

THE *PENTAGON PAPERS* CASE AND THE WIKILEAKS CONTROVERSY: NATIONAL SECURITY AND THE FIRST AMENDMENT

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INTRODUCTION

In this Essay, I will focus on two clashes between national security and the First Amendment—the first is the *Pentagon Papers* case, the second is the WikiLeaks controversy.¹ I shall first discuss the *Pentagon Papers* case.

The *Pentagon Papers* case began with Daniel Ellsberg,² a former Vietnam War supporter who became disillusioned with the war. Ellsberg first worked for the Rand Corporation, which has strong associations with the Defense Department, and in 1964, he worked in the Pentagon under then-Secretary of Defense Robert McNamara.³ He then served as a civilian government employee for the U.S. State Department in Vietnam⁴ before returning to the United

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1. See *infra* Parts V–VIII.

2. See DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE* 33 (1996) (arguing the *Pentagon Papers* never would have leaked but for Daniel Ellsberg).

3. *Id.* at 35.

4. *Id.* at 36.

States in 1967 to work for the Rand Corporation.⁵ Rand, as it happened, was asked by Secretary McNamara to prepare a report on the history of American military involvement from 1944 to 1968.⁶ In 1969, Daniel Ellsberg and another Rand employee copied the classified documents, which later came to be known as the Pentagon Papers, and then shared them with the *New York Times*.⁷ In June 1971, the *Times* published “a secret, classified Pentagon Report outlining the process by which America went to war with Vietnam.”⁸ The U.S. government then asked a newly appointed federal district court judge, Murray Gurfein of the U.S. District Court for the Southern District of New York, to issue a temporary restraining order against the *New York Times*.⁹ Judge Gurfein refused. He declared, “A cantankerous press, an obstinate press, an ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know.”¹⁰

The U.S. Court of Appeals for the Second Circuit reversed,¹¹ ruling that the issue of whether the Pentagon Papers should be published should await “further hearings when the government could develop and support its position that the publication of the papers presented a threat to the security of the United States.”¹² Until this could happen, the *New York Times* would be restrained from further publication of the Pentagon Papers.

5. TOM WELLS, *WILD MAN: THE LIFE AND TIMES OF DANIEL ELLSBERG* 271 (2001).

6. See SANFORD J. UNGAR, *THE PAPERS & THE PAPERS: AN ACCOUNT OF THE LEGAL AND POLITICAL BATTLE OVER THE PENTAGON PAPERS* 40 (1972) (stating that the Rand Corporation was selected to prepare the report because it was a Department of Defense repository).

7. See, e.g., Marian Wang, *Pentagon Papers Reporter: What the WikiLeaks 'War Logs' Tells Us*, PROPUBLICA (July 26, 2010, 6:25 PM), <http://www.propublica.org/blog/item/sheehan-interview>.

8. DONALD M. GILLMOR & JEROME A. BARRON, *MASS COMMUNICATION LAW: CASES AND COMMENT* 113 (2d ed. 1974).

9. *United States v. New York Times Co.*, 328 F. Supp. 324, 325 (S.D.N.Y. 1971) (refusing to grant a requested injunction but allowed the temporary restraining order to be extended), *rev'd per curiam and remanded with instructions*, 444 F.2d 544 (2d Cir.), *cert. granted*, 403 U.S. 942, *rev'd per curiam*, *New York Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971).

10. *Id.* at 331.

11. GILLMOR & BARRON, *supra* note 8, at 113 (citing *United States v. New York Times Co.*, 444 F.2d 544, 544 (2d Cir. 1971) (*per curiam*), *rev'd per curiam*, *Pentagon Papers*, 403 U.S. 713 (1971)).

12. *Id.*

In the meantime, the *Washington Post* sought to publish the Papers as well.¹³ Accordingly, the United States sought an injunction against the *Post* in the U.S. District Court for the District of Columbia.¹⁴ There, Judge Gerhard Gesell rejected the government's request for injunctive relief and the federal appeals court in Washington affirmed.¹⁵ This meant that the *Washington Post* was free to publish without fear of government intervention but the *New York Times* was not. Other papers such as the *Boston Globe*, the *St. Louis Post-Dispatch*, the *Chicago Sun-Times*, and the *Los Angeles Times* also published portions of the Pentagon Papers.¹⁶ The government sought and obtained injunctive relief against the *Boston Globe* and the *St. Louis Post Dispatch*, but did not proceed against the *Chicago Sun-Times* or the *Los Angeles Times*.¹⁷

The Supreme Court decision in the *Pentagon Papers* case was a clear defeat for government claims of national security and an equally clear victory for freedom of the press. The *Pentagon Papers* case is one of the great First Amendment cases, and yet the famous decision was only a per curiam opinion that contained just twenty-six lines.¹⁸ Of those, only six lines dealt with a substantive First Amendment principle.¹⁹ The Court relied on the doctrine of prior restraint and declared that a prior restraint comes before the Supreme Court "bearing a heavy presumption against its validity."²⁰ Furthermore, the government bears a heavy burden in order to justify such a restraint.²¹ The Supreme Court ruled 6–3 that the government had "not met that burden."²²

Why was such an important case a per curiam opinion in the first place? The answer seems to be that there was no time for the usual opinion process to be followed. Usually, the Chief Justice would assign the opinion to one of the Justices, the opinion would be

13. *Id.*

14. *Id.*

15. *Id.*

16. *See id.* at 113–14 (stating that the *Globe* and the *Post-Dispatch* only published one article regarding the Pentagon Papers as the government later obtained restraining orders against each; but the *Chicago Sun-Times* and the *Los Angeles Times* were never subject to any restraining orders after publishing their articles).

17. *Id.*

18. *See Pentagon Papers*, 403 U.S. 713, 714 (1971).

19. *See id.*

20. *Id.* (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

21. *See id.* (citing *Bantam Books*, 372 U.S. at 70).

22. *Pentagon Papers*, 403 U.S. at 714.

circulated, and the Justices would make their comments with respect to corrections, revisions, deletions, and additions.²³ However, there was no time for standard procedure. In response to the national furor that publication of the Pentagon Papers occasioned, the Court gave the case expedited review.²⁴

In the *Pentagon Papers* case there were nine opinions.²⁵ There could hardly have been more. Yet a fundamental point shines through the separate opinions. Each of the Justices thought there should be some judicial role in considering collisions between national security and the First Amendment.²⁶ There were, of course, intense differences of opinion among them about the extent of judicial involvement.

I. JUSTICES BLACK, DOUGLAS, AND BRENNAN, AND FIRST AMENDMENT ABSOLUTISM

To show the deep differences of opinion on the Court, one only has to contrast Justice Hugo Black's separate opinion with those of most of his colleagues. Justice Black's First Amendment absolutism was evident in every sentence of his opinion. He wrote, "Every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible and continuing violation of the First Amendment."²⁷ He was shocked that, as he put it, "some of [his] brethren [were] apparently willing to hold that publication of news may sometimes be enjoined."²⁸ On this point, he was quite correct. Some of the Justices he was referring to were among the six who joined him in upholding the denial of the government's request for an injunctive relief against the press.

