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Shielding Acts Of Journalism: Open Leaks Sites, National Security, And The Free Flow Of Information

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Jason Zenor

Abstract

Newspersons' shield laws are not meant to protect a privileged class of journalists.¹ Nor are they meant to protect whistleblowers whose acts fall under a different set of laws.

KEYWORDS: Wikileaks, law, information

SHIELDING ACTS OF JOURNALISM: OPEN LEAKS SITES, NATIONAL SECURITY, AND THE FREE FLOW OF INFORMATION

JASON ZENOR*

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Newspersons' shield laws are not meant to protect a privileged class of journalists.¹ Nor are they meant to protect whistleblowers whose acts fall under a different set of laws.² Instead, shield laws are meant to protect the free flow of information to the public.³ Unfortunately, the conversation pertaining to shield laws is consumed by arguments over how to define who

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1. See *infra* Part III.D.1.a.

2. See Sarah Wood Borak, Comment, *The Legacy of "Deep Throat": The Disclosure Process of the Whistleblower Protection Act Amendments of 1994 and the No FEAR Act of 2002*, 59 U. MIAMI L. REV. 617, 618 (2005).

3. See Jill Laptosky, Note, *Protecting the Cloak and Dagger with an Illusory Shield: How the Proposed Free Flow of Information Act Falls Short*, 62 FED. COMM. L.J. 403, 421–22 (2010).

is a journalist.⁴ But in the digital age, this debate is futile, as no one can give an adequate answer.⁵ In response to this debate, this Article argues that a federal shield law needs to be adopted that protects information, not people.⁶ In particular, this Article focuses on open leak organizations—such as WikiLeaks—that challenge traditional notions of journalism.⁷ First, this Article outlines the history and controversy surrounding WikiLeaks and the publishing of national security information.⁸ Then, it outlines the development of shield laws and the current state of the privilege at the federal level.⁹ Finally, the Article presents a model shield law that protects the publishing of national security information, which serves the public interest and does not create an immediate, irreparable harm.¹⁰

I. INTRODUCTION

WikiLeaks innocently describes itself as a non-profit media organization dedicated “to bring[ing] important news and information to the public”;¹¹ but for many of the world’s governments, it is a saboteur organization centered on anarchy.¹² In 2010, WikiLeaks exposed hundreds of thousands of U.S. government documents.¹³ Some consider the document dumps to be vital to political change, including being the catalyst for the

4. See *id.* at 425; HENRY COHEN & KATHLEEN ANN RUANE, CONG. RESEARCH SERV., RL34193, JOURNALIST’S PRIVILEGE: OVERVIEW OF THE LAW AND LEGISLATION IN THE 109TH AND 110TH CONGRESSES 7 (2008).

5. See *infra* Part III.C.

6. See *infra* Part III.D.

7. See *infra* Parts I–II.

8. See *infra* Part II.

9. See *infra* Part III.C–D.

10. See *infra* Part III.D.

11. *About: What is Wikileaks?*, WIKILEAKS, <http://www.wikileaks.org/About.html> (last visited Aug. 11, 2015).

12. See Stephanie Condon, *Congress Lashes Out at Wikileaks, Senators Say Leakers May Have “Blood on Their Hands”*, CBS NEWS (Nov. 29, 2010, 5:03 PM) <http://www.cbsnews.com/news/congress-lashes-out-at-wikileaks-senators-say-leakers-may-have-blood-on-their-hands/>. Sen. Joe Lieberman (I-CT) said:

[the leak] is an outrageous, reckless, and despicable action that will undermine the ability of our government and our partners to keep our people safe and to work together to defend our vital interests. Let there be no doubt: the individuals responsible are going to have blood on their hands.

Id. Rep. Lindsey Graham (R-SC) said, “[l]eaking the material is deplorable The world is getting dangerous by the day and the people who do this are really low on the food chain as far as [I am] concerned. If you can prosecute them, [let us] try.” *Id.* Rep. Peter King (R-NY) called WikiLeaks a terrorist group. *Id.*

13. See *Baghdad War Diary*, WIKILEAKS (Oct. 22, 2010, 5:00 PM), <http://www.wikileaks.org/irq/>.

Arab Spring.¹⁴ However, some, like the U.S. government, fear WikiLeaks' power to reveal secrets—which led to the derailing of a proposed federal shield law for journalists.¹⁵

The information that WikiLeaks published was often republished by traditional news outlets.¹⁶ However, no criminal charges were brought against these traditional news outlets for the revelations because the traditional media outlets exist in a framework of traditional laws.¹⁷ For example, the traditional media is exempt from prosecution under the Espionage Act of 1917 (“Espionage Act”) and cannot be punished for publishing truthful information that is legally obtained.¹⁸

A traditional media outlet can offer confidentiality to a source.¹⁹ However, it cannot offer absolute anonymity since most state shield laws have several exemptions.²⁰ Furthermore, national security whistleblowers have almost no promise of anonymity, because of the lack of a federal shield law.²¹ Thus, the risks are high for whistleblowers when working with traditional news outlets.²² Consequently, there are less revelations of government information.²³ It is arguable that in the traditional model, the public interest is harmed.²⁴

14. Peter Walker, *WikiLeaks and Guardian Hailed as Catalysts of Arab Spring*, *GUARDIAN*, May 13, 2011, at 17.

15. See Laptosky, *supra* note 3, at 426; *infra* Part III.C.

16. See 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, 333–36 (2011).

17. See *id.* at 353–56. To have done so would certainly have been politically unpopular, but it is possible that criminal charges would have held up in court. See, e.g., Walter Pincus, *Prosecution of Journalists Is Possible in NSA Leaks*, *WASH. POST*, May 22, 2006, at A4. “Undoubtedly, Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets.” *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 730 (1971) (per curiam) (Stewart, J., concurring).

18. See The Espionage Act of 1917, 18 U.S.C. §§ 793–94 (2012); *Pentagon Papers*, 403 U.S. at 744–45 (Marshall, J., concurring).

19. See, e.g., Latara Appleby, *Judge Rules Reporter Can Claim Fifth Amendment and Keep Source Secret*, *REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS* (Nov. 26, 2013), <http://www.rcfp.org/browse-media-law-resources/news/judge-rules-reporter-can-claim-fifth-amendment-and-keep-source-secre>.

20. See *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972); Laptosky, *supra* note 3, at 410–11.

21. See Laptosky, *supra* note 3, at 421–22.

22. See *id.* at 421.

23. See Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 *B.U. L. REV.* 449, 456 (2014).

24. See *infra* Part III.D.

But for these open leak sites dedicated to transparency—such as WikiLeaks—the rules are seemingly different.²⁵ Though open leak sites consider themselves journalism outlets,²⁶ they seem to be more concerned with transparency for transparency's sake.²⁷ They are online platforms for uploading documents that allow for easy and instantaneous information leaks, which exceed any Freedom of Information Act.²⁸ Their encryption software offers confidentiality, which surpasses any shield law.²⁹ But their acts, such as WikiLeaks' voluminous data dumps, suggest little regard for vetting information.³⁰ Furthermore, without some secrecy, governments become less effective³¹ and total transparency creates very real threats to

25. See Benkler, *supra* note 16, at 347. Most open leak sites are outside the United States and offer many complex jurisdictional issues since they are international organizations, usually with no physical headquarters. *Id.*; see also *infra* note 43 and accompanying text. But for the purpose of this Article, we will not treat open leak sites as extra-territorial entities. We will treat them as any media outlet that publishes in the United States and assume that similar sites could one day be based in the United States, or at the very least, within its jurisdiction.

26. *E.g.*, WIKILEAKS, <http://www.wikileaks.org> (last visited Aug. 11, 2015).

27. See *infra* Part II.A.

28. See Doug Meier, Note, *Changing with the Times: How the Government Must Adapt to Prevent the Publication of Its Secrets*, 28 REV. LITIG. 203, 211 (2008). Some critics argue that open leak sites *incite leakers* to break the law with the ease of dropboxes and the promise of confidentiality. *Id.* Cf. Tim Wu, *Drop the Case Against Assange*, FOREIGN POL'Y (Feb. 4, 2011), <http://www.foreignpolicy.com/2011/02/04/drop-the-case-against-assange/> (arguing that there is no case against Assange for conspiracy to commit a crime).

29. See *About: What is WikiLeaks?*, *supra* note 11.

30. See Julian E. Barnes & Jeanne Whalen, *Pentagon Slams WikiLeaks' Plan to Post More War Logs*, WALL ST. J. (Aug. 12, 2010), <http://www.wsj.com/articles/SB10001424052748704407804575425900461793766#articleTabs%3Article>.

