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Government Secrets, National Security and Freedom of the Press: The Ability of the United States to Prosecute Julian Assange

Heather M. Lacey

STUDENT NOTE

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ABSTRACT

Julian Assange has gained worldwide fame and notoriety through his role as founder and spokesperson for the whistle-blowing news organization, *WikiLeaks*. Throughout its existence, *WikiLeaks* has exposed thousands of classified documents and intelligence related to the national security of the United States and countries throughout the world. Some "leaks" of classified information attributed to *WikiLeaks* include the publication of thousands of State Department diplomatic cables, the disclosure of classified military documents regarding the wars in Iraq and Afghanistan, and the release of what have become known as the "Guantanamo Files," a series of classified documents detailing the inner workings of Guantanamo Bay Detention Center. Currently, the Department of Justice is building a criminal case in order to prosecute Assange for the release and publication of classified national security information through the *WikiLeaks* website.

This article discusses the most foreseeable substantive and procedural difficulties in the potential United States prosecution of Julian Assange. Substantively, the criminal theory upon which the Department of Justice will choose to prosecute Assange is unclear. Legal scholars have speculated that the Federal Espionage Act, which is discussed in detail throughout this article, provides the most viable routes for prosecution of national security leaks. As there is no direct precedent for such a prosecution, this article proceeds by analyzing two cases of foreseeable importance to an Assange prosecution under the Espionage Act: *New York Times Company v. United States* and *United States v. Rosen*. The *New York Times* case, better known Pentagon Papers case, is significant in that it suggests through dicta that it is possible for the press to be prosecuted under the Espionage Act for the publication of classified national

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security material. The *Rosen* case, which represents the first time that a civilian has been prosecuted for a national security leak under the Espionage Act, is important in that the ruling of Judge Ellis establishes significant procedural barriers for an Espionage Act prosecution—most notably the imposition of the "bad faith" requirement. Procedurally, the United States will face difficulty in the process of extraditing Assange to the United States for a criminal prosecution. This article analyzes in depth the potential avenues for extradition, as well as statutory requirements and exceptions, such as the dual criminality requirement and the political offense exception.

Ultimately, the United States Congress will need to establish new policies addressing this matter, as there is currently no statutory framework equipped to handle the global dissemination of classified national security information through the World Wide Web.

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I. INTRODUCTION

Journalist, hacker, rapist, whistleblower, traitor, hero, anarchist, spy and criminal. These are just some of the expressions that have been used to describe Julian Assange, founder of the worldwide whistle-blowing news organization, *WikiLeaks*.[1] *WikiLeaks* is a non-profit media organization that is dedicated to exposing secret information about governments and corporations.[2] *Wikileaks* was founded by Assange, as well as numerous other computer experts and political activists, in 2006.[3] The *WikiLeaks* website is unique in that it functions as a combination between a user-based informational website, such as Wikipedia,[4] in which readers are able to actively participate in providing, changing and enhancing the content of the site, and a news organization. *WikiLeaks* describes itself as:

> A non-profit media organization dedicated to bringing important news and information to the public. We provide an innovative, secure and anonymous way for independent sources around the world to leak information to our journalists. We publish material of ethical, political and historical significance while keeping the identity of our sources anonymous, thus providing a universal way for the revealing of suppressed and censored injustices.[5]

The message of *WikiLeaks* is clear, and the aim is global.[6] The website further details the mission statement of the organization, stating: "We are of assistance to peoples of all countries who wish to reveal unethical behavior in their governments and institutions. We aim for maximum political impact."[7]

Since its inception, *WikiLeaks* has published itself, or has handed over to larger news organizations, such as the *New York Times* and the *Guardian*, a significant amount of classified information that has caught the attention of the United States government.[8] Some "leaks" of classified information attributed to *WikiLeaks* include the publication of thousands of State Department diplomatic