The only Justice who took a categorically absolutist position on the First Amendment was Justice Black. He gave no weight to claims of national security even when supported by those parts of the

23. See, e.g., WILLIAM H. REHNQUIST, *THE SUPREME COURT* 259 (First Vintage Books ed., Random House 2002) (1987).

24. *New York Times Co. v. United States*, 403 U.S. 942 (1971) (granting certiorari and setting oral arguments for the following day).

25. *Pentagon Papers*, 403 U.S. at 713–63.

26. Michael J. Gaffney, *Legal and Constitutional Issues*, in *INSIDE THE PENTAGON PAPERS* 197, 200 (John Prados & Margaret Pratt Porter eds., 2004) (citing *Pentagon Papers*, 403 U.S. at 714).

27. *Pentagon Papers*, 403 U.S. at 715 (Black, J., concurring).

28. *Id.*

Constitution that impose specific responsibilities on the executive, which might run counter to extending full protection to First Amendment claims.²⁹ All such arguments, said Justice Black, seek to support a holding that “despite the First Amendment’s emphatic command, the Executive branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of ‘national security.’”³⁰ Furthermore, “[t]he word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.”³¹ Indeed, he was arguing that all the security that the nation needs is provided by the guarantees of freedom of speech and press.³² I doubt there is a single Justice on the Supreme Court today who would take Justice Black’s position.

Justice Black exempted the opinions of Justices William Brennan and William Douglas from his surprise that some of the Justices were willing to hold that the press might sometimes be enjoined. Justice Douglas’s view is in fact equally categorical: the First Amendment leaves “no room for government restraint on the press.”³³ However, unlike Justice Black, he felt it necessary to examine the Espionage Act to see if there was any merit to the government’s position that “the word ‘communicates’ is broad enough to encompass publication.”³⁴ He concluded that there was no such merit.³⁵ Since no statute authorized the executive branch’s action, any authority for granting injunctive relief against the press must flow from its “inherent power.”³⁶ Such power might exist if it was

29. JAMES J. MAGEE, MR. JUSTICE BLACK: ABSOLUTIST OF THE COURT 26 (1980).

30. *Pentagon Papers*, 403 U.S. at 718 (Black, J., concurring).

31. *Id.* at 719.

32. *See* Gaffney, *supra* note 26, at 199 (citing *Pentagon Papers*, 403 U.S. at 719).

33. *Pentagon Papers*, 403 U.S. at 720 (Douglas, J., concurring) (citing *Beauharnais v. Illinois*, 343 U.S. 250, 267 (1952) (Black, J., dissenting)).

34. *Id.* at 721 (interpreting the text of 18 U.S.C. § 793(e) within the Espionage Act and finding that the word “communicates” does not encompass “publishes”). Section 793(e) of the Espionage Act states “[w]hoever having unauthorized possession of, access to, or control over any document, writing . . . or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates . . . the same to any person not entitled to receive it . . . [s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both.” If “communicates” did mean “publishes,” then the government’s claim that the publishers of the *New York Times* were in violation of the Espionage Act would have had greater force.

35. *Id.*; *see also* Gaffney, *supra* note 26, at 199.

36. *Pentagon Papers*, 403 U.S. at 722; *see also* Gaffney, *supra* note 26, at 199.

preceded by a congressional declaration of war.³⁷ However, Congress had not issued a declaration of war with respect to Vietnam and presidential wars were not authorized. Therefore, there was no case for “inherent power” either.³⁸ However, suppose that serious adverse consequences flowed from press disclosure of the contents of the Pentagon Papers. That surely would be no basis for upholding a prior restraint on the press in Justice Douglas’s view: “The dominant purpose of the First Amendment was to prohibit the widespread practice of government suppression of embarrassing information.”³⁹

Justice Brennan was clear how the case should be resolved: “[T]he First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases.”⁴⁰ In his concurrence, Justice Brennan conceded that some of the restraints issued by the courts below may have been warranted given the unavoidable haste in which those decisions were reached.⁴¹ This was so particularly in light of the fact that “never before [had] the United States sought to enjoin a newspaper from publishing information in its possession.”⁴² Justice Brennan objected that the government’s request for injunctive relief was based on the possibility of prejudice to the “national interest.”⁴³ However, there was only one justification for a prior restraint and that was during war.⁴⁴ The American military intervention in Vietnam was not preceded by a formal declaration of war. This was true also of the Gulf War, the invasion of Iraq, and our present military engagement in Afghanistan; all were undeclared.

Brennan did not deal with the issue of the constitutional validity of prior restraints against the press during undeclared wars. However, he did observe that even in the case of a nuclear holocaust, the executive branch “must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary.”⁴⁵ The courts were not

37. See Gaffney, *supra* note 26, at 198 (citing *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (stating that the Court may allow for exceptions in government action during times of war)).

38. *Pentagon Papers*, 403 U.S. at 722.

39. *Id.* at 723.

40. *Id.* at 725 (Brennan, J., concurring).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 726 (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

45. *Id.* at 727.

to take the word of the executive; they were obliged to demand proof. In First Amendment cases of this nature, the courts, not the executive, were to have the last word.⁴⁶

For Justices Black, Douglas, and Brennan, the First Amendment trumped national security considerations when the government was seeking injunctive relief against the press. However, for the other three Justices who comprised the *Pentagon Papers* majority—Stewart, Marshall and White—reconciling the conflict of national security versus freedom of the press was far more difficult to resolve.

II. JUSTICES STEWART, MARSHALL, AND WHITE, AND THE RULE OF LAW THEME

Justice Stewart observed that in the age of nuclear power, the President of the United States has much greater “constitutional independence” in areas of national defense and foreign relations than does the prime minister of a country with a parliamentary system of government.⁴⁷ Critical public opinion is the only real restraint on the President’s actions in these areas.⁴⁸ Furthermore, he said, critical public opinion is dependent upon a press that is “alert, aware, and free.”⁴⁹

On the other hand, national defense and international relations “require both confidentiality and secrecy.”⁵⁰ How then to resolve the dilemma between the government’s need for confidentiality and the people’s dependence on a free press? For Justice Stewart the answer was clear: “The responsibility must be where the power is.”⁵¹ The executive should resolve the dilemma: it is for the President “to determine and preserve the degree of internal security necessary” for the exercise of his defense and foreign affairs responsibilities.⁵² The role for Congress in these circumstances is to enact “specific and appropriate criminal laws to protect government property and preserve government secrets.”⁵³ Congress had in fact passed such criminal

46. *Id.* at 726–27.

47. *Id.* at 727–28 (Stewart, J., concurring).