WikiLeaks claims to have sought the assistance of the Pentagon in redacting names of people in potential danger from the documents' release. See *id.* But, in August of 2011, it was reported that due to internal strife and lack of security, WikiLeaks accidentally released thousands of documents without redaction. See Hayley Tsukayama, *WikiLeaks Cables Possibly Released by Accident*, WASH. POST (Aug. 29, 2011), http://www.washingtonpost.com/business/wikileaks-cables-possibly-released-by-accident/2011/08/29/gIQAfQHsnJ_story.html.

31. See Chris Good, *WikiLeaks and the U.S. Image*, ATLANTIC (Dec. 3, 2010, 6:42 PM), <http://www.theatlantic.com/politics/archive/2010/12/wikileaks-and-the-us-image/67487/#>.

people's lives.³² Thus, it is arguable that in the new model the public interest is also harmed.³³

This Article puts forward a model shield law that promotes the free flow of information that serves the public interest.³⁴ Part II of the Article outlines the history of the most infamous open leak site, WikiLeaks.³⁵ Part III examines the history of shield law protection at the federal level, including the recent proposals in Congress.³⁶ Part IV proposes a model shield law to be adopted at the federal level that would protect publishers of national security information that serves the public interest.³⁷

II. WIKILEAKS

A. *Brief History*

WikiLeaks can be best described as a whistleblower intermediary.³⁸ It receives and releases leaked documents produced by governments and corporations.³⁹ WikiLeaks' goal is "to allow [for] 'the entire global community to relentlessly examine any document for its credibility,

32. See Raffi Khatchadourian, *No Secrets: Julian Assange's Mission for Total Transparency*, NEW YORKER (June 7, 2010), <http://www.newyorker.com/magazine/2010/06/07/no-secrets>. Julian Assange has agreed that the release of documents could lead to the organization having "blood on our hands." *Id.*

33. See Good, *supra* note 31; Khatchadourian, *supra* note 32. The U.S. government has volumes of classified documents that would not be a direct harm to national safety if released, but the release would hurt American interests worldwide. See Good, *supra* note 31. For example, WikiLeaks' document dump in November 2010, was maligned by the media as being mostly a revelation into the foreign policy playbook versus a revelation of incriminating material. *Id.*; Rainey Reitman, *The Best of Cablegate: Instances Where Public Disclosure Benefited from the Leaks*, ELECTRONIC FRONTIER FOUND. (Jan. 7, 2011), <http://www.eff.org/deeplinks/2011/01/cablegate-disclosures-have-furthered-investigative>. "By the end of the year, the story of this wholesale security breach had outgrown the story of the actual contents of the secret documents and generated much breathless speculation that something—journalism, diplomacy, life as we know it—had profoundly changed forever." Bill Keller, *The Boy Who Kicked the Hornet's Nest*, N.Y. TIMES MAG., Jan. 30, 2011, at 33.

34. These documents fall into a legal void and are not statutorily protected. See Stewart Harris, *The First Amendment and the End of the World*, 68 U. PITT. L. REV. 785, 816–28 (2007) (providing a detailed discussion of this statutory void).

35. See *infra* Part III.D.

36. See *infra* Part II.

37. See *infra* Part III.

38. See Ann Woolner, *WikiLeaks Secret Records Dump Stays in Legal Clear*, BLOOMBERG BUS. (July 27, 2010, 9:00 PM), <http://www.bloomberg.com/news/articles/2010-07-28/wikileaks-secret-records-dump-stays-in-legal-clear-ann-woolner>.

39. Meier, *supra* note 28, at 204.

plausibility, veracity, and validity.”⁴⁰ Some of these documents are classified for reasons such as national security and trade secrets, while others are classified for ostensibly public relations reasons.⁴¹

WikiLeaks describes itself as a *multijurisdictional public service*.⁴² Its headquarters are located in Sweden, because that nation provides the world’s most expansive journalist’s shield law protecting confidential sources.⁴³ The public face of WikiLeaks is Julian Assange,⁴⁴ but the site claims to have several founders, which include dissidents, journalists, and technologists from around the world.⁴⁵ Since it was created in 2006,⁴⁶ WikiLeaks has released thousands of documents.⁴⁷ These documents range from government-approved assassinations in Somalia to the dumping of

40. *Id.*

41. *See id.* at 211–12.

42. *WikiLeaks: About*, WIKILEAKS, <https://wikileaks.org/wiki/WikiLeaks>About> (last visited Aug. 11, 2015); *see also* Nicola Laver, *Revealing the Truth*, INT’L B. ASS’N (Dec. 2010), *available at* <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=CEA217A9-682C-4F6A-9465-5445603259D7>.

43. Woolner, *supra* note 38. WikiLeaks has no actual physical headquarters. *See* Khatchadourian, *supra* note 32. For a discussion on the differences between press protections in the United States and Sweden, *see* David Corneil’s *Harboring WikiLeaks: Comparing Swedish and American Press Freedom in the Internet Age*, 41 CAL. W. INT’L. L. J., 477 *passim* (2011).

44. *See* Khatchadourian, *supra* note 32. Julian Assange was born in 1971—the same year as the Pentagon Papers decision—in Australia. *Id.*; *see also* N.Y. Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713, 713–14 (1971) (per curiam). He has worked as a journalist and publisher. Khatchadourian, *supra* note 32. As a teenager, he was charged with hacking computers. *Id.* Later in life, he attended college in Australia, but dropped out. *Id.* In 2006, he was a founding member of WikiLeaks. *Id.* He has also had run-ins with the law for sexual assault. Justin Elliott, *Julian Assange and the Sex Crime Trojan Horse*, SALON (Dec. 1, 2010, 2:46 PM), https://www.salon.com/2010/12/01/wikileaks_assange_legal_dangers/.

45. MICHAEL D. HORVATH, WIKILEAKS, WIKILEAKS.ORG—AN ONLINE REFERENCE TO FOREIGN INTELLIGENCE SERVICES, INSURGENTS OR TERRORIST GROUPS? 5 (2008), http://www.wired.com/images_blogs/threatlevel/2010/03/wikithreat.pdf; *see also* *WikiLeaks: About*, *supra* note 42. WikiLeaks started as a pure wiki with posts, comments, and user-edited content. Chris Grams, *Does WikiLeaks Damage the Brand Image of Wikis?*, OPENSOURCE.COM (Dec. 8, 2010), <http://opensource.com/business/10/12/does-wikileaks-damage-brand-image-wikis>; HORVATH, *supra* note 45, at 5, 10; *WikiLeaks: About*, *supra* note 42.

46. Khatchadourian, *supra* note 32. The website is published under the auspices of the Sunshine Press Organization. *About: What Is WikiLeaks?*, *supra* note 11.

47. Larry Shaughnessy, *WikiLeaks Redacted More Information In Latest Documents Release*, CNN (Oct. 22, 2010, 10:08 PM), <http://www.cnn.com/2010/US/10/22/wikileaks.editing/>; WIKILEAKS, *supra* note 26. WikiLeaks claims to have millions of documents, but has only released approximately twenty thousand since its inception. Kim Zetter, *Claim: WikiLeaks Published Documents Siphoned over File Sharing Software*, WIRED (Jan. 20, 2011, 11:54 AM), <http://www.wired.com/threatlevel/2011/01/wikileaks-and-p2p>.

toxic chemicals in the Ivory Coast.⁴⁸ The document leaks have also included information that has had less significance on world affairs, such as the secrets of scientology and some of Sarah Palin's personal e-mails.⁴⁹

WikiLeaks received the most media attention for its leaks of U.S. government documents.⁵⁰ The organization has alleged that it still holds seventy-five thousand U.S. intelligence reports on Afghanistan, four hundred thousand classified U.S. reports on the Iraq War, and two hundred fifty thousand confidential U.S. State Department diplomatic cables.⁵¹ In April 2010, WikiLeaks gained international recognition with the release of a video from the U.S. military operations in Iraq.⁵² This video, *Collateral Murder*,⁵³ was gun-sight footage of an airstrike that occurred in Baghdad in July of 2007.⁵⁴ Early on that day, the U.S. troops had been engaged in combat with insurgents.⁵⁵ The video is from later in the day and shows Iraqis and two Reuters reporters walking the streets with no clear threat of violence.⁵⁶ The U.S. soldiers, in Apache helicopters, mistakenly identify the Iraqis as insurgents and mistake the journalists' camera as a gun.⁵⁷ The Apache helicopter fired upon the crowd.⁵⁸ The video captured the troops celebrating their actions.⁵⁹ In the incident, ten Iraqi civilians and the two Reuters employees were killed.⁶⁰

48. See Khatchadourian, *supra* note 32; WIKILEAKS, *supra* note 26.

49. Khatchadourian, *supra* note 32.

50. See HORVATH, *supra* note 45, at 5. In 2010, WikiLeaks revealed a secret 2008 U.S. Department of Defense study strategizing on how to counter WikiLeaks. *See id.*

51. Laver, *supra* note 42.

52. See Sunshinepress, *Collateral Murder-Wikileaks-Iraq*, YOUTUBE (Apr. 3, 2010), http://www.youtube.com/verify_age?next_url=http%3A//www.youtube.com/watch%3Fv%3D5rXPfrnU3G0. The WikiLeaks version of the military video has been criticized as being edited and distorting the truth. Larkin Reynolds, *NSJ Analysis: WikiLeaks and Jus in Bello: Room for a Congressional Response?*, HARV. NAT'L SECURITY J. (Apr. 9, 2010, 2:40 PM) <http://harvardnsj.org/2010/04/nsj-analysis-applying-the-law-of-armed-conflict-to-wikileaks/> (citing arguments that the video is consistent with the military's report).