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[1] *See generally* WikiLeaks, http://wikileaks.org (last visited June 17, 2011).
[2] *See* Wikileaks, http://wikileaks.org/About.html (last visited June, 17, 2011).
[3] *See* Joby Warrick, *Exposing Secrets through Secrecy; Cloaked in the Virtual World, Wikileaks Gives Whistleblowers a Powerful Platform*, WASH. POST, May 20, 2010, at A01.
[4] *See generally* Wikipedia, http://www.wikipedia.org (last visited June 17, 2011).
[5] WikiLeaks, *supra* note 1.
[6] *See generally* WikiLeaks, *supra* note 1.
[7] WikiLeaks, http://mirror.Wikileaks.info/, (last visited Apr. 05, 2011).
[8] *See e.g.* Baruch Weiss, *Prosecuting WikiLeaks? Good Luck.*, WASH. POST, Dec. 5, 2010, at B02; *see also* Burns and Ravi Somaiya, *WikiLeaks Founder Is Jailed in Britain in Swedish Assault*, N.Y. TIMES, Dec. 8, 2010, at A1, col. 3.

cables,[9] the disclosure of classified military documents regarding the wars in Iraq and Afghanistan,[10] and the release of what have become known as the "Guantanamo Files,"[11] a series of classified documents detailing the inner workings of Guantanamo Bay Detention Center.

How does one, then, identify and describe the intent and rationale of Julian Assange and his actions? The speculation is endless, and the debates are heated. Is he a journalistic genius who has informed citizens around the globe as to what their governments are really doing? Is he an anarchist, intent on single-handedly exposing government corruption and thereby destroying faith in institutions and democracy? Is he a criminal, actively encouraging and enabling people around the globe to steal and leak classified information about their governments and militaries? This article seeks to identify some of the most significant issues that the United States will face in its attempt to classify Julian Assange as a criminal under the current U.S. criminal code, and successfully prosecute him in American courts.

Despite the denouncement of the *WikiLeaks* initiative by many governments around the world,[12] there has been a substantial amount of praise for *WikiLeaks'* method of "journalism," as Assange and his efforts have received awards and commendations from various organizations around the globe.[13] The *WikiLeaks* website proudly displays a quote from an article in *TIME Magazine*, stating that the *WikiLeaks* website "could become as important of a journalistic tool as the Freedom of Information Act."[14] In 2009 Julian Assange won the

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[9] *See generally* State's Secrets, *A cache of diplomatic cables provides a chronicle of the United States' relations with the world*, N.Y. TIMES, *available at* http://www.nytimes.com/interactive/world/statessecrets.html#.

[10] *See generally* The War Logs, *An archive of classified military documents offers views of the wars in Iraq and Afghanistan*, N.Y. TIMES, *available at* http://www.nytimes.com/interactive/world/war-logs.html.

[11] *See generally* The Guantanamo Files, *Articles based on a huge trove of secret documents leaked to the anti-secrecy organization WikiLeaks and made available to The New York Times by another source on the condition of anonymity*, N.Y. TIMES, *available at* http://www.nytimes.com/guantanamo-files/; *See also* The Guantanamo Files, *A Statement by the United States Government*, N.Y. TIMES, Apr. 24, 2011, *available at* http://www.nytimes.com/2011/04/25/world/guantanamo-files-us-government-statement.html.

[12] *See e.g.* Secretary of State Hillary Clinton described the leaks as "'an attack on America' responsible for 'endangering innocent people' and 'sabotaging the peaceful relations between nations.'" Weiss, *supra* note 8.

[13] *See generally* Wikileaks, *supra* note 2.

[14] Tracy Samantha, *A Wiki for Whistle-Blowers,* TIME MAG., Jan. 22, 2007, *available at* http://www.time.com/time/nation/article/0,8599,1581189,00.html; *see also* Wikileaks, http://wikileaks.org/ (last visited June 17, 2011).