48. *See id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 729.

53. *Id.* at 730.

laws relevant to the facts of this case.⁵⁴ If the government chose to prosecute under this legislation, then the courts would have to determine whether this legislation was applicable.⁵⁵

At this point, we should stop and ask what Justice Stewart was suggesting. He was making the following argument: under existing legislation—presumably the Espionage Act—criminal charges could be brought against Katherine Graham, publisher of the *Washington Post*, and Arthur Sulzberger, publisher of the *New York Times*. To even entertain such a suggestion takes us into an entirely different First Amendment paradigm than that shared by Justices Black and Douglas. Furthermore, Justice Stewart argued that if Congress were to pass a law authorizing a civil suit, say, which permitted the government to enjoin the press in the interests of national security, then the courts would have to determine the applicability of the facts of the case to the hypothetical statute as well as the constitutionality of such a law.⁵⁶

However, Congress had not passed a law governing the facts of the *Pentagon Papers* case. In such a circumstance, Justice Stewart believed it was wrong to ask the courts to decide the dilemma of national security versus freedom of the press.⁵⁷ It is the job of the executive to decide the issue. The executive was undoubtedly correct that some of the *Pentagon Papers* should be kept secret “in the national interest.”⁵⁸ But then Justice Stewart did a turnabout. He said he could not say that any of these documents would result in irreparable injury to the nation.⁵⁹ (“Irreparable injury” is the standard that courts use to decide whether injunctive relief should lie.⁶⁰) Since there was no irreparable injury, under the First Amendment, the only resolution possible was to deny the injunctive relief sought by the government. Therefore, it would appear Justice Stewart did not truly believe that resolving the clash between national security and freedom of the press in the *Pentagon Papers* case was a presidential responsibility to which the courts must defer.

54. *Id.* (explaining that such laws included the protection of government property, the scope of which were relevant to the issues presented in the cases at hand).

55. *Id.*

56. *Id.*

57. See Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 363–64 (1986).

58. *Pentagon Papers*, 403 U.S. at 730.

59. *Id.*

60. *E.g.*, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506 (1959).

The theme of Justice Marshall's opinion in the *Pentagon Papers* case is the importance of the rule of law. The "ultimate issue" in the *Pentagon Papers* case was "whether this Court or the Congress has the power to make law."⁶¹ For Marshall, it was very clear that the Constitution does not permit "the courts and the Executive Branch" to make law where Congress has not done so.⁶² Justice Marshall reasoned that this was not a situation where Congress simply neglected to provide a remedy to a serious problem.⁶³ In the past, Congress had provided the "Executive with broad power to protect the Nation from disclosure of damaging state secrets."⁶⁴

Justice Marshall pointed out that the Espionage Act provided that anyone who had unauthorized possession of information injurious to the United States and who "willfully communicates" it to a person not entitled to receive it would be subject to criminal sanction.⁶⁵ Under this interpretation, the publishers of the *Washington Post* and the *New York Times* could have been prosecuted, and if found guilty, fined or jailed or both. Justice Marshall conceded, however, that the meaning of the word "communicates" in the statute did not refer to "publication of newspaper stories."⁶⁶ Justice Marshall then went on to point to various proposals that had been made to Congress to make "the conduct engaged in here unlawful" and which would have given "the President the power that he seeks in this case."⁶⁷ However, he acknowledged that Congress had refused to enact them.⁶⁸

Justice White's opinion emphasized a theme Justice Stewart had sounded as well. Congress had in fact passed criminal laws relevant to the facts of this case. Justice White noted that Section 798 of

61. *Pentagon Papers*, 403 U.S. at 741 (Marshall, J., concurring).

62. *Id.* at 742. Counsel for the *New York Times* wisely pressed this point. Floyd Abrams, who was co-counsel with Professor Alexander Bickel in the *Pentagon Papers* case and whose reflections appear elsewhere in this Issue, has observed that the bulk of their brief to Judge Gurfein in the district court stressed that there was no statutory basis for the government's attempt to secure injunctive relief against the *Times*. See FLOYD ABRAMS, SPEAKING FREELY 23 (2005) (stating that the government failed to demonstrate that the *Times* had violated any statute); see also Floyd Abrams, *The Pentagon Papers After Four Decades*, 1 WAKE FOREST J.L. & POL'Y 7 (2011).

63. *Pentagon Papers*, 403 U.S. at 743.

64. *Id.*

65. *Id.* at 745 (citing the Espionage Act, 18 U.S.C. § 793(e) (2006)).

66. *Id.*

67. *Id.* at 746.

68. *Id.* at 745-46.

the Espionage Act proscribed “knowing and willful publication of any classified information concerning the cryptographic systems or communication intelligence activities of the United States as well as any information obtained from communication intelligence operations.”⁶⁹ What he was really saying was that Katherine Graham, publisher of the *Washington Post*, and Arthur Sulzberger, publisher of the *New York Times*, could be prosecuted under this and kindred provisions of the Espionage Act. Justice White was quite blunt here: “I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.”⁷⁰

However, the fact was the government had not chosen to prosecute under the Espionage Act. Nonetheless, the government’s position was that the inherent constitutional powers of Congress and the judiciary provided the constitutional basis to issue an injunction—a prior restraint—against the press in these circumstances.⁷¹ Unlike Justice Black, Justice White would not say that the First Amendment would never “permit an injunction against publishing information about government plans or operations.”⁷² But in this case, Justice White concluded that the government had failed to meet the “unusually heavy justification [required] under the First Amendment.”⁷³ In summary, for Justices Stewart, Marshall, and White it was of vital significance that Congress had not passed a law that authorized enjoining the press. The Court could not, and should not, act in the absence of law. Therefore, under the First Amendment, the only resolution possible was to deny the injunctive relief sought by the government.

III. JUSTICES HARLAN AND BLACKMUN AND CHIEF JUSTICE BURGER: DISSENT AND DEFERENCE

Justices Harlan and Blackmun and Chief Justice Burger dissented.⁷⁴ What was their opinion with regard to the judicial role

69. *Id.* at 735–36 (White, J., concurring) (citing 18 U.S.C. § 798 (2006)).

70. *Id.* at 737.

71. *Id.* at 732.

72. *Id.* at 731; *see also id.* at 731 n.1 (reasoning that “Congress has authorized a strain of prior restraints against private parties in certain instances.”).

73. *Id.* at 733.

74. *Id.* at 752.

when government seeks to restrain the press in the name of national security? Justice Harlan insisted the judicial role was limited.⁷⁵ This conclusion was based on the doctrine of separation of powers and on the executive's "constitutional primacy in the field of foreign affairs."⁷⁶ However, according to Justice Harlan, the courts should still do two things. First, "the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power."⁷⁷ For Justice Harlan, the ultimate decision rested with the executive.⁷⁸ Second, the judiciary had to be assured by the head of the relevant executive department that national security would be irreparably damaged.⁷⁹ In the *Pentagon Papers* case, that head would be the Secretary of State or the Secretary of Defense. One would have to give his personal consideration to the issue.