53. Sunshinepress, *supra* note 52. Full footage of *Collateral Murder* is available on YouTube. *Id.* Assange commented on the naming of the video: "We want to knock out this *collateral damage* euphemism, and so when anyone uses it they will think, *collateral murder*." Greg Mitchell, *One Year Ago: How The 'Era of WikiLeaks' Began-With 'Murder'*, HUFFINGTON POST (Mar. 28, 2011, 10:31 AM), http://www.huffingtonpost.com/greg-mitchell/one-year-ago-now-the-era-the-era-b_841376.html.

54. Elisabeth Bumiller, *Video Shows 2007 Air Attack in Baghdad That Killed Photographer*, N.Y. TIMES, Apr. 6, 2010, at A13.

55. *See id.*

56. *Id.*

57. *See id.*

58. *Id.*

59. *See* Bumiller, *supra* note 54. The soldiers' reactions are documented on the film: "'Look at those dead bastards,' one pilot says. 'Nice,' the other responds." *Id.* "A

The traditional press had originally covered the airstrike story in 2007, but without much scrutiny.⁶¹ Reuters later made a Freedom of Information Act request for the video, but was denied a copy.⁶² The U.S. military conducted an investigation into the incident and relieved all of the soldiers of any wrongdoing, stating that the soldiers did not know there was a journalist in the group.⁶³ The video was eventually leaked to WikiLeaks and Assange premiered the release at the National Press Club in Washington, District of Columbia on April 5, 2010.⁶⁴ Just weeks after the video was posted, the military arrested Private First Class (“PFC”) Bradley Manning for being the source of the leak.⁶⁵

In July of 2010, WikiLeaks began releasing documents from the Afghan War Diary—a compilation of more than seventy-five thousand

wounded man can be seen crawling and the pilots impatiently hope that he will try to fire at them so that under the rules of engagement they can shoot him again.” *Id.*

“All you gotta do is pick up a weapon,” one pilot says. A short time later a van arrives to pick up the wounded and the pilots open fire on it, wounding two children inside. “Well, it [is] their fault for bringing their kids into a battle,” one pilot says. At another point, an American armored vehicle arrives and appears to roll over one of the dead. “I think they just drove over a body,” one of the pilots says, chuckling a little.

Id.

60. *Id.* This is how Mr. Assange described the video:

“In the first phase, you will see an attack that is based upon a mistake, but certainly a very careless mistake. In the second part, the attack is clearly murder, according to the definition of the average man. And in the third part, you will see the killing of innocent civilians in the course of soldiers going after a legitimate target.”

Mitchell, *supra* note 53.

61. *See, e.g.*, Alissa J. Rubin, *2 Iraqi Journalist Killed as U.S. Forces Clash with Militias*, N.Y. TIMES, July 13, 2007, at A8. A Google News Search for the month of July, 2007 lists 45 articles on “Reuters journalist killed in Iraq” published on July 12th and 13th. *See, e.g., id.* For comparison, a Google news search of July 17th, 2007 lists 122 articles on “Victoria Beckham snubs Paris Hilton.” *See, e.g.*, *Victoria Beckham Snubs Paris Hilton*, OH NO THEY DIDN’T! (July 17, 2007, 10:27 PM), <http://ohnotheydidnt.livejournal.com/13986354.html?thread=1618067762>.

62. *See* Khatchadourian, *supra* note 32. Reuters viewed the video three years after the incident. *Id.*

63. Bumiller, *supra* note 54. The redacted military report of the investigation stated the Reuters employees ““made no effort to visibly display their status as press or media representatives and their familiar behavior with, and close proximity to, the armed insurgents and their furtive attempts to photograph the coalition ground forces made them appear as hostile combatants to the Apaches that engaged them.”” *Id.*

64. Khatchadourian, *supra* note 32; Mitchell, *supra* note 53.

65. *See* Julie Tate, *Manning Is Sentenced to 35 Years for Leaks*, WASH. POST, Aug. 22, 2013, at A1. Manning is now incarcerated at Fort Leavenworth, Kansas. *Id.* He is serving a thirty-five year sentence—with a chance for parole after ten years served—for leaking classified information to WikiLeaks. *Id.* He was acquitted of the most serious charge of aiding the enemy, but was found guilty of violating the Espionage Act. *Id.*

previously unreleased documents relating to the war in Afghanistan.⁶⁶ Similarly, in October of 2010, WikiLeaks began to release hundreds of documents from the alleged holding of four hundred thousand documents relating to the Iraq War.⁶⁷ In November of 2010, WikiLeaks began the release of U. S. diplomatic cables⁶⁸ that it claimed numbered in the hundreds of thousands.⁶⁹ WikiLeaks has also released information—through Facebook and Twitter—suggesting that it has other documents including classified video of the notorious Gharani massacre in Afghanistan,⁷⁰ incriminating material on British Petroleum, and an insurance file set to release all the documents held should WikiLeaks ever be shutdown.⁷¹ In 2012, WikiLeaks published more material referring to the U.S. Intelligence community, including information on private companies, such as Stratford, and *The Detainee Policies*, which outlines the rules and procedures on U.S. military custody of detainees.⁷² In 2013, it was reported that WikiLeaks

66. *Kabul War Diary*, WIKILEAKS (July 25, 2010, 5:00 PM), <http://www.wikileaks.org/afg/>; see also Alastair Dant & David Leigh, *Afghanistan War Logs: Our Selection of Significant Incidents*, GUARDIAN (July 25, 2010, 5:00 PM), <http://www.theguardian.com/world/datablog/interactive/2010/jul/25/afghanistan-war-logs-events>.

67. *Baghdad War Diary*, *supra* note 13; see also *Iraq: The War Logs*, GUARDIAN, <http://www.guardian.co.uk/world/iraq-war-logs> (last visited Aug. 11, 2015).

68. Reitman, *supra* note 33; see also Seumas Milne & Ian Black, *Secret Papers Reveal Slow Death of Middle East Peace Process*, GUARDIAN (Jan. 23, 2011, 3:08 PM), <http://www.theguardian.com/world/2011/jan/23/palestine-papers-expose-peace-concession>. The first release was one thousand six hundred documents. Milne & Black, *supra* note 68.

69. Reitman, *supra* note 33. In the media, this leak was affectionately known as *Cablegate*. *Id.*

70. See Philip Shenon, *WikiLeaks Founder to Release Massacre Video*, DAILY BEAST (June 15, 2010), <http://www.thedailybeast.com/blogs-and-stories/2010-06-15/wikileaks-founder-has-garani-massacre-video-according-to-new-email.html>; Luke Villapaz, *WikiLeaks Releases Massive 400 Gigabyte Encrypted 'Insurance' Files on Facebook*, INT'L BUS. TIMES (Aug. 18 2013, 7:21 PM), <http://www.ibtimes.com/wikileaks-releases-massive-400-gigabyte-encrypted-insurance-files-facebook-1389531>.

71. David Leppard & John Ungoed-Thomas, *Assange Ready to Unleash Tide of New Secrets*, SUNDAY TIMES, Dec. 5, 2010, at 17.

72. Andy Greenberg, *Wikileaks Announces 'The Detainee Policies': A History of U.S. Post-9/11 Military Prisoners in Leaked Documents*, FORBES (Oct. 25, 2012, 7:39 AM), <http://www.forbes.com/sites/andygreenberg/2012/10/25/wikileaks-announces-the-detainee-policies-a-history-of-american-military-detainees-in-leaked-documents/>.

released 1.7 million U.S. Intelligence documents from the 1970s.⁷³ That year, it also played a role in evacuating Edward Snowden to Hong Kong.⁷⁴

B. *Reaction to WikiLeaks*

WikiLeaks has received mixed reactions.⁷⁵ Some people have praised WikiLeaks for advancing the free flow of information, transparency, and accountability.⁷⁶ Proponents believe that WikiLeaks has democratized information so we are “no longer reliant on a middle man to offer up an interpretation of [what is] going on.”⁷⁷ The Executive Director of the First Amendment Coalition called WikiLeaks a *journalistic necessity*.⁷⁸ Time magazine called WikiLeaks the most important thing that could happen to journalism since the Freedom of Information Act.⁷⁹ Both the Index on Censorship⁸⁰ and the Amnesty International⁸¹ gave an award to WikiLeaks for its work.⁸² Some have even argued that WikiLeaks has spurred recent pro-democracy movements in the Middle East.⁸³

73. *Kissinger Cables: WikiLeaks Publishes 1.7m U.S. Diplomatic Documents from 1970s*, TELEGRAPH (Apr. 08, 2013, 4:42 AM), <http://www.telegraph.co.uk/news/wikileaks-files/9977979/Kissinger-Cables-Wikileaks-publishes-1.7m-US-diplomatic-documents-from-1970s.html>.

