguments*, WASH. POST, Aug. 21, 2010, at C1. Democratic senators who were working on shield law legislation are now “backpedaling from WikiLeaks,” and senators Charles Schumer (D-N.Y.) and Dianne Feinstein (D-Calif.) are working on an amendment that will give shield protection to traditional news gathering but withhold it from websites that are used to disseminate secret information en masse. See Charlie Savage, *After Afghan War Leaks, Revision in a Shield Bill*, N.Y. TIMES, Aug. 4, 2010, at 12, available at <http://www.nytimes.com/2010/08/04/us/04shield.html> (also describing WikiLeaks as “a confederation of open-government advocates who solicit secret documents for publication”); see also John Eggerton, *Is Shield Law the Next Wikileaks Victim? D.C. Debates Effects of Leaked Docs on Bill Protecting Journalists*, BROAD. & CABLE (Dec. 5, 2010, 9:01 PM), http://www.broadcastingcable.com/article/460623-Is_Shield_Law_the_Next_WikiLeaks_Victim_.php.

14. There was speculation that the ratcheting up of the charges was an attempt to pressure Manning into a plea-bargaining agreement. See, e.g., David S. Cloud, *Soldier in WikiLeaks Case Charged With Aiding the Enemy*, L.A. TIMES, Mar. 3, 2011, <http://www.latimes.com/news/nationworld/nation/la-na-wikileaks-manning-20110303,0,3798837.story>.

15. Manning was not, however, placed on suicide watch. Charlie Savage, *Soldier in Leaks Case Will Be Made to Sleep Naked Nightly*, N.Y. TIMES, Mar. 5, 2011, at A8. According to Manning’s lawyer, the restriction began after Manning, frustrated with the conditions of his imprisonment, “sarcastically stated that if he wanted to harm himself, he could conceivably do so with the elastic waistband of his underwear or with his flip-flops.” David E. Coombs, *The Truth Behind Quantico Brig’s Decision to Strip PFC Manning*, THE LAW OFFICE OF DAVID E. COOMBS (Mar. 5, 2011, 12:39 PM), <http://www.army.court martialdefense.info/2011/03/truth-behind-quantico-brigs-decision-to.html>.

Department spokesman, told a private audience that the restrictions against Manning were “ridiculous and counterproductive and stupid.”¹⁶ Crowley soon resigned.¹⁷

In April 2011, the U.S. military moved Manning from the brig at Quantico, Virginia, to a military prison in Fort Leavenworth, Kansas, where he would have “a larger cell, plus several hours a day with the rest of the prison population for exercise, meals, and other activities,” according to *The Christian Science Monitor*.¹⁸

In May 2011, a federal grand jury began hearing testimony to determine whether Assange and WikiLeaks could face prosecution under the 1917 Espionage Act.¹⁹ A leaked subpoena also said the

16. See Ellen Nakashima, *WikiLeaks Suspect's Treatment 'Stupid,' U.S. Official Says*, WASH. POST, Mar. 12, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/11/AR2011031106542.html>.

17. *Crowley Quits Over Manning Comments*, AL JAZEERA ENGLISH, (Mar. 13, 2011, 6:02 PM), <http://english.aljazeera.net/news/americas/2011/03/201131317356184984.html>.

18. Brad Knickerbocker, *Alleged 'WikiLeaker' Bradley Manning Sent to Less Restrictive Prison*, CHRISTIAN SCI. MONITOR Apr. 21, 2011, <http://www.csmonitor.com/USA/Justice/2011/0421/Alleged-WikiLeaker-Bradley-Manning-sent-to-less-restrictive-prison>.

While all this happened, authorities in Europe continued moving against Assange for allegations that he raped two women in Sweden. Assange was released on bail, subject to curfew, in London while an extradition battle was fought in court. In late February 2011, Assange lost his fight against extradition to Sweden. Esther Addley, *Make This Case Bigger Than Me*, GUARDIAN, Feb. 24, 2011, at 3. Assange promptly appealed, indefinitely delaying the extradition, which would have taken place within 10 days of the ruling against him. “We have always known we would appeal,” he told the media after the ruling. James Meikle, *Assange Starts Appeal Against Extradition to Sweden*, GUARDIAN, Mar. 4, 2011, at 10. Ironically, Assange apparently complained that somebody leaked to *The Guardian* a copy of the Swedish police report about his alleged sexual transgressions. See, e.g., Robert Barr, *Leak Bothers Founder of Wikileaks; Police Report on Assange Disclosed*, BOS. GLOBE, Dec. 22, 2010, at 7.

19. Ed Pilkington, *WikiLeaks: US opens grand jury hearing*, GUARDIAN, May 11, 2011, <http://www.guardian.co.uk/media/2011/may/11/us-opens-wikileaks-grand-jury-hearing>.

On August 25, 2011, the group Citizens for Legitimate Government sent out an email that said, under the heading of “U.S. invokes Patriot Act as WikiLeaks dumps more data:”

The U.S. government has reportedly invoked the controversial Patriot Act as a legal basis for demanding data from Internet provider Dynadot about WikiLeaks and Julian Assange. The whistle-blowing organization [WikiLeaks] recently received a copy of the (now) unsealed court order, which was apparently signed by a U.S. magistrate judge on January 4, 2011. “Using the terms of the Patriot Act the order was issued to Dynadot, the domain registrars [sic] for wikileaks.org, for all information they hold on WikiLeaks, Julian Assange and wikileaks.org,” the organization confirmed in an official statement.

grand jury was considering a prosecution on grounds of “knowingly accessing a computer without authorization or exceeding authorized access” and “knowingly stealing or converting any record or thing of value of the United States or any department or agency thereof,” charges which, according to *The Guardian*, “would appear to point . . . in the direction of Bradley Manning.”²⁰

III. Classified Means Classified, But Unclassified Can Also Count: *Snepp*, *Marchetti*, *Plame-Wilson*, *The Progressive*

The U.S. Supreme Court has not been kind to persons who leak information—even unclassified information, as illustrated in 1980 in *Snepp v. United States*.²¹

CITIZENS FOR LEGITIMATE GOVERNMENT (Aug. 25, 2011), <http://www.legitgov.org/>. However, Reuters said that a “U.S. official” had indicated that the court order had not been officially unsealed. See *WikiLeaks Publishes Tens of Thousands More Cables*, REUTERS (Aug. 25, 2011, 9:20 PM), <http://www.reuters.com/article/2011/08/26/us-wikileaks-idUSTRE77O7PZ20110826>. Within hours of revealing on Twitter that Dynadot, a California Internet registrar that hosted WikiLeaks, had received and complied with the court order issuing from Alexandria, Virginia, WikiLeaks started dumping more diplomatic cables, Reuters reported. *Id.* The order demanded that Dynadot disclose “customer or subscriber account information for each account registered to or associated with Wikileaks, the individual Julian Assange, or the domain name wikileaks.org for the time period November 1, 2009 to present.” *In re* Application of the United States of America for an Order Pursuant to 18 U.S.C. § 2703(d), Misc. No. 10GJ3793 (E.D. Va., Jan. 4, 2011), reprinted by WikiLeaks, available at http://wikileaks.org/IMG/pdf/Dynadot_2703_d_Order.pdf.

20. Pilkington, *supra* note 19; see also Greenwald, *FBI Serves Grand Jury Subpoena Likely Relating to WikiLeaks*, SALON (Apr. 27, 2011, 1:28 PM), http://www.salon.com/news/opinion/glenn_greenwald/radio/2011/04/27/wikileaks.

21. *Snepp v. United States*, 444 U.S. 507 (1980). Nor has the Supreme Court been good to parties requesting information that arguably fell under the “national security” umbrella. In *CIA v. Sims*, 471 U.S. 159 (1985), the Court ruled against ordering the CIA to release information about the CIA’s MKULTRA program. The Court described this broad program as follows:

Between 1953 and 1966, the Central Intelligence Agency financed a wide-ranging project, code-named MKULTRA, concerned with “the research and development of chemical, biological, and radiological materials capable of employment in clandestine operations to control human behavior.” The program consisted of some 149 subprojects that the Agency contracted out to various universities, research foundations, and similar institutions. At least 80 institutions and 185 private researchers participated. Because the Agency funded MKULTRA indirectly, many of the participating individuals were unaware that they were dealing with the Agency. MKULTRA was established to counter perceived Soviet and Chinese advances in brainwashing and interrogation techniques. Over the years the program included various medical and psychological experiments, some of which led to untoward results.

In 1968 during the Vietnam War, Frank Snepp went to work for the CIA. As a condition of employment, Snepp had to agree to submit to the CIA for prior clearance any information on the CIA that he wanted to publish. This was a lifetime agreement, and it was a precondition to his working at the CIA. After leaving the CIA, Snepp published a book titled *Decent Interval* about the CIA's activities during the Vietnam War, which had already ended.²² Not surprisingly, the CIA thought there was no "decent interval."

The government agreed that the book contained no classified information.²³ Still, Snepp "violated his obligation to submit all material for prepublication review."²⁴

The government wanted an injunction requiring Snepp to submit all his future writings for prior clearance. The government also wanted all the profits from Snepp's book.²⁵ The government got both.²⁶ During the trial, the director of the CIA testified that books such as Snepp's had caused a number of foreign intelligence sources to discontinue providing information to the United States.²⁷

The Supreme Court's *per curiam* opinion said that "even in the absence of an express agreement—the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment." The Court then identified two substantial government interests: "the government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so

Id. at 161–62 (footnote omitted). As for those "untoward results": "Several MKULTRA subprojects involved experiments where researchers surreptitiously administered dangerous drugs, such as LSD, to unwitting human subjects. At least two persons died as a result of MKULTRA experiments, and others may have suffered impaired health because of the testing." *Id.* at 62 n.2. In short, the CIA was testing the effectiveness of biological and chemical materials in changing human behavior, performing the tests on human guinea pigs without gaining their informed consent. The Supreme Court upheld the CIA's refusal to disclose names of MKULTRA researchers, invoking the "national security" exemption for "intelligence sources." *Id.* at 173. Now a group of veterans is suing the CIA in federal court for information about alleged experiments on veterans. On September 1, 2011, the veterans filed objections to the CIA's motion for judgment on the pleadings. See *Vietnam Veterans of America v. CIA*, No. CV 09-0037-CW, (N.D. Cal., Oct. 11, 2011), available at <http://www.courthousenews.com/2011/08/01/Plaintiff%20Opposition%20to%20CIAs%20Motion%20to%20Dismiss.pdf>.

22. *Snepp*, 444 U.S. at 507–08.

23. *Id.* at 510.

24. *Id.* at 511.

25. *Id.* at 508–09.

26. *Id.* at 509, 515–16.

27. *Id.* at 512–13.

essential to the effective operation of our foreign intelligence service.” The CIA could impose “reasonable restrictions,” the Court said, and the agreement Snepp signed with the CIA was a “reasonable means” for protecting the government interests in secrecy of information and appearance of confidentiality.²⁸

In this case, none of the information that Snepp used in his book was classified, as the government conceded, so none of the information was secret. Still, the “appearance of confidentiality” arguably posed a problem. The CIA director testified that books such as Snepp’s were causing problems with intelligence sources who feared disclosure.²⁹ Consequences of disclosure, of course, could be disastrous to these sources who arguably deserved protection. The Court said:

Both the District Court and the Court of Appeals found that a former intelligence agent’s publication of unreviewed material relating to intelligence activities can be detrimental to vital national interests even if the published information is unclassified. When a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA—with its broader understanding of what may expose classified information and confidential sources—could have identified as harmful. In addition to receiving intelligence from domestically based or controlled sources, the CIA obtains information from the intelligence services of friendly nations and from agents operating in foreign countries. The continued availability of these foreign sources depends upon the CIA’s ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents.³⁰

And so the Supreme Court had to weigh and balance interests.³¹

Justice John Paul Stevens, dissenting, said, “Inherent in this prior restraint is the risk that the reviewing agency will misuse its authority

28. *Id.* at 510.

29. *Id.* at 512–13.

30. *Id.* at 511–12 (footnote omitted).

31. On *Snepp*, see, e.g., Judith Schenck Koffler & Bennett L. Gershman, Symposium, *National Security and Civil Liberties*, 69 CORNELL L. REV. 816 (1984).

to delay the publication of a critical work or to persuade an author to modify the contents of his work beyond the demand of secrecy.”³²

*United States v. Marchetti*³³ appears to illustrate Justice Stevens’ words about the risk of abuse by the reviewing agency. Marchetti, a former CIA agent, was working on a manuscript. The CIA heard about his work and got an injunction ordering the former CIA agent to submit his manuscript for CIA review. The Fourth Circuit remanded the case, ordering that the injunction be limited to classified information.³⁴ In doing so, however, the Fourth Circuit made clear, in a section heading, that “The Freedom of Speech and of the Press are not Absolute.” The court said: “We readily agree with Marchetti that the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship.” For example, the court said the First Amendment would not permit prior restraint of unclassified information or information the government had disclosed. The court emphasized, “we are here concerned with secret information touching upon the national defense and the conduct of foreign affairs, acquired by Marchetti while in a position of trust and confidence and contractually bound to respect it.”³⁵

The court, under the heading of “The Government has a Right to Secrecy,” pointed to the power and responsibility of the president. The court said, “Gathering intelligence information and the other activities of the Agency, including clandestine affairs against other nations, are all within the President’s constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces.”³⁶ The United States began in secrecy, the Court noted, as “[s]ecrecy governed the deliberations in Philadelphia in 1787.”³⁷

In *Snepp*, the Supreme Court commented that the government’s concession that *Snepp*’s work contained no classified information distinguished *Snepp* from *Marchetti*.³⁸

32. *Snepp*, 444 U.S. at 526 (Stevens, J., dissenting) (Justices Brennan and Marshall joined Stevens in this dissent).

33. 466 F.2d 1309, (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972).

34. *Id.* at 1318.

35. *Id.* at 1313.

36. *Id.* at 1315.

37. *Id.* at 1316, (quoting Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 273–74 (1971)).

38. *Snepp*, 444 U.S. at 510 n.4.

Marchetti's second appearance in front of the Fourth Circuit happened in the wake of the remand. Marchetti collaborated with a former State Department employee, John Marks, to co-author a book, *The CIA and the Cult of Intelligence*. Alfred A. Knopf wanted to publish the book, but first the CIA reviewed the manuscript, per the first Fourth Circuit decision. The CIA wanted to censor 339 sections of the book. After negotiations with Knopf, the CIA approved 168 deletions.³⁹ The book publisher sued for release of the remaining deletions. The district court approved deletion of only 26 sections of the book.⁴⁰

Not waiting for the Fourth Circuit's 1975 decision, Knopf published the book *The CIA and the Cult of Intelligence* in 1974 with 168 blank spaces. In the blank spaces repeatedly appears the notation "DELETED."⁴¹

In 2009, in *Wilson v. CIA*,⁴² the Second Circuit Court of Appeals denied the request by Valerie Plame Wilson and book publisher

39. Fred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1365 (4th Cir. 1975).

40. *Id.* at 1368.

On appeal, the Fourth Circuit declared:

We decline to modify our previous holding that the First Amendment is no bar against an injunction forbidding the disclosure of classifiable information within the guidelines of the Executive Orders when (1) the classified information was acquired, during the course of his employment, by an employee of a United States agency or department in which such information is handled and (2) its disclosure would violate a solemn agreement made by the employee at the commencement of his employment. With respect to such information, by his execution of the secrecy agreement and his entry into the confidential employment relationship, he effectively relinquished his First Amendment rights.

Id. at 1370. The Fourth Circuit remanded the case, ordering the district judge to authorize only disclosure of classified information that Marchetti and Marks learned "unofficially after the termination of their employment." *Id.* at 1371.

41. On *Marchetti*, see, e.g., Laura K. Donohue, *Terrorist Speech and the Future of Free Expression*, 27 *CARDOZO L. REV.* 233, 297-98 (2005); and Michael L. Charlson, *The Constitutionality of Expanding Prepublication Review of Government Employees' Speech*, 72 *CAL. L. REV.* 962, 990 (1984).

The saga of Marchetti took yet another twist. A seemingly exasperated Fourth Circuit Court of Appeals, in a case brought by Martin Halperin, then Director for the Center for National Security Studies, said: "A continuing effort publicly to disclose classified information obtained by Victor Marchetti in his capacity as a highly placed official in the Central Intelligence Agency brings this simmering controversy before us for the third time." *Colby v. Halperin*, 656 F.2d 70, 71 (4th Cir. 1981). Halperin had filed a Freedom of Information request for the material and so wanted the classified information released to his attorney. The Fourth Circuit found "no compelling necessity" to release the information and thus denied the request. *Id.*

42. 586 F.3d 171, 173-74 (2d Cir. 2009).

