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THE APPLICATION OF THE REPORTER'S PRIVILEGE AND THE ESPIONAGE ACT TO WIKILEAKS

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I. INTRODUCTION

In this new age of technology where essentially anybody with a computer and a blog can try to dub themselves a "journalist," the question becomes what impact this new technology will have on our existing laws. The very answer to that question is currently being formulated, in light of the recent outcry regarding WikiLeaks.[2] Suddenly, our courts,[3] legislature,[4] and academics[5] find themselves addressing the challenge of balancing the protection of government interests and sensitive government information against the First Amendment's protection of free speech, including under the Reporter's Privilege.[6]

While disguised in a different digital format, the dissemination of government secrets is hardly a novel concept. The United States has been, vastly unsuccessfully, attempting to clearly delineate the difference between free speech and blatant espionage for decades. However, as technology changes, the line between journalism and espionage continues to blur.

This Article addresses the impact of this new technology and the application of the First Amendment's qualified privilege to WikiLeaks and the potential for prosecution under the Espionage Act. Section II provides the background of the media's leaking of government secrets, as well as the background of WikiLeaks in general and its most controversial leaked information. Section III addresses whether WikiLeaks could avail itself of the protections afforded by the qualified Reporter's Privilege under the First Amendment of the U.S. Constitution, and Section IV addresses the possibility of prosecution under the Espionage Act of 1917, absent the First Amendment qualified privilege.

II. BACKGROUND

The concept of the publication and dissemination of government secrets is hardly novel. One of the more well-known examples is the 1971

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[2] WIKILEAKS, http://wikileaks.org/ (last visited Jan. 29, 2012).

[3] *See, e.g.*, Bill Dedman, *U.S. v. WikiLeaks: Espionage and the First Amendment*, MSNBC.COM, http://www.msnbc.msn.com/id/40653249/ns/us_news-wikileaks_in_security/t/us-v-wikileaks-espionage-first-amendment/ (last visited Apr. 18, 2012).

[4] *See, e.g.*, Kevin Poulsen, *Lieberman Introduces Anti-WikiLeaks Legislation*, WIRED.COM (Dec. 2, 2010, 6:32 PM), http://www.wired.com/threatlevel/2010/12/shield/; Geoffrey R. Stone, *WikiLeaks and the First Amendment*, HUFFINGTON POST (Jan. 4, 2011, 4:37 PM), http://www.huffingtonpost.com/geoffrey-r-stone/wikileaks-and-the-first-a_b_804381.html?view=print&comm_ref=false.

[5] *See, e.g.*, Doug Meier, Note, *Changing with the Times: How the Government Must Adapt to Prevent the Publication of Its Secrets*, 28 REV. LITIG. 203 (2008); Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle Over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311 (2011); Kate Kovarovic, *When the Nation Springs a [Wiki]Leak: The "National Security" Attack on Free Speech*, 14 TOURO INT'L L. REV. 273 (2011); Jamie L. Hester, *The Espionage Act and Today's "High-Tech Terrorist,"* 12 N.C. J.L & TECH. ONLINE 177 (2011).

[6] *See, e.g.*, Jonathan Peters, *WikiLeaks Would Not Qualify to Claim Federal Reporter's Privilege in Any Form*, 63 FED. COMM. L.J. 667 (2011).

publication of a secret government study known as the "Pentagon Papers."[7] The United States sought to enjoin The New York Times and The Washington Post from publishing the contents of a classified study conducted by the U.S. Government entitled "History of U.S. Decision-Making Process on Viet Nam Policy."[8] The Court, recognizing the implication of free speech on its decision, noted that the Government bore the "heavy burden of showing justification for the imposition of such a restraint" on speech.[9] The Court refused to enjoin the publication, despite the government's arguments that such a publication was a threat to national security, holding that the government had not presented enough evidence to show that the government's interest in protecting its study from dissemination outweighed that of the freedom of the press.[10]

While the Court did not address whether any criminal implications could result from the publication of the Pentagon Papers, criminal sanctions were contemplated in the concurring opinions.[11] Both Justice White and Justice Stewart noted the power of Congress to enact specific criminal sanctions and laws to protect government secrets and to combat against an irresponsible press.[12]

The publication of the Pentagon Papers is just one example of the more "traditional" forms of the media publishing information that the government believes to be confidential or classified. And while no criminal charges were pursued in the above scenario (most likely because the government had no grounds upon which to pursue such charges), it has been opined that the underlying cause could be the perception of the role of "traditional media."[13] For example, it seems to be historically understood that the media's "role" was "to serve the governed, not the governors."[14] The press has long been "protected so that it could bare the secrets of government and inform the people" as "[o]nly a free and unrestrained press can effectively expose deception in government."[15] It also appears that the historic perception was that these "traditional" forms of media publications were free of malicious intent.[16] The case is not so clear cut with the new forms of media, such as blogs, online news, or other websites—many of which are created for the sole purpose of leaking private information to the general public.

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[7] Meier, *supra* note 5, at 207–08.
[8] New York Times Co. v. United States, 403 U.S. 713, 714 (1971).
[9] *Id.* (quoting Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).
[10] *Id.*
[11] *Id.* at 730–40 (Black, J., Douglas, J., Brennan, J., Stewart, J., White, J., & Marshall, J., concurring).
[12] *Id.* at 730 (Stewart, J., concurring, with White, J., joining).
[13] Meier, *supra* note 5, at 211.
[14] *New York Times Co.*, 403 U.S. at 717 (Black, J., concurring, with Douglas, J., joining).
[15] *Id.* (Black, J., concurring, with Douglas, J., joining).
[16] Meier, *supra* note 5, at 211.

