

# WikiLeaks, the First Amendment and the Press

By Jonathan Peters<sup>1</sup>

Using a high-security online drop box and a well-insulated website, WikiLeaks has published 75,000 classified U.S. documents about the war in Afghanistan,<sup>2</sup> nearly 400,000 classified U.S. documents about the war in Iraq,<sup>3</sup> and more than 2,000 U.S. diplomatic cables.<sup>4</sup> In doing so, it has collaborated with some of the most powerful newspapers in the world,<sup>5</sup> and it has rankled some of the most powerful people in the world.<sup>6</sup> President Barack Obama [said](#) in July 2010, right after the release of the Afghanistan documents, that he was “concerned about the disclosure of sensitive information from the battlefield.”<sup>7</sup> His concern spread quickly through the echelons of power, as WikiLeaks continued in the fall to release caches of classified U.S. documents.

Secretary of State Hillary Clinton condemned the slow drip of diplomatic cables, saying it was “not just an attack on America's foreign policy interests, it [was] an attack on the

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<sup>2</sup> Noam N. Levey and Jennifer Martinez, [A whistle-blower with global resonance; WikiLeaks publishes documents from around the world in its quest for transparency](#), L.A. TIMES, July 27, 2010.

<sup>3</sup> [The Iraq Archive: The Strands of a War](#), N.Y. TIMES, Oct. 22, 2010.

<sup>4</sup> [How Many Documents Has WikiLeaks Published?](#), NPR, Dec. 28, 2010.

<sup>5</sup> Noam Cohen, [A Renegade Site, Now Working With the News Media](#), N.Y. TIMES, Aug. 2, 2010, at 3B; *see also*, [OPEN SECRETS: WIKILEAKS, WAR AND AMERICAN DIPLOMACY](#), N.Y. TIMES (Alexander Star ed., 2011).

<sup>6</sup> *See, e.g.*, Charlie Savage, [U.S. Prosecutors Study WikiLeaks Prosecution](#), N.Y. TIMES, Dec. 7, 2010; Scott Shane, [Accused Soldier in Brig as WikiLeaks Link Is Sought](#), N.Y. TIMES, Jan. 13, 2011.

<sup>7</sup> [Obama on WikiLeaks: 'I'm Concerned,'](#) ABC NEWS, July 27, 2010.

international community.”<sup>8</sup> Director of National Intelligence James Clapper wrote in an e-mail to intelligence agencies that the “actions taken by WikiLeaks are not only deplorable, irresponsible, and reprehensible—they could have major impacts on our national security.”<sup>9</sup> Members of Congress scrambled to respond to the website and its founder, Julian Assange, calling variously for a criminal prosecution,<sup>10</sup> for an overhaul of the [Espionage Act](#) of 1917,<sup>11</sup> and for a law that would make it illegal to publish the names of military and intelligence informants.<sup>12</sup>

For his part, Attorney General Eric Holder [announced](#) in late November that the Justice Department and the Pentagon were investigating the circumstances surrounding the leaks to determine if criminal charges would be filed.<sup>13</sup> Holder declined to say whether WikiLeaks or Assange were targets of the investigation. He said that anybody, regardless of citizenship or place of residence, could be a target, [adding](#), “Let me be very clear...to the extent that we can find anybody who was involved in the breaking of American law...they will be held responsible.”<sup>14</sup> Holder also said it would be a “misimpression” to think he was studying only the

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<sup>8</sup> David Jackson, [Obama aides condemn WikiLeaks; Obama orders review](#), USA TODAY, Nov. 29, 2010.

<sup>9</sup> Dianne Feinstein, [Prosecute Assange Under the Espionage Act](#), WALL STREET JOURNAL, Dec. 7, 2010.

<sup>10</sup> *Id.* See also, Dan Lungren, [WikiLeaks actions are damaging and should be prosecuted](#), THE HILL, Dec. 1, 2010; Michael O’Brien, [Graham: Prosecute WikiLeaks](#), THE HILL, July 28, 2010.

<sup>11</sup> See, e.g., [Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary](#), 111th Cong. (2010) .

<sup>12</sup> Gautham Nagesh, [Rep. King introduces anti-WikiLeaks bill](#), THE HILL, Dec. 9, 2010; Kevin Poulsen, [Lieberman Introduces Anti-WikiLeaks Legislation](#), WIRED, Dec. 2, 2010.

<sup>13</sup> Ellen Nakashima and Jerry Markon, [WikiLeaks founder could be charged under Espionage Act](#), WASHINGTON POST, Nov. 30, 2010.

