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PRESS FREEDOM AND THE ESPIONAGE ACT: A CRITICAL JUNCTURE

Ethan Thompson*

INTRODUCTION

On May 23, 2019, Wikileaks founder Julian Assange was indicted in the Eastern District of Virginia for allegedly conspiring with Chelsea Manning to leak classified information in violation of 18 U.S.C §§ 793 et seq.¹ This indictment marks the first time since the passage of the Espionage Act of 1917 (“the Act”)² that the government has used the Act to prosecute a news publisher. Because the activities described in the indictment cannot be meaningfully distinguished from traditional journalistic practices, the government’s use of the Act in this context has profound implications for press freedoms. National security journalists may now face the possibility of criminal prosecution for simply doing their jobs.³

Media leak prosecutions under the Espionage Act have historically been infrequent, with the government bringing only four cases in the fifty-year period from 1958–2008.⁴ However, the internet-fueled decentralization of news reporting, the War on Terror, and the expanding surveillance state have drastically changed the relationship between national security and the First Amendment. Since 2009, the government has brought an astounding eighteen media leak prosecutions under the Act.⁵ During the Obama administration as well as early in the Trump presidency, the government used the Act solely to prosecute whistleblowers and leakers who transmitted

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1. Superseding Indictment, United States v. Assange (No. 1:18-cr-111), <https://www.justice.gov/opa/press-release/file/1165556/download> [<https://perma.cc/Z7XG-4UYF>].

2. 18 U.S.C. §§ 793–799.

3. See Charlie Savage, *Assange Indicted Under Espionage Act, Raising First Amendment Issues*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/us/politics/assange-indictment.html> [<https://perma.cc/GXB4-N2TC>].

4. Gabe Rottman et al., *Federal cases involving unauthorized disclosures to the news media, 1778 to the present*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/resources/leak-investigations-chart/> [<https://perma.cc/7SCP-BSZC>].

5. *Id.*

classified information to the press.⁶ Although the language of the Act appears on its face to apply to any actor who *publishes* classified information,⁷ the Obama administration refrained from using the Act to prosecute journalists and news organizations, largely due to First Amendment concerns.⁸ However, these concerns were not enough to prevent the Trump administration from indicting Assange under the Act, setting a precedent that will undoubtedly have a chilling effect on journalistic speech in general and on national security journalism in particular.⁹

In order to solve the issues presented by the government's increased use of the Espionage Act to prosecute journalistic sources and now journalists themselves, Congress will have to take decisive action. The narrowest and most drastic solution to the specific problem presented by the Assange indictment would be for Congress to eliminate § 793(e) of the Act. This would alleviate some of the chilling effect on journalists, who would no longer be directly liable for the act of publishing. However, as Professor Stephen Vladeck notes, this solution would not solve the problem of potential inchoate liability for journalists under the Espionage Act.¹⁰ In order to solve the wider issues created by the Act, a broader solution is needed. In this Note, I will propose a potential statutory framework that includes a balancing test between the government's legitimate interest in protecting classified information and the public benefit resulting from the disclosure. My proposal would allow courts to differentiate espionage and other acts that actually threaten the security of the United States from

6. Kurt Wimmer & Stephen Kiehl, *Prosecution of Journalists Under the Espionage Act? Not So Fast*, 33 COMM. LAW. 24, 24 (2017).

7. 18 U.S.C. § 793(e) (“Whoever having *unauthorized* possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, 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, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it.”) (emphasis added).

8. Wimmer & Kiehl, *supra* note 6, at 24.

9. See, e.g., Laura Poitras, *I Am Guilty of Violating the Espionage Act*, N.Y. TIMES (Dec. 21, 2020), <https://www.nytimes.com/2020/12/21/opinion/laura-poitras-assange-espionage-act.html> [<https://perma.cc/L3SU-MJNQ>] (detailing her own personal experience with the Act's chilling effect).

10. Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL'Y REV. 219, 231 (2007).

fruitful leaks that serve the public interest.

Part I of this Note details the historical development of the Espionage Act from its inception to the present day and discusses the important cases interpreting the Act from *The New York Times* case in the 70's through the controversial AIPAC case in the 2000's. Part II analyzes the First Superseding Assange Indictment and utilizes the Historical Institutional toolkit to demonstrate why the present represents a critical juncture that will determine how prosecutions under the Espionage Act will be conducted in the future. Part III will propose both policy and legal recommendations that will protect the freedom of the press and allow news outlets to perform their vital democratic function of keeping the public informed of government action.

I. HISTORY

This section details the history of the Espionage Act, starting with its enactment and early prosecutions under the Act. Next, I examine the cases challenging the constitutionality of the Act before proceeding to modern trends in Espionage Act prosecutions. The last part of this section introduces Historical Institutionalism (“HI”), which provides the toolkit that I will use to analyze the potential impact of the present period.

A. Enactment

Shortly after the United States declared war against Germany on April 6, 1917, Congress moved to enact a law that would severely punish sedition in wartime.¹¹ Until that point, only the Sedition Act of 1918, which expired in 1920, criminalized treason at the federal level. After intense legislative debate, Congress enacted the original Espionage Act, § 3 of which proclaimed:

Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success

11. Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 336 (2003).

of its enemies and whoever when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.¹²

The original Act notably did not include a provision that would have allowed the Department of Justice (“DOJ”) to directly prosecute journalists for sedition.¹³ Despite President Wilson’s insistence that the “authority to exercise censorship over the press . . . is absolutely necessary to the public safety,”¹⁴ Congress decided not to include the controversial press provision requested by the executive, largely due to First Amendment concerns. Senator Borah (R-ID) was one of many legislators who voiced criticism of the proposed press provision, noting that it “has all the ear marks of a dictatorship. It suppresses free speech and does it all in the name of war and patriotism.”¹⁵ With these concerns in mind, the final version of the Act did not include the press provision, instead containing the relatively narrowed language quoted above.

However, even this narrower version of the Act provided ample ammunition for the DOJ to prosecute anti-war speech. During World War I, the Department used the Espionage Act to prosecute more than 2,000 individuals for speech that inhibited the war effort, primarily under § 3.¹⁶ Prosecutions under the Espionage Act were more frequent than those under any other war law, except for the Selective-Service Act, and resulted in more than 1,000 convictions.¹⁷

The Ninth Circuit’s decision in *Shaffer v. United States* is representative of the legal arguments used in early Espionage Act prosecutions.¹⁸ Shaffer was accused of mailing a book in violation of the Act. The supposedly

12. *Id.*

13. *Id.* at 345.

14. *Id.* at 349.

15. *Id.* at n.57.

16. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 256 (1997).

17. See Stone, *supra* note 11, at 336 (citing DEP’T OF JUST., ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE YEAR 1918, 16–17 (1918)).