However, he wrote, the judiciary should not "go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security."⁸⁰ Justice Harlan did not believe that the "opinions of either the District Court or the Court of Appeals in the *Post* litigation" gave the deference that should be given to the executive branch in the field of foreign affairs.⁸¹ However, Justice Harlan still believed there was a role in a *Pentagon Papers*-type case for the judiciary. The courts must be assured that the executive has seriously considered the national security issue and found it of sufficient gravity to warrant a restraint on the press.⁸² Of course, this very limited review provides only slight protection for First Amendment interests. Certainly, it would be a rare Secretary of State or Secretary of Defense who would say after the Attorney General had authorized a request for injunctive relief against the press that national security concerns did not warrant the restraint. Indeed, as a result of the limited scope of the judicial role as Justice Harlan conceived it, there is no need for the Court to actually examine the documents or data at issue.

75. *Id.* at 756 (Harlan, J., dissenting).

76. *Id.*

77. *Id.* at 757.

78. *Id.* at 757–58.

79. *Id.* at 757.

80. *Id.*

81. *Id.* at 758.

82. *Id.* at 758–59.

If we compare Justice Harlan's opinion with those of two Justices in the majority—Justices Stewart and White—we see that they too would have given a good deal of deference to the Executive if there had been a statute authorizing injunctive relief against the publication of classified or confidential government documents. However, it is questionable whether they would have limited the judicial role to the extent advocated by Justice Harlan. Indeed, the full measure of the deference that Justice Harlan would have extended to the executive is demonstrated by his dissent.⁸³ If Justice Harlan's view had prevailed, the injunction below would have been upheld despite the presumption of invalidity, which First Amendment law had traditionally attached to prior restraints.

Justice Blackmun's opinion criticized the very limited time with which the lower courts and the Supreme Court were given to deal with the great issues presented.⁸⁴ Justice Blackmun thought these cases should be remanded so that standards could be developed for evaluating "the broad right of the press to print and . . . the very narrow right of the government to prevent."⁸⁵ He wrote that after studying the material, he shared the government's concerns that publication of the Papers would cause "the death of soldiers, the destruction of alliances" and difficulties "negotiat[ing] with our enemies."⁸⁶

Justice Blackmun's opinion is far removed from the opinions of Justices Black, Douglas, and Brennan. Indeed, Blackmun observed that "[t]he First Amendment, after all, is only one part of an entire Constitution."⁸⁷ Justice Blackmun was very clear—at least in this early phase of his service on the Supreme Court—that he could not "subscribe to a doctrine of unlimited absolutism for the First amendment at the cost of downgrading other provisions."⁸⁸ Finally, it should be noted that in making his decision to dissent, he emphasized that he had read some of the documents at issue.⁸⁹ However, he did

83. *Id.* at 756–58 (concluding that the Constitution grants exclusive jurisdiction over decisions of foreign policy to the executive and legislative branches).

84. *Id.* at 759–62 (Blackmun, J., dissenting) (stating that under other circumstances, with a case of this importance, he would have voted to remand).

85. *Id.* at 761.

86. *Id.* at 762–63 (quoting *United States v. Wash. Post Co.*, 446 F.2d 1327, 1330 (D.C. Cir. 1971) (Wilkey, J., dissenting), *cert. granted*, 403 U.S. 943, *aff'd, sub nom. Pentagon Papers*, 403 U.S. 713 (1971) (per curiam)).

87. *Id.* at 761.

88. *Id.*

89. *Id.* at 762.

not make clear whether he thought such judicial consideration of the documents at issue should be a requirement. His colleague, Justice Harlan, for example, did not think it was a requirement.⁹⁰

In his opinion Chief Justice Burger complained, as had Justices Harlan and Blackmun, that the case came before the courts with unseemly speed.⁹¹ The *New York Times* had possession of the Pentagon Papers for months.⁹² The courts and the government were required to confront the issues in this case within a far tighter time-frame. The Chief Justice thought the *Times* should have given the government an opportunity to review the Pentagon Papers.⁹³ The *Times* should have tried to reach an agreement with the government on what should and what should not be published. The Chief Justice wrote that although he was in general agreement with Justices Harlan and Blackmun, he was “not prepared to reach the merits.”⁹⁴

Chief Justice Burger joined Justice Blackmun in reasoning that “the First Amendment right itself is not an absolute.”⁹⁵ The Chief Justice complained that “only those judges to whom the First Amendment is absolute and permits of no restraint in any circumstance or for any reason, are really in a position to act”⁹⁶ However, for those like him who did not share this view, the problem was: “We do not know the facts of the cases.”⁹⁷ Neither did the judges on the District Court nor those on the Courts of Appeals. In such circumstances, Chief Justice Burger agreed with the Second Circuit that the case should be remanded.⁹⁸

The Blackmun and Burger opinions in the *Pentagon Papers* case did not directly confront or consider in any detail the role of the judiciary with respect to collisions between the First Amendment and national security. However, at least implicitly, I think there was some disagreement between Burger and Blackmun, on the one hand, and Harlan on the other. I think both Burger and Blackmun thought

90. See *id.* at 756–58 (Harlan, J., dissenting) (concluding that once the executive determined that the subject matter was within his foreign relations power, the judiciary’s role in matters of foreign affairs was limited to reviewing that decision).

91. *Id.* at 748–49 (Burger, C.J., dissenting).

92. *Id.* at 750.

93. *Id.* at 751.

94. *Id.* at 752.

95. *Id.* at 749.

96. *Id.* at 748.

97. *Id.*

98. *Id.* at 752.

judges should review the material themselves. Indeed, their opinions are bitter that they did not have an opportunity to do this. Justice Harlan, however, was clear that if the Court is assured by the executive that the national security issue is very serious and requires restraint, such review is not required.

IV. SUMMING UP: THE SIGNIFICANCE OF THE NINE OPINIONS

In summary, all the Justices in the *Pentagon Papers* case thought there should be some judicial role in deciding whether the government can enjoin the press in the interest of national security. However, there was a vast difference of opinion among the Justices on the nature of that role. For Justice Hugo Black it was the very essence of the judicial function to strike down injunctions against the press obtained by the government.⁹⁹ For Justice Harlan, the judicial function was far more limited. If foreign affairs or national security were involved, the judiciary should only extend minimal oversight even where serious First Amendment issues were presented.¹⁰⁰ The other Justices in the *Pentagon Papers* case fell into intermediate positions—some closer to the First Amendment absolutism of Justice Black, others closer to the concerns expressed by Justice Harlan as to the extent that judicial oversight should be permissible when the executive believes the nation's defense or foreign relations are threatened.