<sup>14</sup> *Id.* See also, Mark Landler and J. David Goodman, [Clinton Says U.S. Diplomacy Will Survive ‘Attack.’](#) N.Y. TIMES, Nov. 29, 2010.

Espionage Act.<sup>15</sup> Then, in early January, the Justice Department [subpoenaed records](#) from Twitter about the account activity of several people connected to WikiLeaks.<sup>16</sup> A federal grand jury reportedly has been meeting in Virginia to weigh the government's evidence against WikiLeaks and Assange,<sup>17</sup> in connection with the military's case against Pfc. Bradley Manning, the Army intelligence analyst accused of leaking classified information to WikiLeaks.

This is largely unfamiliar territory for the Justice Department. As a result, the legal and constitutional issues are challenging and varied. This article focuses on one of them: When can the government, consonant with the First Amendment, punish the publication of classified information related to national security?<sup>18</sup> To that end, **Part I** outlines the constitutional standards that could apply to such a prosecution of Assange or WikiLeaks. **Part II** discusses whether Assange and WikiLeaks are part of the press and whether that matters for constitutional purposes. **Part III** concludes by urging the Justice Department to proceed with caution.

## **I. The constitutional standards**

The first thing to do is briefly to inventory the statutory provisions that could be used to prosecute WikiLeaks or Assange. Notably, there is no one law or provision that generally criminalizes the disclosure of classified information—no catchall that simply says, "Thou shalt not disclose."<sup>19</sup> There is, rather, a patchwork of laws and provisions serving that function, each

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<sup>15</sup> Sarah Ellison, [The Man Who Spilled the Secrets](#), VANITY FAIR, Feb. 2011.

<sup>16</sup> Scott Shane and John F. Burns, [U.S. Subpoenas Twitter Over WikiLeaks Supporters](#), N.Y. TIMES, Jan. 8, 2011.

<sup>17</sup> Kim Zetter, [Report: Federal Grand Jury Considering Charges Against WikiLeaks' Assange](#), WIRED, Dec. 13, 2010.

<sup>18</sup> For this article, I am assuming that proper jurisdiction lies in federal court. There is reason and room for others to challenge that assumption. And, again, I am focusing on criminal liability for publishing classified information, rather than criminal liability for gathering or possessing or eliciting it. Accordingly, I am not addressing some issues that are worthy of consideration (e.g., Are the charging statutes intended to apply extraterritorially? Would extradition be allowed for the offense(s) charged?).

<sup>19</sup> Baruch Weiss, [Why prosecuting WikiLeaks' Julian Assange won't be easy](#), WASHINGTON POST, Dec. 5, 2010.

applying in different circumstances.<sup>20</sup> For our purposes, one law and three of its provisions take center stage.

Passed in 1917, the Espionage Act applies broadly to national defense information and prohibits, in pertinent part: (1) the transmitting of such information with the intent or reason to believe it will be used against the U.S. or used to the benefit of a foreign nation;<sup>21</sup> (2) the disclosure of such information to any person not entitled to receive it, with reason to know it could be used to harm the U.S. or to the benefit of a foreign nation;<sup>22</sup> and (3) the knowing and willful disclosure, prejudicial to the national security or to U.S. interests, of information related to communications intelligence specially designated by a federal agency for “limited or restricted dissemination or distribution.”<sup>23</sup>

Based on those provisions, there appears to be statutory authority to punish WikiLeaks for publishing a number of the classified U.S. documents that it has published, “as long as the intent element can be satisfied and potential damage to national security can be demonstrated.”<sup>24</sup> Those provisions are the most likely to be used in these circumstances because of their scope and because they apply to all people (other provisions in the Act apply only to government employees or those authorized to access classified information).<sup>25</sup>

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<sup>20</sup> Jennifer K. Elsea, [Criminal Prohibitions on the Publication of Classified Defense Information](#), CONGRESSIONAL RESEARCH SERVICE, Jan. 10, 2011.

<sup>21</sup> 18 U.S.C. § 793 (a)-(c) (2010), [available](#) at Cornell University Legal Information Institute.

<sup>22</sup> 18 U.S.C. § 793 (e) (2010), [available](#) at Cornell University Legal Information Institute.

<sup>23</sup> 18 U.S.C. § 798 (a)-(b) (2010), [available](#) at Cornell University Legal Information Institute.

<sup>24</sup> Elsea, *supra* note 20, at 8.

