

Yale University

*“There Is No Law”*

Prior Restraint, the Espionage Act, and the Press

Azeezat Adeleke

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Advisor: Professor Eitan Hersh

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## I. Introduction

In June 1967, Secretary of Defense Robert McNamara commissioned a 7,000-page, 47 volume study on the United States' path to war in Vietnam (Rudensine 27). Its authors—a group of staff from the Defense Department, the State Department, the military, think tanks, and universities—gave it the staid title “Report of the Office of the Secretary of Defense Vietnam Task Force” (Rudensine 26). In 1971, Daniel Ellsberg, an employee of the RAND Corporation and a co-author of the study, began making secret copies of it. In March of that year, Ellsberg sent a copy to Neil Sheehan, a reporter at *The New York Times*. The dramatic series of events that followed would make the documents famous and give them a new name: the Pentagon Papers. It would also raise legal questions that even today remain unanswered.

Those questions arose on June 15, 1971, two days after the *Times* began publishing articles based on Ellsberg's documents. That day, the Nixon Administration sought an injunction in federal court, hoping to block the *Times* from printing further stories. On June 26, lawyers argued *New York Times Co. v. United States* before the Supreme Court. The case raised a fundamental question. Under what circumstances can the government order a prior restraint—an action prohibiting speech *before* it has occurred? Does such a concept violate the First Amendment's protection of free speech and a free press? The Administration argued that publication of the Pentagon Papers, because they were top secret, posed grave harm to national security. For this reason, a prior restraint—in the form of an injunction—was appropriate.

In a 6-3 decision, the Supreme Court ruled against the Nixon Administration. The court issued a *per curiam* opinion of 200 words, with no individual justice as its author. It stated that the government had not met the “heavy burden” against prior restraints. The opinion did not describe what *would* meet that heavy burden. Six justices wrote their own concurrent opinions—

and still no clear answer emerged. Three justices—William O. Douglas, William J. Brennan, and Hugo Black—took an absolutist position, arguing that prior restraints *always* violate the First Amendment and are thus unconstitutional. Six others argued that prior restraints are valid in some circumstances. The debate over what those circumstances are continues today.

Another debate sprang from Justice Byron White's concurrent opinion. White agreed that the government could not maintain an injunction against the *Times*. But, he added, the government *could* prosecute the *Times* for publishing national security information. Justice Burger agreed. The Supreme Court did not consider criminal prosecution of journalists as part of the Pentagon Papers case, nor has it in any case since then. But White's and Burger's statements opened the door to a new realm of possibility.

These issues are not confined to the history books. Questions about prior restraint and criminal prosecution for publishing national security information have become urgent during the Obama Administration. Since Obama took office, his Administration has charged eight people under the Espionage Act of 1917 for leaking national security information.<sup>1</sup> The 43 previous presidents charged three people—*combined* (deZwart 250). This rapid uptick in leak investigations matches an explosion in the amount of classified U.S. government material and in the number of Americans with security clearances (Papandrea 474). Between 1995 and 2012, the number of federal employees with clearances increased by 48 percent, while the number of contractors with clearances increased by 25 percent (Devine and Katz 85).

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<sup>1</sup> Listed according to name, agency, and year of conviction: Thomas Drake (National Security Agency, 2010); Shamai Leibowitz (Federal Bureau of Investigation, 2010); Chelsea Manning (U.S. Army, 2013); John Kiriako (Central Intelligence Agency, 2013); Donald Sachtleben (Federal Bureau of Investigation, 2013); Stephen Kim (Department of State, 2014); Jeffrey Sterling (Central Intelligence Agency, 2015); Edward Snowden (National Security Agency contractor, no conviction) (ACLU 2014)

Two people in those categories—Chelsea Manning<sup>2</sup> and Edward Snowden—face charges under the Espionage Act after disclosing hundreds of thousands of classified documents to Wikileaks. As the Obama Administration addressed the leaks, questions unanswered in the Pentagon Papers case resurfaced. Could the Administration win—and enforce—a prior restraint blocking Wikileaks or American newspapers from publishing the disclosures? Could the Administration prosecute Wikileaks or American journalists for publishing them? In this paper, I will explore the current landscape of legal opinion on these questions and communicate the consensus: The vast majority of legal experts believe that the chances of a prior restraint and prosecution against Wikileaks and other news outlets are slim—approaching zero.

I will argue that this consensus ignores key legal precedent that indicates routes the government could take to successfully win a prior restraint or press criminal charges under the Espionage Act. I assert that both outcomes are well within the realm of possibility, but the barrier to prosecution is lower. This holds important implications not just for Wikileaks, but for all journalists who report on national security information.

I will base my analysis on legal scholarship, first-person accounts, court documents, and interviews with leaders in the field of media law—including lawyers who worked with Wikileaks and its media partners.

Finally, I make a contribution to the literature by designing a preliminary survey on legal opinion regarding prior restraint, the Espionage Act, and the First Amendment. The results indicate that lawyers presume a prior restraint to be unconstitutional. Conversely, they presume prosecution under the Espionage Act to be constitutional. This finding supports the argument that the latter is a more likely outcome in the near future. I also list preliminary findings on the

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<sup>2</sup> At the time of the events described in this study, Manning identified as a man and was called Bradley. In 2013, she announced that she is transgender. Accordingly, I will refer to her using female pronouns.

factors that lawyers predict will make prosecuting a journalist under the Espionage Act more probable. This preliminary survey highlights a fruitful direction for further scholarly research.

## II. Wikileaks on the World Stage

It is useful to begin with context on the origin of Wikileaks, with particular attention to the site's stated mission. Is Wikileaks a news outlet or a source? Or, in the context of the Pentagon Papers, is Wikileaks closer to the *New York Times*, which published them, or closer to Daniel Ellsberg, who leaked them? The answers to these questions change how prior restraint and the Espionage Act impact Wikileaks. If Wikileaks is part of the press, the government faces a tougher standard in justifying an injunction. If Wikileaks is not part of the press—if, like Ellsberg or Manning or Snowden, it is a *source* of classified information—then the government may have a stronger case to prosecute its staff under the Espionage Act.

Julian Assange registered wikileaks.org in 1999. He hoped that it would become a wiki—a website that allows anyone to edit it—where citizen journalists would volunteer to sort and analyze leaked documents (Leigh and Harding 52). He soon realized that this model was not feasible. The documents contained dangerous and incriminating information that required a dedicated staff to comb through it (Leigh and Harding 52). Assange led this small staff, based around the world. Wikileaks began making global headlines in 2007, when it released documents uncovering corruption on the part of a former president of Kenya (Jones and Brown 121).