Then came WikiLeaks. The first question which may come to one's mind in addressing this change in media and reporting is: exactly what is WikiLeaks? In October of 2006, WikiLeaks first registered its domain name and released its first document just two months later, in December of 2006.[17] WikiLeaks was organized by founder Julian Assange, a former computer hacker from Australia, for the purpose of providing "an innovative, secure and anonymous way for sources to leak information to our journalists."[18] WikiLeaks has claimed from its inception to be a source for improving transparency and, accordingly, reducing corruption and building stronger democracies.[19] WikiLeaks also provides complete anonymity for its sources, allowing sources to leak information in person, via postal drops, or through WikiLeaks' anonymous electronic drop box.[20]

The first document released via WikiLeaks in December of 2006 purported to be a decision by rebel leader Sheikh Hassan Dahir Aweys to assassinate certain Somali government officials.[21] Next, in August of 2007, the Guardian newspaper published a story allegedly based on information provided to WikiLeaks regarding corruption allegations made by the family of former Kenyan leader Daniel arap Moi.[22] In November of 2007, WikiLeaks published a copy of the protocol for the Guantanamo Bay detention camp—also serving as the first publication WikiLeaks made with regard to any activity by the United States Government.[23]

In 2008, WikiLeaks published multiple documents ranging from the release of illegal activities at a private Cayman Island branch of the Swiss Bank, Julius Baer, to documents from the Church of Scientology, to private emails from the Yahoo! account of Vice-Presidential candidate, Sarah Palin.[24] In 2009, WikiLeaks continued its exposure of both private and public documents; however, the majority of these documents were wholly unrelated to the U.S. Government and seemed clearly focused on WikiLeaks' articulated goal of providing the public with information related to corruption, human rights violations, and global economics.[25]

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[17] Benkler, *supra* note 5, at 315.

[18] *Timeline of WikiLeaks and its Founder's Extradition Fight*, THE NEW AGE (December 5, 2011, 2:14 PM), http://www.thenewage.co.za/36992-1020-53-Timeline_of_WikiLeaks_and_its_founder's_extradition_fight [hereinafter *Timeline of WikiLeaks*]; *see also About: What is Wikileaks?*, WIKILEAKS, http://wikileaks.org/About.html (last visited Apr. 18, 2012) [hereinafter *What is Wikileaks?*].

[19] *What is Wikileaks?*, *supra* note 18.

[20] *Id.*

[21] *WikiLeaks Timeline*, GLOBE & MAIL (Dec. 14, 2010, 12:04 PM), http://www.theglobeandmail.com/news/technology/wikileaks-timeline/article1837131/; *see* Benkler, *supra* note 5, at 315–17 (for a more thorough analysis of the WikiLeaks timeline).

[22] *WikiLeaks Timeline*, *supra* note 21.

[23] *Id.*

[24] *Id.* (follow the "2008" hyperlink under "WikiLeaks Timeline").

[25] *Id.* (follow the "2009" hyperlink under "WikiLeaks Timeline"); *see also About: What is Wikileaks?*, WIKILEAKS, http://wikileaks.org/About.html (last visited Apr. 18, 2012).

2010 sparked the beginning of a new age for WikiLeaks. First, in March of 2010, WikiLeaks released a 2008 United States Department of Defense Counterintelligence Analysis Report, which identified WikiLeaks as a potential threat and discussed how the leaking of sensitive government materials to the site could be prevented.[26] The Report noted:

> Wikileaks.org, a publicly accessible Internet Web site, represents a potential force protection, counterintelligence, operational security (OPSEC), and information security (INFOSEC) threat to the US Army. The intentional or unintentional leaking and posting of US Army sensitive or classified information to Wikileaks.org could result in increased threats to DoD personnel, equipment, facilities, or installations. The leakage of sensitive and classified DoD information also calls attention to the insider threat, when a person or persons motivated by a particular cause or issue wittingly provides information to domestic or foreign personnel or organizations to be published by the news media or on the Internet.[27]

Then, in April of 2010, WikiLeaks released its first video directly impacting the United States military. The video was alleged to have been provided by Bradley Manning, a Private First Class in the United States Army.[28] This release was a classified video of a U.S. Military Apache helicopter strike in Iraq from 2007, which resulted in the death several men, including two Reuters employees.[29] This video was released in cooperation with more traditional forms of media—newspapers, magazines, and the like—a trend that WikiLeaks would continue to follow in the coming months and up until the present day and the writing of this Article.[30] PFC Manning was later arrested for providing such documentation.[31]

In July of 2010, WikiLeaks published thousands of classified war logs from the field of the war in Afghanistan.[32] Again, WikiLeaks paired this release with three traditional media forums: The Guardian, The New York Times, and Der Spiegel.[33] This release contained details of Special Forces targeted assassinations of Taliban leaders, civilian deaths, and

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[26] *U.S. Intelligence Planned to Destroy WikiLeaks*, WIKILEAKS, at 3 (Mar. 15, 2010), http://www.wlstorage.net/file/us-intel-wikileaks.pdf.

[27] *Id.* at 2.

[28] *Timeline of WikiLeaks*, *supra* note 18.

[29] *Id.*

[30] *See* Benkler, *supra* note 5, at 322.

[31] *Timeline of WikiLeaks*, *supra* note 18.

[32] *Id.*

[33] Benkler, *supra* note 5, at 323.

alleged links between Pakistan and the Taliban.[34] Two months later, in October of 2010, WikiLeaks published another set of similar "war logs" relating to the Iraq war, which revealed evidence of the United States ignoring previous Iraqi torture.[35]

While the United States Government expressed outrage as to WikiLeaks' previous releases, nothing would compare to the outcry that occurred in November of 2010. On November 28, WikiLeaks began its release of more than 250,000 classified United States diplomatic cables.[36] WikiLeaks reported that the leaking of the secret embassy cables was the largest set of confidential documents to ever be released to the general public.[37] The release of these confidential communications from embassies to Washington D.C. spurred an immediate reaction from the U.S. State Department.

