Doug Coats
10/12/11
WikiLeaks discussion

Leaking vital military information to large media sources is nothing new in this country. The *New York Times v. United States* case showed that although classified documents are generally not touched by newspapers, it only takes one person on the inside to share those documents with everyone. Human rights activist Julian Assange may gleefully show that he has the power produce top-secret reports, but he may be shut down by the writings of this country's founding fathers. WikiLeaks creates a dilemma which forces U.S. courts to strip the Constitution down to its core elements.

Naturally, it takes an Australian—someone from a country that the United States has never had major political quarrels with –to be the vehicle that drives out secret government information. From toxic dumping in Africa to Afghanistan war logs, the controversial, "non-profit" website does not back down from exposing anyone.

Nevertheless, Assange and his conspirators have gained access to information that would not otherwise be available to the general public. Does allowing the public to see such reports violate the supreme law of the land? After all, classified information has been leaked to such prominent international publications as *The New York Times*, England's *The Guardian* and Germany's *Der Spiegal* (Jones 1.) It would be one thing if all the written details and video footage presented the United States' wars against Iraq and Afghanistan as passive and economic.

This has not been the case, however. WikiLeaks has gained footage of a helicopter attack in Baghdad that killed two innocent employees of the middle-eastern media company, Reuters (Jones 1.) Initially, Assange has been off the hook regarding allegations about his organization. The alleged leaker—the source of the majority of the classified U.S. content has not been so lucky. Army Soldier Private Bradley Manning has been held captive in Quantico, Va and more recently, Fort Leavenworth, Kan because he violated U.S. Military regulations making off with "highly sensitive diplomatic data" (Crovitz 1.)

To determine whether or not Assange and his controversial works can be charged, the courts will have to look at the precedents set by the Supreme Court case *New York Times Co. v. United States*, which issues prior restaint. Often referred to as the Pentagon Papers case, this Supreme Court decision was based on the leaking of U.S. military information, named "History of U.S. Decision-Making Process on Viet Nam Policy," leaked about the Vietnam War. Defense Secretary Robert McNamera commissioned these "papers" before he left office in 1968 and were leaked by Daniel Ellsburg, who partly authored the documents, which disclosed how the government mislead the country about its objectives towards the war (Middleton 73.)

Without authorization, Ellsburg gave these documents to two major news publications—the *Washington Post* and the *News York Times*. Upon learning of the press' accumulation of the highly sensitive documents, then-President Richard Nixon requested that the publications not run the leaked information. Nixon feared that the content of the Pentagon Papers would prolong the Vietnam

War and that the Chinese would fear conducting confidential business with the U.S., denying then-secret negotiations (Middleton 73.)

Nevertheless, this case is two-fold. The attempt to shut down the printing of that day's *Times* was independent of the printing of the *Washington Post.* The Nixon administration was initially successful with the decision of the Second Circuit of the U.S. Court of Appeals since they halted the *Times*' publication. Nixon and company were not so lucky in the Washington, D.C. metro area, though. The District of Columbia Circuit Court refused to stop the Post's publication that day, but the Supreme Court did in order to review the case (Middleton 73.) Upon an expedited review, the Court declared that the Government "carries a heavy burden of showing justification for the imposition of a [prior restraint of expression]" (*New York Times Co. v. United States 403 U.S. 713 at 714*.)

This decision confirmed the *Post*'s case and reversed the *Times*'. Supreme Court Justice Black explained his reason behind the decision:

> "Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt publication of current news of vital importance to the people of this country" (*New York Times Co. v. United States 403 U.S. 713 at 715*.)

Black, along with five other Supreme Court Justices had enough of a majority, or *per curiam,* to enforce their decision. These justices often noted the proceedings from *Near v. Minnesota* to aid their reasoning. That case deals with the publication of the *Saturday Press*, which the Hennepin County Attorney deemed as a " malicious, scandalous and defamatory…periodical" (*Near v. Minnesota 282 U.S. 697 at 704*.) The defendant, Near had to prove that the content of the publication was true and published " with good motives and for justifiable ends" (*Near v. Minnesota 403 U.S. 697 at 712.*) According to the in-class PowerPoint the Justices ruled that this anti-Semitic speech had no prior restraint.