The site rocketed to international notoriety in 2010. Chelsea Manning, a U.S. army intelligence analyst stationed in Iraq, had become disillusioned with, in her view, a lazy and careless culture at her base (Leigh and Harding 21). She began secreting files away from two top-secret government networks, the Secret Internet Protocol Router Network and the Joint Worldwide Intelligence Communications System, by bringing CDs labeled “Lady Gaga” into

work. She pretended to sing along as she downloaded hundreds of thousands of files onto the disks (Leigh and Harding 31). These documents would become three major Wikileaks disclosures. In July 2010, the site released the Afghanistan War Diaries: 92,000 classified memos on the war dated from 2004 to 2009. In October 2010, it released the Iraq War Logs: 400,000 classified memos covering the same period. The documents, for example, included 66,000 reports of civilian deaths in Iraq (WikiLeaks). Finally, between February 2010 and September 2011, Wikileaks released over 250,000 diplomatic cables sent from 280 U.S. embassies and consulates in 180 countries between 1966 and 2010 (Leigh and Harding 211). In 2013, NSA contractor Edward Snowden leaked information on the agency's global surveillance programs.

To analyze whether Wikileaks acted as a news outlet or as a source during this period, it is essential to focus on the events that occurred before and after the first major disclosure, the Afghan War Diaries. Wikileaks did not release these documents on its own: it coordinated with *The Guardian* and its editorial staff, who released a series of articles online and in print at the same time. It was the first time that Wikileaks worked with a major news organization to vet and coordinate a document release, which represented a shift in its strategy (Leigh and Harding 60). Assange agreed to share the documents with four other publications: *The New York Times*, *Der Spiegel*, *Le Monde*, and *El Pais*.

At first glance, Wikileaks appears as a source for *The Guardian*. Assange came to the paper with documents that it would later base stories on. David Leigh and Luke Harding, respectively the Investigations Editor and Moscow Correspondent for *The Guardian* at the time, published an account of this time period. They quoted editor Nick Davies, who promised Assange that the newspaper would improve his public image, along with that of Wikileaks. "We are going to put you on the moral high ground...so high that you'll need an oxygen mask,"

Davies said. “You’ll be up there with Nelson Mandela and Mother Theresa” (Leigh and Harding 99). This is strange language for a journalist to use in reference to another journalist, however. It positions Assange and Wikileaks as a source that the *Guardian* must legitimize in the eyes of the public. Additionally, Wikileaks did not demonstrate some of the traditional concerns that news outlets consider before publishing sensitive information. Assange first resisted the idea of redacting the names of people in sensitive positions. Of Afghan informants to the U.S. military, Assange said, “Well, they’re informants. So if they get killed, they’ve got it coming to them. They deserve it” (Leigh and Harding 111).

In other respects, Assange positioned Wikileaks as a news outlet. When he first approached *The Guardian*, he described himself as Wikileaks’ “editor” or “investigative editor” (Leigh and Harding 60). Wikileaks published Manning’s disclosures on its website with its own commentary. Assange took part in discussions on what *The Guardian*’s coverage would look like, a role that goes beyond that of a traditional source.

This information demonstrates that, at this time, Wikileaks fit neither the traditional definition of news source, nor the traditional definition of news outlet. How, then, should we treat it? Nathan Siegel, a partner at Levine Sullivan Koch & Shulz (LSKS), a leading media and First Amendment Law Firm, said that he did not consider Wikileaks a source. “There is a difference between simply being an information dump,” he said, “and the exercise of news reporting that requires some degree of editorial judgment of what to publish and what not to publish.”

I, however, argue that Wikileaks *is* a news publisher for that very reason. Assange participated in high-level meetings with *The Guardian* and other partners, actively shaping the direction of the newspapers’ coverage. This editorial influence over how raw information would

be presented to the public places Wikileaks in the category of news publisher. With this distinction in mind, the next section of this essay will explore prior restraint and its relevance to Wikileaks.

### **III. Prior Restraint**

In this section, I will define prior restraint and explore case precedents. I will argue that, despite views to the contrary, the internet has not eliminated the possibility of an injunction against Wikileaks.

I define prior restraint on two levels: as a general concept and as a doctrine in American law. Generally, a prior restraint is an official restriction on speech before it occurs (Emerson 648). According to the Legal Information Institute, a prior restraint can take two forms: as a law that requires a speaker to get a government permit before speaking or as a judicial injunction that prohibits particular speech.<sup>3</sup> The doctrine of prior restraint says that the First Amendment blocks the federal government from requiring permits or ordering injunctions on expression protected under the Amendment (Emerson 648). Those forms of expression include freedom of speech, and of particular relevance to this analysis, freedom of the press.

#### *Near v. Minnesota*

With the landmark case *Near v. Minnesota* (1931), the Supreme Court ushered in decades of confusion about the extent of prior restraint. At the time, Minnesota law said that any publisher of “a malicious, scandalous and defamatory” news periodical could be found guilty of a nuisance. If so, the state could file an injunction and prevent the publication from producing and distributing further issues. This happened to Thomas Near, publisher of *The Saturday Press* in Minneapolis. He published a series of articles accusing the local Chief of Police and other

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<sup>3</sup> I will not discuss permits or licenses for speech in this paper. I will use “prior restraint” and “injunction” interchangeably.



officials of collaborating with a local gangster in a gambling, bootlegging and racketeering scheme. The articles included a heavy dose of anti-Semitism (Emerson 417). The County Attorney filed for an injunction. *Near* appealed.

In a 5-4 decision, the Court ruled that Minnesota's law was unconstitutional. It argued that a prior restraint on publication violated the United States' devotion to a free press, as well as the First Amendment. But the Court also left gaps in its decision—gaps that are relevant to the debate over Wikileaks and the legitimacy of prior restraint in the modern era.

First, the Court made clear that there are “undoubtedly limitations” on the press' immunity from prior restraints. In other words, there are situations in which it *is* constitutional for the government to prevent the press from publishing material. In his opinion for the court, Chief Justice Warren Burger did not give a clear definition of these situations. Instead, he wrote that the limitations had been recognized only in exceptional cases, such as speech that incites acts of violence and speech that undermines the country during wartime.<sup>4</sup>

In the Pentagon Papers case, the Court's opinion did not clarify these exceptions either. Instead, we must turn to the concurrent opinions written by individual justices. They specify different ideas on when the government can block publication. According to Stewart, joined by White, the news material in question must cause “direct, immediate, and irreparable damage” to the United States or its citizens. Unlike Stewart, Brennan argues that prior restraints are acceptable only when the nation is at war. He echoes Stewart in arguing that publication would have to lead to direct and immediate harm, but adds that publication must *inevitably* lead to this harm.

In *Near*, the Court also emphasized that the government was free to pursue criminal charges against Thomas *Near* and *The Saturday Press*. Burger quoted William Blackstone, the

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<sup>4</sup> Here, Burger cited *Schenk v. United States*, a case I will discuss in the next section.

18<sup>th</sup> century jurist, who wrote that freedom of the press “consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.” Justice White would echo this logic in the Pentagon Papers case. This argument, however, reveals a contradiction: can the press be truly free if it operates under the fear of prosecution? I will explore this question in section IV, when I turn to the Espionage Act of 1917.