<sup>25</sup> Other language in those provisions would be used if criminal liability were based on gathering, receiving or possessing the information. Likewise, other laws would take center stage if liability were based on fraud in connection with computers, a violation of 18 U.S.C. § 1030(a)(1) [available](#) at FindLaw; theft or conversion of government property or records, a violation of 18 U.S.C. § 641 [available](#) at Cornell Legal Information Institute; or

However, any prosecution would have to comport with the First Amendment. It is critical to keep in mind a distinction that has played a central role in the Supreme Court's analysis of the Speech and Press Clauses, the distinction between content-neutral and content-based restrictions. The constitutional standard to be applied depends on which type is at issue. Content-neutral laws restrict expression without regard to the message conveyed (e.g., laws banning noisy speeches near a hospital), while content-based laws restrict expression because of the message conveyed (e.g., laws banning the display of the swastika).<sup>26</sup> Criminal statutes prohibiting the publication of classified information fall into the latter category.

For content-based restrictions, the Supreme Court primarily has applied strict scrutiny or some version of the clear-and-present danger standard. It is difficult to predict which one would apply in a criminal prosecution of WikiLeaks or Assange, because the Supreme Court has applied each standard to a wide range of First Amendment issues.<sup>27</sup> It seems that historically the Court has preferred to use the clear-and-present danger standard in cases involving speech that creates some sort of hazard. Recently, however, it seems the Court has preferred in general to use the strict scrutiny standard. Each one is examined in the following subparts of this article, and for now it is enough to say that either standard could apply in a case against WikiLeaks or Assange.

#### **a. Strict Scrutiny**

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disclosing the identities of certain U.S. undercover intelligence officers, agents, informants and sources, a violation of 50 U.S.C. § 421 [available](#) at FindLaw. Again, for this article, I am focusing on liability for publishing the information.

<sup>26</sup> GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET, PAMELA S. KARLAN, *THE FIRST AMENDMENT* 16-17 (2008).

<sup>27</sup> See, e.g., Frank Strong, *Fifty Years of Clear and Present Danger: From Schenck to Brandenburg—and Beyond*, 1969 *SUP. CT. REV.* 41 (1969); Eugene Volokh, [Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny](#), 144 *U. PA. L. REV.* 2417 (1996).

A content-based restriction on expression can be upheld if (1) it is “narrowly tailored to serve a compelling state interest,”<sup>28</sup> and (2) it is the “least restrictive means to further that interest.”<sup>29</sup> The government bears the burden to show that the interest is sufficiently compelling. The standard requires the courts to make a normative judgment about the ends (Is the interest important enough to justify a speech restriction?) and an empirical judgment about the means (Does it further the interest? Is it too broad, too narrow? Is it unnecessarily burdensome?).<sup>30</sup>

The Supreme Court has set forth some general principles to inform those judgments. First, regarding the ends: a restriction’s underinclusiveness can be evidence that the interest is not truly compelling (i.e., the government does not consider it compelling enough to justify a broader statute). An interest itself can also be impermissibly underinclusive, even if the restriction is narrowly tailored to it (i.e., asserting an interest to fight one ill while ignoring other ills that are indistinguishable). Further, the government has no compelling interest in privileging one type of high-value speech (i.e., economic, social and political) at the expense of another, or in restricting expression simply because society would find the expression offensive or bad.<sup>31</sup>

Second, regarding the means: the government must show that the restriction actually advances its interest. A restriction is not narrowly tailored if it covers a large amount of expression that does not implicate the interest, or if other less-restrictive means are available and would adequately serve the interest. Courts also will strike down a restriction if it fails to cover a

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<sup>28</sup> Volokh, *supra* note 27, at 2417.

<sup>29</sup> Sable Comm’c of Cal. v. FCC, 492 U.S. 115, 126 (1989) [available](#) at FindLaw.

<sup>30</sup> Volokh, *supra* note 27, at 2418-19.