74. Shane Scott, *Offering Aid, WikiLeaks Gets Back in the Game*, N.Y. TIMES, June 24, 2013, at A1.

75. *Compare* Matthew Barakat, *Daniel Ellsberg Defends Julian Assange, Bradley Manning*, HUFFINGTON POST (Dec. 16, 2010, 1:56 PM), http://www.huffingtonpost.com/2010/12/16/daniel-ellsberg-wikileaks_n_797801.html, with *Bank Julius Baer & Co. v. WikiLeaks*, 535 F. Supp. 2d 980, 985 (N.D. Cal. 2008).

76. Barakat, *supra* note 75. Daniel Ellsberg, who leaked the classified Pentagon Papers praised WikiLeaks: “I think they provided a very valuable service.” *Id.*

77. Sean Lahman, *The Importance of WikiLeaks*, DEMOCRAT & CHRONICLE (Dec. 10, 2010, 7:26 PM), <http://www.democratandchronicle.com/story/news/local/blogs/watchdog/2010/12/10/the-importance-of-wikileaks/2269423/>.

78. Laver, *supra* note 42.

79. Tracy Samantha Schmidt, *A Wiki for Whistle-Blowers*, TIME, (Jan. 22, 2007), <http://content.time.com/time/nation/article/0,8599,1581189,00.html>.

80. Index on Censorship, *Winners of Index on Censorship Freedom of Expression Awards Announced*, INDEX (Apr. 22, 2008), <http://www.indexoncensorship.org/2008/04/winners-of-index-on-censorship-freedom-of-expression-award-announced/>. WikiLeaks won the *Economist* New Media Award in 2008. *Id.*

81. *Amnesty International Media Awards 2009: Full List of Winners*, GUARDIAN (June 3, 2009, 6:15 EDT), <http://www.theguardian.com/media/2009/jun/03/amnesty-international-media-awards>.

82. *Id.*; Index on Censorship, *supra* note 80.

83. See Daily Mail Reporter, *‘First Wikileaks Revolution’: Tunisia Descends into Anarchy as President Flees After Cables Reveal Country’s Corruption*, DAILY MAIL (Jan. 15, 2011, 12:27 EST), <http://www.dailymail.co.uk/news/article-1347336/First-Wikileaks-Revolution-Tunisia-descends-anarchy-president-flees.html> (arguing that movement to oust

WikiLeaks has also received criticism.⁸⁴ In 2008, the Swiss banks—Bank Julius Baer and Company and Julius Baer Bank and Trust Company—filed a preliminary injunction against WikiLeaks after the site published information about the banks' accounts.⁸⁵ A California district court judge ordered a U.S. based ISP to stop hosting the WikiLeaks site.⁸⁶ After much scrutiny in the press, the judge reversed his order stating that it may have amounted to unconstitutional prior restraint.⁸⁷ In 2010, the U.S. government opened a criminal probe into the organization to determine if it could bring charges under the Espionage Act.⁸⁸ The U.S. government has also blocked its employees from accessing WikiLeaks on both their work and personal computers.⁸⁹ It has also been reported that the U.S. government has pressured international corporations⁹⁰ and foreign governments to stop

Tunisian president began after corruption in its government was released by WikiLeaks in a cable documenting widespread government corruption).

84. See, e.g., *Bank Julius Baer & Co. v. WikiLeaks*, No. C08-00824JSW, 2008 WL 413737, at *1–2 (N.D. Cal. Feb. 13, 2008).

85. *Id.* at *1. There had been allegations that the bank was laundering money. See *id.*

86. See *Bank Julius Baer & Co. v. WikiLeaks*, 535 F. Supp. 2d 980, 985–86 (N.D. Cal. 2008); *Bank Julius Baer & Co.*, 2008 WL 413737, at *1–2.

87. *Bank Julius Baer & Co.*, 535 F. Supp. 2d at 985; see also Jonathan D. Glater, *Judge Reverses His Order Disabling Web Site*, N.Y. TIMES, Mar. 1, 2008, at A11 (describing Judge White's concern over his previous order). Despite the original order, mirror sites of Wikileaks.org were pervasive online. See Glater, *supra* note 87.

88. Charlie Savage, *U.S. Weighs Prosecution of WikiLeaks Founder, but Legal Scholars Warn of Steep Hurdles*, N.Y. TIMES, Dec. 2, 2010, at A18 (explaining the legal hurdles of prosecuting the press under the Espionage Act because of subsequent rulings of the Supreme Court of the United States expanding free press rights); see also *The Espionage Act of 1917*, 18 U.S.C. §§ 793–94 (2012).

The one effort to prosecute recipients of a leak under the Espionage Act ended in embarrassment for the Justice Department. In 2005, it indicted two lobbyists for a pro-Israel group who had been accused of receiving leaked information from a Pentagon official and conveying it to others. The case collapsed after a judge ruled that prosecutors had to prove that the lobbyists specifically intended to harm the United States or benefit a foreign country.

Savage, *supra* note 88.

89. Ewen MacAskill, *Ban on Federal Staff Reading WikiLeaks Hampering Work, Says US Official*, GUARDIAN (Dec. 10, 2010, 13:54 EST), <http://www.theguardian.com/world/2010/dec/10/us-ban-staff-wikileaks-official>.

90. See, e.g., Ashlee Vance, *WikiLeaks Struggles to Stay Online After Attacks*, N.Y. TIMES (Dec. 3, 2010), http://www.nytimes.com/2010/12/04/world/europe/04domain.html?_r=1&hp. PayPal suspended WikiLeaks account in early 2010. Kevin Poulsen, *PayPal Freezes WikiLeaks Account*, WIRED (Dec. 4, 2010, 3:31 AM), <http://www.wired.com/2010/12/paypal-wikileaks/>. Amazon.com cut ties with WikiLeaks in December of 2010. Vance, *supra* note 90. Throughout its short history, WikiLeaks has had trouble securing funding. Jeanne Whalen & David Crawford, *How WikiLeaks Keeps Its*

associating with WikiLeaks.⁹¹ Congress also proposed the Securing Human Intelligence and Enforcing Lawful Dissemination Act (“SHIELD Act”), which would have expanded the Espionage Act to include criminalizing the dissemination of information “concerning the human intelligence activities of the United States” that harms the United States’ national interests.⁹² This was after the Federal Government convened a federal grand jury to examine if WikiLeaks could be charged with violating the Espionage Act.⁹³ In 2013, documents leaked by Edward Snowden showed that the NSA had put Julian Assange on the manhunt target list, joining top members of Al-Qaeda.⁹⁴

These people and organizations may very well be journalistic entities.⁹⁵ Like traditional news media, they serve the public interest in the free flow of information.⁹⁶ It is even arguable that open leak sites are fulfilling the press’ role of watchdog by revealing information that the traditional media⁹⁷ either does not have access to, or will not cover because of corporate flak.⁹⁸ Nonetheless, if the traditional media companies came across sensitive information, such as leaked government documents, it is likely that they would publish the information.⁹⁹ But under the current

Funding Secret, WALL ST. J. (Aug. 23, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704554104575436231926853198>.

91. See Vance, *supra* note 90. This has allegedly included pressuring foreign government to enforce sexual assault charges against Julian Assange. See Elliott, *supra* note 44 (arguing that the criminal prosecution for sexual assault was pretextual).

92. Geoffrey R. Stone, *WikiLeaks, the Proposed SHIELD Act and the First Amendment*, 5 J. NAT’L SECURITY L. & POL’Y 105, 105 (2011); see also SHIELD Act, S. 4004, 111th Cong. (2010). The SHIELD Act may be unconstitutional on its face because it does not require that the publisher know that the information would cause grave and imminent harm. Stone, *supra* note 92, at 105.

93. *Assange Attorney: Secret Grand Jury Meeting in Virginia on WikiLeaks*, CNN (Dec. 13, 2010, 12:00 PM), <http://www.cnn.com/2010/CRIME/12/13/wikileaks.investigation/>; see also The Espionage Act of 1917, 18 U.S.C. §§ 793–94 (2012); John Letzing et al., *WikiLeaks Wants Google Answers on Giving Staff Data to U.S.*, WALL ST. J. (Jan. 26, 2015), <http://www.wsj.com/articles/wikileaks-wants-google-answers-on-giving-staff-data-to-u-s-1422302056>.