Since the contents of Pentagon Papers were, in fact, true, the justices could use that case as precedent. Those who dissented the ruling of the six majority justices were concerned with the interpretation of the First Amendment. Chief Justice Berger does not think the Pentagon Papers decision should have been so simple. "Only those who view the First Amendment as an absolute in all circumstances—a view I respect, but reject –can find such cases (Near v. Minnesota and Organization for a Better Austin v. Keefe) as these to simple or easy." Justice Harlan later states that he considers that the Court has been irresponsibly feverish in dealings with the afore mentioned cases (*New York Times Co. V. United States 403 U.S. 713 at 748 and 753*.)

Can the Pentagon Papers case be directly applied to such legal issues concerning WikiLeaks? Both deal with initially classified documents running in United States newspapers. Both issues include content concerning similar

military conflicts. The Vietnam War lasted over ten years and created mass political and social turmoil while the conflicts in Iraq and Afghanistan are each approaching the ten-year plateau.

Irrelevant of any First Amendment allegations, the actual suppliers of the leaked information in both cases have been punished. While Private Manning, who disobeyed military and U.S. laws, is not the chief supplier of all the WikiLeaks' classified information, he is the supplier of the initial information that spurned the sites' notoriety in 2010 (Jones 1.)

The similarities may stop there, however. Justice Brennan in the Pentagon Papers case stated that prior restraints might be justified in wartime if the government presented clear evidence that the publication presented imminent danger. Here is the kicker: Congress had not declared war in Vietnam at that point and Brennan did not think publishing the Pentagon Papers presented an immediate danger to national security (Middleton 74.) Although Assange's native land may not necessarily want to threaten the United States, he could certainly intentionally want to stir things up in this county.

Wall Street Journal's L. Gordon Crovist contends that Assange is an anarchist, which makes too much sense considering the nature of his site's content. Additionally, he claims that Assange's "stated goal is to deprive the U.S. government of a smooth flow of information by disclosing its internal communications (Crovist 1.) Perhaps Ellsburg was a closet anarchist, too, but in order to obtain the position to help author the Vietnam War documents, he was

simply doing a duty to his country. A previous case may be better suited to draw adequate comparison.

Jay Near's case presents content that corresponds closer to that of WikiLeaks. Near's anti-Semitism is not that different from Assange's anti-government/American/authority stance. Near was neither a fan of some of his hometown police chief nor of any Jewish person period, but was granted publication of his views by the Supreme Court (Middleton 72.) Along the same lines, Assange wants secrets published that may hurt what is left of the U.S.'s reputation.

Nevertheless, prior restraint and the First Amendment may not even be the laws at stake. The Espionage Act was created to punish anyone who has "unauthorized possession of, or access to…any document, writing…or note relating to the national defense … and could be used to the injury of the United States or to the advantage of any foreign nation" The act later defines classified information as " information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination on distribution." (Title 18, Part I, Chapter 37.)

Now it is Assange's reputation that may be hurt (whether or not he holds it dear is another story.) Since the publisher is not liable for its reporting, Assange, not the Times should be held under the Espionage Act. After all, the New York Times is simply trying to publish "all the news that's fit to print." What a re these papers going to do—just ignore these juicy secrets they can easily put

on the front page? Assange is the one providing these tips to the media, evolving into a middleman of classified government information. On the WikiLeaks web site, Assange claims that his goal is to bring important news and information to the public. Additionally, he wants readers and historians, through original source code material, to see evidence of the truth (www.wikileaks.ch.) The organization certainly achieves its goal by presenting otherwise secret information to the public. Ironically enough, publisher Canongate is releasing an unauthorized version of Assange's autobiography after he withdrew from his contract. He feared some of the content in his book would lead to espionage charges. (Addley 1.)