<sup>31</sup> *Id.* at 2419-21.

large amount of expression that harms the interest to the same degree as the expression actually being restricted.<sup>32</sup>

It is unclear exactly how the strict scrutiny standard would apply in a case against WikiLeaks or Assange. Neither the Justice Department nor the Pentagon has released factual findings from their investigations, and we do not know enough at this point to conduct a full-blown analysis. That said, if the government decided to prosecute WikiLeaks or Assange, it would likely argue that punishing the publication of classified defense information promotes its interest in national security and that “no...interest is more compelling than the security of the Nation.”<sup>33</sup> For support, the government might point to the ongoing wars in Iraq and Afghanistan. “When a nation is at war,” as the Court said in *Schenck*, “many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight.”<sup>34</sup>

Of course, even if national security is a compelling interest, it remains an open question whether the charging statute is the “least restrictive means to further that interest.”<sup>35</sup> Consider, for example, the following views of the Espionage Act. Jack Goldsmith, a former head of the Office of Legal Counsel at the Justice Department, said in February 2011 that the Act is “famously overbroad.”<sup>36</sup> Abbe David Lowell, a former special assistant to the Attorney General, said in December 2010 that the Act’s “breadth and language” raise a “legal pad” of questions and

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<sup>32</sup> *Id.* at 2421-24.

<sup>33</sup> *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citing *Aptheker v. Sec. of State*, 378 U.S. 500, 509 (1964)), [available at FindLaw](#).

<sup>34</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919). This case, of course, involved the clear-and-present danger standard, rather than the strict scrutiny standard.

<sup>35</sup> 492 U.S. 115, 126 (1989), [available at FindLaw](#).

<sup>36</sup> Jack Goldsmith, [Why the U.S. shouldn't try Julian Assange](#), The WASH. POST, Feb. 11, 2011.

that the Act could infringe “on proper First Amendment activity,” like “newsgathering to expose government wrongdoing.”<sup>37</sup> Judson Littleton, now a trial attorney at the Justice Department, said in 2008 that the Act has “vagueness and overbreadth problems.”<sup>38</sup> And Bruce Fein, a former U.S. Associate Deputy Attorney General, said in 2006 that the Act is “unconstitutionally overbroad because it makes no distinction between genuine and contrived dangers.”<sup>39</sup>

To make sense of those comments, it helps to review the vagueness and overbreadth doctrines.<sup>40</sup> The vagueness doctrine requires that a criminal statute state clearly and explicitly what is prohibited. This is to provide fair warning and to preclude arbitrary enforcement of the statute. The vagueness doctrine often overlaps with the overbreadth doctrine, which is used to invalidate statutes so broadly written that they cover both unprotected and protected speech. The concern is that protected speech could be chilled. Because the vagueness and overbreadth doctrines are closely related to each other and to the “least restrictive means” test (they all are designed essentially to ensure that restrictions on expression are precise and narrowly drawn), any evidence of overbreadth and vagueness could be used as evidence that the restriction does not satisfy the “least restrictive means” test.<sup>41</sup> The looser the fit between the statute and the government interest, the less likely the restriction will be upheld.

#### **b. The clear-and-present danger standard**

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<sup>37</sup> *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 22 (2010) (statement of Abbe David Lowell).

<sup>38</sup> Judson O. Littleton, *Eliminating Public Disclosures of Government Information from the Reach of the Espionage Act*, 86 Tex. L. Rev. 889, 904 (2008).

<sup>39</sup> Bruce Fein, *A More Secret Government?*, THE WASH. TIMES, August, 21, 2006.

<sup>40</sup> “Of Other Tests and Standards: Vagueness, Overbreadth, Least Restrictive Means, and Others,” CRS ANNOTATED CONSTITUTION [available](#) at Cornell Legal Information Institute.

<sup>41</sup> *Id.*

Historically, the clear-and-present danger standard ensured that Americans had broad expression rights unless the government proved that particular expression posed a clear and imminent danger of serious harm.<sup>42</sup> *Brandenburg* modified that standard in 1969, holding that the government could restrict speech that is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>43</sup> Just two years later, in the *Pentagon Papers* case,<sup>44</sup> yet another version of the standard emerged, in a concurring opinion by Justice Stewart. On that basis, Geoffrey Stone concluded recently that the clear-and-present danger standard would apply today in cases involving the publication of classified information, after the information is leaked.<sup>45</sup>

Although the danger standard has been dormant for a while (again, the Court in recent years has moved toward strict scrutiny), it is not dead. It strikes at the heart of the balance between national security and free expression. Drawing on Professor Stone’s work, the next few paragraphs demonstrate why the clear-and-present danger standard could be used in a criminal prosecution of WikiLeaks or Assange, for publishing classified information. The [Pentagon Papers](#) case is a good place to begin this analysis. Its facts are familiar to many:

In 1967, Secretary of Defense Robert McNamara commissioned a top-secret study of the Vietnam War. [It] reviewed in great detail the formulation of U.S. policy toward Indochina, including military operations and secret diplomatic negotiations. In the

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<sup>42</sup> See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (requiring clear and present danger and that the danger’s magnitude be serious), [available at FindLaw](#); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that even express advocacy of unlawful conduct can be proscribed only if it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”), [available at FindLaw](#); *Bridges v. California*, 314 U.S. 252, 263 (1941) (noting that to punish expression, “the substantive evil must be extremely serious and the degree of imminence extremely high”), [available at FindLaw](#).