In a letter from Harold Koh, the U.S. State Department legal advisor, to WikiLeaks founder Julian Assange and his attorney, Mr. Koh urged that such publication constituted the illegal dissemination of government classified documents and that such publication placed countless lives at risk, as well as military operations and cooperation between countries around the world.[38] Specifically, the letter demanded the ceasing of any publication of such classified government documents, the return of any material in WikiLeaks' possession, and the removal and destruction of any other records of the material from WikiLeaks' databases.[39] This letter further appears to reflect the government's positioning for an Espionage Act cause of action against Mr. Assange and WikiLeaks, as the Espionage Act covers any person who "willfully retains" documents covered under the Act and "fails to deliver it on demand to the officer or employee of the United States entitled to receive it."[40] WikiLeaks refused cooperation or compliance with Mr. Koh's letter.

While the original cables were released in a redacted form, by 2011 and less than a year after their initial publication, WikiLeaks proceeded to publish its entire collection of secret U.S. diplomatic cables in their full and

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[34] Nick Davies & David Leigh, *Afghanistan War Logs: Massive Leak of Secret Files Exposes Truth of Occupation*, GUARDIAN, July. 25, 2010, *available at* http://www.guardian.co.uk/world/2010/jul/25/afghanistan-war-logs-military-leaks.

[35] *Timeline of Wikileaks*, *supra* note 18.

[36] *Id.*

[37] *Secret U.S. Embassy Cables*, WIKILEAKS, http://wikileaks.org/cablegate (last visited Apr. 18, 2012).

[38] *See* Letter from Harold Hongju Koh, Legal Advisor to the U.S. State Department, to Jennifer Robinson and Julian Assange (Nov. 27, 2010), *available at* http://media.washingtonpost.com/wp-srv/politics/documents/Dept_of_State_Assange_letter.pdf.

[39] *Id.*

[40] 18 U.S.C. § 793(d) (2006).

entire form, free of redaction or censorship.[41] WikiLeaks defended this position by asserting that almost half of the documents were already made discoverable and available to the public on a server.[42] These cables expanded on the already released private communications between United States Department Officials and other political officers in various worldwide embassies.[43] Specifically, the release included and expanded on: criticism of other country leaders by Americans (many of which were American allies), allegations that the United States military murdered innocent civilians in Iraq and covered up the evidence, detailed files regarding the Guantanamo Bay detainees, secret military logs from Iraq and Afghanistan, and "evidence of the delicate mixture of diplomacy and espionage that takes place at American embassies abroad."[44]

WikiLeaks has undergone multiple attacks in recent years, including various criminal accusations against its founder, Assange, involving sexual assault charges in Sweden.[45] Assange was arrested on December 7, 2010, in England, and Assange appealed a February 2011 English court decision to extradite him to Sweden to face those charges.[46] Assange appealed the extradition decision, claiming that the allegations he was facing in Sweden were meritless and an attack on him because of his work through WikiLeaks.[47] However, in November of 2011, the extradition decision was upheld. Upon the conclusion of his proceedings in Sweden, it has been suggested that Assange will then be turned over to the United States to face prosecution for his actions through WikiLeaks.[48] On December 5, 2011, Assange won the right to petition the Supreme Court of the United Kingdom on his extradition to Sweden.[49] The Supreme Court of the United Kingdom noted that Assange's case raises questions of "general public importance."[50]

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[41] Joshua Hersh, *WikiLeaks Secret Diplomatic Cables Released in Full*, HUFFINGTON POST (Sept. 2, 2011, 12:44 PM), http://www.huffingtonpost.com/2011/09/02/wikileaks-diplomatic-cables_n_946574.html.

[42] *Id.*

[43] *See id.*

[44] *Id.*

[45] *WikiLeaks Timeline*, *supra* note 21 (follow the "SEX ALLEGATIONS" hyperlink under "WikiLeaks Timeline"). Further, Assange has repeatedly proclaimed his innocence relating to these charges and the suggestion has been made that the charges are part of a ploy to silence Assange and WikiLeaks altogether. Ravi Somaiya, *WikiLeaks Founder Is Released on Bail*, N.Y. TIMES (Europe), Dec. 16, 2010, *available at* http://www.nytimes.com/2010/12/17/world/europe/17assange.html.

[46] Peter Wilson, *Wikileaks Boss Julian Assange Immediately Appeals in Swedish Sex Case*, AUSTRALIAN, Feb. 25, 2011, *available at* http://www.theaustralian.com.au/in-depth/wikileaks/julian-assange-faces-extradition-to-sweden-will-appeal-judgement/story-fn775xjq-1226011650037.

[47] *Assange Can Continue Extradition Fight in UK: Court*, FIRSTPOST (Dec. 5, 2011), http://www.firstpost.com/world/assange-can-continue-extradition-fight-in-uk-court-148534.html [hereinafter *Extradition Fight in UK*].

[48] Robert Booth, *Julian Assange Loses Appeal Against Extradition*, GUARDIAN, Nov. 2, 2011, http://www.guardian.co.uk/media/2011/nov/02/julian-assange-loses-appeal-extradition?newsfeed=true; Nick Collins, *Julian Assange Could Be Handed Over to U.S., Supporters Claim*, TELEGRAPH, Dec. 18, 2011, http://www.telegraph.co.uk/news/politics/8964279/Julian-Assange-could-be-handed-over-to-US-supporters-claim.html.

[49] Wilson, *supra* note 46.

[50] *Extradition Fight in UK*, *supra* note 47.