94. *Julian Assange on Being Placed on NSA “Manhunting” List & Secret Targeting of WikiLeaks Supporters*, DEMOCRACY NOW! (Feb. 18, 2014), http://www.democracynow.org/2014/2/18/julian_assange_on_being_placed_on.

95. See *About: What Is Wikileaks?*, *supra* note 11.

96. *Id.*

97. See, e.g., *supra* notes 61, 77 and accompanying text.

98. See Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for Media: The Challenge of Developing Antitrust Policies that Support the Media Sector’s Unique Role in Our Democracy*, 42 CONN. L. REV. 101, 106–07, 118 (2009). A third of news journalists and editors surveyed have reported that news stories will not be reported if it might negatively affect an advertiser or the parent company. *Id.* at 118.

99. See *id.* at 119.

precedent, those traditional media entities would not be punished, whereas open leaks sites, such as WikiLeaks, are under fierce legal scrutiny.¹⁰⁰

Some in the traditional media have argued that open leak sites are not journalistic organizations deserving protection.¹⁰¹ Under traditional models, it is hard to argue otherwise.¹⁰² Open leak sites challenge our traditional notions of journalism.¹⁰³ For example, WikiLeaks claims to vet information, but the release of hundreds of thousands of documents seems to suggest otherwise.¹⁰⁴ Critics argue that WikiLeaks does nothing more than provide a platform for others to publish illegally obtained documents.¹⁰⁵ Finally, WikiLeaks' own lack of transparency¹⁰⁶ and absolute protection of secrecy are antithetical to the very principles that it espouses.¹⁰⁷

Many critics argue that the objective of open leak sites is not to simply promote the free flow of information for a democratic society, but to instead create a new world order based in anarchy—or the end of the established hegemony.¹⁰⁸ Finally, some have argued that these sites incite criminal activity.¹⁰⁹ The argument is that otherwise law-abiding citizens,

100. See Savage, *supra* note 88; *Assange Attorney: Secret Grand Jury Meeting in Virginia on WikiLeaks*, *supra* note 93.

101. See Benkler, *supra* note 16, at 319–20; Lauren J. Russell, Comment, *Shielding the Media: In an Age of Bloggers, Tweeters, and Leakers, Will Congress Succeed in Defining the Term “Journalist” and in Passing a Long-Sought Federal Shield Act?*, 93 OR. L. REV. 193, 217–18 (2014).

102. See Meier, *supra* note 28, at 211.

103. See *id.* at 211–12.

104. See *About: What Is WikiLeaks*, *supra* note 11; Condon, *supra* note 12; *Kissinger Cables: Wikileaks Publishes 1.7m U.S. Diplomatic Documents from 1970s*, *supra* note 73.

105. See Barnes & Whalen, *supra* note 30.

106. *About: What Is WikiLeaks?*, *supra* note 11; see also Khatchadourian, *supra* note 32. In September of 2010, Daniel Domscheit-Berg left WikiLeaks and began Openleaks, a site that is meant to be more transparent than its predecessor, which Domscheit-Berg claimed was no longer a true wiki site. Andy Greenberg, *WikiLeaks' Stepchildren*, FORBES ASIA, Jan. 2011, at 28; Ben Piven, *Copycat WikiLeaks Sites Make Waves*, AL JAZEERA (Dec. 17, 2010, 3:25 GMT), <http://english.aljazeera.net/indepth/features/2010/12/20101216194828514847.html#> (highlighting five new international open source whistleblower sites).

107. See Benkler, *supra* note 16, at 312–13, 320; *About: What Is WikiLeaks?*, *supra* note 11.

108. See Condon, *supra* note 12.

109. Meier, *supra* note 28, at 211–12. WikiLeaks argues that it does not incite criminal activity or solicit information, but Julian Assange has called for a list of the most wanted leaks. See Woolner, *supra* note 38.

who would have never broken the law and revealed national security secrets, are enticed by the protections of anonymity offered by these sites.¹¹⁰

Since 2010, WikiLeaks has struggled.¹¹¹ Much of their funding has dried up, as companies such as PayPal announced that they would no longer work with the organization.¹¹² Julian Assange took asylum in the Ecuadorian embassy in London after he was accused of sexual assault.¹¹³ Many members of the organization have left.¹¹⁴ Nevertheless, WikiLeaks has inspired many similar sites such as OpenLeaks, created by former WikiLeaks spokesperson, Daniel Domscheit-Berg; BrusselsLeaks; TradeLeaks; BalkanLeaks; RuLeaks, Russia; and Honest Appalachia.¹¹⁵ There are numerous other sites, and many more will come.¹¹⁶ Despite governments' best efforts, the open leaks sites are here to stay and have changed our contemporary notions of state secrets and transparency.¹¹⁷

110. See Meier, *supra* note 28, at 211–12. “WikiLeaks [has] describe[d] itself as ‘an uncensorable version of Wikipedia for untraceable mass document leaking and analysis. It combines the protection and anonymity of cutting-edge cryptographic technologies with the transparency and simplicity of a wiki interface.’” *Id.* at 211. Meier argues that this promise is more akin to espionage than it is journalism, which can offer complete anonymity, as most shield laws have exemptions for such cases. *Id.* at 211–12; SHIELD Act, S. 4004, 111th Cong. (2010).

111. See Poulsen, *supra* note 90.

112. *Id.*

113. Elliott, *supra* note 44; Ricardo Patino, *Two Years on, Julian Assange is Still a Prisoner of Process*, GUARDIAN (Aug. 17, 2014, 14:30 EDT), <http://www.theguardian.com/commentisfree/2014/aug/17/julian-assange-ecuador-political-asylum-stalemate>.

114. See Benkler, *supra* note 16, at 325–26; see also Gina Pace, *WikiLeaks in Disarray, Says Former No. 2 Staffer*, CBS NEWS (Sept. 27, 2010, 12:37 PM), <http://www.cbsnews.com/news/wikileaks-in-disarray-says-former-no-2-staffer/>.

115. *Leak Site Directory*, LEAK DIRECTORY, http://leakdirectory.org/index.php/Leak_Site_Directory (last updated June 6, 2015); Piven, *supra* note 106. For a comprehensive list of open leaks sites, go to *Leak Site Directory*. *Leak Site Directory*, *supra* note 115.

116. See *Leak Site Directory*, *supra* note 115.

117. See Benkler, *supra* note 16, at 347, 350 (outlining how the traditional press assisted the government in painting WikiLeaks as a threat).

III. LEGAL BACKGROUND

A. *Lack of a Federal Shield Law*¹¹⁸

On the federal level, there is no statutory protection against compelled disclosure of sources.¹¹⁹ In the last thirty-four years, at least twenty U.S. journalists have spent time in jail for contempt of court after refusing to disclose their sources.¹²⁰ In recent years, reporters like Vanessa Leggett,¹²¹ Judith Miller,¹²² Matt Cooper,¹²³ Mark Fainaru-Wada,¹²⁴ Lance Williams,¹²⁵ and James Risen¹²⁶ have received media attention because they

118. For purposes of this Article, we will only consider protections at the federal level. *See infra* Part III.B–D. Fortunately for journalists, there are now thirty-six states and the District of Columbia that have statutory protection for journalists. *See* Laptosky, *supra* note 3, at 410. Two other states have adopted evidentiary rules that protect journalists. *See id.* Of the eleven other states, only one state, Wyoming, does not recognize a qualified constitutional or common law privilege. *Id.* (detailing the current state of shield laws in the country).

119. *See infra* Part III.C.

120. *See* *Paying the Price: A Recent Census of Reporters Jailed or Fined for Refusing to Testify*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/jail.html> (last visited Aug. 11, 2015).

121. *Id.* Leggett wrote a non-fiction book about a high profile murder in Houston, Texas. *See* Laptosky, *supra* note 3, at 412. Leggett had interviewed the suspect while he was in custody. *Id.* at 413. The suspect subsequently committed suicide. *Id.* at 414. The prosecution asked for Leggett's notes and she refused. *Id.* The suspect was posthumously acquitted. *Id.* Then, the federal government began its own investigation and a grand jury subpoenaed Leggett. Laptosky, *supra* note 3, at 414. She refused to testify citing a reporter's privilege. *Id.* The Fifth Circuit upheld her contempt conviction and she was sentenced to jail. *Id.* She served 168 days in jail. *Id.* at 415.

122. *See* Laptosky, *supra* note 3, at 415–19.

123. *See infra* Part III.C.