<sup>43</sup> 395 U.S. at 447.

<sup>44</sup> *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971), [available at FindLaw](#).

<sup>45</sup> See, e.g., Geoffrey R. Stone, [Government Secrecy vs. Freedom of the Press](#), 1 HARV. L. & POL’Y REV. 185, 213 (2006).

spring of 1970, Daniel Ellsberg, a former Defense Department official, gave a copy of the *Pentagon Papers* to the *New York Times*. On June 13, the *Times* began publishing excerpts from the *Papers*. The next day, Attorney General John Mitchell...requested that the *Times* [halt publication].

Two hours later, the *Times* transmitted a response, which it released publicly: “The *Times* must respectfully decline the request of the Attorney General, believing that it is in the interest of the people of this country to be informed of the material contained in this series of articles.” The *Times* added that, if the government sought to enjoin any further publication of the material, it would contest the government’s position, but would “abide by the final decision of the court.”<sup>46</sup>

The next day, the government filed for an injunction and for a temporary restraining order, which was granted, halting publication of the *Pentagon Papers*. The order wasn’t in place for long, though, because within two weeks the Supreme Court had heard oral arguments in the case and had announced its decision. Six justices held that the government did not meet its “heavy burden” to justify a prior restraint on the press, allowing the *Times* to resume publication.<sup>47</sup> The *per curiam* was just 237 words, including citations, so “[it] was the individual opinions of the justices—nine justices, nine opinions—that told the detailed story behind the judgment.”<sup>48</sup>

Although they all touched on different themes,<sup>49</sup> Justice Stewart’s stood out as the one that “best capture[d] the view of the Court.”<sup>50</sup> Concurring in the judgment, he wrote, “We are

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<sup>46</sup> *Id.* at 197-98.

<sup>47</sup> *N.Y. Times Co.*, 403 U.S. at 714.

<sup>48</sup> FLOYD ABRAMS, *SPEAKING FREELY* 44 (2005).

<sup>49</sup> *Id.* at 45-46 (“The four justices we had counted on...relied upon all three of the themes Bickel and I had discussed in my office when we first spent the night there strategizing. Three of the four had cited the absence of statutory authority by the government...Three of the four had focused on the fact that what was at issue was a prior restraint...[And two had relied] on the notion that prior restraint aside, the whole purpose of the First Amendment was to protect the sort of speech that was at the heart of the case.”)

<sup>50</sup> Stone, *supra* note 45, at 198.

asked...to prevent the publication...of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will *surely result in direct, immediate, and irreparable damage to our Nation or its people.*<sup>51</sup> A variation on the clear-and-present danger standard, this is the closest the Supreme Court has come to answering the question hanging over WikiLeaks and Assange: When can the government constitutionally punish someone for publishing classified information related to national security?

Notably, the Court in the *Pentagon Papers* case stressed that it was dealing with a prior restraint, not a criminal prosecution after publication. As Professor Stone has observed, this raises the question of whether the same standard applies to both<sup>52</sup> (Justice Stewart and Justice White characterized that question as an open one).<sup>53</sup> Behind the distinction lies the idea that prior restraints, which carry a “heavy presumption” against their validity,<sup>54</sup> are especially threatening to free expression because “they are more likely than criminal statutes to be obeyed.”<sup>55</sup> This is because prior restraints typically take the form of injunctions or temporary restraining orders directed at specific people. As a result, any violation is more likely to be

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<sup>51</sup> 403 U.S. at 730 (Stewart, J., concurring) (emphasis added).

<sup>52</sup> Stone, *supra* note 45, at 201.

<sup>53</sup> 403 U.S. at 730 (Stewart, J., concurring) (“Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is instituted, it will be the responsibility of the courts to decide the applicability of the criminal law under which the charge is brought.”); *id.* at 737 (White, J., concurring) (“Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication.”).

<sup>54</sup> *Id.* at 714.