### *Prior Restraint and Wikileaks*

Wikileaks released the Afghanistan War Diaries, the Iraq War Logs, and the State Department cables while the United States was formally engaged in war in Iraq and Afghanistan. At the time, U.S. government officials declared the leaks a major threat to national security. Based on Supreme Court precedent from *Near* and *New York Times Co.*, I will argue in this section that the federal government could therefore have a strong case to pursue an injunction against Wikileaks.

Yet a survey of recent legal scholarship, in addition to interviews with leading First Amendment lawyers, shows that the vast majority of legal experts believe that a prior restraint against Wikileaks would be unlikely. They offer two explanations. The first says that American courts operate on the presumption that prior restraints are generally unconstitutional, making the chances of winning one small.

As evidence, legal experts point to the fact that the Supreme Court has not upheld a prior restraint since the Pentagon Papers case. David Schulz,<sup>5</sup> Co-Director of Yale Law School’s Media Freedom and Information Access Clinic, said, “The odds of an injunction against a news organization in the United States are very very very very small.” Schulz also advised *The Guardian*’s legal team as the newspaper prepared to work with Wikileaks. Victor Kovner, a partner at Davis Wright Tremaine and legal advisor to *Citizen Four*, Laura Poitras’ documentary

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<sup>5</sup> Schulz is also a founding partner at Levine Sullivan Koch & Schulz

on Edward Snowden, echoed this view on media injunctions. “There’s always a possibility,” he said. But he added, “It’s not likely.”

Second, legal experts argue that technology has made securing and enforcing an injunction impossible. “The problem is that once something is posted on the internet, it’s almost impossible to get it back,” said Schulz. “The idea that something’s on the internet and you can enjoin it and have it taken down—I think judges realize that that’s all but futile.” Boston College Law School professor Mary-Rose Papandrea wrote, “Any attempt to enforce a prior restraint against an entity like Wikileaks would be an exercise in futility” (457).

Though they cite separate reasons, these experts agree that a successful injunction against Wikileaks is not likely. I do not contest this. Instead, I emphasize that it is not impossible. I argue that two cases from the past twenty years, *People v. Bryant* and *Bank Julius Baer & Co. v. Wikileaks* demonstrate the narrow circumstances in which a judge *could* order a prior restraint against Wikileaks.

*Recent Precedent: People v. Bryant and Julius Baer*

*People v. Bryant* was argued before the Colorado Supreme Court in 2004. Ashley Kissinger, a partner at Levine Sullivan who specializes in prior restraint, pointed to this case as an example of a phenomenon that merits more attention: States courts are much more eager than the Supreme Court to uphold injunctions on publication. A Colorado woman accused Kobe Bryant, the basketball player, of rape. The case was brought to trial in criminal court. The victim appeared in court under the presumption that her testimony would remain confidential, as required by Colorado’s Rape Shield Statute. Instead, a court reporter accidentally emailed the transcript to seven news outlets, including the Associated Press and the *Los Angeles Times* (Matrullo 323). The District Court issued an injunction blocking the news outlets from

publishing any articles based on the transcript. The Colorado Supreme Court upheld that ruling, arguing that a prior restraint is acceptable when it “protects a state interest of the highest order” (Matrullo 323). Here, that interest was protecting the privacy of rape victims, shielding them from media scrutiny, and encouraging them to testify. “State interest” is a broader standard than those set forth by the U.S. Supreme Court in *Near* and *New York Times Co.* The realm of information that could cause immediate and direct harm is dwarfed by the amount of information that could harm a “state interest.”

According to Kissinger, “It’s not the only court to uphold a prior restraint in a context that’s something less than troop movements.” She added that she has litigated four or five prior restraint cases in her fifteen years of practice, including another case in Colorado whose decision she called “patently unconstitutional.” State courts have demonstrated that they are more willing than federal courts to find a wide range of prior restraints constitutional. This willingness could have major implications for Wikileaks—especially if those courts continue to employ broad standards. “A lot of lower court judges don’t even understand the law of prior restraint,” Kissinger added. “It’s not something that they regularly deal with. It’s kind of a problematic area of the law.”

This discussion shows that, even if the Supreme Court is unlikely to enjoin Wikileaks or a publication like it, lower courts have left the door open. But even so, how could an injunction work? We have exited the heyday of physical newspapers, when a court could order the machines to stop printing or the delivery vans to turn back. A 2008 case, *Bank Julius Baer & Co. v. Wikileaks*, demonstrates how a hypothetical prior restraint against Wikileaks would and would not be effective.

Julius Baer is a Swiss bank that specializes in managing wealth and investments for elite clients. In 2002, the bank fired one of its employees in the Cayman Islands, Rudolf Elmer. Before he left, Elmer copied confidential documents, including banking records and client data, to his personal computers. In 2005, Elmer leaked the documents to *CASH*, a newspaper in Switzerland, which published articles based on the disclosures. In 2008, Wikileaks published the documents on its website—in full. On February 6 of that year, Julius Baer filed suit against Wikileaks and Dynadot, its web host, in California. Its lawyers demanded temporary, preliminary and permanent injunctive relief. That is, the bank sought to prevent Wikileaks from “publishing,” “distributing,” “linking,” “posting,” or “displaying” any of the documents (*Julius Baer* 18). It wanted Dynadot to block wikileaks.org until its documents were removed from the website.

Julius Baer called the documents stolen property, and claimed that Elmer had forged some of them. In its original legal complaint, Julius Baer also took care to emphasize that it did not intend to infringe upon public discussion surrounding the content of the leaks. Instead, it claimed that its interest was in removing customer information from the internet and recovering its stolen property. One can imagine the government making a similar argument in the realm of national security—claiming that it does not want to curb public debate, but wants to protect individuals or recover pilfered government property.

Julius Baer’s lawyers questioned Wikileaks’ motivations. They wrote that it functions as a site for “untraceable mass document leaking,” regardless of legality or authenticity (*Julius Baer* 5). They added that the site claims “a veil of anonymity, or as they term it, ‘transparency,’ yet its owners, operators, and agents proudly post and disseminate the names, contact information, and even private bank records of others...to increase their Website’s notoriety and traffic.” This

language, characterizing the site as a data dump created for self-serving reasons, would reoccur years later, when it became famous for its disclosures of confidential U.S. government documents. Based on all of these claims, Julius Baer argued that Wikileaks' actions had caused it "irreparable harm" (*Julius Baer* 20). This language echoes the Supreme Court's standard for information that merits a prior restraint.

On February 14, 2008, Julius Baer and Dynadot appeared in court. Wikileaks and its lawyers failed to appear. The judge issued a permanent injunction on wikileaks.org. Accordingly, Dynadot began blocking the website.