124. *See* Peter Meyer, Note, *BALCO, the Steroids Scandal, and What the Already Fragile Secrecy of Federal Grand Juries Means to the Debate over a Potential Federal Media Shield Law*, 83 IND. L. J. 1671, 1672–73 (2008) (detailing the BALCO case). Fainaru-Wada and Williams were reporters for the San Francisco Chronicle who wrote the book *Game of Shadows: Barry Bonds, BALCO, and the Steroids Scandal That Rocked Professional Sports*, which investigated steroids use in professional sports. *Id.* at 1673. A source for their book was the contents of a leaked federal grand jury testimony. *Id.* at 1672–73. The reporters were subpoenaed to disclose their source and they refused. *Id.* at 1680. They were sentenced to eighteen months in jail, but never ended up serving time because the source came forward. *See id.*

125. *See* Meyer, *supra* note 124, at 1673.

126. *See* Jonathan Mahler, *Reporter's Case Poses Dilemma for Justice Dept.*, N.Y. TIMES, June 28, 2014, at A1.

were threatened with jail time or served jail time for a refusal to disclose confidential sources in federal court.¹²⁷

B. *Branzburg v. Hayes*¹²⁸

The Supreme Court of the United States does not recognize a constitutional right for journalists to protect the confidentiality of their sources.¹²⁹ In *Branzburg*, newspapers had published stories on illegal activity.¹³⁰ The journalists kept their sources anonymous.¹³¹ Subsequently, the respective journalists were subpoenaed before a grand jury, but refused to reveal their sources.¹³² The journalists were found to be in contempt, but appealed, stating that forced compulsion violated the First Amendment.¹³³

The Supreme Court disagreed with the journalists and upheld the conviction.¹³⁴ The Court stated there was no constitutional right not to answer a grand jury; rather, the only recourse was for journalists to seek statutory protections.¹³⁵ However, in concurrence, Justice Powell created the oft-cited qualified privilege.¹³⁶ Justice Stewart forwarded the three-part *Branzburg* test.¹³⁷ In order to compel the journalist to divulge the source, the state must:

127. See Meyer, *supra* note 124, at 1671. Furthermore, for the exposed source, federal law provides few protections for a whistleblower, especially when the information is classified or pertains to national security. See Papandrea, *supra* note 23, at 450–51 (outlining the limited statutory protections for national security whistleblowers).

128. 408 U.S. 665 (1972).

129. See *id.* at 697–98. In a 5–4 split, the Court rejected a First Amendment absolute privilege to confidential sources. *Id.* at 665, 698. In all three consolidated cases, the facts involved journalists who had been subpoenaed by a grand jury. *Id.* at 667–70, 672–74. Justice Powell argued that the holding of the case was only limited to grand jury proceedings. *Id.* at 709–10 (Powell, J., concurring).

130. *Branzenburg*, 408 U.S. at 667, 669. *Branzburg* was consolidated with two other cases, *Pappas* and *Caldwell*, where the journalists were protecting the identity of a Black Panther. *Id.* at 665, 669, 672.

131. *Id.* at 667–70.

132. *Id.*

133. *Id.* at 668–70, 679–80.

134. *Branzburg*, 408 U.S. at 708–09.

135. *Id.* at 685, 706. The Court said that states were free to interpret their own constitution's free press clauses. *Id.* at 706.

136. *Id.* at 709–710 (Powell, J., concurring). This privilege is recognized in all different types of proceedings. See *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (criminal case); *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986) (civil case); *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) (civil case); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 594 (1st Cir. 1980) (libel case); *Farr v. Pitchess*, 522 F.2d 464, 467–68 (9th Cir. 1975).

137. *Branzburg*, 408 U.S. at 743 (Stewart, J. dissenting).

(1) show that there is probable cause to believe that the [journalist] has information that is clearly relevant to a specific probable violation of [the] law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.¹³⁸

C. *Free Flow of Information Act(s)*

Within the first “six years after [the decision in] *Branzburg*, ninety-nine bills for a federal shield law were introduced in Congress.”¹³⁹ None of the bills even made it to a floor vote, as Congress could not agree on a definition of *journalist*.¹⁴⁰ Congress then abandoned the proposals after the courts started to recognize the *Branzburg* qualified privilege and states started to adopt their own shield laws.¹⁴¹

The national headlines of Judith Miller’s incarceration renewed Congress’ consideration for a federal shield law.¹⁴² In 2004, Senator Dodd proposed an absolute reporter’s privilege against disclosure of confidential information.¹⁴³ Then, in 2005, a bipartisan bill was proposed in the House.¹⁴⁴ This bill was also an absolute privilege for confidential sources.¹⁴⁵ But, all non-confidential sources only had a qualified privilege that could be overcome with a showing of *clear and convincing evidence*.¹⁴⁶ These bills

138. *Id.* Though the test is oft-cited, federal courts have mostly applied the majority opinion. See *In re Grand Jury Subpoena, Miller*, 438 F.3d 1141, 1147 (D.C. Cir. 2005).

139. Laptosky, *supra* note 3, at 421.

140. *Id.* The press organizations also insisted that a shield law gives absolute protection, which the government did not want to allow. *Id.*

141. Russell, *supra* note 101, at 207.

142. Laptosky, *supra* note 3, at 416, 418, 421. The media insisted that the privilege had to be absolute. *Id.* at 421.

143. *Id.*; see also Free Speech Protection Act of 2004, S. 3020, 108th Cong. § 3 (2004).

144. Laptosky, *supra* note 3, at 422. This bill was also known as the Free Flow of Information Act of 2005, H.R. 581. *Id.*; see also Free Flow of Information Act of 2005, H.R. 581, 109th Cong. § 1 (2005). A companion bill was also introduced in the Senate. Laptosky, *supra* note 3, at 422; see also Free Flow of Information Act of 2005, S. 340, 109th Cong. § 1. United States Senator Lugar, the bill’s sponsor, stated that it was essential to protect whistleblowers and confidentiality agreements needed for the free “flow of information [to] the public.” Laptosky, *supra* note 3, at 422; Press Release, U.S. Senator Richard Lugar, Lugar Introduces Bill to Shield Media (Feb. 9, 2005), available at <http://web.archive.org/web/20050225213402/http://lugar.senate.gov/pressapp/record.cfm?id=231858>.

145. See H.R. 581 § 4.

146. *Id.* § 2(a).

were revised several times to answer concerns from the executive branch, including the addition of an exception for national security.¹⁴⁷ Eventually, these bills died in committee.¹⁴⁸

In 2007, shield law legislation was introduced once again.¹⁴⁹ This time, there were concerns that the definition of journalist was too vague.¹⁵⁰ The 2007 bill protected anyone regularly engaged in journalism for ““a substantial portion of the person’s livelihood or for substantial financial gain.””¹⁵¹ But the House still passed the legislation.¹⁵² The proposed law would only protect information that was obtained while engaged in journalism.¹⁵³ But, the privilege would not be absolute.¹⁵⁴

There was also a more stringent test in order to have confidential information compelled.¹⁵⁵ The government would have to show that the information was necessary to: (1) prevent a national-security threat;¹⁵⁶ (2) to thwart imminent death or significant bodily harm; (3) ascertain the identity of an individual who disclosed a trade secret, personal health, or financial information; or (4) to identify the source of a leak of classified information that could cause significant and articulable harm to national security.¹⁵⁷ Finally, the court would have to apply a balancing test to determine whether compelling the disclosure serves more of a public interest than newsgathering.¹⁵⁸ The Senate Judiciary Committee approved a similar bill,

147. See S. 1419, § 2(a)(3)(A); H.R. 3323, § 2(a)(3)(A).

148. See Laptosky, *supra* note 3, at 424.

149. See Free Flow of Information Act of 2007, S. 1267, 110th Cong. (2007); Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007).

150. See COHEN & RUANE, *supra* note 4, at 7.

151. H.R. 2102, § 4(2); see also *Federal Shield Law Efforts*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/federal-shield-law> (last updated Sept. 12, 2013).