<sup>55</sup> STONE ET AL., *supra* note 26, at 128.

detected, more likely to be seen as a “direct affront to the issuing judge’s authority,” and more likely to be punished.<sup>56</sup> The main ingredient, though, is the collateral bar rule. It says that a court order must be obeyed unless the issuing judge sets it aside; if it is not obeyed, then it cannot be challenged later in a contempt proceeding (e.g., on the theory that it was unconstitutional).<sup>57</sup> That means if a publisher violates an injunction, she could be punished even if the injunction was improperly granted. In contrast, if a publisher is prosecuted criminally, she can defend herself by attacking the validity of the statute.<sup>58</sup>

Professor Stone has softened that distinction by pointing out that the penalties for violating a court order are “usually much less severe than those for violating a criminal law” and that a “system of prior restraint actually enables the speaker to know in advance whether his speech is subject to punishment.”<sup>59</sup> Moreover, the primary focus of that system is low-value speech (e.g., obscenity and libel), which normally can be restricted “on the basis of a relatively undemanding standard.”<sup>60</sup> In that context, prior restraints do have “real bite.”<sup>61</sup> However, for expression at the heart of the First Amendment—high-value speech about public affairs and government—the standards are more demanding. In turn, the distinction between prior restraints and criminal prosecutions carries less weight.<sup>62</sup>

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<sup>56</sup> *Id.* at 128-29.

<sup>57</sup> *Id.* at 129.

<sup>58</sup> *Id.*

<sup>59</sup> Stone, *supra* note 45, at 201.

<sup>60</sup> *Id.* at 202.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

Therefore, it is reasonable to conclude, as Professor Stone did, that the standard the Court used for prior restraint in the *Pentagon Papers* case could be roughly the same standard the Court would use in a criminal prosecution of WikiLeaks or Assange for publishing classified information. In other words, the WikiLeaks disclosures would be protected unless the government could show that they would “surely result in direct, immediate, and irreparable damage to our Nation or its people.”<sup>63</sup>

## **II. Are WikiLeaks and Assange part of the press? Does it matter?**

In mid-December, the House Judiciary Committee held [a hearing](#) about the Espionage Act and WikiLeaks. The chairman, John Conyers of Michigan, opened by saying “it is clear that prosecuting WikiLeaks would raise the most fundamental questions about freedom of speech, about who is a journalist and about what the public can know about the actions of their own government.”<sup>64</sup> The next to speak, ranking member Louie Gohmert of Texas, said WikiLeaks has “resurrected an age-old debate on First Amendment protections afforded to media publications.”<sup>65</sup> Shortly thereafter, two witnesses made similar remarks. First, Abbe David Lowell, a partner at McDermott Will & Emery, said the WikiLeaks disclosures have raised a number of issues, including whether Assange is a journalist.<sup>66</sup> Second, Kenneth Wainstein, a partner at O’Melveny & Meyers, said the “key to overcoming” First Amendment concerns in any

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<sup>63</sup> *N.Y. Times Co.*, 403 U.S. at 730 (Stewart, J., concurring) (emphasis added).

<sup>64</sup> [Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks](#): Hearing Before the H. Comm. On the Judiciary, 111<sup>th</sup> Cong. 2 (2010) (statement of Rep. John Conyers).

<sup>65</sup> [Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks](#): Hearing Before the H. Comm. on the Judiciary, 111<sup>th</sup> Cong. 3 (2010) (statement of Rep. Louie Gohmert).

<sup>66</sup> [Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks](#): Hearing Before the H. Comm. on the Judiciary, 111<sup>th</sup> Cong. 23 (2010) (statement of Abbe David Lowell).

prosecution of WikiLeaks is to show that the site is “fundamentally different from other and real media organizations.”<sup>67</sup>

By those accounts, it seems to matter for constitutional purposes whether Assange and WikiLeaks are part of the press.<sup>68</sup> That perspective reflects the general debate today about the elements and principles of journalism, the role of new media in relation to old media. It is unclear where WikiLeaks stands on that landscape. To [some](#) the website is a “new wrinkle on an old idea,” just an iteration of the journalistic tradition that needs “people to leak and people to dig and people to consume and explain.”<sup>69</sup> To others it is the “world’s first ‘stateless’ news organization,” because it belongs to the Internet rather than to the laws and culture of any one country.<sup>70</sup> And still to [others](#) it appears that WikiLeaks has passed on to the legacy media the burden of real reporting, of adding value to the leaked documents by contextualizing and explaining them.<sup>71</sup> Assange himself has [said](#) “it is not necessary to debate whether [he] is a journalist.”<sup>72</sup> Yet the WikiLeaks site is wrapped in the cloak of journalism. It describes itself as a “not-for-profit media organization” that has adopted “journalism and ethical principles.”<sup>73</sup> The words “journalism” and “journalist” appear on its “About” page a combined 19 times.<sup>74</sup>

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<sup>67</sup> *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 39–40 (2010) (statement of Kenneth L. Wainstein).