This "truth" the organization is presenting makes it liable to fall under prosecution of the Espionage Act (Crovitz 1.) By leaking out the 250,000-plus diplomatic cables and information about Guantánamo Bay protocols, Assange is clearly stating his intent: he wants to harm the United States.

Fortunately, legislation is in motion to halt publishing names of a U.S. intelligence source. Senator Joe Lieberman introduced the SHIELD act, which amends a section of the Espionage Act. The independent Senator noted that WikiLeaks' actions show how U.S. national security interests and those of our allies are jeopardized by illegally releasing the classified and sensitive information. Since leaking such information is already a crime though the Espionage Act, the new legislation is aimed squarely at publishers (Poulsen 1.) This means WikiLeaks could soon be in trouble.

While WikiLeaks and its founder cannot be punished over what it has already released through the ban on ex post facto criminal laws, they may end up not being in any jeopardy at all (Poulsen 3.) The SHIELD Act may end up being unconstitutional since it is in effect, banning a certain speech. As long as there is no libel or any other defamation cast, the leaked information published on the website and presented to other news outlets should be published. On the other hand, prosecution solely based on the Espionage Act may be possible. Currently, Assange has simply been the face of WikiLeaks—not the one directly obtaining the classified and sensitive files. If it was discovered that he, in fact, had some sort of military or political connection to some country, then he could be punished.

If Assange or anyone else at the organization were found to have violated conspiracy or espionage laws, it would be difficult to gain jurisdiction against them, since WikiLeaks is a foreign entity (Jones 2.) In fact, according to Yale Law First Amendment Jack Balkin, most First Amendment lawyers would say preventing the publishing of material is “justified only where absolutely necessary to prevent almost immediate and imminent disaster” (Jones 2.) Basically, as long as there is no national security threat (which it is clear that some government security is more strict than others) discovered through WikiLeaks, they could continue publication. However, if the organization were clearly identified as an American source, their jurisdiction would be defined and would be examined more closely for Espionage.

With its clear jurisdiction, the *New York Times* could be punished in the Pentagon Papers case though the Espionage Act. The act punished against the communication of material that hurts the United States or helps foreign governments. The law itself may be vague, but if one looks at the United States as a group of people rather than a single entity, then a prosecution can be understood. The information about the Vietnam War could have given away troop positions and tactics, helping out enemy troops to kill American soldiers. Additionally, the President feared animosity China. If diplomacy fails with China, anything from trade to a wartime relationship is challenged.

In terms of First Amendment protection, the *Times* and WikiLeaks should be treated similarly. Both provide news to the public and are considered press. Just because WikiLeaks is shady foreign website, its content deals with this country and many its readers come from this country. Since the websites have become so popular compared to physical newspapers, WikiLeaks and the Times website have the same aspirations (at least on the surface.)

WikiLeaks is a shady website, meaning its creator, Mr. Assange is a shady and creepy person. He clearly is trying to corrupt the U.S. government one leak at a time and has his own little army to get the info he wants to present. According to Crovitz, there are 500,000 Americans cleared for classified documents and chances are Assange has lured/paid enough of these folks to create his obnoxious empire.

## Works Cited

Middleton, K. *The Law of Public Communication*.

Pearson: Boston, 2011

Addley, E. “Front: The leaker leaked: autobiography released against Assange's wishes” *The Guardian* accessed via Lexis Nexis Academic 10/10/11

Crovitz, L.G. “WikiLeaks and the Espionage Act: Why Julian Assange is different from the *New York Times*” *The Wall Street Journal Online* <http://online.wsj.com/article/> located 10/11/11

Jones, A. “Pentagon Papers II? On WikiLeaks and the First Amendment” *The Wall Street Journal Online* <http://blogs.wsj.com/law/2010/07/26/pentagon-papers-ii-on-wikileaks-and-the-first-amendment/> Located 10/11/11.

Poulsen, K. “Lieberman Introduces Anti-WikiLeaks Legislation” *Wired* <www.wired.com/threatlevel/2010/12/shield/> Located 10/10/11

*New York Times Co. v. United States 403 U.S. 713*

*Near v. Minnesota 403 U.S. 697*