Simon & Schuster, Inc. to force the CIA to permit publication of certain information about her CIA employment in her memoir, *Fair Game: My Life as a Spy, My Betrayal by the White House*. The CIA did not violate Wilson's First Amendment rights, the court concluded, when its Publication Review Board forbade publication of any material about Wilson's possible pre-2002 work for the CIA.⁴³

Another case that, like *Snepp*, involved no classified information, bubbled up in Madison, Wisconsin—*United States v. Progressive, Inc.*⁴⁴ A monthly magazine, *The Progressive*, was set to publish an article titled, “The H-Bomb Secret: How We Got It, Why We’re Telling It.” The U.S. government got a temporary restraining order after a hearing and then sought a preliminary injunction against publication of the article. The judge called the situation “a clash

43. *Id.* at 173. Whether Wilson worked for the CIA prior to 2002 has long been undisputed. In 2007, U.S. Rep. Jay Inslee (D-Wash.) introduced a bill in the House that would have allowed Wilson to receive retirement benefits from the CIA despite her not having reached the required age. Inslee praised Wilson’s “20 years of service” on the floor of the House. He also included in the Congressional Record, with Wilson’s permission, a copy of a letter sent to Wilson by the CIA that detailed her employment with the agency from 1985 to 2007. *Id.* at 180–82. No classification markings were on the letter when Wilson received it. But three days after Inslee introduced the bill, Wilson received a second letter saying that the original communication “was not properly marked” and that its content “remains classified.” No action was ever requested of Congress regarding its record. *Id.* at 181. When Simon & Schuster published *Fair Game* in 2007, it marked the redacted material by blacking out lines in the text. It included a “Publisher’s Note” describing the reason for the redactions and reminding readers that the information in question “has already been widely disseminated.” The publisher also included an afterword, written by a reporter that provided essentially the same information as was censored. *Id.* at 182–83. The sagas of Judith Miller and Valerie Plame have spawned at least two movies. *Fair Game* was adapted into a Hollywood film starring Naomi Watts as Valerie Wilson and Sean Penn as Joseph Wilson. Critic Roger Ebert said the film was “unusually bold for a fictionalization based on real events.” Roger Ebert, *Fair Game*, CHI. SUN-TIMES, Nov. 3, 2010, <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/20101103/REVIEWS/101109993/1023>. In 2008, *Nothing but the Truth*, starring Kate Beckinsale, Matt Dillon, Angela Bassett, Alan Alda, and David Schwimmer, covered a lot of shield law as it told the story of a female reporter who reveals the name of an undercover CIA agent and then chooses to go to jail rather than disclose her source’s identity. In the movie, the CIA agent is murdered, the reporter is badly beaten in jail, and the reporter’s case goes to the Supreme Court where the reporter’s attorney argues for *Branzburg*’s reversal. The Court decides, again 5 to 4, in favor of national security instead of the First Amendment. The movie has a surprise ending of sorts. And yet another skirmish between the CIA and a book author erupted in the summer of 2011 when the CIA demanded that former CIA agent Ali H. Soufan make extensive cuts in his memoir. Soufan criticized the CIA, saying that it withheld information from the FBI about two men who became hijackers on 9/11 and that it engaged in unnecessarily brutal interrogation. See, e.g., Scott Shane, *C.I.A. Demands Cuts in Book About 9/11 and Terror Fight*, N.Y. TIMES, Aug. 25, 2011, <http://www.nytimes.com/2011/08/26/us/26agent.html?pagewanted=all>.

44. 467 F. Supp. 990 (W.D. Wis. 1979).

between allegedly vital security interests of the United States and the competing constitutional doctrine against prior restraint in publication.”⁴⁵ The bright author, Howard Morland, contended that he had merely synthesized material available to anyone.⁴⁶ The editor, Erwin Knoll, argued that “this country’s security does not lie in an oppressive and ineffective system of secrecy and classification but in open, honest, and informed public debate about issues which the people must decide.”⁴⁷ The judge was not convinced that all of the information was available to the public.⁴⁸ Nor did he agree with their arguments.⁴⁹

The judge thought the government met its high standard of proof in this case. The government admitted that at least some of the information on the H-bomb contained in the article was in the public domain. But even though the material was in the public domain, the government said, “national security” permitted barring its publication because “when drawn together,” when “synthesized,” the information presents “immediate, direct and irreparable harm to the interests of the United States.”⁵⁰

The judge did not make his decision lightly. He said, “A mistake in ruling against *The Progressive* will . . . curtail defendant’s First Amendment rights in a drastic and substantial fashion,” but, “a mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot.”⁵¹

45. *Id.* at 991.

46. *Id.* at 995.

47. *Id.* at 995–96.

48. *Id.* at 995.

49. The judge said that this case was different than the Pentagon Papers case. First, the Pentagon Papers had contained only “historical data.” That was *not* the case with the H-bomb article. Second, in the Pentagon Papers case, the government had not proved that publication would affect national security. *Id.* at 994. On the Pentagon Papers, *see infra* note 105 to 119 and accompanying text.

50. 467 F. Supp. at 991. The judge said that “the danger lies in the exposition of certain concepts never heretofore disclosed in conjunction with one another.” *Id.* at 993. No, the article did not “provide a ‘do-it-yourself’ guide for the hydrogen bomb,” the judge said, but he thought the information it contained might help a “medium size nation” develop an H-bomb more quickly. *Id.* In short, “The Morland piece could accelerate the membership of a candidate nation in the thermonuclear club.” The judge pointed out that the Atomic Energy Act of 1954, 42 U.S.C. § 2104, permitted injunctions against anyone communicating restricted data with reason to believe it would injure the United States. *Id.* at 994.

51. *Id.* at 996.

The judge relied on *Near v. Minnesota*, using the “troop movements” exception to allow prior restraint.⁵²

He pointed out that times had changed since 1931 when the Supreme Court issued *Near*—that foot soldiers had been replaced by machines. Publishing technical information on the H-bomb was analogous to publishing troop movements, the judge concluded.⁵³

The government had not sought to extinguish the article in its entirety but to delete “certain technical information” from the article.⁵⁴ Before any further decisions were handed down in *The Progressive* case, it, in effect, became moot. A daily newspaper in Madison published a letter that included a diagram of the H-bomb and a list of its components. With the information already in print, the government dropped its case against *The Progressive*, and the magazine published the article in its November 1979 issue.⁵⁵

No charges were ever filed against anyone for the publication of the H-bomb information. Nor did Snepp, Marchetti, or Plame-Wilson face criminal prosecution for their actions. The United States treats Manning with a great deal more seriousness. Given the massive size and classification of the leaked material, perhaps this difference should be expected.

52. 283 U.S. 697 (1931). In the 5-4 *Near* decision, the Court said that protection from prior restraint was “not absolutely unlimited” but could occur in “exceptional cases.” Then the Court listed four “exceptional cases” where prior restraint of publication could be acceptable: cases of (1) obstruction of military recruitment; (2) publishing “sailing dates of transports of the number and location of troops;” (3) obscenity; and (4) “incitements to acts of violence and the overthrow by force of government.” 283 U.S. at 716. In *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976), the Court would add a fifth exceptional case: prior restraint to protect a criminal defendant’s right to a fair trial.

53. 467 F. Supp. at 996.

54. *Id.* at 997.

55. Howard Morland, *The H-Bomb Secret: How We Got It, Why We’re Telling It*, PROGRESSIVE (1979), <http://www.progressive.org/images/pdf/1179.pdf>; see also Erwin Knoll, *The H-Bomb and the First Amendment*, 3 WM. & MARY BILL OF RTS. J. 705 (1994) and *Nation: Grievous Harm*, TIME, Mar. 19, 1979, available at <http://www.time.com/time/magazine/article/0,9171,947008,00.html> (last visited Mar. 4, 2011). PBS included the *Progressive* case in its coverage on Frontline. *National Security v. The Role of the Press*, PBS <http://www.pbs.org/wgbh/pages/frontline/newswar/part1/role.html> (last visited Mar. 6, 2011) (a rundown of past and ongoing conflicts between the press and the federal government over the issue of publishing information that the government believes endangers national security). On arguments for the necessity of national security, see generally RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006). For an interesting article on the origin of the phrase, “The Constitution is not a suicide pact,” see David Corn, *The “Suicide Pact” Mystery: Who Coined the Phrase? Justice Goldberg or Justice Jackson?* SLATE (Jan. 4, 2002, 11:04 AM), <http://www.slate.com/id/2060342/>.

By contrast, Samuel Morison, did face criminal prosecution for leaking a small amount of classified data with motives that did not engender much sympathy.

IV. Morison: A Counterpart to Manning with Big-Friend Support

Morison did not stand alone in *United States v. Morison*.⁵⁶ Beside him as *amici curiae* were:

*The Washington Post; CBS, Inc.; National Broadcasting Company, Inc.; Capital Cities/ABC, Inc.; Time, Inc.; Newsweek; U.S. News & World Report; The Wall Street Journal; The New York Times; The New York Daily News; The Los Angeles Times; The Chicago Tribune; The Boston Globe; The Atlanta Journal and Constitution; The Miami Herald; The Dallas Morning News; The Minneapolis Star and Tribune; Ottaway Newspapers, Inc.; The Associated Press; National Public Radio; Pulitzer Broadcasting Company; The American Society of Newspaper Editors; The American Newspaper Publishers Associations; The American Booksellers Association, Inc.; Associated Press Managing Editors; The Magazine Publishers Association; The National Association of Broadcasters; The Newspaper Guild; The Radio-Television News Directors Association; The Reporters Committee for Freedom of the Press; The Society of Professional Journalists and Public Citizen; Washington Legal Foundation; and The Allied Education Foundation.*⁵⁷

To what heroic lengths did Morison rise to garner such prestigious support? In part, he violated the Espionage Act, giving classified information to persons unauthorized to receive it.⁵⁸ He did not

56. *United States v. Morison*, 844 F.2d 1057 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988).

57. *Id.*

58. The Espionage Act covers a broad waterfront of punishable offenses. Under 18 U.S.C. § 793, titled “Gathering, Transmitting, or Losing Defense Information,” Congress targets “[w]hoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation,” engages in prohibited activities involving that national defense information. *Id.* § 793(a). The prohibition extends to anyone who “copies, takes, makes, or obtains . . . anything connected with the national defense” or who “receives or obtains . . . from any source whatever . . . anything connected with the national defense, knowing or having reason to

believe, at the time he receives or obtains . . . it, that it has been . . . taken, made, or disposed of by any person contrary to the provisions” of the Espionage Act. Attempts to engage in such activities are also prohibited. *Id.* § 793(b), (c). The full-blown language lists the national defense information in great detail. For example, section 793 (b) says: “sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense.”

Section 793 also targets any such person who “lawfully having possession of, access to, control over, or being entrusted with any . . . information relating to the national defense” either “willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted” the information “to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it.” *Id.* § 793(d). The same prohibition on transmitting or withholding information also applies to persons with “unauthorized possession of, access to, or control over . . . 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.” *Id.* § 793(e). Again, attempts are also unlawful. *Id.* § 793(e), (d). In short, copying or obtaining national defense material, or attempting to do so, may pose a problem. Whether a person lawfully or unlawfully possessed that national defense information, giving or trying to give that national defense material to a person who is unauthorized to receive it, or withholding it or trying to withhold it from someone who is authorized to receive it, may violate the Espionage Act.

“Gross negligence” by anyone “entrusted with” handling national defense information also violates the law if the information is “removed from its proper place of custody or delivered to anyone in violation of his trust” or if it is “lost, stolen, abstracted, or destroyed.” Failure promptly to report such misplacement, loss, or destruction also is prohibited. *Id.* § 793(f). This law authorizes fines and/or imprisonment of up to ten years. *Id.* Forfeiture of “any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, from any foreign government” is mandated by this law, which says that persons convicted under it “shall forfeit.” *Id.* § 793(h)(1). Under section 794, titled “Gathering or Delivering Defense Information to Aid Foreign Government,” the stakes are much higher for violators, namely, death. The law says, in part:

Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, . . . information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

18 U.S.C. § 794(a). However, the law says that death will only be imposed if the trier of fact determines that “the offense resulted in the identification by a foreign power . . . of an individual acting as an agent of the United States and consequently in the death of that individual” or if the offense “directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.” *Id.* Section 794(b) uses the word “publishes”:

Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, *publishes*, or communicates . . . information relating to the public defense, which

might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

18 U.S.C. § 794(b) (2006). The full-blown language of this section clearly targets troop-movement material. It speaks of publication or communication of “the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States.” Section 794(d) also provides for mandatory forfeiture. While 794(b) uses the word “publishes,” section 793 uses the terms “communicates, delivers, transmits.” In the Pentagon Papers case, Justice Douglas wrote that Section 793 is not applicable to the press. Justice Douglas said, “The Government suggests that the word ‘communicates’ is broad enough to encompass publication.” But he points out that three of the sections of the Espionage Act (sections 794, 797 and 798) do include the word “publishes.” *New York Times v. United States*, 403 U.S. 713, 720–21 (1971) (Douglas J., concurring, joined by Black, J.). Section 795, titled “Photographing and sketching defense installations,” prohibits “in the interests of national defense” the photographing or making of other visual representations of what the President defines as “vital military and naval installations or equipment.” Violation of this provision only results in a fine or imprisonment of up to a year, or both. 18 U.S.C. § 795(a)–(b) (2006). Section 796 prohibits using aircraft to photograph to make other visual representations of vital installations or equipment, again with a possible fine, imprisonment of up to one year, or both. 18 U.S.C. § 796 (2006). Section 797 bears the title “Publication and sale of photographs of defense installation.” Using the term “publication,” as section 794 also does, clearly puts the press on notice about violating the Espionage Act. Section 797 requires permission from a “commanding officer” prior to publication of photographs or other visual representation of vital installation, or a fine or imprisonment up to a year, or both. 18 U.S.C. § 797 (2006). Section 798, titled “Disclosure of classified information,” applies to “Whoever 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 any classified information.” 18 U.S.C. § 798(a) (2006). Note that this section applies both to communication and to publication of classified information. As for a general definition of “classified information,” it means “information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution.” 18 U.S.C. § 798(b) (2006). Classified information includes “any code, cipher, or cryptographic system of the United States or any foreign government” or information about the design of devices used for “cryptographic or communication intelligence purposes,” as well as “communication intelligence activities of the United States or any foreign government.” 18 U.S.C. § 798(a)(1)–(3) (2006). Classified information also includes information “obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes.” *Id.* § 798(a)(4). Committees of the House of Representatives and Senate may lawfully demand and receive classified information. “Nothing in this section shall prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committee thereof.” 18 U.S.C. § 798(c) (2006). Violation of Section 798 can result in a fine, imprisonment of up to ten years, or both. 18 U.S.C. § 798(a) (2006). This section also mandates forfeiture. 18 U.S.C. § 798(d) (2006). On February 10, 2011, Sen. John Ensign, (R-Nev.) introduced bill S. 315 to amend § 798. Senators Scott P. Brown, (R-Mass.), and Joseph I. Lieberman, (D-Conn.) co-sponsored the bill. Called “Securing Human Intelligence and Enforcing Lawful Dissemination Act,” or the “Shield Act,” the amendment’s purpose is “to provide penalties for disclosure of classified information related to certain intelligence activities of

necessarily ride a white horse. Morison wanted a job, and he was willing to break the law, and point the finger at his associates, in order to get it.

More precisely, the District Court of Maryland convicted Morison for theft under 18 U.S.C. § 641 and for violating sections of espionage law, 18 U.S.C. §§ 793 (d) and (e)—one from the Espionage Act of 1917, which made it unlawful to transmit secret information to persons who were unauthorized to receive it, and the other from a 1950 addition to the espionage law that made it unlawful to retain secret information and not give it to persons who were entitled to receive it.⁵⁹

Working at the Naval Intelligence Support Center as an analyst, Morison had top secret clearance, and the area in which he worked was closed to everyone but people with top secret clearance. He agreed not to disclose information and said he understood that unauthorized disclosures could be a violation of U.S. criminal law. While off duty, he also worked for Jane's—a British company that publishes information on international military operations. Although the Navy had approved Morison to work for Jane's, the Navy now wanted him to stop, but Morison wanted to work full time for Jane's.⁶⁰

Morison started corresponding with Jane's editor-in-chief and sending him information. What got him in trouble was that he saw, sitting on a desk at his Navy workplace, pictures taken by an American reconnaissance satellite of a Soviet aircraft carrier with "Secret" and "Warning Notice: Intelligence Sources or Methods Involved" stamped on their borders. He cut off the borders and sent the pictures to Jane's, which published the pictures and made them available to other news agencies. The *Washington Post* published one such picture, and Navy officers saw it.⁶¹

the United States." See, e.g., *Sen. Ensign Introduces Securing Human Intelligence and Enforcing Lawful Dissemination Act*, U.S. FED. NEWS, Mar. 4, 2011 (containing a complete copy of the proposed legislation). For commentary on the Espionage Act and proposed Shield Act, see Jamie L. Hester, *The Espionage Act and Today's 'High-Tech Terrorist'*, 12 N.C. J.L. & TECH. ON. 177 (June 2011). For more on SHIELD Act language, see *infra* note 209.

59. *Morison*, 844 F.2d at 1060, 1065 n.9. W. Cory Reiss opines, "Justices Black and Douglas argued in the Pentagon Papers case that § 793 'does not apply to the press.' Who may be prosecuted under the Espionage Act for leaked classified material is therefore unsettled territory." W. Cory Reiss, Comment, *Crime that Plays: Shaping a Reporter's Shield to Cover National Security in an Insecure World*, 44 WAKE FOREST L. REV. 641, 663 (2009).