Wikileaks was able to reverse its fortunes: by February 29, the court reversed itself and dissolved the injunction. Judge Jeffrey White wrote that Wikileaks' failure to appear on the 14<sup>th</sup> led him to believe that a permanent injunction would be the only effective remedy in this case. Once the owners of the site came forward, he instead issued a more narrow remedy: Wikileaks could retain the documents on its site if it redacted consumers' confidential information. The judge also noted the fundamental issue: even when Wikileaks' main site was down, the documents were re-posted on other parts of the internet (*Order Denying Motion* 5). "Even the broad injunction issued to Dynadot had exactly the opposite effect as intended," he wrote. "The press generated by this court's action increased public attention to the fact that such information was readily accessible online" (*Order Denying Motion* 5).

This case does show that the technology has reduced the power of injunctions. But it also shows that a specific kind of injunction *is* possible for material published online: a court can order an internet service provider to make a website inaccessible. This is the modern-day version of stopping the presses. If a judge decided that certain documents on wikileaks.org were dangerous enough to the public interest that they merited a prior restraint, *Julius Baer* shows one

mechanism that could make it possible. It is, of course, not a perfect mechanism, especially for a website as famous as Wikileaks. But consider what could happen for a publication without international notoriety, like a small blog or local news site. If a court ordered an ISP to block its website, and there was no outcry or media firestorm, then what sort of recourse would the site have?

### *How Wikileaks Approached Prior Restraint and the Afghanistan War Logs*

Finally, I will discuss how Wikileaks and *The Guardian* approached the issue of prior restraint as they prepared to publish the Afghanistan War Diaries in the summer of 2010. David Schulz, who advised *The Guardian's* in-house lawyers at the time, said, “Most people aren’t aware of this: The Snowden disclosures were published initially on *Guardian US*, the *Guardian* publication based in New York.” According to Schulz, the newspaper chose this strategy because it felt that the likelihood of an injunction was lower in the U.S. than in Britain. According to a first-person account published by *Guardian* editors, this was also the reason they chose to partner with other international newspapers—to make sure that if one government blocked publication, coverage could continue in other territories (Leigh and Harding 97).

Nonetheless, the newspaper’s staff did believe an American injunction *could* happen. For this reason, they published all of their articles related to the leak—totaling fourteen pages—on a single day. This broke with the norm of spreading content on a major story over the course of days or weeks. If they published over multiple days, they feared that the U.S. government would win a gag order before day two (Leigh and Harding 110). This account demonstrates that the internet has redefined the doctrine of prior restraint—it facilitates collaboration across borders, freeing publishers of legal constraints in a particular territory. Yet, the internet has not eradicated the fear of prior restraints—they remain within the realm of possibility.

That Wikileaks was able to deflect the threat of an injunction in the United States did not mean that it was free of legal threats. In the next section, I will explore a lingering implication from the Pentagon Papers case. It is clear from Justice White's concurrent opinion, which Justice Stewart joined. "Prior restraints require an unusually heavy justification under the First Amendment," White wrote. But, he continued, "...that the government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way" (733). He then specified what that other way would be: criminal charges under the Espionage Act of 1917. He wrote that he would have "no difficulty" sustaining criminal convictions for journalists on facts that were not enough to justify a prior restraint (787). If the *Times* disclosed any information covered under the Act, White wrote, "The newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish" (787). I now turn to these consequences.

#### **IV. The Espionage Act of 1917**

##### *History*

Congress introduced the Espionage Act in the spring of 1917, two days after President Woodrow Wilson severed diplomatic ties with Germany (Edgar and Schmidt 940). As the country entered World War I, Congress intended to combat the threat of German propaganda and prevent actions that could undermine the national defense. Since then, there have been 2,000 prosecutions under the Espionage Act, often for conduct considered traditional spy craft. For example, U.S. airman Jeff Carney was convicted under the Act for smuggling classified documents from his listening post in Berlin to the East German secret police (Gee). The Act has also been used to prosecute Americans for 'undermining' the war effort indirectly, through speech. In 1918, Eugene Debs, a perennial Socialist presidential candidate and leader of the



Industrial Workers of the World, gave a speech condemning the country's role in the war and calling President Wilson a traitor (Jones and Brown 126). The government sentenced Debs to ten years in jail. This made clear that it could use the Act to punish conduct far from the common idea of espionage. In the next section, I will examine how specific language in the Act could allow the government to categorize typical journalistic activity as "espionage."

### *The Text*

Provisions of the Espionage Act and related statutes are contained within Title 18, chapter 37 of the United States Code, sections 793 to 798. I will argue that sections 793, 794, and 798 in particular criminalize actions that are the essence of journalism. Section 793, titled "Gathering, Transmitting, or Losing Defense Information" criminalizes the act of obtaining information concerning U.S. government property, such as naval vessels, arsenals, and research labs, for the purpose of injuring the U.S. or working to the advantage of any foreign nation. That section also criminalizes the act of receiving or obtaining any documents connected to defense, including photographs, plans, and maps. This language poses a key threat to journalists who receive and obtain information from national security whistleblowers.

Section 794 is titled "Gathering or Delivering Defense Information to Aid Foreign Government." It criminalizes communicating, delivering, and transmitting documents "to any foreign government, or to any faction or party or military or naval force within a foreign country," whether directly or indirectly, with the intent to injure the U.S. or advantage a foreign government. It threatens criminal sanctions on anyone who "collects, records, publishes, or communicates" information on "the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials" belonging to the American

government. These actions—*publishing* and *communicating* in particular—describe the very work of journalism.

Finally, section 798 is titled “Disclosure of Classified Information.” The section makes it a crime to “knowingly” and “willfully” communicate classified information about American intelligence activities to aid a foreign government or harm the U.S.

*Legal Precedent: Schenck and Bartnicki*

*Schenck v. United States*, decided in 1919, is the key case in the history of the Espionage Act because it gave the first clues about the kind of speech the Act could restrict. Charles Schenck mailed letters to 15,000 World War I draftees, urging them to support a repeal of the Conscription Act (*Schenck*). He was charged under the Espionage Act for causing insubordination in the U.S. military and obstructing recruitment. When the case reached the Supreme Court, the debate concerned whether Schenck’s speech was protected under the First Amendment. The Court ruled, unanimously, that it *was not* protected because it posed a “clear and present danger” that would bring about “substantive evils” that Congress had a duty to prevent (*Schenck*). Going forward, “clear and present danger” would a standard both for adjudicating prior restraint cases and for adjudicating charges under the Espionage Act. A lively debate arose around what, exactly, constitutes a clear and present danger.