18. *Shaffer v. United States*, 255 F. 886 (9th Cir. 1919); Stone, *supra* note 11, at 337.

sedition section of the book contained the following passage: “The war itself is wrong. Its prosecution will be a crime. There is not a question raised, an issue involved, a cause at stake, which is worth the life of one blue-jacket on the sea or one khaki-coat in the trenches.”¹⁹ The court of appeals affirmed Shaffer’s conviction, holding that the “natural and probable tendency and effect of the words” ran afoul of the statute because they obstructed recruitment, which was a necessary part of the war effort.²⁰ The court further found that these natural and probable consequences of Shaffer’s knowing act were sufficient to show the willfulness and intentionality required by the statute.²¹ This decision was solidly in line with the majority of courts, who routinely allowed juries to decide whether a defendant’s speech violated the Act.²²

B. *Constitutionality of the Espionage Act*

The first case to reach the Supreme Court challenging the constitutionality of the Act was *Schenck v. United States* (1919).²³ Schenck, the General Secretary of the Socialist Party, was charged with printing and circulating leaflets that encouraged Americans not to volunteer for the draft.²⁴ Schenck argued that his conviction should be overturned and that the Espionage Act violated the First Amendment’s protection of his freedom of speech and of the press.²⁵ Writing for a unanimous Court, Justice Holmes argued that although the government’s actions may have abridged First Amendment freedoms under normal conditions, in this case, the Act was restricting words that are “used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”²⁶ Under this balancing test, the Court held that in this case the government’s compelling interest in national security during

19. *Shaffer*, 255 F. at 887.

20. *Id.*

21. *Id.* at 889.

22. Stone, *supra* note 11, at 338. For more examples of war-time prosecutions, see *id.* at 339–42.

23. *Schenck v. United States*, 249 U.S. 47 (1919).

24. *Id.* at 49.

25. *Id.*

26. *Id.* at 52.

wartime outweighed Schenck's civil liberty interest.²⁷

After *Schenck*, it took over twenty years for another Espionage Act case to make it up to the Court. In *Gorin v. United States* (1941), the Court addressed whether the Espionage Act was void for vagueness under the test established in *Connally v. General Construction Co.*²⁸ In *Connally*, the Court held that a statute was void for vagueness if its terms were not "sufficiently explicit" to inform the public as to what conduct was proscribed.²⁹ In *Gorin*, a U.S. naval officer was accused of leaking defense information to the Soviets in violation of the Act. Gorin alleged that the phrase "connected with the national defense" was unconstitutionally vague because it does not meet *Connally's* sufficiently explicit standard.³⁰ The Court agreed that the phrase was vague on its face but refused to void the statute for vagueness, instead reading into the Act a scienter requirement that "requires those prosecuted to have acted in bad faith" and with the intent to injure the United States.³¹

After *Gorin*, Congress passed the Internal Security Act of 1950, which amended the Espionage Act of 1917 and gave the Act its current codified form.³² The newly codified §§ 793 and 794 adopted the language of § 1 of the original Act, and emphasized leaking national security information, reflecting the fear at the time of large-scale communist theft of military secrets.³³ The first major case addressing the newly codified § 793 was *New York Times Co. v. United States*, commonly known as the *Pentagon Papers* case.³⁴ The facts leading up to the Court's ruling are complicated. Daniel Ellsberg was accused of leaking a trove of documents to the Washington Post and the New York Times detailing American involvement in Indochina leading up to and during the Vietnam War.³⁵ The government originally attempted to prosecute Ellsberg under the Espionage Act, but charges were

27. *Id.*

28. *Gorin v. United States*, 312 U.S. 19 (1941); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

29. *Connally*, 269 U.S. at 391.

30. *Gorin*, 312 U.S. at 26–28.

31. *Id.* at 28.

32. Internal Security Act of 1950, ch. 1024, 64 Stat. 987, 1003–04 (1950) (codified as amended at 18 U.S.C. §§ 793(d)–(e) (2000)).

33. Robert D. Epstein, *Balancing National Security and Free-Speech Rights: Why Congress Should Revise the Espionage Act*, 15 COMM.LAW CONSP. 483, 494 (2007).

34. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

35. Epstein, *supra* note 34, at 495.

dropped after the Watergate scandal revealed the Nixon administration had attempted to steal Ellsberg's medical records.³⁶ Nonetheless, the government still attempted to enjoin the Post and Times from publishing stories based on the unauthorized disclosure of the classified information. The Court ruled in a plurality opinion that the government could not enjoin the newspapers from publishing, as such an action would represent an unlawful prior restraint on the press.³⁷ While this ruling may appear on its face to be a win for press and speech freedom, multiple justices wrote concurring opinions that left the door open for potential Espionage Act prosecutions *after* the publication of stories based on a leak.³⁸ In a dissenting opinion, Justice Harlan indicated that § 793(e) was unconstitutionally vague on its face.³⁹

Another landmark case challenging the constitutionality of § 793 is *United States v. Morison*.⁴⁰ In *Morison*, the defendant was an intelligence analyst for the Navy who leaked classified satellite images of a Soviet aircraft carrier that was under construction in the Black Sea to journalists.⁴¹ He was convicted under § 793(d) and subsequently appealed on the grounds that the statute was unconstitutionally vague and overbroad in its scope.⁴² The court rejected the defendant's argument that the phrases "relating to the national defense" and "not entitled to receive" were unconstitutionally vague.⁴³ According to the court, the fact that the statute included the *mens rea* word "willfully" required the prosecution to show that the defendant acted intentionally with the knowledge that his actions were against the law.⁴⁴ This specific intent requirement combined with the fact that the defendant was an experienced intelligence agent who knew the meaning of the phrase "related to the national defense," confirmed that the language was not vague when applied to his particular case.⁴⁵ Additionally, the court held that the government classification scheme provided adequate guidance regarding who was and was not entitled to handle classified information,

36. *Id.*

37. *N.Y. Times Co.*, 403 U.S. at 715.

38. *Id.* (Marshall, J., concurring); *id.* (White, J., concurring).

39. *Id.* (Harlan, J., dissenting).

40. *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).

41. *Id.* at 1061.

42. *Id.* at 1063.

43. *Id.* at 1074–75.

44. *Id.* at 1071.

45. *Id.* at 1072–74.

and that this guidance saved the phrase “entitled to receive” from vagueness.⁴⁶ Addressing the overbreadth argument, the court held that the statute supported a vital governmental interest, was directly related to protecting the vital interest, and was narrowly tailored enough to not sweep up a substantial amount of unintended protected speech.⁴⁷

In a more recent challenge to the constitutionality of § 793, the District Court for the Eastern District of Virginia confirmed and clarified the rulings in *Morison* regarding the vagueness and overbreadth objections.⁴⁸ In *United States v. Rosen*, the district court confirmed that the *mens rea* component served to counter any potential vagueness concerns, and that the governmental classification scheme adequately limited the Act’s breadth. Multiple prosecutions brought by the Obama DOJ under the Espionage Act have also passed constitutional muster.⁴⁹

C. Recent Prosecutorial Trends

A brief examination of recent pre-Assange recent prosecutions under § 793 reveals two main trends. First, prosecutions are brought against low-level government officials but not high-level officials who engage in similar conduct. Second, prosecutions are brought only when the leak (or the person leaking) portrays the government in an unfavorable light. The prosecution of John Kiriakou by the Obama DOJ provides an illustration of these trends in action. Kiriakou was convicted under § 793(d) for disclosing information related to the CIA’s Extraordinary Rendition Program as well as the names of CIA officers involved.⁵⁰ Kiriakou was a former CIA officer who had become an outspoken critic of the post-9/11 practices employed by the agency in the Middle East.⁵¹ Around the same time that Kiriakou was convicted under 793(d), the Obama DOJ was considering another prosecution under the Act. In 2014, the DOJ was investigating David Petraeus, a retired four-star general and former head of the CIA, for

46. *Id.* at 1074.