Amnesty International New Media Award, which was presented to Assange in appreciation of his work exposing extrajudicial killings in Kenya.[15] Additionally, Assange was awarded the Freedom of Expression Award for New Media in 2008,[16] and, in 2010, he was a runner-up for *TIME Magazine*'s person of the year.[17] Some supporters have even nominated Assange for the Nobel Peace Prize.[18]

Regardless of the journalistic praise that Assange has received, it is easy to understand why many of the documents being published by *WikiLeaks* are ones in which the United States asserts are detrimental to national security, as such documents hold the potential to destroy international diplomatic relations, and endanger the lives of U.S. soldiers overseas through exposing military plans. However, thus far, the United States has not charged Assange with a criminal violation.[19] During a press conference in December of 2010, United States Attorney General Eric Holder stated that the Department of Justice is engaging in a "very serious, active, ongoing investigation that is criminal in nature" into the *WikiLeaks* releases.[20]

The criminal theory that the United States is likely to use in the prosecution of Julian Assange is unclear; therefore all that can be accomplished in the meantime is an analysis of the statutes and precedents that will likely govern the efforts of the Department of Justice. This article seeks to illuminate both the procedural and substantive difficulties that the United States government will face in their on-going efforts to build a criminal case against Julian Assange. First, this article introduces and discusses the nuances of a potential prosecution under the Federal Espionage Act.[21] This is accomplished

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[15]Amnesty International Media Awards 2009, Winners and Shortlist, *available at* http://www.amnesty.org.uk/uploads/documents/doc_20539.pdf; *see also* Wikileaks, *supra* note 2.

[16] Winners of Index on Censorship Freedom of Expression Awards Announced, *available at* http://www.indexoncensorship.org/2008/04/winners-of-index-on-censorship-freedom-of-expression-award-announced/.

[17] Barton Gelman, *Person of the Year 2010*, TIME MAG., Dec. 15, 2010, *available at* http://www.time.com/time/specials/packages/article/0,28804,2036683_2037118_2037146,00.html

[18] John F. Burns and Ravi Somaiya, *WikiLeaks Founder In Court to Fight Extradition Effort*, N.Y. TIMES, Feb. 8, 2011, at A9.

[19] The United States has not yet charged Julian Assange with a criminal violation, yet there have been legal steps taken that are indicative of a pending criminal prosecution. For example, the United States has subpoenaed Assange's Twitter account as part of their investigation. *See* Ravi Somaiya, *British Court Grants Sweden's Request for Extradition of the Founder of WikiLeaks*, N.Y. TIMES, Feb. 25, 2011, at A4.

[20] Burns and Somaiya, *supra* note 8.

[21] 18 U.S.C.A. § 792 et seq. (West).

through a discussion of the statutory text, followed by an analysis and application of two prosecutions under the Espionage Act that are of foreseeable importance: *New York Times Company v. United States*,[22] better known as the "Pentagon Papers" case, and *United States v. Rosen*.[23] This article provides an in-depth analysis of these two cases, and illuminates the ways in which these cases may aid or impair the efforts of the United States in prosecuting Assange under the Espionage Act. Finally, the procedural difficulties of a potential criminal prosecution of Assange in the United States are discussed, with a focus on extradition procedures and possibilities.

II. SUBSTANTIVE CHALLENGES TO PROSECUTION

The theory under which the United States will build a criminal case against Assange is uncertain. What is clear is that is there is no legislation that directly addresses a situation like the one at hand, where classified government documents are made available to the world instantaneously via the World Wide Web. It is likely that Congress will create new legislation that is better able to address national security leaks during this age of growing technology and global dependence on the Internet. In the meantime, the United States must prosecute Assange under an *existing* criminal statute, as the use of an *ex post facto* law[24] is violative of the U.S. Constitution.[25] The success of the United States' efforts is heavily dependent on the ability of the Department of Justice to gather evidence about *WikiLeaks* and its operations, as there are several federal criminal statutes that could be utilized in the efforts to prosecute Assange.[26] Potential theories of liability for Assange include conspiracy and trafficking in stolen government property.[27] However, legal scholars are focusing their speculation on a prosecution under the Federal Espionage Act, which appears to hold the most

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[22] New York Times Co. v. United States, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971).