The Supreme Court decided another, and more recent, case relevant to the Espionage Act in 2001: *Bartnicki v. Vopper*. A teachers’ union and a local school board in Pennsylvania had entered a contentious negotiation. An unidentified person recorded a phone call between the chief union negotiator and the union president. After the negotiations ended, a local radio host, Fredrick Vopper, played audio from the phone call on his show. The union negotiator and the union president filed suit, alleging that Vopper had aired the audio despite knowing it was

illegally obtained. The Supreme Court considered whether the First Amendment protected Vopper's right to air illegally obtained information. In a 6-3 decision, the Court ruled that the First Amendment *does not protect* a journalist who discloses illegally obtained information, if they did not participate in obtaining it (*Bartnicki*). The Justices reasoned that the plaintiffs' privacy concerns were less important than the value of "publishing matters of public importance" (*Bartnicki*). This case did not concern national security information, but it is relevant because it implies that while a leaker may have obtained classified information illegally, it is not necessarily illegal for a journalist to break the law by publishing it. This contradicts the wording of the Espionage Act. Using *Bartnicki* as precedent, a journalist could argue that the First Amendment protects her right to publish these articles regardless of how they were obtained.

*Schenck* and *Bartnicki* present two different standards for illegally obtained speech. According to *Schenck*, speech can be curtailed when it presents a clear and present danger. According to *Bartnicki*, it can be curtailed when it doesn't address a matter of public importance. How do we address speech that is both a clear and present danger *and* in the public interest? Does one of these standards take precedence over the other?

Another debate concerns whether the standard for the government to win a prior restraint is the same as the standard for it to successfully prosecute a journalist under the Espionage Act.

Geoffrey Stone, professor at University of Chicago Law School, argues that it is. He writes, "The distinction between prior restraint and criminal prosecution should not carry much weight" (116). He uses the Pentagon Papers case as an example, arguing that the clear and present danger standard that the court used to justify blocking the injunction is the same standard it would have applied in the case of criminal prosecution under the Espionage Act (Stone 116). This argument, however, ignores the logic that Justices White and Stewart endorsed in the

original case. They stated that they were willing to block the injunction because the government had not met the standard for a prior restraint. But they also indicated that they would be more likely to find the *Times* journalists guilty under the Espionage Act. Stone ignores these statements, which indicate that the standard to pursue criminal prosecution may be *lower* than the standard to win a prior restraint.

### *The Espionage Act and Journalists*

Interviews I conducted with the First Amendment lawyers support this argument. Lawyers who responded that an injunction was unlikely stated that there remains a bigger threat of charges under the Espionage Act. The underlying question is whether the Act, which does not specifically mention journalists or journalism, could be applied to them. Nathan Siegel said, “Certainly the government could argue, and it’s possible a court would agree, that the statute can apply to journalists.”

According to Kissinger, the Bush Administration “started making a lot more noise” about prosecuting journalists under the Act during the mid-2000s. “There was a lot of concern among our clients,” she said, adding that the Administration’s actions seemed to violate the “unwritten rule” that the government “doesn’t go after the press for violating criminal laws when they are revealing newsworthy information to the public.” Today, Kissinger said that “cooler heads have prevailed” — the federal government has not pursued charges against a journalist under the Act. But it is useful to explore two cases that raised these fears during the Bush and Obama Administrations: *United States v. Rosen and Weissman* (2006) and *United States v. Kim* (2011). The government did not charge working journalists under the Espionage Act in either case, but both did wade into murky territory, raising fears that they could set precedents for future investigations and future prosecutions.

*United States v. Rosen and Weissman*

This case involved two defendants: Steve Rosen, Director of Foreign Policy Issues at the American Israel Public Affairs Committee (AIPAC), a pro-Israel lobbyist group, and Keith Weissman, a Senior Middle East Analyst there. In August 2005, the Department of Justice filed an indictment alleging that Lawrence Franklin, an Iran expert at the Department of Defense, leaked classified information to Rosen and Weissman over five years, from 1999 to 2004. In turn, they allegedly disclosed the information to journalists, Israeli officials, and foreign policy commentators. The indictment accused the trio of violating section 793 of the Espionage Act—willfully communicating, delivering, and transmitting information to those not entitled to receive it, with knowledge that it could injure the U.S. or advantage another country (*Rosen* 6).

According to David Schulz, the charges led to a long debate about whether the Espionage Act applied to the lobbyists. Rosen and Weissman argued in court that section 793 was unconstitutional under the First Amendment as applied to them. The District Court refuted the prosecution's claim that Espionage Act cases are immune from First Amendment protection while simultaneously asserting that the First Amendment does not protect all speech at all times. It argued that the question of clear and present danger versus public interest must be answered on a case-by-case basis rather than invoking "inflexible dogmas" (*Rosen* 45). Judge T.S. Ellis ruled that section 793 of the Espionage Act, as applied to the defendants, did *not* violate the First Amendment because it was narrow enough to only punish speech the defendants made with the intent to harm the United States. The notion of "intent" became a key turning point for this case. To convict Rosen and Weissman, the prosecution would have to prove it. By 2009, it determined that it could not. The Justice Department dropped the case against the two men.

This case shows that the spectrum of people who could one day face Espionage Act charges is wide. Rosen and Weissman were not journalists, but their work as policy analysts placed them in the larger media sphere. This sphere is composed of professionals who research and write for the public, not just in traditional news outlets. These include, for example, employees of lobbying groups, partisan and non-partisan think tanks, and non-profit groups. So many of these organizations publish their own blogs, staffed with reporters writing original stories. The Heritage Foundation, a conservative think tank, publishes *The Daily Signal*, which it calls a source for “high-quality, credible news reporting.” The *Signal* has 38,000 Twitter followers who look to it for journalism. The Center for American Progress, a progressive think tank, created *ThinkProgress*. The blog boasts 650,000 followers and the tagline, “Moving news forward.” These examples demonstrate that the work of journalism occurs in entities that we may not automatically award the label of “press.” But because they are not traditional outlets, these websites will have a more difficult challenge in convincing a judge or jury that their work deserves First Amendment protection and falls within the public interest. The government would then have an easier task in pressing charges.

*United States v. Kim*

In *Kim*, the federal government came within spitting distance of pressing charges on a journalist under the Espionage Act. In 2009, a grand jury convened in Washington, D.C. indicted Stephen Kim on charges that he disclosed top-secret information about North Korea’s nuclear weapons to a reporter from Fox News, James Rosen. As part of the investigation, the Justice Department determined that it wanted to review Rosen’s emails. It faced the requirements of two separate laws: the Privacy Protection Act of 1980 and the Electronic Communications Privacy Act of 1986. Under the 1980 law, the government must acquire a subpoena to search a

journalist's documents—it cannot use a search warrant.<sup>6</sup> There is, however, one exception to this rule: the government can obtain a search warrant when the journalist is the subject of the investigation. Under the 1986 law, Congress mandated that the government must attain a warrant to read the content of someone's email. Thus, to read Rosen's email, the prosecution had to acquire a warrant on the premise that Rosen was the subject of an investigation. "So how do they bridge the gap?" asked David Schulz. "They fill out an affidavit saying 'we want a search warrant for this guy's email because we think there's reason to believe he committed an Espionage Act violation.'" To obtain this affidavit, the prosecution claimed that Rosen aided and abetted Kim in violating the Espionage Act. Only after the fact did Attorney General Eric Holder claim that the Justice Department never intended to prosecute Rosen, calling the affidavit a procedural tactic to gain information (Kopan). According to Schulz, legal professionals called this clarification "ridiculous back peddling."