As of the writing of this Article, Assange remains out on bail, with a hearing on the case scheduled for February 2012.[51] Despite these attacks and surrounding turmoil with its founder, WikiLeaks has continued to publish confidential documents and defend its position on free speech to the present day.[52]

III. THE REPORTER'S PRIVILEGE UNDER FEDERAL LAW

A. The Report's Privilege Generally—A Qualified Privilege

The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[53]

Against this backdrop, the issue that has arisen in the WikiLeaks era is whether WikiLeaks (or another website substantially similar) can claim a federal reporter's privilege under the First Amendment, should the U.S. Government attempt to force the website or any of its employees to reveal the sources of its leaked documents.[54] First and foremost, one must have a general understanding of the reporter's privilege. While reporters and other news reporting organizations are still subject to the laws of the United States, persons who qualify for the reporter's privilege may be able to refuse to identify the sources of their information.[55]

This qualified privilege is linked to the United States Supreme Court's 1972 decision in *Branzburg v. Hayes*.[56] *Branzburg* involved several cases in which reporters refused to reveal their sources.[57] First, Branzburg was the author of two news stories involving drug manufacturing and use in Jefferson County, Kentucky.[58] Branzburg was subpoenaed by the Jefferson County Grand Jury to identify the persons described in his stories involved in illegal drug use.[59] Branzburg refused to identify those involved in his stories and asserted his First Amendment right as a reporter to protect his sources.[60] The lower court, however, held that sources of information of a

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[51] *Assange Extradition Case Goes to Supreme Court*, BBC NEWS UK, Dec. 16, 2011, http://www.bbc.co.uk/news/world-16221895.

[52] Devin Dwyer & Jim Sciutto, *WikiLeaks: Stop Us? You'll Have to Shut Down the Web*, ABC NEWS (Dec. 8, 2010), http://abcnews.go.com/International/julian-assange-wikileaks-faces-onslaught-charges-attacks-politically/story?id=12333753.

[53] U.S. CONST. amend. I.

[54] Peters, *supra* note 6, at 670.

[55] *Id.* at 671–72 (internal citations omitted).

[56] Branzburg v. Hayes, 408 U.S. 665, 702 (1972).

[57] *Id.* at 667–79.

[58] *Id.* at 667–68.

[59] *Id.*

[60] *Id.* at 668.

newspaper reporter are not privileged under the First Amendment.[61]

Another case involved a television news reporter and photographer who attended an afternoon Black Panther news conference, and recorded and photographed a statement read by one of the Black Panther leaders at the conference.[62] Later that evening, the reporter returned to the Black Panther headquarters and received permission to re-enter the headquarters under agreement that he was not to disclose anything he witnessed or heard while inside the headquarters, with the exceptions of any police raids, which the reporter, Pappas, was free to record and report as he chose.[63] Pappas waited in the headquarters for hours, but no police raid took place.[64] He was later summoned before the Grand Jury to answer questions about what he had seen and heard at the Black Panther's headquarters that night.[65] Pappas refused to answer, claiming the First Amendment privilege to protect confidential informant identities.[66] A second subpoena was issued, to which Pappas moved to quash, based on the same privilege.[67] The trial judge noted that there was no news reporter privilege in Massachusetts, where the case took place, and therefore held that Pappas had no right to claim the privilege.[68]

United States v. Caldwell, the last decision decided with *Branzburg*, arose from multiple subpoenas issued from a federal court to a reporter, Caldwell, who had been assigned coverage on black militant groups, including the Black Panther Party.[69] The subpoenas instructed him to appear before the grand jury for the Northern District of California and to reveal what was disclosed to him in interviews with the Black Panthers, including providing his notes and taped recordings, concerning the group's purposes, activities, and ultimate goals.[70] The reporter sought to quash and refuse compliance with the subpoenas, claiming that revelation of the requested information would "suppress vital First Amendment freedoms . . . by driving a wedge of distrust and silence between the news media and the militants."[71] The Government responded in an attempt to show the necessity of the information, citing investigations into threats against the President (including assassination conspiracies and attempts), civil disorders, fraud, and overthrowing of the U.S. Government by force.[72] The court ultimately held that Caldwell was in contempt by refusing to comply with the

[61] *Id.* at 670–71.
[62] *Id.* at 672.
[63] *Id.*
[64] *Id.*
[65] *Id.* at 672–73.
[66] *Id.* at 673.
[67] *Id.*
[68] *Id.* at 673.
[69] *Id.* at 675.
[70] *Id.*
[71] *Id.* at 676.
[72] *Id.* at 676–77.

subpoenas issued to him.[73] Caldwell's appeal was reversed, finding that the First Amendment provided a qualified privilege that applied to reporter's testimony.[74] Specifically, the court held that "requiring a reporter like Caldwell to testify would deter his informants from communicating with him in the future and would cause him to censor his writings in an effort to avoid being subpoenaed."[75] The court went on to note that "[a]bsent compelling reasons for requiring his testimony, he was held privileged to withhold it."[76]

Certiorari was granted in all three of the above cases to determine the scope of any potential privilege reporters may have with regard to the information and identity of sources they utilize to gather newsworthy information.[77] In a five-four decision, the Supreme Court of the United States held that journalists have the same duty as any other person when called to testify.[78] The Court acknowledged that some newsgathering qualifies for First Amendment protection; however, the Court went on to note that, as applied to the cases before it,

> [T]hese cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.[79]

Instead, the Court stated that the sole issue in each of these cases was a reporter's requirement to respond to a grand jury subpoena and answer questions about the government's investigation into a crime.[80] In this holding, the Court stated that the reporter's privilege is not an absolute privilege; instead, it is a qualified privilege which may be inapplicable under certain circumstances.

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[73] *Id.* at 678.
[74] *Id.* at 679.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 668, 675, 679.
[78] *Id.* at 665, 690–91.
[79] *Id.* at 681–82.
[80] *Id.* at 682.