152. See *Federal Shield Law Efforts*, *supra* note 151. In October of 2007, the House passed H.R. 2102 by a vote of 398–21. *Id.*

153. See *id.*

154. See *id.*

155. See *id.* First, the government must exhaust all available sources. See H.R. 2102 § 2(a)(1); S. 1267 § 2(a)(1).

156. *Federal Shield Law Efforts*, *supra* note 151. A national-security threat includes a terrorist threat. *Id.*

157. *Id.* The government must first exhaust all available sources and the leak would have to harm national security. See *id.*

158. *Id.* “[T]he public interest in compelling disclosure of the information . . . outweighs the public interest in gathering or disseminating news or information.” Free Flow of Information Act of 2013, H.R. 1962, 113th Cong. § 2(a)(4) (2013). The privilege does not apply to eyewitness testimony of a crime or tortious activity. *Federal Shield Law Efforts*, *supra* note 151.

which was awaiting a full-vote in the Senate that never happened.¹⁵⁹ In 2009, the House passed another bill that was identical to the bills introduced in 2007.¹⁶⁰ The Senate modified it and the bill was placed on the Senate calendar.¹⁶¹ However, Congress took no significant action on it.¹⁶²

In 2013, the White House showed support for federal shield law legislation.¹⁶³ The bill supported by the White House was authored by Senator Chuck Schumer (D-NY) and Senator Lindsey Graham (R-NC).¹⁶⁴ This particular bill gave different levels of protection depending on if a case was civil, criminal, or dealing with national security.¹⁶⁵ In a civil case, the party seeking the source would have to show why the need for the information outweighed the public interest in newsgathering.¹⁶⁶ In a criminal case, the test would be similar with the exception being that the burden of proof would be on the journalists seeking to quash the subpoena.¹⁶⁷ When the case involved national security interests, the government would only have to show that information may prevent harm to national security.¹⁶⁸

D. *Analysis*

1. Focus on Protecting Information, not Journalists

a. *Serving the Public Interest*

Pursuant to *Bartnicki v. Vopper*,¹⁶⁹ a media outlet that publishes truthful information that it obtained legally cannot be punished.¹⁷⁰ But in

159. KATHLEEN ANN RUANE, CONG. RESEARCH SERV., RL 34193, JOURNALISTS' PRIVILEGE: OVERVIEW OF THE LAW AND LEGISLATION IN RECENT CONGRESSES 4 (2011).

160. *Id.* at 10. The Senate Judiciary Committee approved a similar bill and it is awaiting a full-vote in the Senate. *Id.* at 9.

161. *Id.*

162. *See id.* at 9. Many people believe that a WikiLeaks' document dump has derailed the Federal Reporter's Shield Law. *See, e.g.,* Jonathan Peters, *WikiLeaks Would Not Qualify to Claim Federal Reporter's Privilege in Any Form*, 63 FED. COMM. L.J. 667, 669 (2011). For a discussion on this and an argument as to why the Federal Reporter's Shield Law would not protect WikiLeaks, see *WikiLeaks Would Not Qualify to Claim Federal Reporter's Privilege in Any Form. Id.*

163. *See* Charlie Savage, *Criticized on Records Seizure, White House Pushes Shield Law*, PITTSBURGH POST, May 16, 2013, at A5.

164. *See* Free Flow of Information Act of 2013, S. 987, 113th Cong. (2013).

165. *Id.* § 2(a)(2)(A)–(B).

166. *Id.* § 2(a)(2)(B)(ii).

167. *Id.* § 2(b). The burden of proof would be *clear and convincing evidence. Id.* § 2(a)(2)(A)–(B).

168. S. 987 § 2(a)(2)(A)(iv).

169. 532 U.S. 514 (2001).

today's media landscape, the definition of who is a publisher deserving protection is unclear.¹⁷¹ But journalists are not defined by who they are.¹⁷² A person should not have to work for a traditional media company or have been trained in a journalism program in order to be considered a journalist deserving legal protections. Rather, it is the information collected and disseminated that defines journalism. It is more important to protect the principles and product of journalism, than it is to be obsessed with the person behind it.¹⁷³

Thus, any federal shield law should define protected persons as any person who collects, vets, and disseminates information that is in the public interest.¹⁷⁴ Furthermore, just because a person receives information from an anonymous source, that should not destroy his or her journalistic legitimacy.¹⁷⁵ In fact, traditional journalists have used anonymous sources for decades to serve the public interest.¹⁷⁶

170. *Id.* at 517, 529–30 (holding that radio station could publish illegally taped phone conversation that it had obtained legally from a third person).

171. *See supra* Part III.C.

172. *See supra* Part III.C.

173. *See O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 88, 99 (Cal. Ct. App. 2006); *supra* Part III.C. A website that accepts the posting of confidential information is “conceptually indistinguishable from publishing a newspaper, and we see no theoretical basis for treating it differently.” *O'Grady*, 44 Cal. Rptr. 3d at 99.

174. *See Russell, supra* note 101, at 225. Note: This policy is concerned with information pertaining to national security that is almost always in the public interest. *See* Free Flow of Information Act of 2013, S. 987, 113th Cong. § 2(a)(2)(A)(iv) (2013); Meier, *supra* note 28, at 209; Russell, *supra* note 101, at 225. The idea of defining journalist conflicts with the First Amendment protection of all publishing, but nevertheless, courts have attempted to in applying reporter's privilege. *Titan Sports, Inc. v. Turner Broad. Sys., Inc.*, 151 F.3d 125, 128, 131 (3d Cir. 1998); *see also Russell, supra* note 101, at 225. In *Titan Sports v. Turner Broadcasting Systems Inc.*, the Third Circuit forwarded a three-prong test: (1) the claimant was engaged in investigative reporting; (2) the claimant was gathering news; and (3) the claimant “possess[ed] the intent at the inception of the newsgathering process to disseminate this news to the public.” *Titan Sports, Inc.*, 151 F.3d at 131. The Second Circuit has held that in order to claim the privilege, the person must be “involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press.” *Von Bulow v. Von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987).

175. *See Borak, supra* note 2, at 624; Russell, *supra* note 101, at 222–23.

176. *See, e.g., CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN* 71 (1974).

2. New Standard for Compelling Disclosure of Confidential Sources

Under the status quo, open leaks sites would be compelled to disclose their sources or any information leading to the source.¹⁷⁷ Consequently, Congress should pass a new version of the Free Flow of Information Act that protects all publishers who are serving the public interest. This Free Flow of Information Act should apply anytime the news media is subpoenaed and faces a compelled disclosure of its sources. However, the new proposed law would only apply when instances of national security leaks and compelled disclosure would lead to the source of the *leak*.

First, if the *leak* revealed illegal government actions, the publisher would not be compelled to disclose the source.¹⁷⁸ If the *leak* did not reveal illegal action, then in order to compel the disclosure of the source, the government will have to prove a three-part test. The government must show with a preponderance of evidence¹⁷⁹ that: (1) the disclosure is necessary to identify the source of the leaked classified information,¹⁸⁰ and (2) that the leak could cause “direct, immediate, and irreparable damage” to national security.¹⁸¹ Third, the court must apply a balancing test to determine whether

177. See Meier, *supra* note 28, at 211–12.

178. See Borak, *supra* note 2, at 624; Meier, *supra* note 28, at 209. The leak served the public interest in line with the stated principles of whistleblower statutes. See Borak, *supra* note 2, at 624; Meier, *supra* note 28, at 209. Thus, all parties are immune from liability. See Borak, *supra* note 2, at 624; Meier, *supra* note 28, at 209–10 (discussing the legislative history of federal whistleblower statutes).

179. Free Flow of Information Act of 2007, S. 1267, 110th Cong. § 2(a) (2007). This is a lower standard than the previous federal shield law bills, both of which failed to be adopted. Compare Free Flow of Information Act of 2007, S. 1267, 110th Cong. § 2(a) (2007), and Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. § 2(a) (2007) with Free Flow of Information Act of 2005, S. 1419, 109th Cong. § 2(a) (2005) and Free Flow of Information Act of 2005, H.R. 581, 109th Cong. § 2(a) (2005). Both of these bills occurred before WikiLeaks became prominent and essentially killed the Act. See S. 1419 § 2; H.R. 581 § 2. This compromise might propel passage. See S. 1267 § 2(a); H.R. 2102 § 2(a); S. 1419 § 2(a); H.R. 581 § 2(a). More importantly, the standard is also lower than the test used by the independent review tribunal. See S. 1267 § 2(a); H.R. 2102 § 2(a). The desired effect is to encourage potential whistleblowers to use the legal channels rather than risk leaking, and eventual disclosure. Compare S. 1267 § 2(a)(1) and H.R. 2102, 110th Cong. § 2(a)(1) with *Branzburg v. Hayes*, 408 U.S. 665, 743 (1972).

180. See S. 1267 § 2(a)(1); H.R. 2102, § 2(a)(1). The government must first exhaust all available sources. See S. 1267 § 2(a)(1); H.R. 2102, § 2(a)(1).