[23] United States v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2006) *amended*, 1:05CR225, 2006 WL 5049154 (E.D. Va. Aug. 16, 2006) and *aff'd,* 557 F.3d 192 (4th Cir. 2009).

[24] An "ex post facto law" is defined as "A law that impermissibly applies retroactively, esp. in a way that negatively affects a person's rights, as by criminalizing an action that was legal when it was committed." BLACK'S LAW DICTIONARY (9th ed. 2009).

[25] U.S. CONST. art. I § 9, cl. 3 ("No bill of attainder or ex post facto Law shall be passed.").

[26] *See* Charlie Savage, *U.S. Prosecutors Study WikiLeaks Prosecution*, N.Y. TIMES, Dec. 7, 2010, *available at* http://www.nytimes.com/2010/12/08/world/08leak.html?_r=2&hp.

[27] *See id.*; *see also* Pete Williams, *The U.S. Legal Options against WikiLeaks, Julian Assange*, NBC NEWS, Dec. 7, 2010, *available at* http://firstread.msnbc.msn.com/_news/2010/12/07/5606939-the-uss-legal-options-against-WikiLeaks-julian-assange?commentId=19984478.

viable routes for prosecutions relating to national security leaks.[28] However, a prosecution of Assange under the Espionage Act will be challenging, as there has yet to be a successful prosecution under the Espionage Act that is comparable to the case at hand.[29]

A. The Federal Espionage Act

The Federal Espionage Act of 1917[30] was enacted during World War I with the stated purpose of the prevention of espionage and protection of military secrets.[31] Over the past 94 years, the original formulation of the Espionage Act has been amended and transferred[32] several times, with the current formulation of the Espionage Act codified in Title 18 of the United States Code Annotated, in Chapter 37, Espionage and Censorship.[33] There are three sections of the Act of potential importance to the potential United States' prosecution of Assange: Section 793, titled "Gathering, transmitting or losing defense information,"[34] Section 794, titled "Gathering or delivering defense information to aid foreign government,"[35] and Section 798, titled "Disclosure of classified information."[36]

There are two major, foreseeable substantive difficulties facing the Department of Justice in an attempt to prosecute Julian Assange under the Espionage Act. The first challenge comes from the extensive protections regarding freedom of speech and freedom of the press that are afforded by the First Amendment of the United States Constitution.[37] Second, the Department of Justice must establish the element of "intent," meaning it must be established that Assange intended to harm the United States by publishing the classified information.[38]

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[28] *See* Charlie Savage, *U.S. Weighs Prosecution of WikiLeaks Founder, but Legal Scholars Warn of Steep Hurdles*, Dec. 1, 2010, *available at* http://www.nytimes.com/2010/12/02/world/02legal.html.
[29] *Id*.
[30] June 15, 1917, c 30, Title I, 40 Stat 217, 50 U.S.C.A. §§ 31 et seq, 11 FCA title 50, §§ 31 et seq.
[31] Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 336 (2003).
[32] 50 U.S.C.A. § 40 (West).
[33] 18 U.S.C.A. Pt. I, Ch. 37, Refs & Annos.
[34] *Id*. § 793 (West).
[35] *Id*. § 794 (West).
[36] *Id*. § 798 (West).
[37] *See New York Times*, 403 U.S. 713.
[38] *See Rosen*, 445 F. Supp. 2d 602.