60. *Morison*, 844 F.2d at 1060.

61. *Id.* at 1060–61.

In the ensuing investigation of the theft, Morison denied any knowledge of the theft and even told investigators that they should investigate two of his fellow employees. Investigators gathered incriminating evidence, including a fingerprint from one of the photos that had been sent to Jane's. The fingerprint matched Morison's.⁶²

Morison was convicted of theft and violation of espionage law. On appeal, he argued that espionage law should only apply to "classic spying and espionage activity"—giving secret information to agents of foreign governments. Although the statute was clear, Morison wanted to argue legislative history. The court pointed out that another section of the Espionage Act, section 764, makes giving information to foreign agents unlawful, and it carries the death penalty or up to life in prison. The two sections of the law under which Morison was convicted carried much lesser maximum penalties of a \$ 10,000 fine or 10 years in prison or both.⁶³

Morison also raised a First Amendment defense—that unless there was an exemption for "leaks to the press," the Espionage Act violated the First Amendment. The court dismissed this argument. This was not a prior restraint case, the court said. Further, the First Amendment does not confer a license on reporters or their news sources to violate valid criminal laws.⁶⁴

Arguably, Morison was not a terribly sympathetic defendant. He had personal motives for the actions that led to his conviction. On the other hand, what was troubling about this case for journalists was the implications of gaining access to something marked "Top Secret" that contained information that the journalist did not think should be

62. *Id.* at 1061–62.

63. *Id.* at 1063–67.

64. *Id.* at 1068–69. The court also cited *Snepp*, *Marchetti*, and the H-bomb cases, as well as *Branzburg v. Hayes*, 408 U.S. 665 (1972). *Id.* at 1068, 70. For coverage of *Branzburg*, see *infra* note 94 to 103 and accompanying text. The Fourth Circuit cites to this article: Edgar & Schmidt, *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L.L. REV. 349, 396–407 (1986), for discussion of *Morison*. 844 F.2d at 1066.

classified and also vital for the American public to know.⁶⁵ Morison received a presidential pardon from then-President Bill Clinton.⁶⁶

V. *Pearson v. Dodd* and *Bartnicki v. Vopper*

An interesting case that the Fourth Circuit thought inapplicable to Morison's situation is *Pearson v. Dodd*.⁶⁷ The *Morison* court said, "The defendant's reference to *Pearson v. Dodd* . . . is misplaced" because *Pearson* involved "copying." As the court pointed out, "[Morison's] case does not involve copying; this case involves the

65. Government leakers such as Morison do not garner a great deal of support among commentators. For example, Keith Werhan has written: "The pre-9/11 jurisprudence largely denying First Amendment protection to government leakers is sound. In general, the government's interest in preserving the secrecy of properly classified information, the disclosure of which potentially harms the United States, outweighs the First Amendment interest of a government employee in leaking such information for press publication." Keith Werhan, *Rethinking Freedom of the Press After 9/11*, 82 TUL. L. REV. 1561, 1597 (2008).

66. The Reporters Committee for Freedom of the Press reported on January 23, 2001:

The first person convicted under espionage statutes for leaking information to the press received a presidential pardon more than 16 years after his arrest. On his last morning in office, former President Bill Clinton pardoned Samuel Loring Morison, a former Navy intelligence analyst who was found guilty of providing a British magazine with three classified satellite photographs. Two months before the Jan. 20 pardon, Clinton vetoed a bill similar to the law that led to Morison's conviction. A provision in the intelligence authorization bill would have permitted the government to pursue felony charges against leakers of classified government information, even if the information does not threaten national security.

Morison, grandson of naval historian Samuel Eliot Morison, served two years in prison. *Clinton Pardons Convicted Analyst Who Gave Spy Photos to Media*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Jan. 23, 2001), <http://www.rcfp.org/newsitems/index.php?i=2659>. The Reporters Committee for Freedom of the Press was one of the *amici curiae* in Morison's case. 844 F.2d at 1057. For commentary on Ellsberg and Morison, see Anthony R. Klein, Comment, *National Security Information: Its Proper Role and Scope in a Representative Democracy*, 42 FED. COMM. L.J. 433 (1990). For more general commentary on the Espionage Act, see Robert D. Epstein, Comment, *Balancing National Security and Free-Speech Rights: Why Congress Should Revise the Espionage Act*, 15 COMM.LAW CONSPECTUS 483 (2007); Mitchell J. Michalec, Note, *The Classified Information Protection Act: Killing the Messenger or Killing the Message?*, 50 CLEV. ST. L. REV. 455 (2002/2003) (discussing the Espionage Act and other provisions restricting information); Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973) (discussing the legislative histories of the Espionage Act of 1917 and its predecessor statute, the Defense Secrets Act of 1911). See also Hester *supra* note 58.

67. 410 F.2d 701 (D.C. Cir. 1969), *cert. denied, sub nom. Dodd v. Pearson*, 395 U.S. 947 (1969).

actual theft and deprivation of the government of its own tangible property.”⁶⁸

Perhaps *Pearson v. Dodd* has some application in the WikiLeaks situation. Bradley Manning engaged in copying. Julian Assange engaged in copying. Furthermore, *The New York Times*, *The Guardian*, and other newspapers that received the WikiLeaks documents arguably had “clean hands,” receiving the information without being complicit in its procurement.⁶⁹

As for the facts in *Pearson v. Dodd*, columnists Drew Pearson and Jack Anderson published information about the “alleged misdeeds” of Connecticut Senator Thomas Dodd. The columnists obtained the information from staff members and former employees of the senator who photocopied some of the senator’s documents from his files. They gave the columnists the copies but returned the original documents to Dodd’s file cabinets.⁷⁰

68. *Morison*, 844 F.2d at 1077 (citation omitted).

69. Whether Julian Assange himself conspired with Bradley Manning is still a matter of some contention. Unnamed “military officials” told MSNBC in January 2011 that an investigation had revealed no “direct connection” between Assange and Manning, and no evidence that the two had any “direct contact.” See Jim Miklaszewski, *NBC: U.S. Can’t Link Accused Army Private to Assange*, MSNBC, Jan. 24, 2011, http://www.msnbc.msn.com/id/41241414/ns/us_news-wikileaks_in_security/. If Assange did not conspire with Manning, then neither he, nor the newspapers can be guilty of theft or of conversion.

70. In a related case, in 1973, Les Whitten, who worked for Jack Anderson, became involved in a controversy. *Reporters Comm. for Freedom of the Press v. Am. Telephone & Telegraph*, 593 F.2d 1030, 1040 (D.C. Cir. 1978), presented this summary of the Whitten case:

In November 1972 several hundred American Indians occupied the U.S. Bureau of Indian Affairs building. The Washington, D.C., Metropolitan Police Department, Intelligence Section, had an undercover agent inside the building among the Indians. When the Indians eventually vacated the building, they purloined and took with them Government property, including official Government documents. The undercover agent reported to his Section that the Indians had negotiated with Jack Anderson, a journalist, for the purchase of some of these stolen documents and that an Anderson employee was scheduled to receive the documents at the home of one of the Indian leaders. This information was passed on to the FBI. The Indian leader’s apartment building was placed under physical surveillance. At the scheduled time, Mr. Les Whitten, an Anderson employee, arrived at the apartment and was subsequently arrested there in apparent possession of the stolen documents. Mr. Anderson’s and Mr. Whitten’s toll-call records were subpoenaed to obtain further evidence in the case.

Whitten did not go to jail. See Mark Feldstein, *The Jailing of a Journalist: Prosecuting the Press for Receiving Stolen Documents*, 10 COMM. L. & POL’Y 137, 139 (2005) (covering prosecution of Les Whitten and also the *Pearson v. Dodd* case *passim*).

The trial court granted Senator Dodd a partial summary judgment on his claim of conversion. On appeal, the District of Columbia Circuit Court of Appeals said that the columnists were not liable under a theory of conversion.⁷¹

Conversion is “an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.”⁷² The appellate court pointed out that the files were removed, copied, and returned undamaged in the middle of the night, and thus Senator Dodd was not deprived of their use. Documents, however, have more than their physical value as “they may embody information or ideas whose economic value depends in part or in whole upon being kept secret.”⁷³ “The question here is not whether [Dodd] had a right to keep his files from prying eyes, but whether the information taken from those files falls under the protection of the law of property, enforceable by a suit for conversion. In our view, it does not.”⁷⁴ The court went through a laundry list: none of the information could be construed as literary, as scientific inventions or as trade secrets. “Nor does it appear to be information held in any way for sale . . . analogous to the fresh news copy produced by a wire service.”⁷⁵

Although Dodd claimed that the columnists had “aided and abetted” in the document’s removal, the appellate court said that “the undisputed facts” only established that the columnists “received copies of the documents knowing that they had been removed

Feldstein compares Assange’s publishing of leaked material to that of Jack Anderson: “The parallels between Anderson and Assange are striking,” he says. “Both cultivated low-level but well-placed whistleblowers to leak documents revealing corruption and deceit by governments and corporations.” Mark Feldstein, *Spreading Leaks Before WikiLeaks*, AMER. JOURNALISM REV., Sept. 2010, available at <http://www.ajr.org/Article.asp?id=4958>.

71. *Pearson*, 410 F.2d at 703. The trial court did not grant Dodd partial summary judgment for invasion of privacy. The appellate court said: “It has always been considered a defense to a claim of invasion of privacy by publication . . . that the published matter complained of is of general public interest.” The columnists wrote about the senator’s relationship to some lobbyists for “foreign interests” and also presented “an interpretive biographical sketch of [Dodd’s] public career.” The columns dealt with Dodd’s qualifications to serve as a U.S. Senator and thus “amounted to a paradigm example of published speech not subject to suit for invasion of privacy.” *Id.*

72. *Id.* at 706–07 (citing RESTATEMENT (SECOND) OF TORTS § 222A(1) (1965)). If the interference is less severe than conversion, then the tort is “trespass to chattels.” *Id.* at 707.

73. *Id.* at 707.

74. *Id.* at 708.

75. *Id.*

without authorization,” and then published excerpts of those documents.⁷⁶ This rationale would seem to apply to Assange if his hands are clean, and also to the newspapers that received information from him.

The bottom line is that the columnists were spared any liability for transmitting the information given to them, and the U.S. Supreme Court let this decision stand.

Likewise, in *Bartnicki v. Vopper*, the U.S. Supreme Court came to the aid of journalists by ruling against liability for broadcasting illegally recorded phone conversations.⁷⁷ The Court struck down a journalist-unfriendly portion of the federal wiretap law as applied to the journalist.

Federal wiretap law says that anyone who “willfully intercepts . . . any wire, electronic, or oral communication” has violated the law.⁷⁸ The law goes further: 18 U.S.C. § 2511(1)(c) states that it is a crime if anyone “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.” The Supreme Court in *Bartnicki* struck down this portion of the wiretap law as a violation of the First Amendment under the circumstances.⁷⁹

In *Bartnicki*, the Pennsylvania State Education Association, a union, represented teachers in collective bargaining negotiations with the local school board. The media, of course, covered the contentious negotiations. The union’s chief negotiator, Bartnicki, used the cell phone in her car to call the president of the union to discuss the negotiations. An unidentified person taped the call and gave a copy to Vopper, a radio commentator critical of the union. The tape included the president of the union saying, “If they’re not gonna move for three percent, we’re gonna have to . . . blow off their front porches, we’ll have to do some work on some of those guys.”

76. *Id.* at 705.

77. 532 U.S. 514 (2001).

78. See 18 U.S.C. § 2510 (2006) *et seq.*, quoted in *Bartnicki*, 532 U.S. at 521 n.3.

79. The only question before it, the Court said, was whether applying the law under circumstances—intentional, unlawful interception, “disclosure of the contents of the intercepted conversation to . . . representatives of the media, as well as the subsequent disclosures by the media defendants to the public” by one who at least had reason to know of the unlawful nature of the interception—would violate the First Amendment. 532 U.S. at 525.

Vopper aired the tape,⁸⁰ violating § 2511(1)(c). Although Vopper did not participate in the illegal taping, he knew or “had reason to know” that the phone call was illegally intercepted.⁸¹

In striking down the portion of the wiretap law in question as it related to Vopper, the Court said that the interception law’s “naked prohibition against disclosures is fairly characterized as a regulation of pure speech.” The Court quoted language from the 1979 case of *Smith v. Daily Mail Publishing Co.*,⁸² saying that “state action to punish the publication of truthful information seldom can satisfy constitutional standards.”⁸³ The Court also cited the 1971 Pentagon Papers case,⁸⁴ stating “the Court upheld the right of the press to publish information of great public concern obtained from documents stolen by a third party.” The Court continued, explaining:

the attention of every Member of this Court was focused on the character of the stolen documents’ contents and the consequences of public disclosure. Although the undisputed fact that the newspaper intended to publish information obtained from stolen documents was noted in Justice Harlan’s dissent . . . neither the majority nor the dissenters placed any weight on that fact.⁸⁵

The Court made clear, however, that the Pentagon Papers case “did not resolve the question whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well.”⁸⁶ That question, the Court said, is still open.

That question of whether government may punish the publication of unlawfully acquired information may well prove to be the WikiLeaks question. Given the Court’s position that “state officials

80. *Id.* at 518–19.

81. *Id.* at 517–18, 525.

82. *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979) (prohibiting punishment of a newspaper for publication of the name, lawfully obtained, of a juvenile arrested for allegedly killing a person).

83. *Bartnicki*, 532 U.S. at 527 (quoting *Smith*, 443 U.S. at 102). The Court went on to say “this Court has repeatedly held 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.” *Id.* at 527–28 (citations omitted).

84. *New York Times Co. v. United States*, 403 U.S. 713 (1971), covered *infra* in notes 106 to 120 and accompanying text.

85. *Bartnicki*, 532 U.S. at 528.

86. *Id.* (emphasis added).

may not constitutionally punish publication of the information, absent a need . . . of the highest order,”⁸⁷ an answer to whether the government may punish the publication of unlawfully acquired information would raise the question of whether the government could show a need of the highest order in the WikiLeaks case. Arguing “national security” as a need of the highest order would seem an obvious route for the government, or “secrecy of information,” as in *Snepp*.⁸⁸

The Court characterized the question in *Bartnicki* as: “Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?”⁸⁹ The Court answered in the negative and struck down § 2511(1)(c) as it applied to the facts in this case on First Amendment grounds.⁹⁰

In part, the Court reasoned that unlawful conduct is usually deterred by appropriately punishing the person who broke the law. If the interception law in question had insufficient sanctions to deter illegal conduct, then, the Court suggested, maybe the sanctions should be increased. “But it would be quite 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.”⁹¹

The Court said that it was balancing the interests between “privacy of communication” and the First Amendment, and made clear that its decision in this case did not apply to publication of

87. *Id.* at 527–28 (citing *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), where the Court denied punishment of a newspaper under a statute forbidding instruments of mass communication to name rape victims, and *Landmark Communications v. Virginia*, 435 U.S. 829 (1978), where the Court denied punishment of a newspaper for publishing truthful information about a confidential proceeding involving the conduct of a judge).

88. Would keeping “state secrets” qualify as a governmental interest of the highest order? “Secrecy of information” is a “compelling interest,” the Court says in *Snepp v. United States*, 444 U.S. 507, 510 (1998). One commentator says, “The classic example of such [‘highest order’] information from Supreme Court dicta is the sailing date of a troop ship during a time of war. Additional examples might well include the identity of undercover CIA agents and technical design information for weapons of mass destruction. Werhan, *supra* note 65, at 1561, 1597. Another commentator argues, “Even when the national security damage does not outweigh First Amendment considerations in a given case, the release of national security information should still only be tolerated when the objectives of the First Amendment as a tool of democracy are served.” Reiss, *supra* note 65, at 668–69.

89. *Bartnicki*, 532 U.S. at 528.

90. “The constitutional question before us concerns the validity of the statutes as applied to the specific facts of this case.” *Id.* at 524.

91. *Id.* at 529–30.

private matters such as “trade secrets or domestic gossip.” The Court explained: “The outcome of the case does not turn on whether § 2511(1)(c) may be enforced with respect to most violations of the statute without offending the First Amendment. The enforcement of that provision in this case, however, implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern.”⁹² Still, the Court “reiterated its repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment.”⁹³

Could the primary question in the WikiLeaks case, then, be whether the dissemination of its truthful information is of public concern? After all, the Court stated flatly in *Bartnicki*, “We think it clear that . . . a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”⁹⁴

VI. *Branzburg v. Hayes*

In *Branzburg v. Hayes*,⁹⁵ by a narrow 5-4 margin,⁹⁶ the U.S. Supreme Court slammed the door on journalists’ attempts to use the First Amendment to protect their confidential sources when subpoenaed to appear in front of good-faith grand juries.⁹⁷ Indeed, prior to 1972 and the *Branzburg* decision, some courts had permitted journalists to claim First Amendment protection when ordered to reveal their sources before grand juries.⁹⁸

92. *Id.* at 533–34.

93. *Id.* at 529.

94. *Id.* at 535.