181. *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 730 (1971) (per curiam); *Am. Civil Liberties Union v. Dep’t of Def.*, 389 F. Supp. 2d 547, 558 (S.D.N.Y. 2005).

this specific compelling disclosure serves more of a public interest than the protection of newsgathering.¹⁸²

3. Balancing Transparency and Government Efficacy

Of course, this policy is in response to the government's reaction to WikiLeaks and other open leak sites, and their mantra of complete transparency.¹⁸³ This reaction has included the derailing of a needed federal shield law and whistleblower protection enhancement for those who undoubtedly disseminate information in the public interest.¹⁸⁴ The government's reaction might have been an overreaction, but it is understandable from its perspective.¹⁸⁵ These leaks may have caused some damage to the United States' reputation¹⁸⁶ and may have put actual lives in danger.¹⁸⁷

There is no doubt that open leaks sites do add to the free flow of information and government accountability.¹⁸⁸ But if these sites are going to take the place of corporate media to better serve the public interest, then they must live up to the ideals of journalism.¹⁸⁹ Whoever it is that *works* at open leaks sites must actually vet through the information¹⁹⁰ and decide what truly

182. See Free Flow of Information Act of 2009, S. 448, 111th Cong. § 2(a)(2)(B)(ii) (2009) (currently stalled in committee). “[T]he [public] interest in compelling disclosure [of the information] outweighs the public interest in gathering [or] disseminating the information or news.” *Id.*

183. Shield Act, S. 4004, 111th Cong. (2010); S. 448 § 2(a)(2)(B)(ii). See also *About: What is WikiLeaks?*, *supra* note 11.

184. See *supra* note 162 and accompanying text.

185. See Ken Dilanian & Richard A. Serrano, *Snowden Leaks Severely Hurt U.S. Security, Two House Members Say*, L.A. TIMES (Jan. 9, 2014), <http://articles.latimes.com/print/2014/jan/09/nation/la-na-snowden-intel-20140110>.

186. *Id.* Or more accurately has setback its reputation rebuilding after the international community's opinion about the Bush Administration. See, e.g., *id.*

187. See David Williams, *Taliban: We'll Behead WikiLeaks Informers*, DAILY MAIL.COM, (July 29, 2010, 22:24 EST), <http://www.dailymail.co.uk/news/worldnews/article-1298817/Taliban-Well-behead-WikiLeaks-informers.html>. The Taliban was on record promising to *behead* any informants found on WikiLeaks. *Id.* In August of 2011, it was reported that WikiLeaks accidentally released thousands of documents without redaction. Tsukayama, *supra* note 30; Williams, *supra* note 187.

188. See, e.g., Daily Mail Reporter, *supra* note 83 (arguing that movement to oust Tunisian President began after corruption in its government was released by WikiLeaks in a cable documenting widespread government corruption).

189. See, e.g., Woolner, *supra* note 38. WikiLeaks is admittedly an advocacy group, but claims that it is still a *publication organization*. *Id.*

190. See *id.* WikiLeaks claims to have five *journalists* working full-time and about eight hundred people who worked occasionally, none of whom were compensated. Stefan Mey, *Leak-o-nomy: The Economy of Wikileaks (Interview with Julian Assange)*,

is in the public interest.¹⁹¹ They must redact names—as WikiLeaks has done¹⁹²—and consider what lives are being put in danger.¹⁹³ Finally, these sites must consider the cost that complete transparency has on the public.¹⁹⁴ This can be ascertained by assessing the benefits of publication versus the harms of publication.¹⁹⁵ Information about military abuse, possible war crimes, corruption, and massive spy programs serve the public interest as it informs us about the government who represents us.¹⁹⁶ A government, which we empower to take lives and for which we sacrifice our lives.¹⁹⁷ But if transparency is just to spite those in power, to reveal behind-the-door meetings and innocuous promises made by diplomats,¹⁹⁸ then it hardly serves the public interest and actually undermines the value of such sites. Furthermore, if publication by open leaks sites lead to immediate harms such as aiding terrorism or actual people dying,¹⁹⁹ then these sites should not be protected.

IV. CONCLUSION

Since the Nineteenth Century, journalists have defined themselves as the watchdog, informing and protecting the public from the abuses of powerful public and private interests.²⁰⁰ This perceived role has been the basis for journalists' arguments that they deserve special privileges not

MEDIEN-ÖKONOMIE-BLOG (Jan. 4, 2010), <http://web.archive.org/web/20101213110334/http://stefanmey.wordpress.com/2010/01/04/leak-o-nomy-the-economy-of-wikileaks/>. There is no physical headquarters for the organization. Khatchadourian, *supra* note 32.

191. See *supra* notes 50–56 and accompanying text.

192. Shaughnessy, *supra* note 47.

193. See Khatchadourian, *supra* note 32. Julian Assange has said that the release of documents could lead to the organization to have “blood on our hands.” *Id.* However, there were no reports of deaths directly caused by information released in the leaks. Adam Levine, *Gates: Leaked Documents Don't Reveal Key Intel, but Risks Remain*, CNN (Oct. 17, 2010, 8:25 AM), <http://www.cnn.com/2010/US/10/16/wikileaks.assessment/>.

194. See Khatchadourian, *supra* note 32.

195. See *id.* The same test as above, but self-regulated. See *id.* Ideally, all media would conduct this internal check. See *id.*

196. See *supra* notes 50–56 and accompanying text.

197. See *supra* note 50–56 and accompanying text.

198. See Joshua Foust, *WikiLeaks Hurts the Cause of Transparency*, PBS (Dec. 3, 2010), <http://www.pbs.org/wnet/need-to-know/security/wikileaks-hurts-the-cause-of-transparency/5503>. “The Wikileaked embassy cables have been viewed as either the foreign policy equivalent of TMZ or as the ruination of the entire international system.” *Id.*

199. See, e.g., Ed Pilkington, *Bradley Manning Leak Did Not Result in Deaths by Enemy Forces, Court Hears*, GUARDIAN (July 31, 2013 17:48 EDT), <http://www.theguardian.com/world/2013/jul/31/bradley-manning-sentencing-hearing-pentagon>.

200. See *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting).

afforded to the general public.²⁰¹ But critics argue that the traditional media has abandoned its watchdog role to become a part of the giant oligopolistic industries that they were meant to investigate.²⁰² Critics claim that, as another power player in this hierarchy, the corporate media are unable and unwilling to investigate government sources or other barons of industry.²⁰³

Conversely, if government abusers like Abu Ghraib, Black Sites, and Wiretapping were all exposed by the traditional press, then it is arguable that the current legal structure is working just fine.²⁰⁴ So, why would the law need to protect open leak sites, like WikiLeaks, at all? Why would the law need to give any further protections to whistleblowers? The answers are found in the source of the WikiLeaks most notorious drops: Army PFC Bradley Manning.²⁰⁵

One must consider why Manning went to this new media site and not the traditional press. For PFC Manning, the most important consideration had to be that WikiLeaks promised absolute confidentiality.²⁰⁶ With the traditional press in the United States, there is no federal shield law.²⁰⁷ Manning would not have had any real promise of confidentiality in the traditional model.²⁰⁸ Even if Congress had passed the Free Flow of Information Act, the exemptions added on to it would have undermined any promise of confidentiality for him.²⁰⁹ Moreover, no current whistleblower law protected him from criminal prosecution for whistleblowing on national security *secrets*.²¹⁰

Ultimately, Manning thought his *justified* actions were safer with WikiLeaks, though it did not turn out to be true.²¹¹ Without WikiLeaks, the world would never have been exposed to videos such as *Collateral Murder*

201. See *id.* at 721. “The press has a preferred position[ing] in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public’s right to know.” *Id.*; see also Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975) (arguing that the press clause gave the news media separate additional protection than that afforded by the free speech clause).

202. See *Branzburg*, 408 U.S. at 721 (Douglas, J., dissenting).

203. See, e.g., ROBERT W. MCCHESNEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES I* (1999).

204. See *supra* note 61 and accompanying text.

205. See *supra* note 65 and accompanying text.

206. See Meier, *supra* note 28, at 211.

207. See discussion *supra* Part III.A.

208. See discussion *supra* Part III.C.

209. See Free Flow of Information Act of 2013, S. 987, 113th Cong. §§ 2, 5 (2013); Tate, *supra* note 65.

210. See *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 730 (1971) (per curiam) (White, J., concurring); Borak, *supra* note 2, at 635.

211. See Tate, *supra* note 65; *supra* notes 63–65 and accompanying text.

and other important leaks, which arguably had less to do with protecting national security and more to do with protecting public perception.²¹² So, maybe WikiLeaks and PFC Bradley Manning are “far from deserving condemnation for their courageous reporting,” but instead maybe they “should be commended for serving the purpose that the Founding Fathers saw so clearly.”²¹³

212. See Meier, *supra* note 28, at 211–12; Sunshinepress, *supra* note 52. Recent leaks have revealed that after the 2003 Invasion of Iraq, the U.S. Government ignored reports of torture by Iraqi Officials, kept counts on over sixty-six thousand civilian casualties, and ignored reports of civilians killed at U.S. Army checkpoints. *Huge Wikileaks Release Shows US 'Ignored Iraq Torture'*, BBC NEWS (Oct. 23, 2010, 5:42 ET), <http://www.bbc.co.uk/news/world-middle-east-11611319>.

213. *Pentagon Papers*, 403 U.S. at 717 (Black, J., concurring).