47. *Id.* at 1076.

48. *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006).

49. *United States v. Kim*, 808 F. Supp. 2d 44 (D.D.C 2011); *United States v. Kiriakou*, 2012 U.S. Dist. LEXIS 112393 (E.D. Va. Aug. 8, 2012).

50. *Kiriakou*, 2012 U.S. Dist. LEXIS 112393, at *5–7.

51. Steve Coll, *The Spy Who Said Too Much*, THE NEW YORKER (Mar. 25, 2013), <https://www.newyorker.com/magazine/2013/04/01/the-spy-who-said-too-much> [https://perma.cc/MDX3-MSKS].

revealing the names of covert officers and the details of covert operations to his biographer.⁵² Although officials in the Department of Justice claimed that the materials could have caused “exceptionally grave damage” to the United States, they decided not to charge Petraeus under the Espionage Act.⁵³ He eventually pled guilty to a misdemeanor and avoided prison.⁵⁴

Although the juxtaposition of these two cases does not prove governmental misconduct, it does shed light on the dynamics at work behind the prosecutions. In a motion to dismiss, Kiriakou’s attorneys addressed many of the important issues regarding prosecutions under the Espionage Act. They argued that the government engaged in a selective prosecution of Kiriakou in the face of widespread similar activity that went unprosecuted.⁵⁵ Kiriakou’s attorneys cited leaks to the press about the details and identities of the Navy Seals involved in the raid that killed Osama Bin Laden, as well as a story by *The New York Times* detailing cyber-attacks by the United States Government that disrupted Iranian nuclear facilities.⁵⁶ These are specific examples of a much more widespread phenomenon. In his exhaustive study of the ecosystem of leaks, Professor Pozen cites a Senate Intelligence Committee report that determined there were 147 stories published on the front pages of the nation’s leading newspapers that relied on classified information in the first six months of 1986 alone.⁵⁷ Despite the widespread nature of leaking classified information and the fact that many similar leaks went unprosecuted, the court in *Kiriakou* refused to allow discovery into the motivations behind the government’s prosecution.⁵⁸

The first Espionage Act prosecution under the Trump administration provides further evidence of the political nature of these prosecutions. Reality Winner, a former air force officer, was convicted of leaking a document to the online news outlet *The Intercept* which detailed Russian

52. Adam Goldman, *How David Petraeus avoided felony charges and possible prison time*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/world/national-security/how-david-petraeus-avoided-felony-charges-and-possible-prison-time/2016/01/25/d77628dc-bfab-11e5-83d4-42e3bceea902_story.html [https://perma.cc/GY7M-VCU4].

53. *Id.*

54. *Id.*

55. Def. Mot. to Dismiss Counts 1, 2, 3, and 4 for Selective and/or Vindictive Prosecution at 5, *United States v. Kiriakou*, 2012 U.S. Dist. LEXIS 112393 (E.D. Va. Aug. 8, 2012) (No. 1:12-cr-127) <https://fas.org/spp/jud/kiriakou/062112-dismiss46.pdf> [https://perma.cc/MC53-77XK].

56. *Id.* at 5, 7.

57. David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 Harv. L. Rev. 512, 528–29 (2013).

58. *United States v. Kiriakou*, 898 F. Supp. 2d 921 (E.D. Va. 2012).

attempts to hack election infrastructure during the 2016 election.⁵⁹ Winner's prosecution and subsequent conviction had the appearance of being politically motivated. In his released memos, former FBI director James Comey recalls a conversation with Trump concerning leaks of classified information.⁶⁰ Trump was concerned with recent leaks, including transcripts of his calls with foreign leaders, and urged Comey and the DOJ to more aggressively pursue leakers.⁶¹ Comey responded that they should "nail one to the door as a message."⁶² Winner was arrested three months later.⁶³ This would appear to be an effort at the highest level of government to chill certain types of speech. Additionally, acting consistent with previous Espionage Act cases, the Court did not allow Winner to argue that her disclosure was in the public interest.⁶⁴ With this avenue of defense unavailable, Winner plead guilty and was sentenced to five years in prison.⁶⁵

Although the Winner case has garnered the most media attention, it was far from the only prosecution under the Act brought by the Trump Department of Justice. Including the Winner case, the Trump DOJ brought a total of five prosecutions under the Act. A brief examination of each of these cases will help illustrate how the Trump DOJ wielded the Act to aggressively target leakers of national security information. The second case brought by the Trump DOJ was against Terry Albury, an F.B.I. agent who was sentenced to 48 months in prison for leaking classified information regarding the Bureau's methods for recruiting informants and identifying potential extremists.⁶⁶ In court, Albury's lawyers argued that he came forward in an attempt to shed light on what he perceived to be "widespread racist and xenophobic sentiments" influencing the Bureau's tactics.⁶⁷ In

59. Charlie Savage & Adam Blinder, *Reality Winner, N.S.A. Contractor Accused in Leak, Pleads Guilty*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/us/reality-winner-nsa-leak-guilty-plea.html> [https://perma.cc/8P75-5AES].

60. Michael S. Schmidt, *6 Takeaways from the James Comey Memos*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/politics/comey-memos-takeaways.html> [https://perma.cc/MBL4-6FB2].

61. *Id.*

62. *Id.*

63. Savage & Blinder, *supra* note 60.

64. Savage & Blinder, *supra* note 60.

65. Savage & Blinder, *supra* note 60.

66. Charlie Savage & Mitch Smith, *Ex-Minneapolis F.B.I. Agent Is Sentenced to 4 Years in Leak Case*, N.Y. TIMES (Oct. 18, 2018), <https://www.nytimes.com/2018/10/18/us/politics/terry-albury-fbi-sentencing.html> [https://perma.cc/DGE9-Z6VS].