Both the concurring opinion, authored by Justice Powell, and the dissenting opinion by Justice Stewart, acknowledged that the First Amendment may afford greater protection to reporters under different circumstances.[81] Both noted that a claim of privilege by a reporter should be judged on its facts, by balancing the freedom of the press, the need for the requested information, and the obligation for citizens to provide testimony when called upon.[82] Justice Stewart's dissenting opinion has become the basis for most states' shield laws with respect to the reporter's privilege and formed the argument many reporters name when claiming the privilege.

Justice Stewart's opinion expressed the belief that the reporter's right to retain a confidential relationship with the source for his or her stories was a basic concern underlying the Constitutional protection of free speech.[83] Justice Stewart further acknowledged that such considerations stem from the broad societal interest in the free and complete flow of information to the public.[84] Justice Stewart believed that the reporter's privilege is a benefit for the citizens of the United States more than it is a benefit for the press, and thus believed that it should be protected.[85] The right to gather news, in an effort to disseminate that news to the public, predominated as a concern in his dissent.[86] Accordingly, Justice Stewart expressed that the newsgathering system must be protected by affording protection to the sources of that newsworthy information.[87] Justice Stewart found fault with the majority decision as, in view of the holding, informants would never be certain (nor could reporters offer any such certainty) that their identities would be protected.[88] Accordingly, a potential source would have to "choose between risking exposure by giving information or avoiding the risk by remaining silent."[89] As such, Justice Stewart urged that when government investigations impinge on First Amendment rights, such as free speech, the government should show that its inquiry is of "compelling and overriding importance" and also "convincingly demonstrate that the investigation is 'substantially related' to the information sought."[90]

Following *Branzburg*, about half of the appellate courts in the United States and almost all of the circuit courts have recognized that the First Amendment provides a qualified privilege, despite *Branzburg's* failure

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[81] *Id.* at 710, 725 (Powell, J., concurring, and Stewart, J., dissenting, with Brennan, J., & Marshall, J., joining).
[82] *Id.* at 710, 725–26.
[83] *Id.* at 725–26 (Stewart, J., dissenting, with Brennan, J., & Marshall, J., joining).
[84] *Id.*
[85] *Id.*
[86] *Id.* at 727–29.
[87] *Id.*
[88] *Id.* at 731.
[89] *Id.*
[90] *Id.* at 738–40.

to provide an absolute right to refuse testimony.[91]

B. Who Can Invoke the Reporter's Privilege?

The next question in examining the Reporter's Privilege is who has standing to assert the privilege? Given the new forms of media and "reporting" trends through the Internet, the question of who is a journalist and what constitutes journalism has become less easy to determine. Courts have historically held that whether a person is a journalist is determined by an examination of the person's intent from the inception of the "information-gathering process."[92] One court further held that a person may assert the reporter's privilege if he or she is involved in activities thought of as "traditionally" associated with news gathering and the dissemination of news, regardless of whether that person is a "traditional" reporter.[93] Additionally, other courts have further examined this same issue, coming to similar conclusions that to decide whether one is considered a journalist for purposes of the privilege, the court must examine whether the person was engaged in investigative reporting, whether he or she was gathering news, and whether he or she had the intent at the inception of the news gathering to disseminate his or her findings to the public.[94] However, case law also notes that the mere possession of a manuscript, film, or the running of a website does not alone entitle anyone to assert the privilege.[95]

The age of Internet reporting and blogging adds a new element to what may constitute "journalism" online. In *Blumenthal v. Drudge*, one of the earlier cases to address Internet journalism and the reporter's privilege, the District Court for the District of Columbia held that an online gossip columnist was protected from revealing his sources by the reporter's privilege and his status as an online journalist.[96] Likewise, other cases have held that bloggers constitute journalists and are entitled to protection under the First Amendment from revealing the identity of their sources.[97] However, it is also important to note that it has been only in rare cases where the reporter's privilege has been successfully invoked by individuals who are considered "journalists" in the traditional sense but are not affiliated

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[91] *See* Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 224–25 (2005); David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 489 n.329 (2002); *Protecting the New Media: Application of the Journalist's Privilege to Bloggers*, 120 HARV. L. REV. 996, 998 n.8–9 (2007) [hereinafter *Protecting the New Media*].

[92] von Bulow v. von Bulow, 811 F.2d 136, 142 (2d Cir. 1987).

[93] *Id.* at 142.

[94] In re Madden, 151 F.3d 125, 130 (3d. Cir. 1998).

[95] Peters, *supra* note 6, at 674.

[96] Blumenthal v. Drudge, 186 F.R.D. 236, 244–45 (D.C. Cir. 1999).

[97] *Protecting the New Media*, *supra* note 91, at 1000; *see also* O'Grady v. Superior Court, 139 Cal. App. 4th 1423, 1480 (Cal. Ct. App. 2006) (holding that bloggers are journalists entitled to protection under the First Amendment Reporter's Privilege and refusing to compel blogger to reveal their sources).

with "traditional" forms of media.[98] Further, the Supreme Court has long articulated a concern that the privilege only be afforded to "legitimate members of the press," and this concern has been echoed by circuit courts in evaluating the privilege.[99]

C. Shield Statutes

In addition to potential protection under the First Amendment, thirty-one states and the District of Columbia have enacted statutory laws to protect journalists.[100] These laws are known as "shield laws." State shield laws are generally considered to be more encompassing and offer more protection than the First Amendment privilege.[101] Where the First Amendment privilege is highly qualified and often inapplicable in criminal cases and in front of grand juries, state-specific shield laws may serve as protection under both circumstances—in fact, some essentially offer an absolute protection.[102]

While state shield laws seemingly offer an expansive, all-encompassing protection, they are largely limited in whom they protect.[103] For example, most shield laws protect only those who are affiliated with a traditional source of news—newspapers, radio stations, television stations, and the like.[104] Some state shield laws require the person claiming protection under the law to be a reporter, in that their principal source of livelihood is earned as a journalist.[105] The question of whether Internet journalists are protected under shield laws is one that is largely unanswered, but given the shield laws' connection with traditional media, it seems unlikely that many courts will afford protection to individual bloggers or websites not affiliated with a traditional form of media under state shield laws.