Alexander Bickel, the lawyer for the *New York Times* in the *Pentagon Papers* case, captured the divergences in opinion among Supreme Court Justices in First Amendment cases such as this one when he wrote,

Actually, ambiguity . . . is, if not the theory, at any rate the condition of the First Amendment in the law of our Constitution. Nothing is more characteristic of the law of the First Amendment—not the rhetoric, but the actual law of it—than the Supreme Court's resourceful efforts to cushion rather than resolve clashes

99. *Id.* at 714–15 (Black, J., concurring).

100. *Id.* at 756–57 (Harlan, J., dissenting).

between the First Amendment and interests conflicting with it.¹⁰¹

It is, therefore, illustrative of the observations made that Justices Stewart, White, and perhaps Marshall as well had declined to say that they would never uphold injunctions against the press, under any circumstances. More surprising, however, is another observation from Professor Bickel.

[A]s I conceive the contest established by the First Amendment, and as the Supreme Court of the United States appeared to conceive it in the *Pentagon Papers* case, the presumptive duty of the press is to publish, not to guard security or to be concerned with the morals of its sources.¹⁰²

I would like to think that the foregoing statement is what the *Pentagon Papers* case stands for. However, as I have analyzed the opinions of the Justices in that case, it seems that only four—Black, Douglas, Brennan, and Marshall—really subscribed to it. Certainly, the dissenters—Harlan, Burger, and Blackmun—did not. Furthermore, I am not sure that Stewart and White would have subscribed to this statement either. They, like Marshall, were concerned with the absence of statutory authority. However, the refusal of Congress to enact a law authorizing the United States to request injunctive relief against the press where national security is jeopardized, either then or now, is an indication that Professor Bickel’s statement that the “duty of the press is to publish, not to guard security”¹⁰³ reflects a national understanding of the meaning of the First Amendment.

V. THE WIKILEAKS CONTROVERSY

Let us now move from the *Pentagon Papers* case to the WikiLeaks controversy. WikiLeaks is a website founded by an Australian citizen, Julian Assange, who resided in Sweden at the time his

101. ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 78 (1st ed. 1975).

102. *Id.* at 81.

103. *Id.*

website became famous.¹⁰⁴ In July 2010, WikiLeaks released over 75,000 classified military documents concerning six years of U.S. military records and operations in Afghanistan.¹⁰⁵ Julian Assange heralded the event as equivalent to “opening the files of East Germany’s secret Stasi police.”¹⁰⁶ Subsequently, he posted 15,000 more documents.¹⁰⁷ Taking a more somber view, U.S. National Security Adviser General James Jones warned that release of such classified information “could put the lives of Americans and [its] partners at risk”¹⁰⁸ WikiLeaks gave the material to some traditional major media in the United States, United Kingdom, Germany, and elsewhere (e.g., the *New York Times*, the *Guardian*, *Der Spiegel*, *Le Monde*, and *El Pais*).¹⁰⁹ Unlike the original file dump on the WikiLeaks site, the *Guardian* and the *New York Times* reported that they had “spent weeks cross-checking the information.”¹¹⁰

WikiLeaks describes itself as a public forum for whistleblowers to expose government and corporate wrongdoing that has been kept under the cover of classified or confidential material.¹¹¹ Not everyone subscribes to this interpretation of WikiLeaks. Human rights groups in Afghanistan as well as the Paris-based, non-profit organization Reporters Without Borders expressed concern about Julian Assange’s posting of U.S. military records in Afghanistan.¹¹²

104. See John F. Burns & Eric Schmitt, *Sweden Adds to Drama over Founder of WikiLeaks*, N.Y. TIMES, Aug. 22, 2010, at A6.

105. See Charlie Savage, *Gates Assails WikiLeaks Over Release Of Reports*, N.Y. TIMES, July 30, 2010, at A8 (explaining the reaction of the U.S. Secretary of Defense to the release of 75,000 documents); *Unvarnished Look at a Hamstrung Fight*, N.Y. TIMES, July 26, 2010, at A1 (explaining that newspaper’s participation in the release of a six-year archive of classified documents).

106. *Wikileaks Says Evidence of War Crimes in Documents*, ASSOCIATED PRESS, July 26, 2010, available at 2010 WLNR 14917755.

107. Burns & Schmitt, *supra* note 104.

108. Press Release, The White House Office of the Press Secretary, Statement of National Security Adviser General James Jones on Wikileaks (July 25, 2010), available at <http://www.whitehouse.gov/the-press-office/statement-national-security-advisor-general-james-jones-wikileaks>.

109. Russell Adams & Jessica E. Vascellaro, *To Publish Leaks or Not to Publish?*, WALL ST. J., Nov. 29, 2010, <http://online.wsj.com/article/SB10001424052748703785704575643431883607708.html>.

110. E.g., *Afghanistan War Leak Papers Will Take ‘Weeks to Assess’*, BBC NEWS (July 27, 2010), <http://www.bbc.co.uk/news/world-us-canada-10770682>.

111. *About: What is WikiLeaks?*, WIKILEAKS, <http://wikileaks.ch/About.html> (last visited Apr. 14, 2011).

112. Adam Levine, *Rights Groups Express Concerns About WikiLeaks*, CNN.COM (Aug. 10, 2010), http://articles.cnn.com/2010-08-10/us/wikileaks.rights.groups_1_wikileaks-julian-assange-rights-groups; see Jean-Francois

Names of individuals appeared in the first batch of files posted by WikiLeaks, thereby placing those individuals at risk.¹¹³ The Secretary General of Reporters Without Borders said WikiLeaks' actions showed "incredible irresponsibility" in posting unfiltered, classified U.S. military records online.¹¹⁴ Giving some force to these claims, the Pentagon charged that the posted documents "disclosed the names of Afghans who collaborate with the U.S. military."¹¹⁵ Defending his actions, Assange responded, "We believe the way to justice is transparency, and we are clear that the end goal is to expose injustices in the world and try to rectify them."¹¹⁶

On Friday, October 22, 2010, the WikiLeaks website released more than 390,000 documents on the Iraq War.¹¹⁷ Many of the documents provide detailed accounts of detainee abuse carried out by Iraqi personnel. However, unlike the release of the Afghanistan War documents, WikiLeaks redacted locations and names.¹¹⁸ WikiLeaks gave "advance access" of this material to the *New York Times*, the Qatar satellite television network, Al-Jazeera, *Der Spiegel* in Germany, the Paris newspaper, *Le Monde*, the British newspaper, the *Guardian*, and Channel 4 in the United Kingdom.¹¹⁹

Julliard, *Open Letter to WikiLeaks Founder Julian Assange: "A Bad Precedent for the Internet's Future"*, REPORTERS SANS FRONTIÈRES (Aug. 12, 2010), <http://en.rsfo.org/united-states-open-letter-to-wikileaks-founder-12-08-2010,38130.html> (describing the disclosure of military informants' names as "highly dangerous" and "irresponsible").