95. 408 U.S. 665 (1972).

96. With Justice Lewis Powell landing in the middle, some commentators even argue that *Branzburg* can be viewed as a 4-1-4 decision. See, e.g., Rodney A. Smolla, Panel Discussion, *The First Amendment, Journalists, and Sources: A Curious Study in “Reverse Federalism,”* 29 CARDOZO L. REV. 1423, 1426 (2008); David Rudenstine, Panel Discussion, *A Reporter Keeping Confidences: More Important Than Ever,* 29 CARDOZO L. REV. 1431, 1436 (2008); and C. Edwin Baker, *Reclaiming the First Amendment: Constitutional Theories of Media Reform: The Independent Significance of the Press Clause Under Existing Law,* 35 HOFSTRA L. REV. 955, 984 (2007).

97. The Court says that “grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter’s relationship with his news sources would have no justification.” *Branzburg*, 408 U.S. at 707–08.

98. For example, in *Caldwell v. United States*, 434 F.2d 1080 (9th Cir. 1970), the Ninth Circuit granted a First Amendment privilege to journalist Earl Caldwell, who was covering

According to the Supreme Court, “The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information.”⁹⁹ The Court rejected this claim, while paying at least some homage to the importance of protecting the press.¹⁰⁰

Still, the Court seemed to be doing its best to deflate what it apparently perceived as journalists’ overstated value of their importance.¹⁰¹ Journalists attempted to claim a “privileged position,”

Black Panther Party activities for *The New York Times*. Caldwell had received a subpoena to appear in front of a grand jury. In opposing a motion to quash, the government had maintained that an officer in the Black Panther Party had threatened to kill then-president Richard Nixon in a televised speech and that three issues of the Panther newspaper had repeated that threat. *Id.* at 676–77. After more legal wrangling and the expiration of one grand jury and the convening of a new one, Caldwell received a contempt citation for refusing to appear in front of the grand jury. *Id.* at 667–68. The Ninth Circuit, however, granted Caldwell a limited First Amendment privilege. In *Branzburg*, the Supreme Court gave the following account of the Ninth Circuit’s decision:

Viewing the issue before it as whether Caldwell was required to appear before the grand jury at all, rather than the scope of permissible interrogation, the court first determined that the First Amendment provided a qualified testimonial privilege to newsmen; in its view, requiring a reporter like Caldwell to testify would deter his informants from communicating with him in the future and would cause him to censor his writings in an effort to avoid being subpoenaed. Absent compelling reasons for requiring his testimony, he was held privileged to withhold it. The court also held, for similar First Amendment reasons, that, absent some special showing of necessity by the Government, attendance by Caldwell at a secret meeting of the grand jury was something he was privileged to refuse because of the potential impact of such an appearance on the flow of news to the public.

408 U.S. at 679.

99. 408 U.S. at 681.

100. The Court said:

We do not question the significance of free speech, press, or assembly to the country’s welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold.

Id.

101. For example, the Court said, “we cannot seriously entertain the notion that the First Amendment protects a newsman’s agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it.” *Id.* at 692.

the Court apparently thought.¹⁰² What the high Court did, in effect, was to level the playing field between journalists and other citizens in front of grand juries:

The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence.¹⁰³

The high Court even invoked Jeremy Bentham on the importance of everyone's availability to testify in front of grand juries, including royalty subpoenaed to testify about a case involving paupers,¹⁰⁴ and Chief Justice John Marshall's opinion that the President of the United States could be subpoenaed if the circumstances were right.¹⁰⁵

In short, the Court was emphatic that "the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task."¹⁰⁶

102. Speaking of the obligation to testify in front of grand juries, the Court said:

The claim is . . . that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them.

Id. at 682.

103. *Id.*

104.

Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly.

Id. at 688, n.26 (quoting 4 THE WORKS OF JEREMY BENTHAM 320–21 (J. Bowring ed. 1843)).

105. 408 U.S. at 688, citing *United States v. Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807).

106. 408 U.S. at 691.

Justice Stewart decried the Court's "crabbed view of the First Amendment."¹⁰⁷

In the wake of *Branzburg*, journalists could no longer claim any privilege in front of grand juries other than the privilege belonging to everyone, namely, the Fifth Amendment privilege against self-incrimination.¹⁰⁸ However, the Court did say that legislators could fashion privileges for journalists, if the legislators wished.

Perhaps the Court was primarily showing its practical bent: If the Court granted a journalist¹⁰⁹ privilege, then the Court would necessarily have to define who fell into the classification of "journalist" and could thus claim the privilege.¹¹⁰ Defining who falls into that category is difficult and is arguably becoming even more difficult in the age of the Internet where bloggers abound.¹¹¹

The *Branzburg* majority expressed the viewpoint that *everyone*, journalists included, must obey valid criminal laws. In the Court's words: "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."¹¹² Nor does the First Amendment grant to the press "a constitutional

107. *Id.* at 725 (Stewart, J., dissenting).

108. *Id.* at 689–90.

109. The Court used the sexist term "newsmen"—for example, in the very first sentence of the opinion: "The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment." *Id.*

110.

The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

Id. at 703–04.

111. The supposed lines delineating journalists blurs further given that social media allow its users to quickly and easily commit "random acts of journalism." Twitter users were among the first to post pictures of the 2009 US Airways flight that landed safely in the Hudson River. More recently, a Twitter user in Abbottabad, Pakistan, unknowingly posted live updates of the U.S. Special Forces raid that killed Osama bin Laden. See Matthew Ingram, *Does Posting Things to Twitter Make You a Journalist?*, GIGAOM (May 5, 2011, 4:04 PM), <http://gigaom.com/2011/05/05/does-posting-things-to-twitter-make-you-a-journalist/>.

112. 408 U.S. at 682.

right of special access to information not available to the public generally.”¹¹³

The *Branzburg* Court even addresses the issue of stealing documents:

Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.¹¹⁴

The Court thus made its viewpoint clear: First Amendment arguments wither when confronted with valid laws of “general applicability.”

VII. The Danger of Applying *Branzburg’s* Logic to *Bartnicki* and *New York Times v. United States*

What if the Court in *Bartnicki* had followed the doctrine that journalists must follow rules of general applicability, namely, that it is a crime to receive stolen property? In other words, what if the Court in *Bartnicki* had applied *Branzburg*-type logic?

Under a *Branzburg*-type analysis, Vopper’s actions would fall under the ambit of the generally applicable rule that receiving stolen property is a crime and, therefore, Vopper’s receipt of the tape would be a criminal act and punishable.

Further, the Pentagon Papers case would have to be decided differently using *Branzburg’s* logic. The *Bartnicki* Court characterized the Pentagon Papers case as upholding “the right of the press to publish information of great public concern obtained from documents *stolen by a third party*.”¹¹⁵

The Pentagon Papers case started in early 1971 when a reporter from *The New York Times* received a photocopy of the secret 47-volume study of the history of the U.S. involvement in Vietnam, the

113. *Id.* at 684.

114. *Id.* at 692.

115. *Id.* at 528 (emphasis added).

so-called Pentagon Papers.¹¹⁶ This study was prepared by the Defense Department, which had not planned for the papers to be made public.¹¹⁷

But Dr. Daniel Ellsberg, a former Pentagon employee and one of the study's thirty-six authors,¹¹⁸ had turned against the war. He slipped a copy of the Pentagon Papers to a *New York Times* reporter.¹¹⁹ A team of reporters worked for three months. Then, on

116. According to Circuit Judge MacKinnon on June 23, 1971, "Our ability to deal effectively with the problem is also currently complicated today by the release of the entire 47 volumes to Congress where the problem of disclosure may be compounded." *United States v. Wash. Post Co.*, 446 F.2d 1327, 1329 (D.C. Cir. 1971). According to Justice Burger, "[T]he Times conducted its analysis of the 47 volumes of Government documents over a period of several months and did so with a degree of security that a government might envy." *N. Y. Times Co. v. United States*, 403 U.S. 713, 749 n.1 (1971) (Burger, J., dissenting). But Floyd Abrams says Ellsberg made 43 volumes available:

In 1971, Daniel Ellsberg decided to make available to the New York Times (and then to other newspapers) 43 volumes of the Pentagon Papers, the top-secret study prepared for the Department of Defense examining how and why the United States had become embroiled in the Vietnam conflict. But he made another critical decision as well. That was to keep confidential the remaining four volumes of the study describing the diplomatic efforts of the United States to resolve the war. Not at all coincidentally, those were the volumes that the government most feared would be disclosed.

Floyd Abrams, *Why WikiLeaks is Unlike the Pentagon Papers*, WALL STREET JOURNAL, Dec. 29, 2010, <http://online.wsj.com/article/SB10001424052970204527804576044020396601528.html>.

117. The National Archives released an official, declassified version of the Pentagon Papers in June 2011. It is almost a complete version of the original report: Eleven words remain redacted. See A.J. Daverede, *The Real Pentagon Papers*, NAT'L DECLASSIFICATION CTR (NDC) BLOG (May 26, 2011), <http://blogs.archives.gov/ndc/?p=138>.

118. Leslie H. Gelb, *The Way Out of Afghanistan*, DAILY BEAST, (Aug. 1, 2010, 6:58 PM), <http://www.thedailybeast.com/articles/2010/08/01/gelb-pentagon-papers-and-wikileaks.html>.

119. Comparing the ease of Manning's transfer of information to Julian Assange in 2010 with the difficulty of Daniel Ellsberg's copying and smuggling 47 volumes of hard-copy Pentagon Papers to a *New York Times* reporter in 1971 makes clear how easy technology has made the transmission of massive amounts of information. So does comparing the ease with which Julian Assange made information available to the whole world to the relatively limited transmission of chunks of Pentagon Papers information to readers of *The New York Times*, *Washington Post*, and other newspapers. The age of the Internet is clearly a new age for information acquisition and transmission. The transformation is perhaps like that from conventional warfare to the atomic age, with massive fallout on a global scale: the information "bomb" goes off and radiates worldwide almost instantaneously. WikiLeaks' "leaks became a torrent," Scott Shane says. He states:

Traditional watchdog journalism, which has long accepted leaked information in dribs and drabs, has been joined by a new counterculture of information vigilantism that now promises disclosures by the terabyte. A bureaucrat can hide a library's worth of documents on a key fob, and scatter them over the Internet to a dozen countries during a cigarette break.

Scott Shane, *Keeping Secrets WikiSafe*, N.Y. TIMES, Dec. 12, 2010 at WK1. In response, he says, the Defense Department is cutting back on sharing information, stripping computers of their CD and DVD recorders, requiring two people instead of just one for huge downloads of information from a classified to an unclassified computer, and installing software that can detect unusually large downloads. *Id.* The Internet also briefly buzzed at claims that Daniel Ellsberg calls Julian Assange his "reincarnation." See, e.g., Webster G. Tarpley, *Wikileaks Is The "Cognitive Infiltration" Operation Demanded by Cass Sunstein*, DPROGRAM.NET (Jan. 22, 2010), <http://dprogram.net/2011/01/22/wikileaks-is-the-%E2%80%9C-cognitive-infiltration%E2%80%9D-operation-demanded-by-cass-sunstein-webster-g-tarpley/>.

A California court of appeals in 2006 put a positive spin on digital communication and how availability of source material will reduce editorial spin:

Digital communication and storage, especially when coupled with hypertext linking, make it possible to present readers with an unlimited amount of information in connection with a given subject, story, or report. The only real constraint now is time—the publisher's and the reader's . . . Courts ought not to cling too fiercely to traditional preconceptions, especially when they may operate to discourage the seemingly salutary practice of providing readers with source materials rather than subjecting them to the editors' own "spin" on a story.

O'Grady v. Superior Court, 44 Cal. Rptr. 3d 72, 98 (Cal. Ct. App. 2006). The same would seem to apply to source material reducing government's spin. For example, on February 4, 2011, *The Daily Telegraph* of London reported, "The US secretly agreed to give the Russians sensitive information on Britain's nuclear deterrent to persuade them to sign a key treaty, *The Daily Telegraph* can disclose." The source? U.S. diplomatic communiques posted on WikiLeaks. The Telegraph did not stop with its story but also gave interested readers the raw information: "Details of the behind-the-scenes talks are contained in more than 1,400 US embassy cables published to date by the Telegraph, including almost 800 sent from the London Embassy, which are published online today." See Matthew Moore, Gordon Raynor & Christopher Hope, *WikiLeaks cables: US Agrees to Tell Russia Britain's Nuclear Secrets*, TELEGRAPH, Feb. 4, 2011, <http://www.telegraph.co.uk/news/worldnews/wikileaks/8304654/WikiLeaks-cables-US-agrees-to-tell-Russia-Britains-nuclear-secrets.html>. See also Nile Gardiner, *The Obama Administration Betrays Britain to Appease the Russians Over New START*, TELEGRAPH, Feb. 4, 2011, <http://blogs.telegraph.co.uk/news/nilegardiner/100074846/the-obama-administration-betrays-britain-to-appease-the-russians-over-new-start>. The Bangkok Post reported: "For those seeking to better understand the events in Egypt, by far the best source of information is WikiLeaks. The huge release of cables from the US embassy in Cairo offer fascinating insights and background into the drama unfolding in Tahrir." Fascinating and disturbing, if one agrees with the position of the Bangkok paper: "[T]he cables show how Arab and Islamic leaders have allowed themselves to be made complete fools, why their peoples are rising up to say that enough is enough and why that political tsunami will strike many shores right across the world." See Imtiaz Mugbil, *WikiLeaks: Clues to a Failed U.S. Policy*, BANGKOK POST, Feb. 6, 2011, <http://www.bangkokpost.com/news/local/220085/>

June 13, 1971, a Sunday, *The New York Times* printed on the front page its first story based on the Pentagon Papers.¹²⁰ *The New York*

wikileaks-clues-to-a-failed-us-policy. And WikiLeaks has been given the credit or blame, depending on one's attitude, for the revolutions in the Middle East. See, e.g., Maha Azzam, *Opinion: How WikiLeaks helped fuel Tunisian revolution*, CNN, Jan. 18, 2011, http://articles.cnn.com/2011-01-18/opinion/tunisia.wikileaks_1_tunisians-wikileaks-regime; Robert Mackey, *Quaddafi Sees WikiLeaks Plot in Tunisia*, N.Y. TIMES, Jan. 17, 2011, <http://thelede.blogs.nytimes.com/2011/01/17/quaddafi-sees-wikileaks-plot-in-tunisia/>; Ian Black, *Tunisia: The WikiLeaks Connection*, GUARDIAN, Jan. 15, 2011, <http://www.guardian.co.uk/world/2011/jan/15/tunisia-wikileaks-ghannouchi>. Assange himself said WikiLeaks was responsible in part for the regime changes in Egypt and Tunisia. See *Wikileaks' Julian Assange takes credit for Tunisian and Egyptian revolutions*, DAILY MAIL (Feb. 14, 2011, 3:23 AM), <http://www.dailymail.co.uk/news/article-1356754/Wikileaks-Julian-Assange-takes-credit-Tunisian-Egyptian-revolutions.html#ixzz1JniuB74Zntstu>. Even former Libyan dictator Muammar Gaddafi joined in. See Matthew Weaver, *Muammar Gaddafi condemns Tunisia uprising*, GUARDIAN UK (Jan. 16, 2011, 1:07 AM), <http://www.guardian.co.uk/world/2011/jan/16/muammar-gaddafi-condemns-tunisia-uprising>. Abroad, the WikiLeaks flap in part is seen as curious. While Secretary of State Hillary Clinton called the diplomatic leaks “not just an attack on America—it’s an attack on the international community,” from Paris came this report: “For many Europeans, Washington’s fierce reaction to the flood of secret diplomatic cables released by WikiLeaks displays imperial arrogance and hypocrisy, indicating a post-9/11 obsession with secrecy that contradicts American principles.” See Scott Neuman, *Clinton: WikiLeaks ‘Tear at Fabric’ of Government*, NPR.ORG, Nov. 29, 2010, <http://www.npr.org/2010/11/29/131668950/white-house-aims-to-limit-wikileaks-damage>; Steven Erlanger, *Many Europeans Find U.S. Attacks on WikiLeaks Puzzling*, N.Y. TIMES, Dec. 10, 2010, at 12, available at <http://www.nytimes.com/2010/12/10/world/europe/10wikileaks-react.html>. One comment in this article came from the *Berliner Zeitung*: “The U.S. is betraying one of its founding myths: freedom of information. And they are doing so now, because for the first time since the end of the cold war, they are threatened with losing worldwide control of information.” On the other hand, a reporter for *Le Figaro*, Renauti Girard, opined: “What is most fascinating is that we see no cynicism in U.S. diplomacy. They really believe in human rights in Africa and China and Russia and Asia. They really believe in democracy and human rights. People accuse the Americans of double standards all the time. But it’s not true here. If anything, the diplomats are almost naive, and I don’t think these leaks will jeopardize the United States. Most will see the diplomats as honest, sincere and not so cynical.” *Id.* But WikiLeaks did leak hundreds of thousands of classified documents concerning U.S. wars. And Assange has shown himself capable of using information offensively, threatening to dump unredacted material if the United States attempts to prosecute him and, separately, to release information about major banks. See, e.g., Andrew Ross Sorkin, *A WikiLeaks Problem for Enforcers*, N.Y. TIMES, Dec. 21, 2010 at 1, available at <http://query.nytimes.com/gst/fullpage.html?res=9C06E1D71639F932A15751C1A9669D8B63>; Ian Drury, *WikiLeaks founder Julian Assange ‘will release poison pill of damaging secrets if killed or arrested,’* DAILY MAIL, Dec. 6, 2010, <http://www.dailymail.co.uk/news/article-1335888/WikiLeaks-Julian-Assange-release-damaging-secrets-killed-arrested.html>.