The decision to formally implicate Rosen in the investigation set off a wave of fear about charges for journalists under the Espionage Act. Writing in the *National Security Law Brief*, Michael Becker<sup>7</sup> speculated, "The federal government is closer than ever to prosecuting newspapers under the Espionage Act of 1917, and has stopped short of doing so only as a matter of policy" (2). *Kim* demonstrated that the Justice Department could convince a court that journalism involving sensitive information warranted formal investigation. Though the Obama Administration did not prosecute Rosen, there is an open question over whether a different president, with a harsher attitude toward journalists, would do so.

### *Wikileaks and the Espionage Act*

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<sup>6</sup> With a search warrant, investigators can conduct a search without warning. With the subpoena requirement, investigators must go to court first, giving the journalists the ability to contest or block the request.

<sup>7</sup> At the time, Becker was a J.D. candidate at the American University Washington College of Law; he is now an attorney at the Department of Homeland Security.

Primary source accounts from 2010 show that Julian Assange and the *Guardian* did believe that prosecution was a viable threat. This fear gave them another motive to partner with the *Times*. “There was no way,” reasoned editor Nick Davies, “that the Obama Administration would attack the most powerful Democrat-leaning paper in the U.S.” (Leigh and Harding 100). With this statement, Davies indicated that he and his team viewed a news outlet’s political affiliation (or *perceived* political affiliation) as a factor affecting the likelihood of journalistic prosecution. In addition, Leigh and Harding also reference the Pentagon Papers case, writing that the *Times*’ success over the federal government in the 1970s made it a stronger partner in the present. This indicates that an outlet’s reputation also influences the likelihood of prosecution. I will address these dimensions in section V of this paper.

*Legal Interpretations: Intent v. Text*

I have argued that while the federal government has never charged a journalist under the Espionage Act, it is clear that such an event could occur. In this section, I hypothesize about how the prosecution could make its case.

Prosecutors would face a critical challenge: the question of legislative intent. Lawyers and legal scholars consider intent to be one of the main theories for interpreting legal statutes, along with text, precedent, tradition, and policy. When lawyers consider intent, they investigate the meaning that the legislature intended to give the law (Clark and Connolly 17). Information on intent comes contemporary documents, such as transcripts of committee meetings and draft versions of bills.

In 1973, just two years after the Pentagon Papers case, Columbia Law School professors Harold Edgar and Benno Schmidt published a legislative history of the Espionage Act. Despite an initial finding that the Act “is in many respects incomprehensible,” they concluded that



Congress *did not* intend for journalists to face prosecution under its provisions (Edgar and Schmidt 934). They based this assessment on debates, amendments, and legislative conferences in the Congressional record. Edgar and Schmidt wrote that these primary documents “may fairly be read” as excluding “well-meaning publication” of classified information from criminal sanction, regardless of potential damage to national security (Edgar and Schmidt 940). As evidence, the authors wrote that President Wilson proposed a provision that would have sanctioned publishers for disseminating information against the Administration’s guidelines (Edgar and Schmidt 940). Congress defeated this provision multiple times, demonstrating that it did not want a blanket ban on publication. But this was not a definitive statement on intent: Wilson’s opponents in Congress feared that his Administration would use such a provision to silence those critical of the war. Thus, those who opposed a blanket ban may have been less concerned with a broad freedom of the press and more concerned with limiting Wilson’s power (Edgar and Schmidt 941).

As an alternative to the blanket ban, Congress made publication of defense information illegal when the person intends to harm the United States. But, Edgar and Schmidt write, “The proponents of culpability requirements were more concerned with obtaining their inclusion than elucidating their meaning” (942). That is, the law states that a person must demonstrate this intent, but Congress did not elaborate on prosecutors could prove it. This vague intent standard became the main tension in *U.S. v. Rosen and Weissman*.

Another theory of legal interpretation says that Congress’ intent and legislative history are irrelevant. Instead, textualism emphasizes plain meaning—the definition of exact words and phrases in a law (Clark and Connolly 13). Ashley Kissinger agrees that the legislative history of the Espionage Act indicates that Congress did not intend to apply it to working journalists. But,

she said, “The literal language of the statute doesn’t really reveal that.” She added that many judges follow a theory of statutory interpretation that says if a statute is clear on its face, there is *no need* to examine legislative history. These judges could look at the text of the Espionage Act and determine that it is crystal clear: publishing national security information with intent to harm the United States is, in itself, a criminal offense. These judges could define “intent” as they see fit—for some, publishing *any* top-secret disclosures to the world is proof of ill intent.

If a text-based interpretation of the law is most likely to lead to Espionage Act charges for journalists, then how could they best defend themselves in court? I will address this question in the next section.

#### *Legal Defenses: The Vagueness Doctrine and the Overbreadth Doctrine*

According to Kissinger, there are two key principles of constitutional law that journalists could use to mount a defense: the vagueness doctrine and the overbreadth doctrine. I discuss them in turn.

The vagueness doctrine<sup>8</sup> says that a law is unconstitutional when the range of conduct that falls within its scope is unclear. Such a law would then violate a citizen’s right to due process, guaranteed by the Fifth and Fourteenth amendments (Todd 856). Due process ensures that court procedures are fair for all citizens. Accordingly, laws must give “a fair warning” on actions they prohibit, as well as “explicit standards” for how they will be adjudicated in court (Todd 857). According to Stann Thomas Todd, writing in the 1974 *Stanford Law Review*, courts consider multiple factors before applying the vagueness doctrine, including the nature of the right that the statute threatens, the statute’s effect as a deterrent, and whether the subject matter merits a vaguely-worded statute (860). He concluded that the courts are most likely to employ the vagueness doctrine to strike down laws that violate free speech (Todd 859). Additionally,

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<sup>8</sup> It is also known as the void-for-vagueness doctrine.

Todd cites previous cases in which courts struck down laws that did not give a fair warning (Todd 865).

The fact that the federal government hasn't formally charged a journalist under the Act in one hundred years becomes the basis for a strong defense: If a future presidential administration reverses course and does pursue charges, journalists could argue that they did not have fair warning that their work could be subject to criminal sanctions.

Nonetheless, a judge could still reject a vagueness defense, especially if she believes that the text of the statute is fair warning enough. In the alternative, journalists could challenge Espionage Act charges using the overbreadth doctrine. The doctrine applies when a law is so broadly written that it curtails speech that is actually protected under the First Amendment (Kissinger). A judge might be convinced that a statute that bans actions as common as communicating, delivering, and transmitting documents, directly or indirectly, is overbroad. This argument could mean the difference between acquittal and conviction for a journalist defendant. Conviction under the Espionage Act would carry a harsh penalty: Sections 793 and 798 set a prison sentence of up to ten years, while Section 794 exacts the highest price—life in prison or death. This punishment is severe—and it highlights why journalists and legal professionals must fully understand their exposure to prosecution under the Espionage Act.