67. *Id.*

handing down the sentence, Judge Wright recognized Albury's good intentions but labeled his actions "a fool's errand" that "put our country at risk."⁶⁸ Soon after Albury was indicted, the DOJ charged Adam Shulte, a former C.I.A. software engineer, under the Act for allegedly leaking agency hacking tools to Wikileaks in what is known as the Vault 7 hack.⁶⁹ Although this case has not yet been resolved, Shulte faces thirty years in prison on the Espionage Act charges.⁷⁰

In May 2019, Daniel Everette Hale became the fourth person to be charged under the Act by the Trump DOJ for allegedly leaking classified information regarding the U.S. Government's use of military drones to an online news outlet widely reported to be *The Intercept*.⁷¹ The *Hale* case is potentially important since his defense team argued that the Espionage Act violates the First Amendment.⁷² Hale claimed that the court should overrule the holding in *Morrison* because that holding was based at least in part on a factual finding that the Espionage Act did not pose a significant danger to journalistic activity.⁷³ Hale and the Reporters Committee for Freedom of the Press as amici argue that the recent proliferation in Espionage Act prosecutions against media leakers is evidence that the Act does in fact significantly affect journalistic activities and therefore *Morrison* should be overruled.⁷⁴

The most recent Espionage Act prosecution is that of Henry Kyle Frese, a Pentagon counterterrorism analyst who allegedly leaked information

68. *Id.*

69. Adam Goldman, *New Charges in Huge C.I.A. Breach Known as Vault 7*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/us/politics/charges-cia-breach-vault-7.html?module=inline> [<https://perma.cc/6FUJ-9CN8>].

70. In addition to the Espionage Act charges, Shulte was also charged with child pornography offenses stemming from images found on his laptop during the leak investigation. Press Release, U.S. Attorney's Office, Joshua Adam Schulte Charged With the Unauthorized Disclosure of Classified Information and Other Offenses Relating to the Theft of Classified Material from the Central Intelligence Agency (June 18, 2018), <https://www.justice.gov/usao-sdny/pr/joshua-adam-schulte-charged-unauthorized-disclosure-classified-information-and-other> [<https://perma.cc/7HXE-SD9U>].

71. Adam Goldman, *Ex-Intelligence Analyst Charged With Leaking Information to a Reporter*, N.Y. TIMES (May 9, 2019), <https://www.nytimes.com/2019/05/09/us/politics/daniel-hale-leak-intercept.html> [<https://perma.cc/CW3A-9VAV>]. Hale is the third *Intercept* source prosecuted under the Act by the Trump Administration. Both Winner and Albury also allegedly leaked documents to *The Intercept*, a news organization that was founded in the aftermath of the Snowden disclosures.

72. Def's Mot. To Dismiss the Indictment, *United States v. Hale*, No. 1:10-cr-59 (Sept. 16, 2019).

73. *See id.* at 25 n.32.

74. *Id.*; Brief of Reporters Committee for Freedom of the Press as Amicus Curiae at 19, *United States v. Hale* (No. 1:19-cr-59).

concerning Chinese ballistic missile defenses in the South China Sea to multiple reporters, one of which was his girlfriend.⁷⁵ The Frese investigation employed a wiretap, an intrusive technique rarely used in leak investigations, which is evidence of the Trump DOJ's determination to prosecute leakers through all available means.⁷⁶ Frese was charged with two counts of willful transmission of national defense information, which carries a potential total sentence of twenty years.⁷⁷ He pled guilty and was sentenced to 30 months in prison.⁷⁸

In addition to the five Espionage Act prosecutions detailed above, the Trump administration has also brought charges against leakers in three other cases under other statutes. In June 2018, James A. Wolfe, a Senate Intelligence Committee aide, was charged with making false statements to investigators about contacts that he had with reporters.⁷⁹ Wolfe allegedly leaked details of the Committee's investigation into Russian interference in U.S. elections, including the investigation into former Trump campaign aide Carter Page.⁸⁰ Although Wolfe was not prosecuted under the Act and received a comparatively light two month sentence,⁸¹ the case provides further evidence of the politicization of leak investigations. Additionally, during the investigation into Wolfe, the Department of Justice seized the communications records of journalist Ali Watkins who had published

75. Katie Benner, *Pentagon Analyst is Charged in Leaks of Classified Reports*, N.Y. TIMES (last updated Oct. 14, 2019), <https://www.nytimes.com/2019/10/09/us/politics/kyle-frese-classified-leaks.html> [<https://perma.cc/58VL-2ERE>].

76. *Id.*; Rachel Weiner, *Intelligence analyst accused of leaking classified information let out on bond*, WASH. POST. (Oct. 11, 2019), https://www.washingtonpost.com/local/public-safety/intelligence-analyst-accused-of-leaking-classified-information-let-out-on-bond/2019/10/11/99d8ee02-eb70-11e9-9306-47cb0324fd44_story.html [<https://perma.cc/AB56-X9DZ>].

77. Press Release, Office of Public Affairs [or Dept. of Justice], Defense Intelligence Agency Employee Arrested for Leaking Classified Information to Journalists (Oct. 9, 2019), <https://www.justice.gov/opa/pr/defense-intelligence-agency-employee-arrested-leaking-classified-information-journalists> [<https://perma.cc/C4K2-WF4Z>].

78. Adam Goldman, *Ex-Pentagon Analyst Sentenced to 30 Months in Leak Case*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/us/politics/henry-frese-leaks.html> [<https://perma.cc/ZH63-XNLX>].

79. Adam Goldman et al., *Ex-Senate Aide Charged in Leak Case Where Times Reporter's Records Were Seized*, N.Y. TIMES (June 7, 2018), <https://www.nytimes.com/2018/06/07/us/politics/times-reporter-phone-records-seized.html> [<https://perma.cc/NR6J-62HS>].

80. *Id.*

81. Josh Gerstein & Matthew Choi, *Ex-Senate aide gets 2 months in prison for lying to FBI*, POLITICO (Dec. 12, 2018), <https://www.politico.com/story/2018/12/20/james-wolfe-sentencing-senate-intelligence-committee-leaking-1071960> [<https://perma.cc/TCB9-CGL3>].

stories based on the leaks.⁸² This appears to be the first instance of the Trump administration obtaining a journalist's records, a practice that the DOJ normally avoids due to First Amendment concerns.⁸³

Two more recent leak cases were brought under bank secrecy laws rather than the Espionage Act.⁸⁴ The first charges were brought against Natalie Mayflower Sours Edwards, a Treasury Department employee, for allegedly leaking details of suspicious financial transactions involving former Trump campaign manager Paul Manafort.⁸⁵ The second case involved an I.R.S. employee, John C. Fry, who allegedly leaked bank records related to former President Trump's former lawyer Michael D. Cohen.⁸⁶ All three of these non-Espionage Act prosecutions were brought against leakers who supplied information to the press about former President Trump's inner circle and Robert Mueller's investigation into the 2016 election. Even though the penalties in these cases were less severe, the prosecutions themselves evince the DOJ's determination to go after leakers, specifically those who appear to be acting against the Trump administration's best interests.

D. The Assange Indictment

It is against this backdrop of increased leak prosecutions that the government began the prosecution against Julian Assange, the founder of Wikileaks, an organization dedicated to publishing information regarding the clandestine activities of powerful governments around the world. The Obama administration reportedly considered prosecuting Assange in the aftermath of the Wikileaks' release of the Afghanistan War Logs, a trove of

82. Goldman et al., *supra* note 80.

83. Goldman et al., *supra* note 80.

84. Gabe Rottman, *This Week in Technology + Press Freedom*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Oct. 14, 2019), <https://www.rcfp.org/tech-press-freedom-oct-13-2019/> [https://perma.cc/WJX6-Y22Q].