120. On the top-center of the front page of *The New York Times* appeared a story three columns wide by Neil Sheehan titled “Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement.” In a small box at the top of the middle column appeared these words: “Three pages of documentary material from the Pentagon study begin on Page 35.” According to Sheehan’s story, the Pentagon Papers are composed of a

Times also made Pentagon Papers information available to other newspapers.¹²¹

Less than forty-eight hours later, *The New York Times* received a telegram from U.S. Attorney General John Mitchell, saying that any more articles based on the Pentagon Papers would bring about “irreparable injury to the defense interests of the United States.”¹²² Columnist James Reston summed up the situation: “For the first time in the history of the Republic, the Attorney General of the United States has tried to suppress documents he hasn’t read about a war that hasn’t been declared.”¹²³

The Justice Department asked U.S. District Court Judge Murray Gurfein to issue a temporary restraining order against *The New York Times*. Interestingly, it was Judge Gurfein’s first day on the job as a federal judge.¹²⁴ He granted the temporary restraining order on June 15, but on June 19, Judge Gurfein refused to give the government a preliminary injunction. He said:

These are troubled times. There is no greater safety valve for discontent and cynicism about the affairs of Government than freedom of expression in any form. 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.¹²⁵

“3,000 page analysis, to which 4,000 pages of official documents are appended,” and Secretary of Defense Robert S. McNamara commissioned the study.

121. For example, on June 14, the day after *The New York Times* published its first story on the Pentagon Papers, the *Louisville Courier Journal* said: “Dateline: Washington: The White House has no copy of the highly secret governmental history of U.S. involvement in Vietnam. Excerpts were published yesterday in *The New York Times* and made available through its news service to newspapers nationwide, including the *Courier-Journal*.”

122. Max Frankel, *Court Step Likely*, N.Y. TIMES, June 15, 1971, at 1.

123. *The Pentagon Papers: A Public Domain Reminder: US Lies and Deception*, ASK WHY!, May 15, 2003, at 20 available at www.askwhy.co.uk/warandpropaganda/pentagonpapers.pdf (last visited June 5, 2011).

124. See, e.g., *Cover Story: Pentagon Papers, The Secret War*, CNN, <http://www.cnn.com/ALLPOLITICS/1996/analysis/back.time/9606/28/index.shtml>; *Top Secret: The Battle for the Pentagon Papers*, www.topsecretplay.org/index.php/content/timeline, and *The Nation: The Legal Battle Over Censorship*, TIME MAGAZINE, June 28, 1971, www.time.com/time/magazine/article/0,9171,905236,00.html.

125. *United States v. New York Times Co.*, 328 F. Supp. 324, 331 (S.D.N.Y. 1971).

However, the Court of Appeals for the Second Circuit reversed, demanding further hearings and enjoining publication of more Pentagon Papers stories by the *Times*.¹²⁶

On June 26, only thirteen days after *The New York Times* published its first story on the Pentagon Papers, the Supreme Court heard the case, and the Court reached its decision four days later.

The Supreme Court issued a three-paragraph-long *per curiam* decision. All nine justices wrote separate opinions, with three justices dissenting. The bottom line is that the Supreme Court lifted the injunction on *The New York Times*. The Court said, “Any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity.”¹²⁷ John Mitchell and the Department of Justice were not able to meet that heavy burden.

Justice Douglas wrote a concurring opinion, saying, “The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. . . . [A] debate of large proportions goes on in the Nation over our posture in Vietnam. *Open debate and discussion of public issues are vital to our national health.*”¹²⁸ Justice Douglas seems to be saying that instead of being a risk to national security, the publishing of the Pentagon Papers was “vital” to national security. He acknowledged that “[t]hese disclosures may have a serious impact,”

126. *United States v. New York Times Co.*, 444 F.2d 544 (2d Cir. 1970). On June 18, the *Washington Post* got into the act, publishing parts of the Pentagon Papers. The Justice Department got a TRO against the *Washington Post*, as well, but Judge Gerhard Gesell, the district court judge, denied a preliminary injunction. On June 23, the U.S. Court of Appeals for the District of Columbia heard the United States’ appeal from the district court’s denial of a preliminary injunction against the *Post*. When the issue came before the U.S. Court of Appeals for the District of Columbia, the Pentagon claimed that publication would betray a national security secret. After Judge David Bazelon called attorneys for both sides, and one *Post* reporter, into his chambers to ask what secret would be betrayed. The Pentagon identified the “secret” as the fact that the American military had broken the code of the North Vietnamese navy. But the reporter, George Wilson, reached into his green vinyl bag and located a passage from a Congressional hearing that disclosed that the government had already made the alleged secret public during a Senate investigation of the 1964 naval incident in the Gulf of Tonkin. See EDMUND B. LAMBETH, COMMITTED JOURNALISM: AN ETHIC FOR THE PROFESSION, 156 (2d ed. 1992). See also *United States v. Wash. Post Co.*, 446 F.2d 1327, 1328 (D.C. Cir. 1971). The court ruled in favor of the *Post* and against an injunction. *Id.* at 1328.

127. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

128. *Id.* at 723–24, (Douglas J., concurring) (emphasis added).

but he said “that is no basis for sanctioning a previous restraint on the press.”¹²⁹

Justice Black in his concurrence extolled the virtues of the Founding Fathers, saying that with the First Amendment, they provided the needed protection for the press to fill its “essential role” in democracy. He explained that “[t]he press was to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government. *The press was protected so that it could bare the secrets of government and inform the people.*”¹³⁰

The duty of the press for Justice Black could be boiled down, perhaps, to two words: exposing deception. He said that “[o]nly a free and unrestrained press can effectively expose deception in government.” But what about exposing deception when national security is arguably at issue? He seems to be saying that if the issue is war, then the press *must* expose deception: “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.”¹³¹

Justice Black could hardly have been more complimentary to the newspapers involved in the leak of the Pentagon Papers to the American public:

In my view, far from deserving condemnation for their courageous reporting, *The New York Times*, *The Washington Post*, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.¹³²

Had *Branzburg’s* reasoning held sway with the Pentagon Papers, the Court would have applied the general rule of applicability concerning the criminality of receiving stolen property and ruled against *The New York Times* and *The Washington Post*. The Court

129. *Id.* at 722–23. Justice Douglas also argued the statutory language in 18 U.S.C. § 793, concluding that no statute existed to bar publication of the Pentagon Papers material. *Id.* at 720–21.

130. *Id.* at 717 (emphasis added).

131. *Id.*

132. *Id.*

would have constricted the free flow of information and changed history—much for the worse.

The *Branzburg* doctrine of applying rules of general applicability (“Thou shalt not receive stolen property”) was mercifully ignored by the Court in *Barntnicki* and the Pentagon Papers case, as it arguably should have been in *Branzburg*. But would the *Branzburg* rules-of-general-applicability doctrine be applied in a WikiLeaks case?

The government was able to get Daniel Ellsberg and one of his cohorts indicted under federal espionage, theft, and conspiracy laws, but no conviction ensued. The trial judge looked at the “totality of the circumstances” of the trial and thought that there was improper government conduct. The judge declared a mistrial.¹³³

On June 13, 2011, forty years to the day after *The New York Times* printed its first story based on the Pentagon Papers, the U.S. government released the Pentagon Papers for public consumption.¹³⁴

VIII. Franklin, Rosen, and Weissman; Risen and Lichtblau; Drake and Sterling

In January 2006, Lawrence Franklin, who worked for the Department of Defense, received a 150-month sentence for violating the Espionage Act. He pleaded guilty to two counts.¹³⁵ Franklin had been indicted along with two other Department of Defense officials, Steven J. Rosen and Keith Weissman. Rosen was the Director of Foreign Policy Issues at the American Israeli Public Affairs Committee (“AIPAC”), while Weissman was the Senior Middle East Analyst for AIPAC’s Foreign Policy Issues Department. Rosen and Weissman did not plead guilty.

In 2009, the Fourth Circuit Court of Appeals made a ruling in the series of cases known as *United States v. Rosen*.¹³⁶ The cases began in

133. SANFORD J. UNGAR, *THE PAPERS & THE PAPERS: AN ACCOUNT OF THE LEGAL AND POLITICAL BATTLE OVER THE PENTAGON PAPERS* 242, 274 (1972); On government improprieties as the grounds for the dismissal in the Ellsberg case, see Transcribed Remarks of the Honorable Stephen Trott, *Perspectives on Watergate Panel: Memories of the Ellsberg Break-In*, 51 *HASTINGS L.J.* 765 (2000) (excellent coverage of the break-in of Daniel Ellsberg’s psychiatrist’s office and Ellsberg’s release).

134. See, e.g., Calvin Woodward & Richard Lardner, *Pentagon Papers Released 40 Years After New York Times Began Publishing Them*, *HUFFINGTON POST* (June 13, 2011, 9:18 PM), http://www.huffingtonpost.com/2011/06/13/pentagon-papers-released-_n_875748.html.

135. *United States v. Rosen*, 557 F.3d 192, 194 n.1 (4th Cir. 2009). See also, Scott Shane & David Johnston, *Pro-Israel Lobbying Group Roiled by Prosecution of Two Ex-Officials*, *N.Y. TIMES*, Mar. 5, 2006, at 21.

136. 557 F.3d 192 (4th Cir. 2009).

2006 with a ruling by the Eastern District Court of Virginia that 18 U.S.C. § 793, as applied to Rosen and Weissman, was not unconstitutionally vague.¹³⁷ A grand jury had indicted Rosen and Weissman, along with Franklin, in August 2005 for unlawful transmission of national defense information from government sources to AIPAC, foreign officials, and news media from 1999 to 2004.

Applying the Classified Information Procedures Act,¹³⁸ the trial court made an evidentiary ruling on classified information.¹³⁹ The court concluded that an FBI report was relevant to Rosen and Weissman's defense. While the defendants wanted to use the whole report, the government wanted to redact the report, maintaining that portions of it were irrelevant. According to the appellate court, the trial court "proposed redactions in painstaking detail," agreeing with the government that some redactions were necessary but that some would impede the defendants' in preparing their defense. In so ruling, the appellate court said, the trial court did not abuse its discretion.¹⁴⁰ A "classified information privilege," claimed by the government, must yield if the classified information "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause."¹⁴¹

In 2009, the U.S. government dropped charges against Rosen and Weissman for conspiring with Franklin to transmit government secrets. The two lobbyists had gained court permission to subpoena high-ranking government officials, including then-Secretary of State Condoleezza Rice, to explore the defense allegation that government officials frequently pass classified information to foreign governments.¹⁴²

137. *United States v. Rosen*, 444 F. Supp. 2d 664 (E.D. Va. 2006).

138. 18 U.S.C. app. 3 §§ 1–16.

139. 557 F.3d at 194–95.

140. *Id.* at 200.

141. *Id.* at 195 (citations omitted).

142. See Derigan A. Silver, *National Security and the Press: The Government's Ability to Prosecute Journalists for the Possession of Publication of National Security Information*, 13 COMM. L. & POL'Y 447 (2008) (covering the prosecution under Attorney General Alberto R. Gonzales of the American Israel Public Affairs Committee (AIPAC) for possession and dissemination of national security information); Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881 (2008); Joe Bant, Comment, *United States v. Rosen: Pushing the Free Press onto a Slippery Slope?* 55 KAN. L. REV. 1027 (2007); Peter Shapiro, Note, "Prologue to a Farce?" *A Historical Perspective on the AIPAC Case and the Applicability of the Espionage Act to Journalists*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 237 (2007) (The AIPAC case is the *Rosen* case). For coverage of the Franklin affair, see William E. Lee, *Probing Secrets: The Press and Inchoate Liability for*

According to Heidi Kitrosser, there is a link between the case involving Rosen and Weissman and the later National Security Agency leak case involving two *New York Times* reporters. She said the Rosen and Weissman case reflected “a broader trend toward cracking down on classified information leaks” by the Bush administration, which maintained that the Espionage Act authorized prosecution not only of government employees for leaking classified information but also of other people, including journalists, who transmitted the information or even just received it. The convening of a grand jury to investigate leaks about the National Security Agency’s classified program of warrantless spying on phone calls, Kitrosser says, is yet another example of this crackdown.¹⁴³

The more recent skirmish between the government and the reporters who published stories about NSA leaks involved James Risen and Eric Lichtblau of *The New York Times*. Late in 2005, they reported that the NSA was violating U.S. law by eavesdropping on U.S. citizens without getting the warrants required by the Foreign Intelligence Surveillance Act.¹⁴⁴

Commentator Keith Werhan says that the Pentagon Papers case has a “strong default rule making prior restraints on national security grounds next to impossible,” and he uses the Risen-Lichtblau story as an example of the strength of this alleged default rule. According to Werhan, government officials met with *Times* editors to try to persuade them to spike the story. The government got the story delayed for a year, pushing its publication after the 2004 presidential elections, and the *Times* did delete some information. The published

Newsgathering Crimes, 36 AM. J. CRIM. L. 129, 130–32 (2002). See the Lee article, *passim*, for coverage of the general topic of the complex relationship between reporters and their confidential sources. See also, William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453 (2008); Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists’ Confidentiality*, 43 SAN DIEGO L. REV. 425 (2006); Rick Karr, *Rick Karr on Government Secrecy* (PBS broadcast on Feb. 28, 2008), available at <http://www.pbs.org/moyers/journal/02292008/profile4.html> (last visited Feb. 5, 2011) (covering the federal grand jury investigation against Risen and Lichtblau).

143. Kitrosser, *supra* note 142, at 883–84.

144. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, <http://www.nytimes.com/2005/12/16/politics/16program.html>. In May 2011, Congress passed a four-year extension to parts of the controversial PATRIOT Act that address surveillance techniques that were set to expire. Paul Kane & Felicia Sonmez, *Congress approves extension of USA Patriot Act provisions*, WASH. POST., May 27, 2011, http://www.washingtonpost.com/AGGgXICH_story.html.

story said that it omitted “some information that administration officials argued could be useful to terrorists.”¹⁴⁵

The Risen and Lichtblau story, as well as a *Washington Post* story published six weeks earlier by Dana Priest about the CIA’s prisons overseas that used “enhanced interrogation techniques” such as waterboarding,¹⁴⁶ won Pulitzer Prizes. The Bush administration denounced both stories as compromising the government’s war on terrorism.¹⁴⁷ Instead of apologizing for breaching Foreign Intelligence Surveillance Act law, President Bush called the leak about the warrantless surveillance “a shameful act.” Some critics even said that *The New York Times* had committed treason.¹⁴⁸

While no indictments were ever handed down against Risen and Lichtblau, Thomas A. Drake was not so lucky. Drake, a former NSA senior executive, was indicted. According to information released by Assistant Attorney General Lanny A. Breuer of the Criminal Division of the Department of Justice, a grand jury in the District of Maryland charged that Drake was the source for newspaper articles about the NSA published between February 2006 and November 2007.

The indictment alleged that, among other things, he engaged in the following activities to provide highly classified information to a reporter:

exchanging hundreds of e-mails with and meeting with the reporter; . . . copying and pasting classified and unclassified information from NSA documents into untitled word

145. Werhan, *supra* note 65, at 1561, 1574 (quoting Risen & Lichtblau, *supra* note 144).

146. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

147. See Laura Rozen, *Hung Out to Dry: The National-Security Press Dug Up the Dirt, but Congress Wilted*, COLUMBIA JOURNALISM REV. (Jan. 22, 2009), available at http://www.cjr.org/transparency/hung_out_to_dry_1.php?page=all.

148. See Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 235–36 (2008); see also Werhan, *supra* note 65, at 1561, 1574 (calling the story a “shameful act”). President Bush also said that the story was “helping the enemy,” and a Congressional resolution condemning *The New York Times* for possible endangerment of American lives garnered 210 votes. *Id.* at 1574–75.

On wiretapping done by presidents, and particularly by President George W. Bush, see generally, Heidi Kitrosser, Symposium, *Law at the Intersection of National Security, Privacy, and Technology: It Came from Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401 (2010). See also Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009) (exploring whether judges should defer to the executive branch on facts in national security cases).

processing documents which, when printed, had the classification markings removed; . . . scanning and emailing electronic copies of classified and unclassified documents to the reporter from his home computer; and reviewing, commenting on, and editing drafts of the reporter's articles.