B. The Pentagon Papers Precedent

In June of 1967, the United States Secretary of Defense, Robert S. McNamara, commissioned a classified study that would provide an "encyclopedic history" of the United States involvement with the Vietnam War, which is now known as the Pentagon Papers study.[39] Daniel Ellsberg, an American citizen, had a long history of working in military intelligence: he had worked as an employee of the RAND Corporation, the Pentagon, as a consultant for the White House, and as an advisor to high-ranking Pentagon and State Department officials.[40] Due to his extensive defense intelligence experience, Ellsberg became one of the researchers for the Pentagon Papers study that was commissioned by McNamara.[41] After the completion of the 7,000 page classified study, Ellsberg was given permission to read the study in its entirety.[42] After Ellsberg read the entire Pentagon Papers report, he became convinced that the policy of the United States in Vietnam was futile, and that releasing the classified Pentagon Papers study to the public may be able to "change the political calculus" by holding President Nixon accountable, and preventing more casualties from occurring in Vietnam.[43] After much contemplation, including legal consultation, Ellsberg decided that he would steal and leak the classified study to the public.[44] Ellsberg solicited the help of Anthony Russo, his friend from the RAND Corporation who also opposed the war, and began the long process of secretly photocopying the classified Pentagon Papers study.[45] Ellsberg and Russo then distributed the copies of the study to the *New York Times* and the *Washington Post*.[46] Both newspapers published a series of articles exposing the contents of the Pentagon Papers study.[47]

After the publication of the Pentagon Papers in the *Times* and the *Post*, the United States took legal action seeking to enjoin the newspapers from publishing the study.[48] The Court of Appeals for the D.C. Circuit affirmed the

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[39] DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE, 15-20 (University of California Press, 1996).
[40] *Id*. at 42.
[41] *Id*. at 37.
[42] *Id*. at 39–40.
[43] *Id*. at 41–42.
[44] *Id*. at 42–43.
[45] *Id*. at 42.
[46] *Id*. at 47; 127–128.
[47] *Id*. at 129.
[48] "On June 12, June 13 and June 14, 1971 The New York Times published summaries and portions of the text of two documents— certain volumes from a 1968 Pentagon study relating to Vietnam and a summary of a 1965 Defense Department study relating to the Tonkin Gulf incident. The United States sues to enjoin the Times from 'further dissemination, disclosure or divulgence' of materials contained in the 1968 study of the

denial of the preliminary injunction to restrain the publication of classified materials by the *Washington Post*[49]; while the Court of Appeals for the Second Circuit remanded the decision of the Southern District of New York[50] to determine whether the disclosure of the study would "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined."[51]

1. The Per Curiam Opinion

The Supreme Court of the United States granted certiorari for the consolidated appeals regarding both the *New York Times* and the *Washington Post*.[52] The decision of the Court was per curiam, with separate concurring opinions written by Justices Black, Douglas, Brennan, Stewart, White and Marshall.[53] Chief Justice Burger, along with Justices Harlan and Blackmun dissented.[54] In the opinion, the Court stated that "'[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity,'"[55] therefore the government bears "a heavy burden of showing justification for the imposition of such a restraint."[56] The Court ultimately held that the government had not met its burden of showing justification of restraint on publication of the contents of the study, and thereby allowed the Pentagon Papers to be published.[57]

2. The Supreme Court Dicta

The decision of the Supreme Court in *New York Times v. United States* represents a significant assertion of broad First Amendment protections that are guaranteed to the press in the United States. This holding, however, came with a few grave warnings as to the potential criminal liability of the press for the

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decision making process with respect to Vietnam and the summary of the 1965 Tonkin Gulf study." United States v. New York Times Co., 328 F. Supp. 324, 326 (S.D.N.Y. 1971).

[49] United States v. Washington Post Co., 446 F.2d 1327, 1328 (D.C. Cir. 1971) *aff'd sub nom. New York Times*, 403 U.S. 713.

[50] *New York Times*, 328 F. Supp. 324 (The motion for preliminary injunction was denied, as the court found that the evidence was insufficient to establish that the publication of the documents in question would seriously breach national security.).

[51] United States v. New York Times Co., 444 F.2d 544, 544 (2d Cir. 1971) *rev'd,* 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971).

[52] *New York Times*, 403 U.S. 713.

[53] *Id*.

[54] *Id*.

[55] *Id*. at 714 (per curiam) quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963).

[56] *Id*.