85. Devlin Barrett et al., *Senior Treasury employee charged with leaking documents related to Russia probe*, WASH. POST (Oct. 17, 2018), https://www.washingtonpost.com/world/national-security/senior-treasury-employee-charged-with-leaking-documents-related-to-russia-probe/2018/10/17/74f67faa-d226-11e8-83d6-291fcea2ab1_story.html [https://perma.cc/9TJ8-KVKG].

86. Maggie Haberman, *I.R.S. Employee Charged With Leaking Records of Trump Lawyer Michael Cohen*, N.Y. TIMES (Feb. 22, 2019), <https://www.nytimes.com/2019/02/22/us/politics/michael-cohen-irs.html> [https://perma.cc/QY4T-P5D4].

U.S. military documents that cataloged abuses by the U.S. military abroad.⁸⁷ Although the Obama administration refrained from prosecuting Assange, the Trump administration has exhibited no such restraint. Assange was initially indicted in the Eastern District of Virginia on March 6, 2018 for allegedly conspiring with Chelsea Manning, the War Logs leaker, to hack a classified U.S. military computer network.⁸⁸ The original indictment, which was unsealed on April 11, 2018, did not charge Assange under the Espionage Act, but rather focused on Assange's alleged attempts to assist Manning in hacking a password in violation of 18 U.S.C. § 317 (conspiracy to defraud the United States) and 18 U.S.C. § 1030 (computer fraud).⁸⁹

The DOJ did not stop there and went on to issue a superseding indictment on May 23, 2019 charging Assange with 18 counts, including charges under § 793(g) (conspiracy to receive national defense information), § 793(b) (obtaining national defense information), § 793(c) (obtaining national defense information), § 793(d) (disclosure of lawfully obtained national defense information), and § 793(e) (disclosure of unlawfully obtained national defense information).⁹⁰ The superseding indictment alleged that through Wikileaks, Assange actively solicited classified information, aided and abetted Manning in obtaining classified information, and subsequently published classified information containing unredacted names of human intelligence sources.⁹¹ In remarks regarding the superseding indictment, Department of Justice officials stated that the indictment was not a threat to press freedoms since Assange was “no journalist,” and because the publication charges focused on the narrow category of information that revealed the identities of human sources.⁹²

87. Savage, *supra* note 3; Nick Davies & David Leigh, *Afghanistan war logs: Massive leak of secret files exposes truth of occupation*, THE GUARDIAN (July 25, 2010), <https://www.theguardian.com/world/2010/jul/25/afghanistan-war-logs-military-leaks> [<https://perma.cc/YM6A-2YH7>].

88. Indictment, United States v. Assange (No. 1:18-cr-111), <https://www.justice.gov/opa/press-release/file/1153486/download> [<https://perma.cc/VN5H-BSNC>]; Savage, *supra* note 3.

89. Indictment, United States v. Assange, *supra* note 89.

90. Superseding Indictment, United States v. Assange, *supra* note 1.

91. Press Release, Dep't of Justice, Wikileaks Founder Julian Assange Charged in 18-Count Superseding Indictment (May 23, 2019), <https://www.justice.gov/opa/pr/wikileaks-founder-julian-assange-charged-18-count-superseding-indictment> [<https://perma.cc/7FQH-MVKT>].

92. Press Release, Dep't of Justice, Remarks from the Briefing Announcing the Superseding Indictment of Julian Assange (May 23, 2019), <https://www.justice.gov/opa/press-release/file/1165636/download> [<https://perma.cc/G2YG-KVBP>].

However, multiple commentators have argued that the evidence of criminal activity charged in the indictment, such as using encrypted messaging platforms to communicate with sources, providing secure drop boxes to facilitate the disclosure of classified information, and pressing sources to reveal more information is activity that cannot be separated from traditional journalistic activities.⁹³

Although the first superseding indictment remains the most important and problematic aspect of the Assange case, there have been two additional developments that could influence how the case proceeds and its potential consequences for press freedoms. On June 24, 2020 the Department of Justice issued a second superseding indictment against Assange which purportedly “broaden[s] the scope of the conspiracy surrounding alleged computer intrusions with which Assange was previously charged.”⁹⁴ Although this new indictment does detail Assange’s role in allegedly conspiring with hackers to steal documents, it does not substantially modify the previous indictment or add more charges.⁹⁵

Lastly, on January 4, 2021 Judge Baraitser of the Westminster Magistrates’ Court ruled that Assange cannot be extradited to the United States, citing mental health concerns and the risk of potential suicide.⁹⁶ However, the ruling focused narrowly on health grounds and did not endorse the defense’s arguments on the politically motivated nature of the prosecution and its potential impact on free speech.⁹⁷ Subsequently, Judge Baraitser denied Assange’s request for bail, deeming him a flight risk, and requiring him to remain in the Belmarsh prison until the conclusion of

93. See Gabe Rottman, *Special Analysis of the May 2019 Superseding Indictment of Julian Assange*, 34 COMM. LAW. 5 (2019); Charlie Savage, *Press Freedoms and the Case Against Julian Assange, Explained*, N.Y. TIMES (last updated May 23, 2019), <https://www.nytimes.com/2019/04/11/us/politics/assange-indictment.html?module=inline> [<https://perma.cc/QFY7-T8XE>]; Brian Barrett, *The Latest Julian Assange Indictment is an Assault on Press Freedoms*, WIRED (May 23, 2019), <https://www.wired.com/story/julian-assange-espionage-act-threaten-press-freedom/> [<https://perma.cc/VD3Z-99X9>].

94. Press Release, Dep’t of Justice, WikiLeaks Founder Charged in Superseding Indictment (June 24, 2020), <https://www.justice.gov/opa/pr/wikileaks-founder-charged-superseding-indictment> [<https://perma.cc/6PSB-EYHB>].

95. See Second Superseding Indictment, *United States v. Assange* (No. 1:18-cr-l 11), <https://www.justice.gov/opa/press-release/file/1289641/download> [<https://perma.cc/Z96M-ASWW>].

96. Elian Peltier & Megan Specia, *U.K. Judge Blocks Assange’s Extradition to U.S., Citing Mental Health*, N.Y. TIMES (last updated Feb. 12, 2021), <https://www.nytimes.com/2021/01/04/world/europe/assange-extradition-denied.html> [<https://perma.cc/95GK-V9R4>].