113. E.g., Eric Schmitt & Charlie Savage, *Pentagon Studies Risks to Afghans From Leaks*, N.Y. TIMES, July 29, 2010, at A1.

114. Julliard, *supra* note 112. While Reporters Without Borders has decried some of WikiLeaks' practices as irresponsible, that organization has also staunchly defended WikiLeaks' promotion of transparency and has criticized efforts by foreign governments to sabotage the WikiLeaks website.

115. Scott Horton, *WikiLeaks: The National-Security State Strikes Back*, HARPER'S MAG. (Aug. 3, 2010, 11:25 AM), <http://harpers.org/archive/2010/08/hbc-90007466>.

116. Ellen Nakashima & Joby Warrick, *WikiLeaks Flexes Some Muscle*, WASH. POST, July 26, 2010, at A1. A disenchanted former close associate of Julian Assange observes in a book providing an insider's perspective on WikiLeaks that transparency may be in the eye of the beholder. "Someone who criticizes the fact that secrets always remain in the hands of a chosen few with power must answer the question of whether his publishing strategy truly makes them accessible to everyone. Is it not the case—that with the cables only the guardians of the secrets are being replaced?" DANIEL DOMSCHEIT-BERG, *INSIDE WIKILEAKS: MY TIME WITH JULIAN ASSANGE AT THE WORLD'S MOST DANGEROUS WEBSITE* 267 (2011).

117. Greg Miller & Peter Finn, *Secret Iraq War Files Offer Grim New Details*, WASH. POST, Oct. 23, 2010, at A1.

118. *Id.*

119. *Id.*

The October 22, 2010 WikiLeaks posting shows the influence of the established press on new media. In that posting, WikiLeaks followed the press practice of redacting names.¹²⁰ Arguably, this could improve a website like WikiLeaks' claim to be treated as part of the press and to be entitled, therefore, to the same protections accorded to the traditional press.¹²¹ However, WikiLeaks' most controversial posting was yet to come.

On Sunday, November 28, 2010, WikiLeaks disclosed 250,000 diplomatic cables exposing "years of U.S. foreign policy maneuvering that could prove embarrassing" to the United States and its allies.¹²² Major newspapers in the United States and Europe—the *New York Times* (U.S.), the *Guardian* (U.K.), *Der Spiegel* (Germany), *El Pais* (Spain), and *Le Monde* (France)—were given access to the material in advance of its appearance on the WikiLeaks website.¹²³ The *New York Times* began publishing the substance of the cables the next day, November 29.¹²⁴ The *Times* told its readers that it received the cables from a source it did not disclose, but explained that the cables were "originally obtained by WikiLeaks."¹²⁵ It is possible the "source" actually serves as a kind of straw man. This third-party approach would counter a charge that the *Times* and WikiLeaks were acting in concert. Such an approach might also help to resist an assertion that any legal liability that WikiLeaks faced was also shared by the *Times*.

The *Times* told readers it had taken care to ensure the material published from the diplomatic cables did not include information that "would endanger confidential informants or compromise national security."¹²⁶ The *Times* said it shared its redactions with WikiLeaks in hopes that WikiLeaks would follow suit.¹²⁷ Before publishing, the *Times* then contacted the Obama administration and

120. *Id.*

121. Mary Turck, *War Secrets, WikiLeaks and Journalism*, DAILY PLANET, July 25, 2010, <http://www.tcdailyplanet.net/blog/mary-turck/war-secrets-wikileaks-and-journalism>.

122. Jay Solomon, Adam Entous & Julian E. Barnes, *Vast Leak Discloses Diplomatic Secrets*, WALL. ST. J., Nov. 29, 2010, at A1.

123. *Id.* at A2.

124. See Scott Shane & Andrew W. Lehren, *Leaked Cables Offer a Raw Look Inside U.S. Diplomacy: Dispatches Chronicle Threats and Tensions*, N.Y. TIMES, Nov. 29, 2010, at A1.

125. Bill Kelly, *A Note To Readers: The Decision to Publish Diplomatic Documents*, N.Y. TIMES, Nov. 29, 2010, at A8.

126. *Id.*

127. *Id.*

informed it of the cables the paper planned to publish and asked the administration to indicate if any of that material would jeopardize the national interest.¹²⁸

It should be remembered that this was exactly what was not done in the Pentagon Papers affair. The *Times* published the Pentagon Papers without giving the government an advance look at what it planned to publish. The *New York Times* did not give the Nixon administration an opportunity to say what should be included and what should be excluded in the interest of national security. Indeed, Chief Justice Burger complained bitterly in his dissent that this should have been done.¹²⁹ In short, the *New York Times* cooperated with the Obama administration about the WikiLeaks publication of the diplomatic cables to a far greater extent than it did with the Nixon administration concerning publication of the Pentagon Papers. The *Times* voluntarily adopted a procedure, which if it had been required to adopt by statute, would have been the essence of a prior restraint.

The Obama administration responded negatively to the offer of the *Times* to indicate what part of the material in the diplomatic cables they would like excised. First, the administration said it was opposed to publication of any of the diplomatic cables.¹³⁰ Apparently upon realizing that this position was not going to be accepted by the *Times*, the administration then suggested additional redactions, some of which the *Times* did accept.¹³¹ Furthermore, the *Times* said it would forward the administration's objections regarding publication of some of the material that appeared in the diplomatic cables not only "to other news organizations" but also, "at the suggestion of the State Department[,] to WikiLeaks itself."¹³²

VI. THE ARREST AND PROSECUTION OF JULIAN ASSANGE

After the release of the confidential or classified material described above, Assange's legal troubles began. The Swedish government issued an arrest warrant for Assange based on sexual assault

128. *Id.*

129. *Pentagon Papers*, 403 U.S. 713, 750–51 (1971) (Burger, C.J., dissenting).

130. Kelly, *supra* note 125.

131. *Id.*

132. *Id.*

charges that had been filed against him there.¹³³ Assange went into hiding and the Swedes turned the matter over to Interpol.¹³⁴ Assange denied the charges and said they were “part of an elaborate plot to silence WikiLeaks.”¹³⁵ On December 7, 2010, Assange surrendered to British authorities in London.¹³⁶ After considering a request by the Swedish government for the extradition of Assange, a British judge found Assange to be a flight risk, denied his request for bail, and ordered him jailed.¹³⁷ Eventually, Assange’s request for bail was granted.¹³⁸ On February 24, 2011, a British judge approved an extradition request from the Swedish government that Assange will appeal.¹³⁹

Certainly, Assange’s arrest for an alleged sexual offense rather than for disclosure on WikiLeaks of confidential and classified material involving many governments is a surprise. Earlier, Attorney General Eric Holder announced that the Justice Department was considering prosecuting those responsible for publishing classified or confidential material about the wars in Afghanistan and Iraq, and later, the State Department cables.¹⁴⁰ Indeed, Attorney General Holder confirmed that the Department of Justice was specifically considering whether Assange “could be charged with a crime.”¹⁴¹ Clearly, for the United States, the obstacles to a successful prosecution of Assange are many. First, Assange, an Australian citizen, is not a citizen or resident of the United States.¹⁴² Furthermore, if Assange is extradited to Sweden, that country may refuse extradition if the request is politically motivated.¹⁴³

133. Anthony Faiola, *Assange in Talks to Come Out of Hiding*, WASH. POST, Dec. 7, 2010, at A11.

134. *Id.*

135. *Id.*

136. John F. Burns & Ravi Somaiya, *WikiLeaks Founder Is Jailed in Britain in Swedish Assault*, N.Y. TIMES, Dec. 8, 2010, at A1.