[57] *Id*. at 713.

publication of classified documents. The *decision* of the Court concerned only the injunction for publication of the Pentagon Papers, yet all of the Justices discussed in *dicta*[58] the ability of the United States to prosecute the press for publication of classified documents in general.[59] This Supreme Court dictum is fragmented, but nevertheless demonstrates that a majority of the Court felt that the newspapers could be held criminally liable for such actions.[60]

Only two Supreme Court Justices, Justice Douglas and Justice Black, found that there were no circumstances under which the press could be restrained or held liable for the material that it publishes.[61] In his concurring opinion, Justice Black described how the decision of the Court was rooted in the First Amendment of the Constitution.[62] Justice Black wrote that "[b]oth the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints."[63] Regarding the classified nature of the documents that were published in the Pentagon Papers case, Justice Black further states that "[i]n revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do."[64]

Justice Douglas, with whom Justice Black joins concurring, writes that not only is there "no room for governmental restraint on the press," but there is also "no statute barring the publication by the press of the material which the Times and Post seek to use."[65] Justice Douglas specifically eliminates the application of Section 793 of the Espionage Act to the press, as he finds that throughout the statutory text of the Espionage Act, Congress specifically distinguished between the use of the word "publish" and the word "communicate."[66] This is significant, as Section 793 criminalizes only those who "willfully *communicate*" classified information, therefore those who *publish* information do not fall under the

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[58] "Judicial dictum" is defined as "An opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision." BLACK'S LAW DICTIONARY (9th ed. 2009).

[59] *See New York Times*, 403 U.S. 713.

[60] The majority of the Court suggests that a criminal prosecution could be possible under various provisions of the United States Criminal Code. *See New York Times*, 403 U.S. at 724–762. The sections that the Court refers to have now been codified to include the Espionage Act of 1917. *See supra* at note 33.

[61] *New York Times*, 403 U.S. at 720–725 (Douglas, J., with whom Black, J. joins, concurring).

[62] *See id*. at 714–718 (Black, J., concurring); *See also* U.S. CONST. amend. I.

[63] *Id.* at 717 (Black, J., concurring).

[64] *Id.*

[65] *Id*. at 720.

[66] *Id*. at 720–721.

scope of liability.[67] Justice Douglas further discusses the inapplicability of Section 793 to the press by citing a version of Section 793 that had been proposed but ultimately rejected during Senate ratification debates.[68] The proposed version would have allowed for the President to prohibit publication of "any information relating to the national defense" during a time of war.[69] Justice Douglas concluded that as Congress ultimately rejected this proposed version of Section 793, it could not be found that Congress intended to impose this type of limitation or liability on the press for the information that it publishes.

However, the remaining seven Supreme Court Justices each found that there are some circumstances in which the government may be able to criminally prosecute the press for publication of specified information.[70] Justice White, who wrote a concurring opinion, outlined the circumstances in which a criminal prosecution of the press may be warranted.[71] Justice White argued that if Congress has enacted a law that encompasses the actions of the press, or if there is a relevant section of the criminal code, the press can be held criminally liable for publication regardless of First Amendment protections.[72] Justice White directly refuted the arguments of Justice Douglas, finding that although Congress rejected a version of Section 793 that would have given the Executive authority to proscribe the publication of defense-related information in a time of war, the same members of Congress also argued that "newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed."[73] Justice White also directly referenced three sections of the Espionage Act—Section 793,[74] Section 797[75] and Section 798,[76] which, according to the recorded Congressional intent,

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[67] "Whoever having any unauthorized possession of, access to, or control over any document, writing . . . or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United states or to the advantage of any foreign nation, willfully *communicates* . . . the same to any person not entitled to receive it . . . (s)hall be fined not more than $10,000 or imprisoned not more than ten years, or both." 18 U.S.C. §793(e) (emphasis added).

[68] *New York Times*, 403 U.S. at 721–722.

[69] The proposed and rejected version of §793 read, "'During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy.'" *Id*. at 721–722.

[70] *See New York Times*, 403 U.S. at 724–762.