97. *Id.*

proceedings.⁹⁸ Since the U.S. has declared its intention to appeal the extradition ruling, Assange will likely remain in Belmarsh for some time.⁹⁹

E. Historical Institutionalism

Because the remainder of this Note will apply the analytical tools of Historical Institutionalism (“HI”), it is necessary to explain how this framework has developed and how it works in practice. While political scientists have long recognized the impact that institutions have on society, the birth of “new institutionalism” has created more precise frameworks for analyzing the birth and development of institutions.¹⁰⁰ Of the three “new institutionalisms,” rational choice, sociological, and historical, historical institutionalism is unique in its emphasis on the temporal aspect of institutional development.¹⁰¹

The two main concepts that inform historical institutionalist analysis are critical juncture and path dependence. Political Science literature defines a critical juncture as “a period of significant change, which typically occurs in distinct ways in different countries . . . and which is hypothesized to produce distinct legacies.”¹⁰² In identifying a particular juncture as critical, historical institutionalists look for two key characteristics: the probability jump and the temporal aspect.¹⁰³ The probability jump measures the probability of a certain outcome occurring before the critical juncture as opposed to the probability of the same outcome occurring after the juncture.¹⁰⁴ The temporal aspect is simply the amount of time involved in a

98. Ben Quinn, *Julian Assange refused bail despite judge ruling against extradition to US*, THE GUARDIAN (Jan. 6, 2021), <https://www.theguardian.com/media/2021/jan/06/julian-assange-refused-bail-despite-judge-ruling-against-extradition-to-us> [<https://perma.cc/XQD2-7X43>].

99. See Ellen Milligan, *Julian Assange Denied Bail During U.S. Extradition Appeal*, BLOOMBERG (Jan. 6, 2021), <https://www.bloomberg.com/news/articles/2021-01-06/julian-assange-denied-bail-during-u-s-extradition-appeal> [<https://perma.cc/EHA8-XBP8>].

100. Orfeo Fioretos et al., *Historical Institutionalism in Political Science*, in THE OXFORD HANDBOOK OF HIST. INSTITUTIONALISM (Orfeo Fioretos et al., eds., 2016).

101. For an overview of the “new institutionalisms” see Peter A. Hall & Rosemary C. R. Taylor, *Political Science and the Three New Institutionalisms*, 46 POL. STUD. 936 (1996).

102. RUTH BERINS COLLIER & DAVID COLLIER, SHAPING THE POLITICAL ARENA: CRITICAL JUNCTURES, THE LABOR MOVEMENT, AND REGIME DYNAMICS IN LATIN AMERICA 29 (1991).

103. Giovanni Capoccia & R. Daniel Kelemen, *The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism*, 59 WORLD POL. 341, 360 (2007).

104. *Id.* at 360–61.

junction compared to the length of the path that the juncture facilitates.¹⁰⁵ Basically, a juncture is at its most critical when there is a high probability jump combined with a short juncture and a long path.

Path dependence, although originally developed in the field of economics, is the concept through which historical institutionalists explain how institutions and institutional behavior persist, even after they are no longer efficient or after the conditions giving rise to the institution or behavior no longer exist.¹⁰⁶ Path dependence can be understood as a self-reinforcing process, where institutional change creates positive feedback for the political actors embedded within an institution, making it increasingly difficult to deviate from the existing path over time.¹⁰⁷ Taken together, critical juncture and path dependence allow historical institutionalists to analyze why institutions take the shape that they do and why institutional actors behave in certain ways. I will now attempt to use these analytical tools to examine the potential impact of the current period on the future institutional behavior of the Department of Justice regarding prosecutions under the Espionage Act.

105. *Id.* at 361.

106. Fioretos et al., *supra* note 101, at 7.

107. Fioretos et al., *supra* note 101, at 8, (citing Paul Pierson, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 20–21 (2004)).

II. ANALYSIS

This section begins with a legal analysis of the Assange Indictment, which will demonstrate why the charges leveled against Assange cannot be differentiated from traditional journalistic activities. I will then attempt to use the HI toolkit to show the potential impacts of the Assange Indictment on the precarious equilibrium between First Amendment protections and national security.

A. The Indictment and Journalistic Activity

Although the Department of Justice has attempted to frame Assange and Wikileaks as operating outside the scope of journalism,¹⁰⁸ the charges in the indictment fail to differentiate Assange's behavior from that of traditional national security journalists. Notably, the argument that the charges in the original March 6, 2018 indictment are separable from traditional journalistic activities is a plausible one. The original indictment centered around an alleged conspiracy between Assange and Manning to crack a password on a secure DOD computer.¹⁰⁹ Assange allegedly assisted Manning in cracking a password that would have allowed Manning to cover her tracks by accessing the classified DOD documents under another username.¹¹⁰ Although the original indictment was concerning to some press freedom advocates because it seemingly criminalized the act of obscuring a source's identity, the specifically alleged act of hacking a password on a DOD computer certainly falls outside the purview of mainstream investigative journalism.¹¹¹ Conversely, the activity cited in the first superseding indictment *cannot* be differentiated from traditional journalistic activity, and the second superseding indictment does not alter the crux of the pure publication¹¹² allegations contained in the first superseding indictment.¹¹³

108. Press Release, *supra* note 93 (stating that Assange is "no journalist").

109. Indictment, United States v. Assange, *supra* note 89.

110. Ben Wizner & Jameel Jaffer, *The Assange Indictment and Press Freedoms*, ACLU (Apr. 15, 2019), <https://www.aclu.org/blog/free-speech/freedom-press/assange-indictment-and-press-freedoms> [<https://perma.cc/K7GJ-TVA4>].

111. *Id.*

112. "Pure publication" refers to charges based solely on the underlying act of publication.

113. For more discussion on the potential ameliorative effects of the Second Superseding Indictment, see *The National Security Law Podcast: Cleanup on Aisle Trump!* (July 2, 2020), <https://www.nationalsecuritylawpodcast.com/episode-172-cleanup-on-aisle-trump/>

The government has put forth three lines of reasoning in an attempt to differentiate Assange and Wikileaks from traditional journalism outlets. The first government line of reasoning contends that Assange is “no journalist”¹¹⁴ and therefore the indictment is not an attack on the press. Although reasonable minds can disagree about the validity of Assange’s methods, whether he is or is not a journalist bears no relation to the charges alleged in the superseding indictment.¹¹⁵ This is largely because the Espionage Act makes no mention of journalism or the press, but instead criminalizes the act of communicating classified information without regard for the medium used for such a communication.¹¹⁶ Similarly, the First Amendment applies to everyone, including non-citizens, regardless of their journalistic credentials.¹¹⁷ Therefore, the fact that the current Department of Justice (and many commentators) do not classify Assange as a journalist is irrelevant when considering the First Amendment implications of the superseding indictment.

The government’s second line of reasoning attempts to differentiate Assange from traditional journalistic outlets because he published the names of U.S. allies and informants, thereby putting lives at risk.¹¹⁸ Importantly, the text of the Act does not discriminate between redacted and unredacted information, but rather refers only to documents “relating to the national defense, 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.”¹¹⁹ In previous Espionage Act cases, including the recent prosecution of Reality Winner, the government has successfully argued that this phrase should be broadly construed to include essentially any information that the government deems harmful to national security, and not be limited to

[<https://perma.cc/V36M-CBEW>].

114. Press Release, *supra* note 93.

115. Rottman, *supra* note 94, at 5–6.

116. 18 U.S.C. § 793(d)–(e) (whoever “willfully communicates” NDI to a person “not authorized to receive it”).