According to Breuer, Drake shredded documents and lied to federal agents. Because of national security needs, Breuer said, Drake's disclosure of classified information warranted that he be "prosecuted vigorously."¹⁴⁹

Drake was scheduled to go on trial in June 2011. He defended himself publicly in a May 2011 *The New Yorker* article:

"I'm a target," he said. "I've got a bull's-eye on my back." He continued, "I did not tell secrets. I am facing prison for having raised an alarm, period. I went to a reporter with a few key things: fraud, waste, and abuse, and the fact that there were legal alternatives to the Bush Administration's 'dark side'—in particular, warrantless domestic spying by the N.S.A."¹⁵⁰

But instead of going to trial or to jail, he pled guilty to a single misdemeanor charge of exceeding authorized use of a government computer, in order to share that computer's contents with persons unauthorized to receive the shared information. Under the agreement, Drake would receive no jail time. Originally, the government had sought conviction on ten felony charges, including violating the Espionage Act.¹⁵¹ In short, the "vigorous prosecution" seemed to fizzle out.¹⁵² On July 15, 2011, Drake received a sentence

149. See DEPT. OF JUSTICE OFFICE OF PUBLIC AFFAIRS, *Former NSA Senior Executive Charged with Illegally Retaining Classified Information, Obstructing Justice and Making False Statements*, (Apr. 15, 2010), available at <http://www.justice.gov/opa/pr/2010/April/10-crm-416.html> (last visited Feb. 5, 2011).

150. See Jane Mayer, *The Secret Sharer*, NEW YORKER, May 23, 2011, at 46, 48. Mayer named the reporter as Siobhan Gorman of the *Baltimore Sun*. According to Mayer, Gorman "has not been charged with wrongdoing."

151. See, e.g., Jane Mayer, *A Deal in the N.S.A. Case*, NEW YORKER, June 9, 2011, <http://www.newyorker.com/online/blogs/newsdesk/2011/06/a-deal-in-the-nsa-case.html>.

152. *The Washington Post* quoted Jesselyn Radack, the director of national security for the Government Accountability Project, as saying of the plea agreement that "It's an unambiguous victory for Drake" and that "The prosecution's case imploded." Ellen Nakashima, *Ex-NSA Official Thomas Drake to Plead Guilty to Misdemeanor*, WASH. POST, June 9, 2011, http://www.washingtonpost.com/national/national-security/ex-nsa-manager-has-reportedly-twice-rejected-plea-bargains-in-espionage-act-case/2011/06/09/AG89ZHNH_story.html. *Smithsonian Magazine* also quoted Radack as saying that President Obama's Administration "has brought more leak prosecutions than all previous

of one year on probation and 240 hours of community service from United States Judge Richard D. Bennett, who from the bench rebuked the government and called it “unconscionable” for the government to put Drake and his family through “four years of hell” before folding on all felony charges.¹⁵³ On December 22, 2010, former CIA agent Jeffrey Sterling was indicted by a federal grand jury in St. Louis for allegedly giving classified information to a journalist about a secret endeavor to impede weapon development by some foreign countries. Sterling was arrested in St. Louis on January 6. Although the indictment does not specifically say that Sterling was passing secret information to journalist James Risen, the details led *The New York Times* to conclude that Risen received information from Sterling that then appeared in Risen’s 2006 book, *State of War: The Secret History of the C.I.A. and the Bush Administration*.¹⁵⁴

Federal District Judge Leonie M. Brinkema quashed a subpoena for journalist Risen in November 2010, but prosecutors subpoenaed him again in May 2011.¹⁵⁵ According to Justice Department rules, prosecutors can only seek information from journalists if the information is both essential and cannot be gained in any other manner.¹⁵⁶ Federal prosecutors were able to indict Sterling without

presidential administrations combined.” David Wise, *Leaks and the Law: The Story of Thomas Drake*, SMITHSONIAN MAGAZINE, Aug. 2011, available at <http://www.smithsonianmag.com/history-archaeology/Leaks-and-the-Law-The-Story-of-Thomas-Drake.html>. She introduced Thomas Drake when he received the \$10,000 Ridenhour Prize for Truth-Telling from the National Press Club in Washington, D.C. in April 2011. *Id.* As President-elect, President Obama also had praised government whistleblowers, speaking of the “courage and patriotism” of whistle-blowing and saying it “should be encouraged rather than stifled.” *Id.*

153. See, e.g., Tricia Bishop, *No Jail Time for Ex-NSA Official; Thomas Drake, Accused of Espionage, Gets Probation After Case Collapses*, THE BALTIMORE SUN, July 16, 2011, at 1A. See also Scott Shane, *Ex-N.S.A. Official Takes Plea Deal; Setback for U.S.*, N.Y. TIMES, June 10, 2011, at 1. In a case that received relatively little publicity, Shama K. Leibowitz, a lawyer who worked as a Hebrew translator for the FBI on a contract basis, pleaded guilty to leaking classified documents to an unnamed blogger. Maria Glod, *Former FBI Employee Sentenced in Classified Leak*, WASH. POST, May 25, 2010 at B03 [hereinafter *FBI Employee Sentenced*]. See also Wise, *supra* note 152, and Shane, *supra* note 152. Although U.S. District Judge Alexander Williams, Jr., said during the sentencing that government authorities persuaded him that this case involved a “very, very serious offense,” he also said that “I don’t know what was divulged, other than some documents, and I don’t know how it’s compromised things.” See *FBI Employee Sentenced*.

154. See Charlie Savage, *Ex-C.I.A. Officer Named in Disclosure Indictment*, N.Y. TIMES, Jan. 7, 2011, at 15 available at <http://www.nytimes.com/2011/01/07/us/07indict.html>.

155. Ellen Nakashima, *Reporter Subpoenaed in Leaks Case*, WASH. POST., May 24, 2011, http://www.washingtonpost.com/national/reporter-subpoenaed-in-leaks-case/2011/05/24/AFV2MiAH_story.html.

156. Since 1980, prosecutorial guidelines have existed to help curb overzealous pursuit of journalists’ sources. Published in the Code of Federal Regulations, the guidelines

Risen disclosing him as a source. The indictment includes details of phone conversations and e-mail exchanges between Sterling and the unnamed journalist.¹⁵⁷

Subpoenas on the media are having an impact: the discussion is not just academic.¹⁵⁸ RonNell Andersen Jones rejects the notion that there is an “avalanche” of subpoenas.¹⁵⁹ But Jones concludes that there is a problem with subpoenas. In 2006 she conducted a survey and then compared her data with a comparable survey done in 2001 by the Reporters Committee for Freedom of the Press. She stated that “analysis of the survey data suggests that federal subpoenas may be both more frequent than they were five years ago and more common than opponents of a federal shield law have suggested.”¹⁶⁰

explain the rationale for limiting prosecutors’ power over journalists—preserving the functioning of the press:

Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter’s responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function.

28 C.F.R. § 50.10 (1980).

157. Savage, *supra* note 154. In April 2011, a federal prosecutor told Judge Brinkema that “potential witness issues” might prevent the case from going to trial. The prosecutor did not describe the problem or say which witness was causing trouble, but the *Associated Press* said, “it seems clear that testimony from Risen, who has not cooperated with the investigation, is key to the government’s case.” See *Associated Press, Prosecutor Says Witness Issue May Prevent Leak Case Against Ex-CIA Officer From Going to Trial*, WASH. POST, Apr. 8, 2011, http://www.washingtonpost.com/national/prosecutor-leak-case-against-ex-cia-man-may-not-go-to-trial-because-of-witness-problem/2011/04/08/AFn2jf2C_story.html.

Prosecutors in the case took the uncommon step of subpoenaing Sterling’s attorney, Mark Zaid of Washington, D.C. This brought criticism that this subpoena of prosecutor was violating Rule 3.8 of the American Bar Association’s *Model Rules of Conduct* that say that prosecutors may only subpoena an attorney to testify about a client if (1) the prosecutor does not believe that the information sought is covered by the attorney-client privilege, (2) the information is “essential,” and (3) there are no alternative sources of the information. See William H. Freivogel, *Feds take Unusual Step of Subpoenaing Sterling’s Lawyer*, ST. LOUIS BEACON, Jan. 21, 2011, <http://www.stlbeacon.org/issues-politics /nation /107662-sterling-lawyers-subpoena>.

158. See RonNell Anderson Jones, *Media Subpoenas, Impact, Perception and Legal Protection in the Changing World of American Journalism*, 84 WASH. L. REV. 317 (2009).

159. See Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 667 (2008).

160. *Id.* at 637.

Between 2001 and 2006, federal subpoenas nearly doubled.¹⁶¹ Both the 2006 survey and respondents' comments led Jones to say that these federal subpoenas are having an "increasing impact" on newsrooms nationwide. Jones says her work suggests that in 2006 federal subpoenas were served on 10.3 percent of U.S. media organizations. Larger media organizations received the brunt of the subpoenas, with 70 percent of newspaper subpoenas being served on the 100 largest daily newspapers (out of 1,400) and over half of broadcaster subpoenas being served in markets of one million or more households.¹⁶²

According to Lucy A. Dalglish, executive director of Reporters Committee for Freedom of the Press, and Casey Murray, "Two time periods . . . stand out for the sheer volume of subpoenas served on the media—the late 1960s through the early 1970s, when government officials aggressively went after political groups and others deemed to be 'subversive,' and . . . when the post-9/11 atmosphere caused federal and state governments to clamp down on the public release of government information." They maintain that this "culture of conspiracy" has resulted in media organizations using more anonymous sources than ever before.¹⁶³

IX. National Security

How valuable is openness in a society? How much openness should be sacrificed in the name of security? Reaching the appropriate balance between openness and security is a difficult, contentious task. Trying to determine the appropriate decision-maker is also difficult and contentious.

Of course, not everyone agrees with unilateral press decisions to release information. Gabriel Schoenfeld in *Necessary Secrets: National Security, the Media, and the Rule of Law*¹⁶⁴ challenges the press. He favors the government over the press on national security

161. *Id.* at 638.

162. *Id.* at 638. Federal subpoenas were served in 32 states and the District of Columbia. *Id.*

163. Lucy A. Dalglish & Casey Murray, *Deja Vu All Over Again: How a Generation of Gains in Federal Reporter's Privilege Law is Being Reversed*, 29 U. ARK. LITTLE ROCK L. REV. 13, 13 (2006).

164. GABRIEL SCHOENFELD, *NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW* (2010).

issues, and his book received some glowing endorsements, even in *The New York Times*.¹⁶⁵

Consumer activist and unsuccessful presidential candidate Ralph Nader decried classification of documents that he says should not have been classified. He maintains that “there’s just so many things that have been declassified later, or leaked, that were absurd to [be] classified.”¹⁶⁶

Heidi Kitrosser arguably goes a step further than Nader, saying that excessive classification is dangerous. She says that “secrecy often is at best unnecessary and at worst deeply harmful to national security.” Arguably, the need for secrecy is “dramatically overstated,” she says, and “excessive secrecy hurts national security by encouraging poorly informed and under-vetted decision-making and diminishing the United States’ domestic and international credibility.”¹⁶⁷

165. *The New York Times* review of Schoenfeld’s book said, in part: “In his aptly titled book, ‘Necessary Secrets,’ Gabriel Schoenfeld, a senior fellow at the Hudson Institute, has presented a subtle and instructive brief challenging the right of the press to make unilateral decisions to ‘publish and let others perish,’ as he puts it somewhat tendentiously.” See Alan M. Dershowitz, *Who Needs to Know?*, N.Y. TIMES, May 28, 2010, <http://www.nytimes.com/2010/05/30/books/review/Dershowitz-t.html>.

Another review of *Necessary Secrets* said this:

In December 2005, *The New York Times* revealed a secret National Security Agency operation that spied on Al Qaeda’s communications. Six months later the *Times* reported that the U.S. government gained access to an international financial clearinghouse, which allowed the feds to track the financial transfers of Al Qaeda. By the *Times*’s own accounts, these programs achieved significant successes; but the disclosure surely compromised that effectiveness. In most countries, the reporters who broke these stories—Eric Lichtblau and James Risen—would have been placed in shackles and interred in the deepest dungeon, along with their editor, Bill Keller. In the United States, they receive prizes.

Eric A. Posner, *The Prudent and the Imprudent*, NEW REPUBLIC (May 18, 2010), available at <http://www.nnr.com/book/review/the-prudent-and-the-imprudent>. Probably very few people would argue that government has no need for any secrets whatsoever, and those few might very well also argue that there is no need for government, either. For purposes of this discussion, an underlying assumption is that government does have some need of secrecy, although that need can be blown out of all proportion by governments that seek to govern outside of the view of their citizens and to sweep purely embarrassing information under the rug of classified information.

166. *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 96 (2010) (statement of Ralph Nader, Legal Advocate and Author).

167. Heidi Kitrosser, Symposium, *The Domestic Commander in Chief: Congressional Oversight of National Security Activities*, 29 CARDOZO L. REV. 1049, 1066 (2008). See also

She questions what she calls the “conventional assumption” that volumes of information exist that would be dangerous in enemy hands, and says that persons from all political viewpoints have suggested that the United States unnecessarily classifies a lot of information. For example, the Solicitor General for Richard Nixon, Erwin N. Griswold, who fought against publication of the Pentagon Papers, later acknowledged that he never even saw any suggestion that the Pentagon Papers endangered national security. Instead, he spoke of the “massive overclassification” of government information, contending that “the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another.”¹⁶⁸ She also questions the Bush Administration’s rationale for trying to keep the NSA eavesdropping a secret, referring to executive “spinning of information” with selective leaks and declassification.¹⁶⁹

But even Kitrosser says, “It is not remotely unreasonable, of course, for anyone to wish to block information that could assist terrorists.” However, she is concerned that there is “massive abuse” of claims about information aiding terrorism and that there are “very real risks” to national security and the democratic process from an over-abundance of secrecy.¹⁷⁰ In short, she warns of the “dangers of unchecked government secrecy.”¹⁷¹

Christina E. Wells, *State Secrets and Executive Accountability*; Symposium, *Presidential Power in the Obama Administration: Early Reflections*, 46 CONST. COMMENTARY, INC. 625 (2010) (discussing the state secrets privilege and court deference to government arguments for secrecy).

168. Kitrosser, *supra* note 167, at 1066.

169. Kitrosser, *supra* note 167, at 1067.

170. Kitrosser, *supra* note 167, at 1088–89.

171. Kitrosser, *supra* note 167, at 1090. This fear of secrecy as dangerous to national security is echoed by a 2009 note in the *Harvard Law Review*, but the author also mistrusts media publication decision-making. “Some secrecy is essential to both national security and democracy, but excessive secrecy undermines democratic accountability and decisionmaking, and sometimes national security itself.” The government has an incentive to keep information secret, while the press benefits from publication of secrets, the note maintains. Striking the appropriate balance between secrecy and disclosure is not something the note’s author would trust to government or to the press. The press may well underestimate national security risks. Note, *Media Incentives and National Security Secrets*, 122 HARV. L. REV. 2228 (2009). The press needs to reform its decision-making process when trying to determine whether to publish, the note contends. *Id.* at 2229. In particular, the note looks askance at “fear of being scooped” as a factor in decision-making. *Id.* at 2237–39. See also Katherine L. Johansen, *A Legion of Worries: National Security Reporting in the Age of the War on Terror 2008*, 34 WM. MITCHELL L. REV. 5107 (2008) (discussing how journalists report national security stories).

In another article, Kitrosser questions “whether the Constitution . . . counsels substantial deference to political branch judgments regarding national security related speech suppression.” She says “no” because suppression of speech relating to national security is “more dangerous” than suppression of other types of speech.”¹⁷² Further, she maintains that “the First Amendment demands some breathing room for disclosure by those within the vast secret-keeping infrastructure as well as by the press and the public to whom information might be leaked.”¹⁷³

Protection for leakers seems an increasingly divisive issue in the days of WikiLeaks. Although she was writing prior to the WikiLeaks saga, much of Mary-Rose Papandrea’s commentary directly aims at the issues WikiLeaks raises. She speaks of the “complicated relationship between the executive branch and the press, particularly with respect to national security information” and the “virtually unbridled classification authority” of the executive branch. The Freedom of Information Act and whistleblower laws are “largely ineffectual” when the issue is national security, she says.¹⁷⁴

Because national security information is under executive control, a “game of leaks” has developed, Papandrea claims, between the government and the press. “During this game, the press alternatively serves as lapdogs, watchdogs, and scapegoats for the executive branch. The press depends upon the government for news; the government in turn depends upon the press to communicate with the public.” Since Theodore Roosevelt’s presidency, she says, leaks have become a primary method of communicating information, even classified information, to the public through a compliant press. Because of its power over information and because of its own leaks, the executive power to punish the press for publishing leaks should be “extremely limited,” she says: The government should have to prove intent or reckless disregard for harm to the United States by publishing leaks.¹⁷⁵

172. Kitrosser, *supra* note 142, at 881, 885.

173. Kitrosser, *supra* note 142, at 885–86.

174. See *CIA v. Sims*, discussed *supra* note 20.

175. Papandrea, *supra* note 148, at 236–37. See also Derigan A. Silver, *National Security and the Press: The Government’s Ability to Prosecute Journalists for the Possession of Publication of National Security Information*, 13 COMM. L. & POL’Y 447, 447 (2008) (arguing that Congress should amend federal law “to limit prosecution to instances when there is evidence of intent to harm the United States”). For more on government secrets, see also GEOFFREY STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004).