[71] *Id*. at 730–740.

[72] *Id*.

[73] *Id*. at 733–734 (White, J., concurring).

[74] *Id*. at 737 n.8.

[75] *Id*. at 735 n.5.

could and should be applicable to the press for the publication of classified information.[77]

Therefore, due to the strong assertion of First Amendment protections that this case represents, it is unlikely that the United States will be able to enjoin or restrain the operations of *WikiLeaks*. However, applying the dictum of the majority in *New York Times v. United States* to the *WikiLeaks* case, it appears possible for *WikiLeaks*, and thereby Assange as cofounder, to be *criminally prosecuted* under the Espionage Act.[78] This is possible as long as the court finds that the *WikiLeaks* website functions as a media outlet (or "the press"), such as the *New York Times* or the *Washington Post*, and that the actions of *WikiLeaks* fall within the statutory language of the Espionage Act. However, it is important to know that there has never been a successful prosecution of the press under the Espionage Act.[79] Nevertheless, the Supreme Court dictum in *New York Times v. United States* provides at least theoretical legal support for such a prosecution, which may aid in the efforts of the Department of Justice.

In the aftermath of the decision of the Supreme Court in *New York Times v. United States*, the government chose not to pursue espionage charges against the *New York Times* or the *Washington Post*, even though the majority of the Justices suggested that such a prosecution might be successful. Instead, the government chose to criminally prosecute Russo and Ellsberg, as the sources of the "leaked" Pentagon Papers.[80] Russo and Ellsberg were indicted on charges of "conspiracy, theft of government property, and espionage in connection with the release of papers to the press."[81] Ultimately, the criminal case against Ellsberg and Russo was dismissed due to government misconduct.[82] Due to the

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[76] *Id*. at 735 n.7.

[77] *Id.* at n.7–8.

[78] The dicta of the majority of Justices in *New York Times v. United States* indicate that it is theoretically possible, for the press to be criminally prosecuted for the publication of classified information. *See New York Times*, 403 U.S. at 724–762.

[79] Floyd Abrams, *Why WikiLeaks is unlike the Pentagon Papers*, WALL ST. J., Dec. 29, 2010, *available at* http://online.wsj.com/article/SB10001424052970204527804576044020396601528.html; *See also* Weiss, *supra* note 8. ("The U.S. government has never successfully prosecuted a media entity for a leak. It is typically much easier to bring such cases against the government officials who do the leaking, because they sign nondisclosure agreements surrendering many of the legal protections they otherwise would enjoy.").

[80] Rudenstine, *supra* note 39, at 339.

[81] N.Y. TIMES, Mar. 22, 1972, at Page 22, Column 3 ("Ellsberg and Russo have been indicted on charges of conspiracy, theft of government property and espionage in connection with release of papers to press.").

[82] The suit was dismissed because of governmental misconduct. United States v. Russo & Ellsberg, Crim. No. 9373 (C.D.Cal. dismissed May 11, 1973). Russo and Ellsberg later

dismissal of the Espionage charges against Ellsberg and Russo, the Pentagon Papers case leaves no established precedent indicating what may happen to Assange if he were personally prosecuted under the same statutory provisions, further enhancing the challenges that the United States will face in a successful prosecution under the Espionage Act.

3. The WikiLeaks Comparison

It is undisputed that the *WikiLeaks* case differs from the Pentagon Papers case in numerous ways. However, there are two important differences between the *New York Times*, the *Washington Post*, and *WikiLeaks*, which create foreseeable points of contention if *WikiLeaks* was criminally prosecuted. First, there is a significant temporal component, as the method by which *WikiLeaks* "publishes" classified documents is markedly different from the ways in which the *New York Times* and the *Washington Post* published the classified study on Vietnam.[83] *WikiLeaks* uses the World Wide Web, while the *Times* and the *Post* were only able to use printed newspapers to disseminate the classified information. This drastic change in technology and methodology of publication would appear to drive a temporal aspect in prosecution, as classified and potentially damaging information can be spread much more quickly.[84] Another important temporal component stems from the fact that some of the information published on the *WikiLeaks* website affects the immediate state of national security and diplomacy for the United States, and other countries around the world,[85] which provides further impetus for a timely prosecution.