137. *Id.*

138. Ravi Somaiya, *Freed on Bail, WikiLeaks Founder Offers Defiant Note*, N.Y. TIMES, Dec. 17, 2010, at A13.

139. Jeremy Kirk, *British Judge Approves WikiLeaks’ Assange Extradition*, PCWORLD, Feb. 25, 2011, <http://www.pcworld.com/article/220561>.

140. Ashby Jones, *U.S. Faces Hard Bid to Prosecute Leakers*, WALL ST. J., Dec. 1, 2010, at A11.

141. Charlie Savage, *U.S. Weighs Prosecution of WikiLeaks Founder, but Legal Scholars Warn of Steep Hurdles*, N.Y. TIMES, Dec. 2, 2010, at A13.

142. *Id.*

143. Baruch Weiss, *Prosecuting WikiLeaks? Good Luck*, WASH. POST, Dec. 5, 2010, at B2.

Baruch Weiss, the lawyer for one of the lobbyist defendants in the AIPAC case,¹⁴⁴ has discussed why leaks cases are so difficult for the government.¹⁴⁵ For one thing, Mr. Weiss points out that there is no general federal statute making the disclosure of classified information illegal.¹⁴⁶ He explains why this is so.

When Congress tried to enact such a statute [i.e., a general law prohibiting the disclosure of classified information] President Bill Clinton sensibly vetoed it. His reason: The government suffers from such an overclassification problem—some intelligence agencies classify even newspaper articles—that a law of this sort would end up criminalizing the disclosure of innocuous information.¹⁴⁷

VII. PROSECUTING JULIAN ASSANGE UNDER THE ESPIONAGE ACT?

One option that has been suggested is that prosecution might lie under the Espionage Act.¹⁴⁸ As I noted earlier in my discussion of the *Pentagon Papers* case, several of the Justices in that case considered whether it was possible that a criminal prosecution might lie against the newspaper publishers who published the Pentagon Papers even though they could not support the government's request for an injunction in the absence of a statute.¹⁴⁹ They took this position because they believed the Espionage Act might have supported a criminal prosecution. However, legal commentators question whether an Espionage Act could ever be successfully used against Assange.¹⁵⁰ At least two issues beset such a prosecution. First, can the U.S. government prove that Assange's actions meet the specific intent re-

144. *United States v. Rosen*, 557 F.3d 192 (4th Cir. 2009) (denying defendants' motion to dismiss their charges of disclosing national defense information); *see also* Jerry Markon, *U.S. Drops Case Against Ex-Lobbyists*, *Wash. Post*, May 2, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/01/AR2009050101310.html>.

145. Weiss, *supra* note 143.

146. *Id.*

147. *Id.*

148. Dianne Feinstein, Op-Ed., *Prosecute Assange Under the Espionage Act*, *WALL ST. J.*, Dec. 7, 2010, at A19.

149. *See supra* Part II.

150. Savage, *supra* note 141.

quirement of the Act? Second, are Assange's postings on WikiLeaks protected by the First Amendment?

A. The Specific Intent Issue

The Espionage Act is a rather ancient statute at this point. Enacted in 1917, it is nearly one hundred years old. By today's First Amendment standards, the language of many of its prohibitions is vague and overbroad.¹⁵¹ No successful prosecution against a news organization has even been brought under the Act. The specific intent requirement of the Act may be a real obstacle to a successful prosecution of Assange.

A recent case is illustrative. Two officials of AIPAC, a pro-Israel lobbying group, were indicted under a provision of the Espionage Act for conspiring to transmit information relating to the national defense to those not entitled to receive it.¹⁵² The defense filed a motion to dismiss the indictment, which was denied.¹⁵³ Ultimately, the prosecution was dropped before the trial.¹⁵⁴ In the AIPAC case, Judge Ellis, who declined to dismiss the indictment brought under the Espionage Act,¹⁵⁵ nonetheless declared at the same time that a successful prosecution under the Act had to meet a specific intent requirement. "[I]nformation relating to the national defense, whether tangible or intangible, must necessarily be information which if disclosed is potentially harmful to the United States, and the defendant must know that disclosure of the information is potentially harmful to the United States."¹⁵⁶

Furthermore, it should be mentioned that before the diplomatic cables were posted, Assange went to the State Department and asked what redactions its officials would like to make.¹⁵⁷ The State Department refused to cooperate.¹⁵⁸ It might therefore be difficult, at least in respect to the postings of the diplomatic cables, to prove that

151. *Id.*

152. *United States v. Rosen*, 557 F.3d 192, 194 (4th Cir. 2009).

153. *United States v. Rosen*, 445 F.Supp. 2d 602, 602 (E.D. Va. 2006), *aff'd*, 557 F.3d 192 (4th Cir. 2009).

154. *Weiss*, *supra* note 143.

155. *Rosen*, 445 F.Supp. 2d at 602.

156. *Id.* at 641.

157. *Weiss*, *supra* note 143.

158. *Id.*

he knowingly intended to harm the United States. One would expect his defense counsel to argue that his actions prove the contrary.

B. Is WikiLeaks Protected by Freedom of the Press?

The second issue is the First Amendment problem the WikiLeaks postings present. Even if the specific intent requirement of the Espionage Act is met, the prosecution of Assange for WikiLeaks' posting would still have to survive a First Amendment challenge. Assange would certainly insist that his WikiLeaks posting should be protected under the First Amendment's guarantee of freedom of the press.¹⁵⁹ If Assange were prosecuted for his WikiLeaks postings, it is most likely he would insist that the WikiLeaks website is part of the press. Baruch Weiss points out that neither the *Washington Post* nor the *New York Times* is being investigated for publication of the same material that Julian Assange posted on WikiLeaks.¹⁶⁰ And the reason for this is clear: the First Amendment freedom of the press guarantee. Weiss says the Justice Department's practice has been to "refrain from bringing leaks indictments against traditional media outlets."¹⁶¹ Yet Julian Assange is being investigated. Weiss suggests "[Attorney General] Holder may feel emboldened to move against WikiLeaks because it does not have the look or feel of traditional news media."¹⁶²

Is WikiLeaks part of the press? Today, some bloggers receive press passes and participate in presidential news conferences.¹⁶³ The WikiLeaks website exists in order to dispense information. However, some, like Senator Dianne Feinstein of California, contend that Assange is "no journalist" but is instead an "agitator intent on damaging our government, whose policies he happens to disagree

159. See 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 (explaining the view that WikiLeaks qualifies as a media source that should receive First Amendment protection).