## **V. Original Survey**

Throughout this analysis, I have used legal documents, scholarly research, and interviews with working lawyers to argue that American courts could issue an injunction to prevent journalists from publishing national security information or use the Espionage Act of 1917 to punish them after publication.

In this section, I describe my contribution to the literature: a survey of American media lawyers asking three sets of related questions. First, does the concept of prior restraint violate the First Amendment? Second, does the Espionage Act—in particular, section 798—violate the First Amendment? Third, under what circumstances is prosecution under the Act more likely?

### *Theory and Hypotheses*

The first two questions are significant because they address a fundamental issue. According to some scholars, like Stone, the standard for the government to win a prior restraint is equal to the standard for it to conduct a successful Espionage Act prosecution (116). I have argued that the standards are, in fact, different. The government faces an easier task in pursuing prosecution. I predicted that the number of respondents who believe that prosecution is constitutional would be higher than the number who believe that a prior restraint is constitutional. If this is the case, then the survey bolsters my assertion that journalists should be particularly wary of the Espionage Act.

I then ask respondents to imagine that a hypothetical leaker has disclosed information to a news outlet. In the next set of questions, they predict the likelihood of prosecution for attributes related to four categories: the current president, the publisher, the leaker, and the leaked information.

The first two factors address the role of party affiliation and political ideology in potential prosecutions. Is a Democrat or Republican president more likely to pursue charges? Are journalists from a news outlet with a partisan reputation more likely to face charges? Most interview respondents believed that party affiliation was a weak explanatory variable. Schulz said, “I don’t know that [that the probability of prosecution] is partisan. I think it’s more personality. Anyone has a choice of remedies if they’re in office.” Along the same lines, Kovner

said, “I don’t see this as a partisan issue...there are major conservative media entities that wish to rely on the same protection that liberal media entities wish to rely on.” Based on these interviews, I predicted that the survey would show that the president’s and the publishers’ political affiliations (formal or perceived) would exert little effect on the estimated probability of prosecution.

Next, I wanted to determine if leaks from sources with a higher position in the U.S. government or military were thought to carry a lower chance of prosecution for journalists. This follows from Callahan and Dworkin’s 1994 research on the organizational characteristics of media whistleblowers. They found that, relative to those who use internal channels, media whistleblowers are more likely to hold higher-ranking jobs (Callahan and Dworkin 177). Additionally, the issues they report are more likely to concern serious wrongdoing (Callahan and Dworkin 178). This research concerned whistleblowers in large corporations, but it is plausible that these conclusions apply to the government as well. I predicted that respondents would rate the probability of prosecution as relatively lower for leaks from a high-ranking source and higher for leaks from a low-ranking source.

Finally, I asked respondents to rank dimensions of the leak itself, including the number and nature of the documents. Stephen Kim and Lawrence Franklin, sources in the two cases that led to formal Espionage Act investigations for those in the media sphere, leaked a small number of documents. On the other hand, Wikileaks specializes in mass document dumps. I hypothesized that respondents would indicate that leaks involving a large number of documents are more likely to lead to prosecution, on the assumption that the government could argue that they posed a clear and present danger. I predicted that respondents would estimate that documents

concerned with military information, as opposed to political scandal, would more likely lead to prosecution, following language from Supreme Court precedent.

Before explaining the results, I will describe my methods.

### *Methodology*

The survey consists of twelve questions. The first three questions include two yes or no responses on whether prior restraint and the Espionage Act contradict the First Amendment, plus an open-ended response asking when, if ever, prior restraints do contradict it. The subsequent questions ask the respondent to estimate the likelihood of prosecution on a sliding scale from 1 (very unlikely) to 10 (very likely). The factors are: 1) the sitting president's political party, 2) the platform where the story is published, 3) the leaker's job, 4) the content of the leak. The remaining questions asked demographic information, including gender, year of graduation from law school, legal specialty, political ideology, and party identification.

I emailed the survey to a list of 102 lawyers practicing in the fields of Media & First Amendment, Cybersecurity, Privacy & Data Security, and National Security Law. The Media Law Resource Center also included a link to the survey in its daily newsletter.<sup>9</sup> The survey received 14 responses. This is a major caveat for the results: the low number of respondents means that the survey cannot be a representative sample. Additionally, those who answered the survey all identified as very liberal (27%), liberal (47%), or moderate (27%). None identified as conservative or very conservative. This may skew the results of the survey, especially on questions explicitly related to politics. The respondents, however, did not uniformly identify as Democrats. Those who did made up 62% of respondents, while 31% were independents and 8% were Libertarians. These issues mean that the survey should be viewed only as a starting point

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<sup>9</sup> Special thanks to George Freeman from the Media Law Resource Center for agreeing to send out the survey

for future scholarly research that aims to obtain responses from a larger and more ideologically diverse population.

### *Results & Analysis*

#### Prior Restraint, the Espionage Act, and the First Amendment

A strong majority—92%—of respondents answered *yes*, a prior restraint contradicts the First Amendment. Conversely, a minority of respondents—31%—indicated that section 798 of the Espionage Act does so. This supports my hypothesis and demonstrates that lawyers believe that the First Amendment provides a much stronger defense against prior restraints than prosecution. The Amendment is not an obstacle to prosecution. Finally, the diverging responses to these two questions point to a division in the legal community. It indicates that there could be a battle between the two camps if the government does charge a journalist under the Act in the future.

#### *The Espionage Act and Prosecution*

##### President's Political Party

Respondents rated the probability that a Democratic president would pursue Espionage Act prosecution at 2.92 out of 10, on average. They estimated that charges under a Republican president are more likely, at 4.64 out of 10. These results contradict my hypothesis and the view that most of the interview subjects expressed—that presidents of both parties are equally likely to pursue charges. These results may be attributed to the fact that no self-identified conservatives or Republicans answered the survey. Still, the data indicates that lawyers view the likelihood of prosecution as partisan, contrary to expectations. It would be fruitful in the future to investigate whether Republican lawyers believe that a Democratic president is more likely to pursue charges.

### Publication Platform

Survey respondents were able to individually rank the likelihood of prosecution for journalists from eight news outlets. I listed them in random order, but selected them either because their audience tends to be ideologically skewed<sup>10</sup> (FOX News, *The New York Times*, and National Public Radio) or because their audience tends to be ideologically neutral (*ABC News*, *USA Today*, and *The Wall Street Journal*). Two additional platforms—Wikileaks and *The Intercept*<sup>11</sup>—are famous for working with controversial whistleblowers to publish national security information. I included them in the survey to determine if their likelihood of prosecution was substantially higher than that of the more ‘traditional’ news outlets. I also assume that neither website has a perceived partisan skew.