D. Should WikiLeaks Qualify for the Reporter's Privilege?

As described above, in order for WikiLeaks to be able to assert a claim of privilege as a journalist, it would have to show that it was engaged in investigative newsgathering and reporting—a process in which

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[98] Too Much Media, LLC v. Hale, 993 A.2d 845, 854 (N.J. Super. 2010).

[99] In re Madden, 151 F.3d at 129; *see* Lovell v. City of Griffin, 303 U.S. 444, 450–52 (1938).

[100] *The Reporter's Privilege Compendium: An Introduction*, REPORTERS COMMITTEE FOR THE FREEDOM OF THE PRESS, http://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/introduction (last visited Apr. 18, 2012).

[101] *Protecting the New Media*, *supra* note 91, at 1001.

[102] *Id.*

[103] *Id.*

[104] *Id.*; *see, e.g.*, OHIO REV. CODE ANN. § 2739.04 (West 2008).

[105] *Student Media Guide to Protecting Sources and Information*, STUDENT PRESS L. CTR., *available at* http://www.splc.org/knowyourrights/legalresearch.asp?id=63 (last visited Apr. 18, 2012); *see, e.g.*, DEL. CODE ANN. tit. 10, § 4320 (2008) (noting the requirement that a "reporter" have "obtained the information" sought while "earning his or her principal livelihood" or have spent at least twenty hours per week engaged in journalistic endeavors and production).

WikiLeaks does not engage.[106] While WikiLeaks itself characterizes its website as a form of media and alleges it is engaging in the journalistic process—by employing reporters who review, rewrite, and publish the material received from WikiLeaks' anonymous sources—in truth, WikiLeaks does not engage in any form of investigative reporting.[107]

WikiLeaks solicits sources to supply leaked material, which it then publishes and disseminates to the public.[108] Essentially, stories and their corresponding documentation are brought to WikiLeaks as an outlet for publication. While WikiLeaks is arguably engaged in the collecting of news with the intention of dissemination, the mere mass dumping and publication of documents does not constitute investigative newsgathering and reporting.

Investigative journalism is often labeled "watchdog journalism," which generally involves the following, investigating, and development of a story over a period of time in order to ascertain the facts, uncover the truth, and disseminate that truth to the public at large.[109] Investigative reporting involves being a "sort of global police reporter, uncovering intelligence pratfalls, foreign intrigues, and administration wrongdoing" throughout the reporting and investigative process.[110] Investigative reporting is a form of traditional journalism, often considered tough and skeptical, but involves all of the same elements of traditional story formation in which all reporters engage to develop their stories.[111] Further, investigative reporters "lay out the facts" and also "tell the reader what they add up to."[112] Investigative reporters "adopt[] words and metaphors, solve[] a narrative puzzle and assess[] and interpret[]" the facts of their story for their reader.[113] Additionally, when assessing the application of the reporter's privilege, courts have focused on the activity in which the reporter engaged—specifically allowing the application of the privilege in instances where the reporter engaged in traditional reporting strategies, such as conducting interviews, performing research, gathering data, and engaging in editorial judgment-making.[114]

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[106] Peters, *supra* note 6, at 676.

[107] *Id.*; *see also What is Wikileaks?*, *supra* note 18.

[108] *What is Wikileaks?*, *supra* note 18.

[109] *See generally* Joe Bergantino, Co-Director, New England Ctr. for Investigative Reporting, Introduction of Keynote Speaker Seymour Hersh (May 19, 2009), http://www.bu.edu/buniverse/view/?v=guWT08d.

[110] *Id.*

[111] *Id.*

[112] Peters, *supra* note 6, at 677–78.

[113] *Id.* at 678 (quoting G. Stuart Adam, *Journalism Knowledge and Journalism Practice: The Problems of Curriculum and Research in University Schools of Journalism*, 14 CAN. J. COMM. 70, 75 (1989)).

[114] *Id.* at 678–79 (citing Cusumano v. Microsoft Corp., 162 F.3d 708, 715 (1st Cir. 1998) ("interviews were protected because their 'sole purpose' was 'to gather data so that [the professors] could compile, analyze, and report their findings'"); Blum v. Schlegel, 150 F.R.D. 42, 45 (W.D.N.Y. 1993) ("the privilege applied to a student journalist" whose article "exposed and described, in the journalist's own words, a controversy at the school, quoting some of the people involved" whom he interviewed); Tripp v.

WikiLeaks' dumping of leaked documents with an introductory description hardly constitutes "investigative reporting." WikiLeaks wholly fails to engage in any of the outlined elements of investigative reporting: it does not conduct interviews; it does not independently investigate stories; and it does not independently gather information in an effort to produce its own commentary on a newsworthy story.[115] WikiLeaks fails to undertake any journalistic or literary endeavor. Merely playing the role of a Xerox machine does not constitute creation. While WikiLeaks verifies the stories and documents leaked to it, this alone is a far cry from the investigative journalism outlined by *Bulow* and *Madden*, as well as the subsequent cases that followed these decisions, in identifying the "legitimate press" the law was concerned in protecting. Further, because WikiLeaks is not a "traditional" form of media, it is also unlikely that state shield laws would offer more expansive protection.