160. Weiss, *supra* note 143.

161. *Id.*

162. *Id.*

163. E.g., Peter Baker, *How a Blogger's News Conference Query Came About*, N.Y. TIMES, June 26, 2009, <http://www.nytimes.com/2009/06/26/us/politics/26baker.html> (illustrating the Obama administration's innovative treatment of bloggers, including issuing press credentials and occasionally calling on bloggers for the honor of the first question at press conferences).

with, regardless of who gets hurt.”¹⁶⁴ The test of its claim to First Amendment protection is certainly not whether governments or society at large approve of the information that it chooses to disseminate. Therefore, the case for excluding WikiLeaks from the protection afforded by the freedom of the press guarantee has to be because its content is transmitted on the Internet rather than through the printed pages of daily newspapers. To state this argument is to refute it. This argument is particularly weak in a case such as WikiLeaks when traditional media outlets have been working so closely with WikiLeaks.¹⁶⁵ Their cooperation has only served to increase the reach of the WikiLeaks postings.

Ultimately, the WikiLeaks postings demonstrate an interaction between WikiLeaks and the established press. It is first a story of competition and then ultimately of cooperation. When the first postings of material concerning the Afghanistan War were posted on WikiLeaks, the reaction of the newspaper press was critical.¹⁶⁶ Specifically, the press complained. Names of soldiers and other personnel had been revealed, and the press reported that people’s lives were put in danger.¹⁶⁷ However, by the time of WikiLeaks’ posting of files concerning Iraq, and later releases of diplomatic cables, WikiLeaks made redactions. The press praised the fact that WikiLeaks was making redactions itself.¹⁶⁸ The press was given advance access to the material posted by WikiLeaks at the outset.¹⁶⁹ Instead of competing with and scooping the newspaper press, WikiLeaks had apparently decided to cooperate with established press. Indeed, WikiLeaks had become a kind of press adjunct. But, of course, the

164. Feinstein, *supra* note 148.

165. E.g., Brett J. Blackledge & Jamey Keaten, *Respected Media Outlets Collaborate with WikiLeaks*, ABCNEWS.COM (Dec. 3, 2010), <http://abcnews.go.com/Business/wireStory?id=12302107> (noting “extraordinary collaboration” between respected media outlets and WikiLeaks).

166. See, e.g., Susan Page, *Papers Detail the Scope of a Tense, Difficult War*, USA TODAY, July 27, 2010, at A1 (questioning whether the amount of and detail in posted material would increase growing unease about the war in Afghanistan).

167. See, e.g., David Martin, *Pentagon: WikiLeaks Endangers Soldiers, Afghans*, CBS NEWS.COM (July 29, 2010), <http://www.cbsnews.com/stories/2010/07/29/eveningnews/main6725935.shtml>.

168. See, e.g., Larry Shaughnessy, *WikiLeaks Redacted More Information in Latest Documents Release*, CNN.COM (Oct. 22, 2010), http://articles.cnn.com/2010-10-22/us/wikileaks.editing_1_wikileaks-founder-julian-assange-redacted-documents.

169. E.g., Blackledge & Keaten, *supra* note 165.

fact that Julian Assange and WikiLeaks, if prosecuted, will make a First Amendment defense does not mean they will prevail.

In cases such as this, “rigorous scrutiny” is applied but a compelling government interest may trump First Amendment considerations.¹⁷⁰ In *Holder v. Humanitarian Law Project*, the Supreme Court ruled that, under the facts of that case, national security and foreign affairs considerations should prevail over First Amendment claims.¹⁷¹ Chief Justice Roberts, writing for the Supreme Court majority, gave the First Amendment claimants the benefit of the strict scrutiny standard of review, but then wrote that the Court would defer to the government’s assessment of the facts as to whether the national security and foreign affairs interests of the United States were endangered.¹⁷² Yet such deference deprives the strict scrutiny standard of review of the protection it is designed to afford. It is entirely plausible that such an approach might be taken if Assange was prosecuted in the United States for postings that arguably jeopardized national security and interfered with the United States’ relationships with other countries.

VIII. WIKILEAKS AND THE *PENTAGON PAPERS* CASE COMPARED

What parallels can we draw between the *Pentagon Papers* case and WikiLeaks? The two cases are hardly exact parallels. For one thing, in the *Pentagon Papers* case the government was seeking to enjoin publications. The government was therefore asking for the imposition of a prior restraint. In that context, the press received the benefit of the “heavy presumption” against such prior restraints.¹⁷³ However, in the WikiLeaks controversy the discussion centers on the possibility of a criminal prosecution against Julian Assange and there is no equivalent “heavy presumption” against such a prosecution.

There are, of course, some parallels. In each case, the actual leaker was arrested—Private First Class Bradley Manning, a soldier

170. See *Holder v. Humanitarian L. Project*, 130 S. Ct. 2705, 2724 (2010) (citation omitted).

171. *Id.* at 2730 (holding that while other statutes relating to speech and terrorism may not pass First Amendment review, the statute before the Court in that case did not violate the First Amendment).

172. *Id.* at 2727.

173. *Pentagon Papers*, 403 U.S. 713, 714 (1971) (per curiam).

working for U.S. Army intelligence in the WikiLeaks case,¹⁷⁴ and Daniel Ellsberg, a Rand employee, in the *Pentagon Papers* case.¹⁷⁵

However, in the *Pentagon Papers* case, the newspaper publishers were not prosecuted. Assange has not yet been the subject of a U.S. criminal prosecution, but it may happen. Some aspects of his situation may be helpful to him. Assange is not a U.S. citizen; he lives abroad and his website was not established in the United States. However, from the perspective of a prosecutor, the case has some favorable aspects as well. The newspaper press is obviously an addressee of the First Amendment. An issue remains as to whether a website such as WikiLeaks is part of that same press. Furthermore, Assange and WikiLeaks seek to challenge the very idea and practice of government secrets altogether. Such a claim is unlikely to receive full First Amendment protection.

174. Peter Grier, *Soldier Arrested in WikiLeaks Classified Iraq Video Case*, CHRISTIAN SCI. MONITOR, June 7, 2010, <http://www.csmonitor.com/USA/Military/2010/0607/Soldier-arrested-in-WikiLeaks-classified-Iraq-video-case>.

175. SUSAN A. BREWER, *WHY AMERICA FIGHTS: PATRIOTISM AND WAR PROPAGANDA FROM THE PHILIPPINES TO IRAQ 218* (Oxford Univ. Press, 2009).