<sup>68</sup> To be fair, two witnesses, Thomas Blanton and Geoffrey Stone, did suggest that it would be fruitless under the First Amendment to define who the press is, but they did not really elaborate.

<sup>69</sup> Samuel Axon, [The WikiLeaks Debate: Journalists Weigh In](#), MASHABLE, Aug. 20, 2010.

<sup>70</sup> Jay Rosen, *The watchdog press died; we have this instead*, Pressthink (blog), Dec. 9, 2010.

<sup>71</sup> See, e.g., Anne Applebaum, [WikiLeaks' Defense of Journalism](#), THE WASHINGTON POST, July 29, 2010.

<sup>72</sup> <http://www.guardian.co.uk/world/blog/2010/dec/03/julian-assange-wikileaks> THE GUARDIAN, Dec. 3, 2010.

<sup>73</sup> [“About,”](#) WIKILEAKS.

<sup>74</sup> *Id.* See also, Adam L. Penenberg, [WikiLeaks' Julian Assange: 'Anarchist,' 'agitator,' 'arrogant' and a journalist](#), THE WASH. POST, JAN. 28, 2011.

Whether WikiLeaks and Assange are part of the press is worthy of attention and debate, and in some circumstances it would matter very much for legal purposes. For example, if Assange wanted to claim a federal reporter's privilege, which allows reporters in certain jurisdictions and cases to refuse to testify about their sources, he would have to show that he qualified for the privilege—that he was engaged in investigative journalism.<sup>75</sup> Here, however, in the context of publishing and criminal prosecution, that issue is less important. This is because the First Amendment does not belong to the press. It protects the expressive rights of all speakers, sometimes on the basis of the Speech Clause and sometimes on the basis of the Press Clause. To argue that the First Amendment would protect Assange and WikiLeaks only if they are part of the press is to assume (1) that the Speech Clause would not protect them, and (2) that there is a major difference between the Speech and Press Clauses.

In reality, “[m]ost of the freedoms the press receives from the First Amendment are no different from the freedoms everyone enjoys under the Speech Clause.”<sup>76</sup> This is true for even the “core liberties...essential to the functioning of the press”:<sup>77</sup> the right of access to courtrooms and other judicial proceedings,<sup>78</sup> the right to publish news and information free from government censorship and prior restraint,<sup>79</sup> and the benefit of high standards in libel cases (at least those

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<sup>75</sup> I make this very argument in an article that will be published this June in the *Federal Communications Law Journal*.

<sup>76</sup> David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430 (2002). Whether the clauses *should* be read coextensively is a subject for another article.

<sup>77</sup> Russell H. Falconer, [Institutional Rights, Individual Litigants: Standing to Sue Under the Press Clause](#), 87 TEX. L. REV. 1223, 1223-24 (2009).

<sup>78</sup> *Id.*

<sup>79</sup> Anderson, *supra* note 76, at 430

involving matters of public concern).<sup>80</sup> The *Pentagon Papers* case seems to implicate both clauses. The *per curiam* referred to “expression,” while the individual opinions referred variously to “expression,” “speech,” and “press.”<sup>81</sup> The few times the Supreme Court has relied on the Press Clause alone, the same results could have been reached by relying on the Speech Clause.<sup>82</sup> For these reasons, David Anderson concluded, “the Press Clause today is no more than an invisible force in constitutional law.”<sup>83</sup>

On the one hand, this could be a good thing for Assange and WikiLeaks. If the government prosecutes them for publishing information related to national security, they would not have to argue that they do journalism or deserve to be protected as members of the press. They simply could call on the Speech Clause, which would trigger (1) the strict scrutiny standard, requiring the government to show that the charging statute is “narrowly tailored to serve a compelling state interest” and is the “least restrictive means to further that interest,” or (2) the clear-and-present danger standard, requiring the government to show that the publishing would “surely result in direct, immediate, and irreparable damage to our Nation or its people.”<sup>84</sup>

On the other hand, this could be a bad thing for the legacy press. Bill Keller, executive editor of the *New York Times*, summed up the problem in February, at a symposium at Columbia University: “It’s very hard to conceive of a prosecution of Julian Assange that wouldn’t stretch the law in a way that would be applicable to us. American journalists...should feel a sense of alarm at any legal action that tends to punish Assange for doing essentially what journalists do.