IV. PROSECUTION UNDER THE ESPIONAGE ACT

Having determined that WikiLeaks' publications are not protected by the qualified privilege under the First Amendment, the question is presented as to what legal ramifications may be in store for WikiLeaks, given its recent publications involving the United States' classified documents. The Espionage Act of 1917 has already been identified as a potential remedy for the government against WikiLeaks and its founder, Julian Assange, as well as any sources of the leaked information whose identities can be ascertained by the government.[116]

In June of 1917, shortly after entering World War I, the United States of America enacted the Espionage Act.[117] In its original language, the Espionage Act contemplated the carving out of an exception to free speech by the press during wartime.[118] Although this "press censorship" portion of the Act was removed before its enactment, the Espionage Act has continued to be viewed as allowing for the inhibition of what might normally be considered "free speech" by the press under the First Amendment.[119]

Although amended multiple times, the Espionage Act currently provides punishment for any person who "willfully communicates, delivers,

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Dep't of Defense, 284 F. Supp. 2d 50, 58 (D.D.C. 2003) (in concluding that the journalist engaged in newsgathering and investigative reporting, the court said "'[t]he article itself indicates that [the writer] interviewed a number of individuals while researching [the article], . . . an activity which is a 'fundamental aspect' of investigative journalism'"); U.S. Commodity Futures Trading Comm'n v. McGraw-Hill Co., Inc., 390 F. Supp. 2d. 27, 32 (D.D.C. 2005) (holding that the journalist engaged in "editorial judgments")).

[115] *See What is Wikileaks?*, *supra* note 18.

[116] *See infra* Part IV and accompanying notes.

[117] 18 U.S.C. §§ 792–799 (2006).

[118] Kovarovic, *supra* note 5, at 279–80.

[119] *Id.*; Benkler, *supra* note 5, at 336–38.

[or] transmits" any information "relating to the national defense."[120] This language in and of itself seems applicable to all parties involved with WikiLeaks, as all are transmitting and communicating classified documents that are related to national defense. However, the Espionage Act arguably does not apply to publishers, like WikiLeaks, because on its face it does not prohibit the publication of classified information. Indeed, Congress long ago rejected a version of the Act that prohibited the "publication" or "attempt to publish" information relating to the national defense.[121] This serves as strong evidence that the Espionage Act, in its current form, may not apply to publishers like WikiLeaks. In fact, as of this Article, the U.S. Government has yet to successfully prosecute and convict a journalist or publisher for the publishing of classified or secret government information under the Espionage Act.[122]

However, in order to make the Espionage Act applicable to entities like WikiLeaks, an amendment known as the SHIELD (Securing Human Intelligence and Enforcing Lawful Dissemination) Act has been introduced.[123] The SHIELD Act would amend the Espionage Act to make it a crime to publish any information "'concerning the identity of a classified source or informant of an element of the intelligence community of the United States,' or 'concerning the human intelligence activities of the United States or any foreign government'" should such publications be shown to be prejudicial to the United States and its interests.[124] Because the leaking of such classified information is already a crime, as outlined above, this amendment seemed aimed directly at the publishers—including publishers like WikiLeaks.[125]

The government has already begun utilizing the existing Espionage Act to combat WikiLeaks' dissemination of otherwise confidential documents. For example, in 2010, Bradley Manning, the Army private who has been held for over nineteen months for his alleged involvement in the leaked information of the United States' diplomatic cables to Julian Assange, has been charged under the Espionage Act.[126] Further, it is clear that the U.S. Government has engaged in investigation to determine whether

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[120] 18 U.S.C. § 793(d).

[121] Meier, *supra* note 5, at 226.

[122] Hester, *supra* note 5, at 184 (internal citations omitted).

[123] Kevin Poulsen, *Lieberman Introduces Anti-WikiLeaks Legislation*, WIRED.COM (Dec. 2, 2010, 6:32 PM), http://www.wired.com/threatlevel/2010/12/shield/.

[124] *Id.*

[125] *Id.*

[126] L. Gordon Crovitz, *Information Age: WikiLeaks and the Espionage Act*, WALL ST. J., Apr. 25, 2011, at A13; Raffi Khatchadourian, *Manning, Assange, and the Espionage Act*, NEW YORKER, May 20, 2011, http://www.newyorker.com/online/blogs/newsdesk/2011/05/manning-assange-and-the-espionage-act.html. Further, it should be noted that Manning is technically charged under Article 134 of the Uniform Code of Military Justice, which incorporates parts of the U.S. Code. *Pentagon Statement: Pfc. Manning Being Mistreated*, MSNBC.COM, http://www.msnbc.msn.com/id/40718434/t/pentagon-statement-pfc-manning-not-being-mistreated/#.TyV8wZiQbzl (last visited Apr. 18, 2012).

it can charge Assange under any existing statutes, such as the Espionage Act or the Computer Fraud and Abuse Act of 1986, which prohibits individuals from the unauthorized accessing of computers in order to obtain national security data.[127] It has been rumored that the Government has contemplated charging Assange as a conspirator to the leaking of Manning's information; however, because so many traditional news sources were also a part of the publication, the government has yet to pursue this option.[128] Should the SHIELD Act or another amendment to the Espionage Act prohibiting the publishing of classified information be enacted into law, it seems the Government could then effectively prosecute both Assange and his website. Until then, the Espionage Act seems ineffective to prosecute anyone except the sources of the leaked information, such as Private Manning.[129]

The question begs as to whether such an amendment to the Espionage Act to prohibit the publication of secret or classified documents would extend to bar traditional forms of media like The Guardian, The New York Times, and Der Spiegel, all of which published portions of WikiLeaks' leaked documents, from also engaging in such publication. Should newspapers be protected by state shield laws and the reporter's privilege against charges under the Espionage Act or similar legislation where WikiLeaks is not? The answer to this question remains unanswered by the courts. One view indicates that the publication of leaked documents by a newspaper should be treated in the same way as the publication of leaked documents by WikiLeaks. After all, the newspapers who reprinted WikiLeaks' leaked documents engaged in essentially the same actions as Assange and WikiLeaks itself.