Respondents rated the average likelihood of prosecution across the eight publication platforms at 3.4 out of 10. Wikileaks skewed the average with a score of 5.58, by far the highest in the group. Without Wikileaks, the average amongst the seven remaining outlets is 3.1. The next highest score belongs to *The Intercept*, at 3.44. ABC News falls at the lowest end of the spectrum, with a score of 2.82. The other outlets are all clustered around the average, with scores of 3.0 or 3.1. This data shows that lawyers estimate low odds of prosecution for most news publishers and believe those odds are about the same regardless of perceived political ideology. This supports my prediction. *The Intercept*, which often publishes sensitive documents, has a higher than average chance of prosecution. The highest probability belongs to Wikileaks,

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<sup>10</sup> The concept of ideological skew comes from the Pew Research Center’s 2014 study “Political Polarization & Media Habits” (Mitchell et al.). Pew calculated the ideological placement of viewers/readers for each news organization, averaged them, and then ranked them, with -10 meaning the audience is consistently liberal, 0 meaning the audience is consistently neutral, and 10 meaning the audience is consistently conservative. Here, I use the audience’s ideological placement as a measure of the publication platform’s perceived ideology. So, if *New York Times* readers tend to be very liberal, then I assume that the *Times* is perceived as very liberal.

<sup>11</sup> *The Intercept* is an online news publication that focuses on civil liberties and transparency. It is known for publishing articles based on national security leaks, including past work with Edward Snowden.



demonstrating that legal professionals believe that the site's reputation and methods make it a more-than-likely target.

### Leaker's Job

In this question, respondents could estimate the likelihood of prosecution for a journalist if their source is 1) a civilian government employee, 2) a government contractor, 3) a low-ranking member of the military, or 4) a high-ranking member of the military. The overall average was 4.1. The key finding is that respondents believe that a leak sourced from a high-ranking military officer is least likely to lead to journalistic prosecution, with a score of 3.55. This was the only score below average and supports my hypothesis.

### Content of the Leak

Respondents indicated that the type of information contained in the leak to the journalist has a substantial impact on the likelihood of prosecution. The overall average was 4.8 out of 10. "Information revealing military logistics" received the highest score, at 7.5. This finding is unsurprising because this is one of the few types of information that the Supreme Court has explicitly called a clear and present danger. A leak consisting of a large cache of documents—as was the case with Manning and Snowden—received a score of 5. However, a leak with a small number of documents was less likely to lead to prosecution, with a score of 3.9. This supports my hypothesis and indicates that the Wikileaks model, in particular, exposes it to criminal charges. It also suggests that websites that wish to emulate that model should be wary. Documents revealing political scandal were the least likely to lead to prosecution, with a score of 3.3. This data supports my hypothesis. This finding is also important in light of Wikileaks' recent activity, which I will discuss in section VI.

### Summary

Overall, these results indicate that respondents believe that political identification matters, but only to a certain extent. They conclude that a president's partisan identity shifts her likelihood of prosecuting a journalist, but a news outlet's (perceived) political ideology does not change the probability of prosecution. Characteristics associated with high-level leaks—the source is a senior military official and a small number of documents are disclosed—make prosecution less likely. This indicates that journalists receiving large amounts of information from low-level sources—the case with the Manning and Snowden disclosures—should be particularly wary of the consequences.

## **VI. Conclusion**

Next year will mark the 100<sup>th</sup> anniversary of the Espionage Act. Since then, the U.S. has changed in a vast number of ways, and the scope of the Act has grown greater than its drafters could have imagined. Verbs like *communicating*, *publishing*, and *transmitting* are possible on a global and lightening-fast scale—all with a few clicks of a mouse. Since 2010, when Chelsea Manning emailed her documents to Julian Assange, Wikileaks has served as a case study for the full implications of these changes, in terms of prior restraint and the statutes that comprise the Espionage Act.

In 2016, Wikileaks took a sharp turn. Before then, the website made headlines for exposing the misdeeds of the American government in a nonpartisan way. With its military and diplomatic disclosures, Wikileaks' implicit message was *a pox on both parties*. This year, commentators accused the site of releasing information that was both partisan and to the benefit of a foreign adversary—Russia. In July, the *New York Times* reported that Julian Assange released 20,000 private emails from the Democratic National Committee with the explicit intention of undermining Hillary Clinton's presidential campaign (Savage). CNN quoted

anonymous U.S. officials who indicated that the Russian intelligence service hacked the DNC, and anonymously delivered the documents to Wikileaks (Sciutto et al.). “Has WikiLeaks become a laundering machine for compromising material gathered by Russian spies?” the *New York Times* asked (Becker et al.). In *WIRED* magazine, the headline was “What the heck is going on at Wikileaks?” (Gray Ellis). In 2012, Assange received his own political program on RT, the Russian government-funded television network. This bolstered speculation that he has forged close ties with Vladimir Putin’s government.

If the United States perceives Wikileaks to be working on the behalf of a government that wants to undermine it, then federal prosecutors can argue that disclosures published on the site in the future do, in fact, constitute a clear and present danger. Wikileaks’ disclosures during the election did work to the advantage of the incoming administration, but that may not be the case going forward. What happens if Putin and the next president begin to butt heads? What sort of information might Wikileaks disclose then? In this scenario the government’s case to pursue an injunction or Espionage Act prosecution becomes much stronger, for Wikileaks and for journalists associated with it. And, as I have argued throughout this analysis, Wikileaks is not the only publisher exposed to the risk of prosecution. The next presidential administration may make good on its threats to punish journalists who disseminate information that it does not like. In that case as well, both legal outcomes—an injunction and prosecution—are possible.

Still, the end result is unknowable. As David Schulz said, “If there’s an effort made to prosecute a journalist under the Espionage Act, there will be a huge fight because there is no law.” It is still in the making.

## Appendix A: Comparison of Prior Restraint and the Espionage Act

	<b>Prior Restraint</b>	<b>Espionage Act of 1917</b>
<b>What is it?</b>	<ul style="list-style-type: none"> <li>• A term describing an action the government can take to prohibit certain speech before it happens.</li> <li>• Specific legal instruments to enact a prior restraint include permit requirements or petitions for an injunction</li> </ul>	<ul style="list-style-type: none"> <li>• Law passed by Congress</li> <li>• Title 18, Chapter 37, §793-798 of the U.S. Code</li> </ul>
<b>Origin</b>	<ul style="list-style-type: none"> <li>• Origins in English law</li> <li>• Became an important concept in American First Amendment law</li> </ul>	<ul style="list-style-type: none"> <li>• Legislation passed at the start of World War I</li> </ul>
<b>When does it happen?</b>	<ul style="list-style-type: none"> <li>• Before speech / before publication</li> </ul>	<ul style="list-style-type: none"> <li>• After speech / after publication</li> </ul>

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