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<sup>80</sup> *Id.*

<sup>81</sup> 430 U.S. at 713.

<sup>82</sup> Anderson, *supra* note 76, at 526-27.

<sup>83</sup> David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 66 (2006).

<sup>84</sup> *N.Y. Times Co.*, 403 U.S. at 730 (Stewart, J., concurring) (emphasis added).

That is to say, any use of the law to criminalize the publication of secrets.”<sup>85</sup> Keller is right. Putting his remarks in legal terms, unless the Supreme Court all of a sudden decided to “interpret the Press Clause as something independent of the Speech Clause”<sup>86</sup> (e.g., by adopting an institutional view of the press that excludes WikiLeaks and Assange, by narrowing the protections of the Speech Clause, etc.),<sup>87</sup> any prosecution here for publishing information related to national security would affect the legacy press and their rights under the First Amendment to do the same.

Admittedly, if the government did successfully prosecute Assange or WikiLeaks, then news media defendants in subsequent cases could distinguish their facts from those in the WikiLeaks case. The most obvious way to do so, in general, would be to focus on the way WikiLeaks operates. Unlike the traditional press, it does not contextualize the documents it releases, it does not explain their meaning or significance, and it has not taken steps consistently to minimize harm to people who could be affected by its actions. Still, that sort of argument would be persuasive only if the Supreme Court would be willing to vary a speaker’s right of expression according to the way the speaker operates.

### **III. Conclusion**

In the 40 years since the *Pentagon Papers* case, the Supreme Court has not once upheld a content-based restriction on the publication of truthful information about the government that

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<sup>85</sup> Sam Gustin, [Times Editor Alarmed by Prospect of WikiLeaks Prosecution](#), WIRED, Feb. 3, 2011.

<sup>86</sup> Anderson, *supra* note 76, at 526.

<sup>87</sup> This was the vision of the Press Clause held most famously by Justice Stewart. Anderson, *supra* note 76, at 449. He distinguished the Speech and Press Clauses by saying that the former applies to individuals, while the latter is structural and protects the “institutional autonomy of the press.” *Id.* (quoting Potter Stewart, “Or of the Press,” Address at Yale University (Nov. 2, 1974), in *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975)). As Professor Anderson noted, “Justice Stewart was never able to sell this interpretation to a majority of the Court.” *Id.*

“did not involve some special circumstance, such as public employment.”<sup>88</sup> Perhaps that is because the purpose of the First Amendment is “to protect the free discussion of governmental affairs,”<sup>89</sup> and “state action to punish the publication of truthful information seldom can satisfy constitutional standards.”<sup>90</sup> Or perhaps that is because the Court has come to understand that the effects of dangerous speech often are exaggerated in the heat of what Alexander Hamilton called “temporary passion.”<sup>91</sup> Or perhaps that is because in the last 40 years we have felt relatively safe. As Judge Richard Posner put it, in 2002, “[W]hen the country feels safe the Justices [can] plume themselves on their fearless devotion to freedom of speech and professors can deride the cowardice of [speech-restrictive decisions]. But they are likely to change their tune when next the country feels endangered.”<sup>92</sup>

In any case, if the government prosecuted WikiLeaks or Assange for publishing information related to national security, it would have to overcome a serious First Amendment challenge that would implicate either the strict scrutiny standard or the clear-and-present danger standard. It is unclear exactly how the challenge would play out, because neither the Justice Department nor the Pentagon has released factual findings from their investigations. But it is clear that the challenge would affect the legacy press and their rights. For these reasons, it would behoove the government to proceed with caution. The constitution is not a “suicide pact.”<sup>93</sup> It

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<sup>88</sup> Stone, *supra* note 45, at 202.

<sup>89</sup> *Mills v. Alabama*, 384 U.S. 214, 218 (1966) [available](#) at FindLaw.

<sup>90</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (citing *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979)) [available](#) at FindLaw.

<sup>91</sup> THE FEDERALIST No. 85 (Alexander Hamilton) (concluding remarks) [available](#) at Constitution.org.

<sup>92</sup> Richard Posner, *Pragmatism versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 741 (2002).

<sup>93</sup> *Terminiello v. Chicago*, 337, U.S. 1, 37 (1949) (Jackson, J., dissenting) [available](#) at FindLaw.

does not require the government to tolerate expression at any cost. But it does derive great strength from the freedom that the First Amendment affords to expression. That strength must be acknowledged by the Justice Department before it decides whether to prosecute WikiLeaks or Assange.