Keith Werhan agrees with Papandrea on limiting the executive power to punish the press for leaks. He says, “There are few absolutes in constitutional jurisprudence, and there surely are extraordinary circumstances in which the principle of press autonomy (like every other fundamental right) should be overridden by competing social costs.”¹⁷⁶

Preventing a terrorist attack or other such deadly violence is an example of an extraordinary circumstance justifying a government subpoena of the press. But without such circumstances, Werhan says, he does not think prosecutors can justify subpoenaing the press even if necessary to reveal a “government leaker.” He says, “The leaking of classified information is an everyday occurrence, and the necessity of a journalist’s testimony to prove the case against a government leaker beyond reasonable doubt likely would be the rule rather than the exception.”¹⁷⁷

Werhan would countenance criminal prosecution for publication of classified information if prosecution furthered “a state interest of the highest order.”¹⁷⁸ He mentions the “extreme security risks” of publishing sailing dates of ships transporting troops, or technical information for designing weapons of mass destruction, or undercover CIA agents’ identities.¹⁷⁹

Rodney A. Smolla echoes the “watchdog” theme. He says:

There should be no per se “carve out” for national security matters. We live at a time in American history in which the watchdog role of a free and aggressive press is more vital than ever, and that watchdog role must above all include the vital and historic role of the press as a check and balance on the actions of the national government in matters relating to national security and foreign affairs.

To ensure a balance between “truly important national security secrets” and the watchdog press, Smolla calls for “qualified protection” for confidentiality promises by newsgatherers. But he

176. Werhan, *supra* note 65, at 1561, 1604. Werhan explains, “I am not a First Amendment absolutist. Not many people are. There are circumstances in which our rights to free speech and a free press must give way to competing societal interests. National security can be such an interest, but it is not inevitably so.” *Id.* at 1592.

177. Werhan, *supra* note 65, at 1604–05.

178. Werhan, *supra* note 65, at 1594 (citing the “*Daily Mail* principle”); *see also* Smith, *supra* note 82.

179. Werhan, *supra* note 65, at 1594.

tips the balance in favor of national security. Although he does not want a “blanket exception” for national security interests, he does say that national security would usually trump privilege—with the caveat that “we should preserve the possibility that the invocation of the national security interest would be overridden by courts when it is a sham.”¹⁸⁰

David Rudenstine argues in favor of extending shield law protection in alleged matters of national security. Although he also wrote prior to the WikiLeaks situation, his argument also seems highly applicable to it. He rails against the “enormous shift” of power to the executive branch in matters concerning national security and the danger created by secret use of power.¹⁸¹

This vast, secretly exercised power creates a “direct threat” to democratic government, Rudenstine says. He strongly supports shield law, maintaining that confidential sources are a necessity for reporting about national security matters. Why? “[B]ecause almost all information pertinent to national security is classified, thus preventing those with lawful access to it from revealing it to the press. It is only because some individuals do make such information public that we have access to it.”¹⁸²

While Anthony Lewis flatly states that “the press does not always have right and justice on its side,” he values protecting confidential sources. He cites *The New York Times*’ NSA story, calling it “vitally important” because it shed light on “lawless executive activity,” as well as *The Washington Post*’s story on CIA interrogations in secret European prisons. Lewis contends that “[n]either of those stories could have been reported without the use of confidential sources.

180. Smolla, *supra* note 96, at 1423, 1430.

181. Rudenstine presents a laundry list of secret uses of executive power:

[S]ince 9/11, the executive has, without public disclosure and debate, engaged in eavesdropping on United States citizens, monitored international banking transactions, tortured individuals subject to executive detention, executed signing statements to disavow the executive’s duty to faithfully execute the laws, and authorized renditions—the extraordinary practice of kidnapping and shipping a suspected terrorist to a nation state such as Syria or Egypt—where the suspect will be tortured.

Rudenstine, *supra* note 96, at 1431, 1433.

182. Rudenstine, *supra* note 96, at 1431, 1433 (footnotes omitted).

And without, I should add, great courage on the part of the journalists and their newspapers.”¹⁸³

As for shield law, Lewis says that the government’s argument about the national-security need for testimony poses a “serious obstacle” to Congress passing a shield law. He cites the suggestion of Geoffrey Stone that to skirt this problem, shield law should provide for journalists being subpoenaed if their testimony could help in cases involving an “imminent” national security threat.¹⁸⁴

But Lewis criticizes Stone’s suggestion, saying, “The trouble with that proposed exception is that it could easily become as wide as a barn door. The most important press disclosures have had to do with what the government says is national security: the Pentagon Papers case, warrantless wiretapping, secret CIA prisons.” While the government often says the nation’s fate is at stake, according to Lewis, judges are wary of second-guessing these national security claims.¹⁸⁵

Lewis has company in fearing that national security poses an obstacle to federal shield-law enactment. According to Jane Kirtley, the Justice Department has “vigorously opposed” proposed federal shield laws, and national security is a reason. She cites as an example the testimony by a Justice Department representative at a June 2007 hearing that shield laws would protect leaks and thus be a threat to national security, and that persons covered by the shield law would include “a terrorist operative who videotaped a message from a terrorist leader threatening attacks on Americans, because he would be engaged in recording news or information that concerns international events for dissemination to the public.”¹⁸⁶

183. Like Papandrea and Werhan, Lewis comments on the Bush administration calling the reporters traitors and focusing on the leaks, not the “flagrant” law violations. He also commented that compared to recent abuses of power, “the Pentagon Papers conflict of 1971 seems like simpler days.” Anthony Lewis, Panel Discussion, *Are Journalists Privileged?* 29 CARDOZO L. REV. 1353, 1353–54 (2008).

184. *Id.* at 1357, n.9 and accompanying text (citing Geoffrey R. Stone, *Half a Shield Is Better Than None*, N.Y. TIMES, Feb. 21, 2007, <http://www.nytimes.com/2007/02/21/opinion/21stone.html>).

185. *Id.* at 1357.

186. Jane E. Kirtley, *Reporter’s Privilege in the 21st Century: Despite the Ongoing Controversy Concerning Adoption of a Federal Reporter’s Privilege Statute, the Idea is Neither New, Nor Novel*, 25 DEL. LAWYER 12, 15 (2007/2008) (quoting *Hearing Before the House Comm. on the Judiciary Concerning H.R. 2102, the Free Flow of Information Act of 2007*, 109th Congress 18 (2007) (statement of Rachel L. Brand, Assistant Att’y Gen., Office of Legal Policy), available at http://www.usdoj.gov/olp/pdf/hr2102_brand_hjc_061407.pdf).

Kirtley sees protection of sources as necessary for supplying information for public debate: “Stories ranging from Watergate, the Enron scandal, abuse at Abu Ghraib prison, and conditions at Walter Reed Army Medical Center depended, at least in part, on confidential sources.” Without protection for such sources, she says, information and debate will suffer.¹⁸⁷

Lewis also has company in thinking that a national-security exception to shield protection could become overbroad. For example, Kristen Anastos says of proposed federal shield legislation: “The national security exception, without which this or any future-proposed Act has little chance of passing, gives the government too wide a loophole with which to bypass the constraints of the Act.”¹⁸⁸ And Heidi Kitrosser speaks of “a reflexive willingness to slash informed public debate at its root in the name of national security.”¹⁸⁹

Even the Supreme Court has shown unease with the government having too close control over information. In *Smith v. Daily Mail Publishing Co.*, the Court said: “A free press cannot be made to rely solely upon the sufferance of government to supply it with information.”¹⁹⁰

Now say that a member of the press has gotten hold of and published some classified information. And further, say that the Justice Department is unwilling or unable to indict a media outlet for disseminating classified information. A federal prosecutor can make an end run that can accomplish much the same goal by convening a grand jury to uncover the source of the leak. The judge can then order a subpoenaed journalist to disclose the source of the leak or go to jail, while the confidential source waits, wondering if the journalist faced with such a Hobson’s choice will choose revelation over incarceration. Such prospects could perhaps chill even the most heated leaker who is incensed over government wrongdoing—wrongdoing that is shielded from public inspection by a system of classification and the incantation of “national security.” With

187. *Id.* at 16.

188. Kristen Anastos, Note, *Protecting the Public Interest? Why Qualified Legislative Protection Undermines the Need for a Federal Reporters’ Privilege*, 31 SETON HALL LEGIS. J. 463, 464 (2006).

189. Kitrosser, *supra* note 142, at 881, 884. On the other hand, W. Cory Reiss wants to treat national security information differently than any other material. He says that this would “mitigate” some agencies’ concerns over a shield law. Reiss, *supra* note 59, at 641, 664–65. He proposes a three-part test for gaining a privilege when national security is involved: “a track record, a process of deliberation and verification, and transparency.” *Id.* at 668–69.

190. *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 104 (1979).

increasing prosecutorial pressure on journalists, sources could fade away, taking their information with them and leaving government misadventure undisclosed and undeterred.

X. Secrecy and Precedents in the Age of WikiLeaks

For all leakers of information that the government wants to keep secret, secrecy is a two-edged sword. Generally, leakers do not want the government to have secrecy, but they want secrecy themselves to avoid prosecution.

For receivers of leaked information who are within the U.S. government's reach, the threat of a grand jury subpoena and a court order to reveal the source of the leaked information is a serious threat. The Supreme Court in *Branzburg v. Hayes* was not sympathetic to confidential sources because the Court found a compelling governmental need when the concern was fighting crime.¹⁹¹

The need could override any First Amendment values raised by those who did not want to reveal their confidential sources in front of grand juries.¹⁹² Thus, if the U.S. government could subpoena Julian Assange, then it could order him to reveal his source(s) of information for WikiLeaks.

But perhaps Assange or any other receiver of leaked information does have a way around *Branzburg*: ignorance. Assange maintains that he does not know who his sources of information are because he has purposefully designed his information-gathering system *not* to be able to trace sources. Assange says: "We do not know whether Mr. Manning is our source or not. . . . [O]ur technology does not permit us to understand whether someone is one of our sources or not because the best way to keep a secret is to never have it."¹⁹³

191. The Court opined:

The requirements of those cases . . . which hold that a State's interest must be "compelling" or "paramount" to justify even an indirect burden on First Amendment rights, are also met here. As we have indicated, the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen.

Branzburg v. Hayes, 408 U.S. 665, 701 (1972) (citations omitted).

192. For coverage of *Branzburg*, see notes 98–114 and accompanying text.

193. *WikiSecrets*, *supra* note 1; *see also*, *CNN Presents Wiki Wars*, *supra* note 1 (quoting Nick Davies of *The Guardian*). Of course, there is controversy over whether Assange really is ignorant of the source of some of his WikiLeaks information. *See supra* note 1 and accompanying text. "WikiSecrets" also covered the controversy over whether

Impossibility (or ignorance) would seem a plausible defense to a possible contempt citation for refusal to reveal one's source when ordered to do so by a judge during grand jury proceedings. In short, technology has arguably softened the bite of *Branzburg* in the age of WikiLeaks.

While the Supreme Court found that the need to fight crime trumped alleged First Amendment needs in *Branzburg*, it found that the First Amendment trumped any other considerations in *Bartnicki v. Vopper*, which itself echoed *Pearson v. Dodd*.¹⁹⁴ The question that reporters must ask themselves, either when receiving illegally recorded phone conversations as in *Bartnicki*, or when receiving information gained through trespass as in *Pearson*, is whether the information is of legitimate public concern. In other words, the reporters must ask themselves whether the information is newsworthy. If it is newsworthy, and not merely a matter of private concern, then the reporters may use it.

Bartnicki and *Pearson* would seem to protect Julian Assange and newspapers such as *The New York Times* if they merely received information without soliciting it, and then disseminated the information. Likewise, *New York Times v. United States*¹⁹⁵ would stand as a potent precedent for protecting *The New York Times* from punishment for publishing classified information that it received from Assange.

Protection from the Pentagon Papers case, however, would seem penetrable. As Justice Byron White said in his concurring opinion:

When the Espionage Act was under consideration in 1917, Congress eliminated from the bill a provision that would have given the President broad powers in time of war to proscribe, under threat of criminal penalty, the publication of various

Manning confessed to leaking to WikiLeaks. When specifically asked about the "Collateral Murder" video, Assange said, "There was discussion [internally] about, you know, we have a situation where there's a young man held in military prison under investigation who's alleged to be a source for the 'Collateral Murder' video. But we have published and received military documents long before Bradley Manning ever joined the Army." As for the later release of diplomatic cables, there was internal dissension. Daniel Domscheit-Berg, who left WikiLeaks in 2010, said, "It was clear for me that these diplomatic cables should not be released . . . Because it was unclear how much that would implicate someone that had gotten into trouble." He said, "My gut and my heart say that you should protect the person." *Id.*

194. See *supra* notes 67–76 and accompanying text.

195. *New York Times Co. v. United States*, 403 U.S. 713 (1971). See also *supra* notes 106–120 and accompanying text.

categories of information related to the national defense. Congress at that time was unwilling to clothe the President with such far-reaching powers to monitor the press, and those opposed to this part of the legislation assumed that a necessary concomitant of such power was the power to “filter out the news to the people through some man.” 55 Cong. Rec. 2008 (remarks of Sen. Ashurst). However, these same members of Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed. Senator Ashurst, for example, was quite sure that the editor of such a newspaper “*should be punished if he did publish information as to the movements of the fleet, the troops, the aircraft, the location of powder factories, the location of defense works, and all that sort of thing.*”¹⁹⁶

If a clear case of revealing troop movements were to be found in the WikiLeaks documents, then *Near v. Minnesota*¹⁹⁷ could also offer a theoretical possibility of an injunction against publishers of such information. The injunction would have to apply to future publications; once information is out on the Web, getting it back would be more difficult than putting the proverbial toothpaste back in the tube. The die would already be cast. Of course, enforcement of even a prospective injunction could prove difficult at best, given the worldwide digital tentacles of WikiLeaks.¹⁹⁸

196. *New York Times*, 403 U.S. at 733–34 (White, J. concurring) (emphasis added).

197. *Near v. Minnesota*, 283 U.S. 697 (1931). *See also supra* notes 52–53 and accompanying text.

198. Based on *The New York Times*’ scrubbing of WikiLeaks documents for names, the possibility of the *Times* reporting troop movements seems remote. According to the *Times*, the types of information that have been removed from the documents include:

Names or precise identifying information of sources. Names of buildings under surveillance. Names of prisoners. Names of kidnap victims. Times required for various tactical military reactions. Radio frequencies or phone numbers used in insurgent communications. Names of public figures (generals, prominent police officials, governors, warlords and senior afghan officials) have not been redacted, though on a case-by-case basis, the names of lower-level employees have been removed. Similarly, well-known insurgent commanders or terrorists are not redacted, but the names of lower-level figures are.

C.J. Shivers et al., *Text From a Selection of the Secret Dispatches*, N.Y. TIMES, <http://www.nytimes.com/interactive/world/26warlogs.html>.

And even if the government arguably could pursue *The New York Times*, U.S. Attorney General Eric Holder is already on the record as saying the government will not seek sanctions against the *Times*.¹⁹⁹ But no publication over which the United States could assert jurisdiction would be immune from restraint if troop-movement information became the problem and if the government wanted to take action. The H-Bomb case, *United States v. Progressive*,²⁰⁰ would stand as a precedent for any type of troop-movement leaks for which the government sought an injunction.

The U.S. Supreme Court has emphasized the importance of the *effectiveness* of injunctions, if they are to be granted. In *Nebraska Press Association v. Stuart*,²⁰¹ a case concerning the issuance of gag orders in order to preserve a defendant's right to a fair trial, the Court emphasized that "prior restraints on speech and publication are the most serious and the least tolerable infringement of First Amendment rights."²⁰² Prior restraints could be imposed in cases that passed Judge Learned Hand's version of the clear and present danger test, namely, whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."²⁰³ But such invasion of free speech could not be justified if

In a "note to readers" published with the Afghanistan documents, the *Times* said:

Most of the incident reports are marked "secret," a relatively low level of classification. The Times has taken care not to publish information that would harm national security interests. The Times and the other news organizations agreed at the outset that we would not disclose—either in our articles or any of our online supplementary material—anything that was likely to put lives at risk or jeopardize military or antiterrorist operations. We have, for example, withheld any names of operatives in the field and informants cited in the reports. We have avoided anything that might compromise American or allied intelligence-gathering methods such as communications intercepts. We have not linked to the archives of raw material. At the request of the White House, The Times also urged WikiLeaks to withhold any harmful material from its Web site.

Piecing Together the Reports, and Deciding What to Publish, N.Y. TIMES, July 25, 2010, <http://www.nytimes.com/2010/07/26/world/26editors-note.html>. See also Julie Moos, *News Organizations Publish WikiLeaks Documents With Caution, Innovation*, POYNTER (Oct. 24, 2010, 5:44 AM), <http://www.poynter.org/uncategorized/106490/>.

199. See *supra* note 13 and accompanying text.

200. *United States v. Progressive*, 467 F. Supp. 990 (W.D. Wis. 1979). See also *supra* notes 44–50 and accompanying text.

201. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

202. *Id.* at 559.