117. Rottman, *supra* note 94, at 5–6.

118. Press Release, *supra* note 94, (“The indictment also charges Assange for his posting of a narrow subset of classified documents on WikiLeaks that allegedly identified the names of human sources—including local Afghans and Iraqis who were assisting U.S. forces in theater, and those of journalists, religious leaders, human rights advocates, and political dissidents living in repressive regimes. Assange thereby is alleged to have created grave and imminent risk to their lives and liberty”).

119. 18 U.S.C. §§ 793(d)–(e).

information that puts informants or allies at risk.¹²⁰ Because the two rationales put forth by the government—that Assange is not a journalist and that he published unredacted documents—fail to differentiate the activity charged in the first superseding indictment from traditional journalistic activity, the indictment represents an unprecedented infringement on the freedom of the press guaranteed by the First Amendment.

The government's third line of reasoning, as reflected in the second superseding indictment, attempts to differentiate Assange from traditional journalists by emphasizing his hacker credentials and his conspiratorial interactions with other hackers. If the government were to rely solely on these interactions in court, this would limit the potential chilling effect since such actions are outside of mainstream journalistic activity. However, because Assange prevailed in his extradition hearing, he will likely never stand trial in the U.S. As a result, DOJ will likely never have to make the case before a court. Because we will likely never know how DOJ would have framed the case and because the first superseding indictment remains pending and unaltered, the second superseding indictment does not diminish its potential chilling effect.

In attempting to establish a criminal conspiracy between Assange and Manning, the government cites as evidence two actions that are commonplace journalistic techniques. The first is Wikileaks' use of Secure File Transfer Protocol ("SFTP") technology to facilitate Manning's leak of classified information. The use of SFTP technology is cited in paragraphs 22 and 27 of the first superseding indictment as evidence that Assange and Wikileaks actively solicited classified disclosures.¹²¹ However, SFTP technology is indistinguishable from "secure drop," a common tool used by *The New York Times*, *The Washington Post*, *Al Jazeera*, *The Guardian* and others to facilitate anonymous tips.¹²² In the digital age, it is important for journalistic outlets to be able to provide secure systems that protect a source's identity in order to facilitate important, newsworthy stories. By

120. Indictment, *United States v. Winner* (No. 1:17-cr-00034-JRH-BKE).

121. Superseding Indictment, *United States v. Assange*, *supra* note 1, at ¶¶ 22, 27.

122. *Secure Drop*, N.Y. TIMES, <https://www.nytimes.com/tips#securedrop> [<https://perma.cc/857M-NYV3>] (last accessed Jan. 15, 2020); *How to share a story or a tip with Al Jazeera*, AL JAZEERA, <https://www.aljazeera.com/tips/> [<https://perma.cc/ZVR8-RSWG>] (last accessed Jan. 15, 2020); *The Guardian SecureDrop*, THE GUARDIAN (last accessed Jan. 15, 2020), <https://www.theguardian.com/securedrop> [<https://perma.cc/2M2H-DVGJ>]. For more information on SecureDrop see <https://securedrop.org/> [<https://perma.cc/ADW9-P97Q>] (last accessed Jan. 15, 2020).

citing the use of this technology as evidence of a criminal conspiracy, the superseding indictment sets a dangerous precedent that will undoubtedly hinder the ability of news organizations to perform vital investigative journalism in the future.

The second action cited by the government as evidence of a criminal conspiracy is Assange's remark to Manning that "curious eyes never run dry."¹²³ The indictment alleges that this comment was intended to "encourage Manning to continue her theft of classified documents . . ."¹²⁴ However, in the course of reporting a story, journalists will often ask for additional documents or information from sources in order to vet a story for accuracy, provide more context for the story, or assess the potential national security impacts of the story.¹²⁵ Assange's remark falls far short of direct solicitation of classified information, but is rather a classic example of source cultivation, a widespread journalistic practice. By citing this vague remark as evidence of a criminal conspiracy, the government injects a new obstacle into the journalist-source relationship that may well make it more difficult for journalists to accurately report on matters of national security.

The distinctions that the government attempts to draw between Assange and mainstream journalism fail to ameliorate the First Amendment concerns raised by the superseding indictment. Counts 15-17 of the indictment charge Assange with direct violations of § 793(e), the "pure publication" section of the Act. Neither the government's assertion that Assange is "no journalist" nor the government's argument about unredacted identifying information succeed in legally differentiating Assange from traditional journalists. Similarly, the evidence that the government cites as establishing a criminal conspiracy between Assange and Manning to violate the Act risks criminalizing widely used journalism tools and methods.

123. Superseding Indictment, *United States v. Assange*, *supra* note 1, at ¶¶ 22, 24, 27.

124. Superseding Indictment, *United States v. Assange*, *supra* note 1, at ¶ 21.

125. Rottman, *supra* note 94, at 9.

B. A Critical Juncture

The current period represents a critical juncture that will determine the future relationship between the First Amendment and national security. As discussed above, the two factors that characterize a critical juncture are the temporal aspect and the probability jump. This section will analyze the current period in terms of these two factors.

The temporal aspect should be examined in terms of the history of the institution in question. As discussed in the history section above, there has essentially been 100 years of interaction between the Department of Justice and the press under the auspices of the Espionage Act. The first historical period, during World War I, saw an extreme number of cases brought under the original formulation of the Act in a manner that is incompatible with our modern conception of the First Amendment. The second historical period, from the end of the World War I up until 2009, was characterized by a reluctance on the part of the government to use the Act in way that would affect the First Amendment. The third historical period, from 2009 through the present day has seen a drastic increase in Espionage Act prosecutions brought against whistleblowers. Even during this upswing in prosecutions, there has never been an Espionage Act charge brought against a third-party based purely on the publication of national defense information.¹²⁶

The Assange prosecutions threaten to distort the precarious equilibrium between national security and the press which has been in place relatively intact since the end of World War I. The Obama era prosecution of whistleblowers (which continued under Trump) has certainly affected this ecosystem by imposing harsher penalties on leakers, thereby making potential leakers think twice before blowing the whistle on potentially newsworthy stories. On some level, the tactic of going after leakers makes sense for the government. In the digital age, large media companies no longer have a monopoly on the information that reaches the public. Before the internet, the government was generally able to halt the publication of potentially damaging national security information by the press through

126. *Id.* It should be noted that there are two previous instances where charges have been filed against third parties before being dropped, the *Pentagon Papers* case and *Rosen*. In the former because of prosecutorial misconduct and in the latter because of the *mens rea* requirement imposed by the judge for charges under § 793(d). See Epstein, *supra* note 33, at 495; *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006).

negotiations with the newspapers or television stations that had possession of the damaging information. The internet changed this dynamic by democratizing the ability to broadcast information to the public through blogs and social media. Because the government no longer has the ability to halt publication once the leak has occurred, it has turned to prosecutions to disincentivize the act of leaking in the first place. These prosecutions have surely had an effect on the ecosystem of leaks; but it is impossible to tell exactly how large the impact has been. Because the logic of the Assange indictment could potentially apply to a large variety of news organizations that publish stories based on classified information, a successful prosecution of Assange or the continued looming presence of the first superseding indictment would significantly alter this already fragile ecosystem.