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[127] 18 U.S.C. § 1030 (2006).

[128] Crovitz, *supra* note 126, at A13.

[129] In addition to the WikiLeaks controversy, the Government has already begun its attempts to utilize the Espionage Act to crack down on leakers of government and secret information. In January of 2011, Jeffrey Sterling, a former CIA officer, was indicted for alleged violations under the Espionage Act based on allegations that he leaked information to James Risen, the *New York Times* reporter who was the recipient of the Pulitzer Prize for his work regarding illegal surveillance being conducted by the NSA and who published a book detailing the "secrets" and "secret history" of the CIA and the Bush administration. *See* David Stout, *DOJ Still Wants NY Times Reporter to Reveal Sources in CIA Leak Trial*, MAIN JUST. (Oct. 20, 2011, 10:41 AM), http://www.mainjustice.com/2011/10/20/doj-still-wants-ny-times-reporter-to-reveal-sources-in-cia-leak-trial/.; *see also* Charlie Savage, *Ex-C.I.A. Officer Named in Disclosure Indictment*, N.Y. TIMES, Jan. 6, 2011, http://www.nytimes.com/2011/01/07/us/07indict.html?_r=1. The Government moved to force Risen to reveal his source as being Mr. Sterling, but Risen refused and Judge Brinkema of the United States District Court for the Eastern District of Virginia agreed that Risen could not be compelled to reveal his sources. U.S. v. Sterling, No. 1:10cr485, 2011 WL 4852226, at *13 (E.D. Va. July 29, 2011). Further, in June of 2011, in another high-profile case, Judge Richard Bennett (D. Md.) ruled that the Government would not be permitted to present unclassified substitution documents in support of its prosecution against Thomas Drake, a former NSA agent who allegedly provided the *Baltimore Sun* with classified documents under the Espionage Act. Ellen Nakashima, *Ex-NSA Official Thomas Drake to Plead Guilty to Misdemeanor*, WASH. POST, June 9, 2011, *available at* http://www.washingtonpost.com/national/national-security/ex-nsa-manager-has-reportedly-twice-rejected-plea-bargains-in-espionage-act-case/2011/06/09/AG89ZHNH_story.html. Accordingly, the Government was forced to drop the charges under the Espionage Act, resulting in Drake's pleading to a misdemeanor with maximum probation time capping out at one year. *Id.*

However, another view draws a distinction when comparing traditional news sources with those akin to WikiLeaks. Justice Potter Stewart noted in his famed "Or of the Press" article that the freedom of speech afforded to traditional forms of media was meant to function as a "fourth institution outside the Government as an additional check on the three official branches" of the government.[130] In essence, Justice Stewart noted what many argue to be the function of the press: to keep the citizens of the United States apprised of newsworthy events and information.[131] As previously discussed in this Article, the role of the press has historically been found to serve the governed and not the governors.[132] Accordingly, traditional news media's publication of the same documents WikiLeaks has obtained and published could be seen merely as the traditional press doing the job for which it was made, as opposed to websites, such as WikiLeaks, who many say "exist solely for the purpose of encouraging the reckless—and illegal—disclosure of secret national security information."[133] Further, proponents of the distinction between traditional media and "new media," like WikiLeaks, indicate that there is seemingly an element of malice present in WikiLeaks' publication and dissemination of classified documents that is notably absent from similar publications by traditional forms of media.[134]

In addition, traditional forms of media, like The Guardian, The New York Times, and Der Spiegel, are all likely to take steps to comply with journalistic and reporting principles, which WikiLeaks most certainly avoids. In addition to source checking (which WikiLeaks also claims it does),[135] traditional forms of media likely contact the government or other agency or institution to be affected by the publication of the leaked documents in an effort to gain a comment on the pending publication. WikiLeaks certainly would avoid any such journalistic endeavor, as it wants to avoid any prior restraint on the publication of its leaked documents. This could serve as further evidence indicating the lack of malice on the part of traditional forms of media and also serve to indicate that traditional forms of media, while printing almost the same material as WikiLeaks, comply with the basic principles of journalism—compliance that WikiLeaks continues to avoid.

Again, this distinction has yet to be addressed by the courts and will likely prove to be another level of ambiguity, should the Espionage Act be

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[130] Potter Stewart, "*Or of the Press*," 26 HASTINGS L.J. 631, 634 (1975); *see also* Meier, *supra* note 5, at 215.

[131] Stewart, *supra* note 130, at 635.

[132] New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring, with Douglas, J., joining).

[133] Meier, *supra* note 5, at 215.

[134] *Id.* at 211.

[135] *See What is WikiLeaks?*, *supra* note 18.

amended to prohibit publication.

V. CONCLUSION

WikiLeaks is a perfect example of the potential for the line between journalism and espionage to be blurred in the face of new technology without adequate legal restraints. Journalism is faced with performing a balancing act of what the public has a right to know and the dissemination of government secrets, which may jeopardizing national security. Currently, WikiLeaks is likely not protected by the First Amendment's qualified Reporter's Privilege. This would open WikiLeaks up to prosecution that more traditional news sources may avoid. However, the current laws fail to accurately address the problem of Internet websites, like WikiLeaks, which have the capability to obtain classified documents through government leaks and then publish those documents on its website for international access. Until the Espionage Act is amended to prohibit such publication, or other legislation is enacted to address the issues of publication, WikiLeaks will likely be able to continue its publication and dissemination of classified documents without legal repercussion.