203. *Id.* at 562.

other alternatives existed and if a restraining order would not “effectively . . . operate to prevent the threatened danger.”²⁰⁴

As for an injunction against WikiLeaks itself, as noted before, that would seem a futile endeavor because the “effectiveness” of an injunction would be problematic given its worldwide reach. WikiLeaks’ design would almost certainly negate most if not all external attempts at containing its content. Attempts at enforcement would thus seem to start a digital game of whack-a-mole, with an injunction against one WikiLeaks site simply leading to the posting by another WikiLeaks site, and on and on.

In *The New Yorker*, Raffi Khatchadourian explained the difficulty of trying to remove WikiLeaks material from the Internet:

Assange also wanted to insure that, once the video was posted online, it would be impossible to remove. He told me that WikiLeaks maintains its content on more than twenty servers around the world and on hundreds of domain names. (Expenses are paid by donations, and a few independent well-wishers also run “mirror sites” in support.) Assange calls the site “an uncensorable system for untraceable mass document leaking and public analysis,” and *a government or company that wanted to remove content from WikiLeaks would have to practically dismantle the Internet itself.*²⁰⁵

204. *Id.*

205. Raffi Khatchadourian, *No Secrets*, NEW YORKER, June 7, 2010, at 40 (emphasis added). Khatchadourian uses WikiLeaks’ stance against Scientology to demonstrate WikiLeaks’ tough stance against opponents, saying he “typically tells would-be litigants to go to hell.” After WikiLeaks leaked the church’s secret manuals and lawyers for Scientology demanded their removal, Assange posted more Scientology material and proclaimed: “WikiLeaks will not comply with legally abusive requests from Scientology any more than WikiLeaks has complied with similar demands from Swiss banks, Russian offshore stem-cell centers, former African kleptocrats, or the Pentagon.” *Id.* Not only does Assange take revenge when he considers himself to have been crossed, but so do his followers. After Frontline aired “WikiSecrets,” hackers attacked PBS’s servers and posted thousands of stolen passwords. They also posted a fake story about Tupac Shakur titled “Tupac still alive in New Zealand” on a PBS Newshour blog. A hacker group called Lulzsec claimed responsibility. Google News indexed the story, and even though PBS took the story down, it spread through Facebook and Twitter. *See, e.g.*, Kevin Poulsen, *Hactivists Scorch PBS in Retaliation for WikiLeaks Documentary*, THREAT LEVEL (May 30, 2011, 3:29 AM), <http://www.wired.com/threatlevel/2011/05/lulzsec/>. Assange followers also staged distributed denial of service attacks. Hactivists who call themselves “Anonymous” mounted, for example, an “Operation Payback” against MasterCard after MasterCard had announced in December 2010 that it would not process attempted donations to WikiLeaks because MasterCard considered WikiLeaks’ behavior to be illegal. Anonymous temporarily shut down MasterCard. PayPal, which had announced

While enjoining WikiLeaks would be difficult if not impossible, enjoining Manning is a different story. He could theoretically find himself in legal difficulty for his revelations, again assuming he is guilty, even if the government did not pursue criminal charges. An injunction against him could be a possibility. *Snepp*²⁰⁶ involved no classified information, but the former CIA agent's revelations about his service during the Vietnam War arguably did compromise the appearance of confidentiality. During the hearing, the then-head of the CIA testified that sources of information were drying up.

Likewise, the government could argue that the leaking of information such as State Department cables could compromise the appearance of confidentiality, inhibiting the sort of free flow of information that is essential for diplomats to carry out their diplomatic service. And if the information were also secret, then that would constitute another compelling reason for acting against the leaker of the information. The civil remedies could include an injunction against any further leaks and damages.²⁰⁷ *Snepp's* publisher, however, did not receive sanctions. Assange and *The New York Times*, of course, would stand in the same shoes as *Snepp's* publisher.

Criminal prosecution, however, seems the most likely outcome of the WikiLeaks situation. Bradley Manning is clearly within the government's bullseye. He has already been imprisoned while awaiting trial. Assuming that Manning gave WikiLeaks massive doses of confidential information, then he is guilty of violating valid criminal laws encoded in the Espionage Act. This U.S. Army

that it would freeze WikiLeaks' account, also suffered a denial-of-service attack. And Anonymous also temporarily shut down the Swedish prosecution's website. See Esther Addley & Josh Halliday, *Operation Payback cripples MasterCard site in revenge for WikiLeaks ban*, GUARDIAN, Dec. 8, 2010 <http://www.guardian.co.uk/media/2010/dec/08/operation-payback-mastercard-website-wikileaks>. Anonymous also targeted Visa, see *Student Charged Over Anonymous' Attacks in Support of WikiLeaks*, TELEGRAPH, Aug. 26, 2011, available at <http://www.telegraph.co.uk/technology/news/8723333/Student-charged-over-Anonymous-attacks-in-support-of-wikileaks.html> (British student Peter Gibson was charged with conspiring to amount a distributed denial of service attack). For more on how "Anonymous" performs its attacks, visit Zoe Chace, *Why the 'Anonymous' Hackers Do What They Do, All Things Considered* (NPR radio broadcast Aug. 26, 2011, available at www.npr.org/2011/08/26/139977284/why-the-hacker-group-anonymous-does-what-it-does).

206. *Snepp v. United States*, 444 U.S. 507 (1980); see also, *supra* notes 22–32 and accompanying text.

207. The government was also able to get all the profits from *Snepp's* book, *Decent Interval*. See *supra* notes 25–26 and accompanying text.

intelligence analyst, like *Morison*, will be convicted if the evidence shows guilt beyond a reasonable doubt.²⁰⁸

Past precedents point to prosecuting persons who work for the government and then leak information gained while on the job. *Morison* is perhaps the precedent most on point for the *Manning* case. The cases of Franklin, Rosen, and Weissman, who were indicted together, are also illustrative.²⁰⁹ Manning, who worked for the government, is more similarly situated to Franklin, of course, than to Rosen or Weissman. Like Franklin, Manning would logically be the man the government has in its crosshairs. Rosen and Weissman would be more similarly situated to Assange. With a conviction or guilty plea from Manning, the government drive, if there be any, to prosecute Assange might be deflated. In Assange's case, the jurisdictional hurdles alone might make any pursuit of him seem not worth the effort.

Another prosecution that could serve as a precedent in Manning's case is that of Drake, a former National Security Agency senior executive and thus a government employee. Drake, however, escaped imprisonment, and his case might help quell prosecutors' ardor.²¹⁰ And yet another indictment, this time of former CIA agent Sterling late in 2010, demonstrates that government workers who leak information face a real possibility of criminal prosecution.²¹¹ Manning, again, would seem to be in the same position as Drake and Sterling: Government employees who leaked information. Reporters Risen and Lichtblau would stand in the same position as Assange if Assange had clean hands in receiving secret information.

The most famous person who worked for the government and then leaked information to the press is undoubtedly Ellsberg. He escaped prosecution for violating the Espionage Act when he leaked the Pentagon Papers material to *The New York Times* because the judge at his trial concluded the government had engaged in misconduct. If the government does not engage in similar misconduct in Manning's case, such as breaking into his psychiatrist's office, then Manning seemingly would not have the same luck as Ellsberg.

208. *Morison v. United States*, 486 U.S. 1306 (1988); *see also, supra* notes 58–66 and accompanying text.

209. *See supra* notes 134–142 and accompanying text.

210. *See supra* notes 148–152 and accompanying text for additional discussion of Drake.

211. *See supra* notes 153–156 and accompanying text for additional discussion of Sterling.

As for Assange, if he entered into a relationship with Manning to gain access to secret material, then he was a co-conspirator.²¹² Co-conspirators, of course, can be prosecuted. Absent a provable conspiracy, conviction on other matters, such as for sex crimes in Sweden,²¹³ would seem the available alternative for taking Assange off the worldwide electronic streets.²¹⁴

XI. Conclusion

Leakers take great risks. If allegations against Bradley Manning are correct, then Manning could face conviction for charges such as theft and violation of the Espionage Act. Morison was convicted under the Espionage Act. Franklin pleaded guilty to violating the Espionage Act for leaking information to the American Israeli Public

212. Raffi Khatchadourian, who wrote the *New Yorker* profile of Assange cited *supra* note 205, wrote this in a June 2011 blog post:

This January, there were reports that U.S. investigators “could detect no contact between Manning and Assange.” That was surprising. Manning’s confessions to Lamo make explicit references to direct communications between him and WikiLeaks. At one point, while trying to answer a question, Manning writes, “I’ll have to ask Assange.” In another burst of short notes, he says: (2:04:29 PM) im a source, not quite a volunteer (2:05:38 PM) i mean, im a high profile source ... and i’ve developed a relationship with assange ... but i dont know much more than what he tells me, which is very little (2:05:58 PM) it took me four months to confirm that the person i was communicating was in fact assange Some people doubt the veracity of these logs. I find this aspect of them to be consistent with what I know and what is reasonable ... In May of last year, my piece about WikiLeaks was making its way through the last stages of production at The New Yorker. ... I did not interview Manning for the article; nonetheless, while we were working on the piece, he wrote to Lamo on May 25th and said, “new yorker is running 10k word article on wl.org on 30 may, btw.” ... But how could he have known specifics about our piece before we had published it? The answer is pretty clear: someone involved in WikiLeaks, or an intermediary, told him.

Raffi Khathadourian, *Manning, Assange, and WikiLeaks*, NEWS DESK, May 20, 2011, <http://www.newyorker.com/online/blogs/newsdesk/2011/05/manning-assange-and-the-espionage-act.html>.

213. See Knickerbocker, *supra* note 18.

214. Passage of a proposed amendment to section 798 of the Espionage Act, called the “SHIELD” Act, would broaden the reach of the current Espionage Act and specifically prohibit revelations of “human intelligence activities” (sec. 2 (4)) and “the identity of a classified source or informant of an element of the intelligence community of the United States” (sec. 2 (5)). See S.315, introduced March 4, 2011. If passed, the SHIELD Act would arguably make future leakers such as Assange an easier target for prosecutors than does the current Espionage Act, which was written in 1917. See *supra* note 58 (further discussion of the Espionage Act and the SHIELD Act).

Affairs Committee. Drake has been indicted for allegedly leaking NSA information to the media. Sterling was indicted for allegedly leaking classified information to a journalist about a secret U.S. effort to slow some countries' weapon development. Ellsberg might have been convicted had the government not bungled the case.

Perhaps the government keeps too many secrets. Perhaps those who think the government is sweeping a lot of merely embarrassing information under the carpet of secrecy are correct. But perhaps leakers should not be the ones to determine what information should see the light of public scrutiny. Julian Assange did come under attack for some of the sensitive information his WikiLeaks revelations contained.

Clearly, leaking has become easier in the age of WikiLeaks. Gutenberg opened the days of the press with limited and slow distribution. Now, there is no need to copy and carry volumes of heavy, printed material to convert it into more hard copy for slow distribution. Immediate access—and the threat of immediate harm and no means of recall—prevail. There is no bonfire for the Internet like the one that can be lit under books. There is no Internet injunction that could circle the globe with an invisible force of law.

The Internet's ease of disclosure and immediacy of distribution arguably demands a different mindset than the one that prevailed in the age of Gutenberg. "Leaner and meaner," perhaps, should be the watchword—leaner classification of information and meaner security of the information that is absolutely necessary to protect. Once the information is online, it is irretrievably out. Information is out faster than the proverbial horse with the gate futilely shut behind it.

Speed-of-light communication combined with a Cold War-era document classification system was a disaster awaiting whomever leaked the information to Julian Assange. That is, it was a disaster if viewed from the perspective of a government intent on keeping secret the trivial information as well as the defensibly classified information necessary for security, but which government is inept at keeping secure. In the gap between the government's desire for keeping secrets and its execution of a way to secure secrecy, a leaker found ample room for acquiring information to leak. After all, digital information occupies no more room than perhaps that available on a rewritable disk.

The government's failure to secure information was, to some, a bonanza instead of a disaster, a thing to be celebrated instead of bemoaned. Dean Baquet told *Frontline*:

If you boil it down, look at what happened as a result of WikiLeaks. We gained a tremendous understanding of how government works, how wars are conducted. Balance the disclosures and the impact and the importance of the disclosures against everybody's fear over what was going to happen, seems to me it ended up OK, right?²¹⁵

Perhaps—but not so far, at least, for Bradley Manning. For those who seek transparency as a goal, WikiLeaks was primarily a positive development. Daniel Domscheit-Berg said this to Frontline about WikiLeaks:

It has set in motion a cultural change, in some way that it has created this whole debate that we are having today. What is secrecy? And is there a need for secrecy? . . . The goal is not to get rid of all secrets in this world, but the goal is to foster transparency. And that I think is a really important cause.²¹⁶

And Bill Keller, then the executive editor of *The New York Times*, said:

I don't want to give WikiLeaks credit for the transformation of the Arab world, but you know, to the extent that Tunisia influenced Egypt, these cables played some role in the overthrow of the Mubarak regime. And these things are having an impact that I don't think any of us imagined at the time when it was somebody was just handing us a huge trove of secret documents.

Indeed, WikiLeaks and Julian Assange have received awards. For its work in Kenya, WikiLeaks received an Amnesty International award.²¹⁷ And in 2011, the Sydney Peace Foundation awarded Assange its top award for his "exceptional courage in pursuit of human rights." Other winners of the award include Nelson Mandela and the Dalai Lama.²¹⁸

215. WikiSecrets, *supra* note 1.

216. WikiSecrets, *supra* note 1.

217. Khatchadourian, *supra* note 201. WikiLeaks exposed the killings occurring in Kenya. See *CNN Presents Wiki Wars*, *supra* note 1.

218. AGENCE FRANCE-PRESSE, *WikiLeaks' Assange awarded top Sydney peace prize*, NEW DELHI TELEVISION, May 11, 2011, <http://www.ndtv.com/article/technology/wikileaks-assange-awarded-top-sydney-peace-prize-104890>.

But the failure to sufficiently redact documents brought Assange criticism. His “harm minimization” process had missed some informants’ names, exposing them to severe risks.²¹⁹ These exposed informants could, perhaps, be considered the WikiLeaks form of “collateral damage.”

The old question of whether the ends justify the means inevitably arises when some good results flow from some questionable methods. Arguably the jury is still out on WikiLeaks. Maybe it will be a hung jury. Thoughtful, well-informed people can disagree, as the U.S. Supreme Court has so aptly demonstrated on so many 5-4 occasions.

Precedents would seem to point against legal consequences for Julian Assange. Moral approbation and praise, however, both continue to flow toward him. For Bradley Manning, on the other hand, the legal consequences appear rather dire. U.S. law does not favor government-employed leakers.

While the saga of Bradley Manning unfolds, protests in his favor continue. For example, on March 20, 2011, Daniel Ellsberg was arrested near Quantico Marine Corps Base while calling for Manning’s release from the prison there. About thirty more of the roughly 400 protesters were also arrested. On that same day, rallies for Manning occurred in at least eight other cities worldwide, including London, Berlin, and Sydney.²²⁰ On April 23, when President Obama was in San Francisco at a fundraising breakfast that cost as much as \$35,800 per plate, a table of ten protesters started singing for Manning’s release.²²¹ The protesters, who paid \$5,000 per plate and held small “Free Bradley Manning” signs, decried Manning’s prison conditions.²²² And on June 4, more than 200 protesters rallied at Fort

219. Assange reportedly had not wanted to do any redaction whatsoever on the Afghan War Logs and only did so under pressure, not giving WikiLeaks sufficient time to do an adequate job. *WikiSecrets*, *supra* note 1.

220. Darryl Fears, *Protesters Arrested at Rally for Leak Support*, WASH. POST, Mar. 21, 2011, at A4.

221. Kara Rowland, *Activists disrupt Obama fundraiser; President laughs off antiwar hecklers protesting treatment of WikiLeaks figure*, WASH. TIMES, Apr. 22, 2011 at 4. Their song did indicate that the protesters would still vote for Obama.

222. They sang, among other things: “Even though we don’t know if we’ll retain our liberties, in what you seem content to call a free society, yes it’s true that Terry Jones is legally free, to burn a people’s holy book in shameful effigy, but at another location in this country, alone in a 6 x 12 cell sits Bradley, 23 hours a day is night, the 5th and 8th Amendments say this kind of thing ain’t right, we paid our dues, where’s our change?” Carrie Budoff Brown, *Obama Gets a Singing Rebuke*, POLITICO (Apr. 21, 2011, 2:10 PM), www.politico.com/news/stories/0411/53546.html.

Leavenworth, Kansas, calling for Manning's release from the federal prison located there.²²³

223. Jonathan M. Seidl, *Over 200 Protesters Rally Outside Prison of Alleged WikiLeaks Bradley Manning*, BLAZE, June 5, 2011, <http://www.theblaze.com/stories/over-200-protesters-rally-outside-prison-of-alleged-wikileaker-bradley-manning/>; *see also*, *Hundreds protest at Kansas Military Base for Manning Release*, DEMOCRACY NOW!, June 6, 2011, *available at* http://www.democracynow.org/2011/6/6/headlines/hundreds_protest_at_kansas_military_base_for_manning_release.