The question remains: why is this happening now? This is the probability due to jump factor, which can be explained by examining current events. The current period represents a perfect storm, which allowed the Trump administration to pursue a prosecutorial policy that previous administrations avoided. The first factor relates to Assange himself. It is hard to imagine a less sympathetic case for press freedom advocates. Not only did Assange make the ethically questionable decision to publish these stories unredacted, he has also been charged with sexual assault in Sweden¹²⁷ and is widely disparaged for his controversial role in the 2016 election.¹²⁸ The indictment also comes at a time when faith in the media has never been lower.¹²⁹ Former President Trump repeatedly labelled the media as “the enemy of the people,”¹³⁰ and the public has grown increasingly frustrated with mainstream media outlets over supposed “fake news.” This lack of confidence in the media combined with the peculiar nature of the

127. Megan Specia, *Sweden Reopens Rape Case Against Julian Assange*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/world/europe/wikileaks-julian-assange.html> [https://perma.cc/38BE-MGVV].

128. See, e.g., Zack Beauchamp, *WikiLeaks just tried to justify its behavior this year in a bizarre Election Day statement*, VOX (Nov. 8, 2016), <https://www.vox.com/world/2016/11/8/13563750/wikileaks-2016-election-statement> [https://perma.cc/EGE6-F3XA].

129. Megan Brenan, *Americans' Trust in Mass Media Edges Down to 41%*, GALLUP (Sept. 26, 2019), <https://news.gallup.com/poll/267047/americans-trust-mass-media-edges-down.aspx> [https://perma.cc/E2LY-KBEA].

130. John Wagner, *'Crazed lunatics': Trump again attacks the news media as 'the enemy of the people'*, WASH. POST, Jan. 7, 2019, https://www.washingtonpost.com/politics/crazed-lunatics-without-explanation-trump-again-attacks-the-news-media/2019/01/07/290aed10-126d-11e9-b6ad-9cf62dbb0a8_story.html [https://perma.cc/9W96-ELQ3].

Assange case allowed the Trump administration to take action that would have previously been politically untenable.

III. PROPOSAL

In order to end this critical juncture and head down a more reasonable path, we must take decisive action now. This action must come from either the federal judiciary or Congress. There are potential executive actions that could deescalate the present situation, but this does not seem likely. Even if the executive branch were to decide to drop the charges against Assange, the legal frameworks that allow the government the discretion to bring such charges would remain in place. My proposal details two potential actions, one by the judiciary and one by Congress, that could potentially reestablish a more balanced equilibrium between the First Amendment and the government's national security interests.

Firstly, Congress could amend the Espionage Act. The easiest and most effective fix would be to simply eliminate § 793(e) altogether. Although this may seem like a drastic action, it would be unlikely to hinder the ability of the government to prosecute the vast majority of Espionage Act cases. For instance, in the Assange case the government could still bring charges under the Computer Fraud and Abuse Act as well as conspiracy charges under the other sections of the Espionage Act. Even without § 793(e) at its disposal, the government could still effectively prosecute rogue journalists who go beyond journalistic norms and take concrete steps to aid and abet leakers. Additionally, the government could still prosecute malicious actors by imposing inchoate liability under the other sections of the Act such as § 793(d). By eliminating the pure publication portion of the Act, § 793(e), and leaving intact the unauthorized disclosure portions of the Act such as § 793(d), Congress would continue to allow the executive to protect national security while significantly decreasing infringement on the First Amendment.

Even if Congress does not take action, the judiciary could interpret the Act in a way that would minimize its First Amendment implications. As noted above, courts have repeatedly refused to rule specific sections of the Act unconstitutionally vague or overbroad. However, these prior rulings would not be binding if the Assange case or another pure publication case were to come before the courts. It is possible that a pure publication case

could change a court's overbreadth calculation, as any case involving media publication would necessarily sweep in more potential speech than any previous case. Even if the courts were to uphold the constitutionality of the Act, a court could alleviate First Amendment concerns by applying a balancing test similar to the test established by the Supreme Court in *Pickering v. Board of Education*.¹³¹ In *Pickering*, a case involving a public school teacher and speech critical of the government, the Court balanced a teacher's right to discuss matters of public interest with the state's legitimate interest in promoting efficiency in public services.¹³² In pure publication cases brought under § 793(e), courts could employ a similar test that would balance the public interest value of the speech against its potential harm to national security. Courts could go through each count charged under § 793(e) and determine whether the particular speech in question is in the public interest and whether this interest outweighs any potential national security harms.

Although this balancing test would necessitate a more active role in national security cases, it should not be too difficult to implement. For instance, in the Assange case, the court would apply the test individually to counts 15, 16, and 17. For count 15, Assange's defense lawyers would have to demonstrate the public interest in the specific document, which for count 15, would be the significant activity logs from the war in Afghanistan. The prosecution would argue that the publication harmed national security because it named sources and put lives in danger. The court would then repeat the process for count 16 regarding Iraq war logs and count 17 evaluating the state department cables. By allowing the defense to argue for speech in the public interest, the court would significantly reduce the First Amendment impact of § 793(e). In Assange's case, such a balancing test would be unlikely to favor Assange because of his publication decisions. However, in a case where publication is clearly in the public interest and does not significantly harm national security, such as the Reality Winner case, such a balancing test would likely favor the freedom of the press.

131. *Pickering v. Board of Ed.* 391 U.S. 563 (1968); see *Our Gym Was Named for the Espionage Act Guy???*, THE NAT. SEC. LAW PODCAST (May 28, 2019), <https://www.nationalsecuritylawpodcast.com/episode-123-our-gym-was-named-for-the-espionage-act-guy/> [<https://perma.cc/5DRW-DK4Q>] (discussing *Pickering* balancing test in the Espionage Act context).

132. *Pickering*, 391 U.S. at 568.

CONCLUSION

When the government unveiled the superseding indictment charging Assange under §

793(e) of the Espionage Act, the balance between the First Amendment and the government's interest in protecting national security entered a critical juncture. Neither the government's assertion that Assange is "no journalist," the indictment's focus on unredacted information, nor the government's attempt to link Assange with hacking is sufficient to legally distinguish the case against Assange from other traditional journalistic national security reporting. Furthermore, the specific actions cited in the indictment, including the use of secure drop technology and Assange's alleged solicitation of further documents from Manning, criminalize common journalistic methods. In order to prevent a significantly altered equilibrium between national security and the First Amendment, Congress or the courts must take action. In the legislative arena, Congress could potentially amend the Act by eliminating § 793(e), which would alleviate First Amendment concerns while preserving the government's ability to prosecute whistleblowers and journalists who significantly aid and abet classified leaks. Alternatively, the courts could step in and implement a balancing test for § 793(e) cases that would weigh the public interest in publication against any potential national security concerns. Additionally, the incoming Biden Administration could drop the charges against Assange, although such an action would not cure the First Amendment defects inherent in the Act. If no action is taken during this critical juncture, the United States risks crippling the First Amendment freedoms of journalists and publishers who inform the public of matters vital to the functioning of our democracy.