Second, the purpose or intent of *WikiLeaks* behind the publication of classified documents may differ from the intent of other conventional news sources, such as the *Times* or the *Post*. For example, in the Pentagon Papers case, the *New York Times* reviewed the Pentagon papers for months before publishing any of the classified information.[86] On the other hand, *WikiLeaks* publishes information received almost immediately, which is clear from the goals and the mission statement[87] of the *WikiLeaks* organization. This seems to indicate a significant difference in intent and purpose behind publication between *WikiLeaks* and other conventional news sources, as it could be

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brought a constitutional tort action seeking compensation for the injuries sustained through their exposure to warrantless electronic surveillance. Ellsberg v. Mitchell, 807 F.2d 204 (D.C. Cir. 1986).

[83] Rudenstine, *supra* note 39, at 129.

[84] *See generally* WikiLeaks, *supra* notes 1–2.

[85] *See* Weiss, *supra* note 8.

[86] "The New York Times clandestinely devoted a period of three months to examining the 47 volumes that came into its unauthorized possession" before publication. *New York Times*, 403 U.S. at 759 (Blackmun, J., dissenting).

[87] *See* WikiLeaks, *supra* note 5.

interpreted that "[*WikiLeaks*] revels in the revelation of 'secrets' simply because they are secret."[88] This point provides a segway into the next substantive difficulty that the United States will face in successfully prosecuting Assange under the Espionage Act—the establishment of the element of intent.

C. United States v. Rosen: The Element of Intent

Although the federal Espionage Act originated from the World War I era, this Act is still used successfully in prosecuting government agents who leak information from the United States to other governments around the world.[89] The difficulty arises in the application of the 1917 Espionage Act to non-government actors who distribute classified information for a reason other than for the said intent of harming the U.S. government.[90] This problem is highlighted in a recent case, *United States v. Rosen*,[91] which represents the first instance in which the government attempted to criminally prosecute civilians (non-government employees) under the 1917 Espionage Act. The defendants, Steven Rosen and Keith Weissman, were employees of a pro-Israeli lobbying organization, the American Israel Public Affairs Committee (AIPAC), located in Washington D.C.[92] Rosen and Weissman were part of an alleged conspiracy in which the defendants fostered relationships with government employees (most notably Department of Defense employee Lawrence Franklin), obtained classified information from these employees, and then leaked this information to the press (a reporter for the *Washington Post*).[93] The information allegedly leaked to the media by Rosen and Weissman consisted of mostly intelligence information relating to the United States' diplomatic and military strategies in Middle Eastern nations.[94] Rosen and Weissman were federally indicted for charges citing various sections of the Espionage Act, including "conspiring to transmit information relating to the national defense to those not entitled to receive it, in violation of 18 U.S.C. § 793(g)"[95] and "aiding and abetting the

[88] Abrams, *supra* note 79.
[89] Gilead Light, *The WikiLeaks Story and Criminal Liability Under the Espionage Laws*, 2010 WL 3766819 (WJCOMPI), 2.
[90] *Id*.
[91] *Rosen*, 445 F. Supp. 2d 602.
[92] *Id*. at 607–08.
[93] *Id*. at 608–10.
[94] *Id*.
[95] *Id*. at 607; *See also* 18 U.S.C. §793(g) ("If two or more persons conspire to violate any of the forgoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to punishment provided for the offense which is the object of such conspiracy.").

transmission of information relating to the national defense to one not entitled to receive it, in violation of 18 U.S.C. § 793(d)."[96]

In May of 2009, four years after the indictment, the United States dropped all charges against Rosen and Weissman.[97] The Government dropped the charges because they foresaw procedural difficulties during litigation, mostly attributed to Judge Ellis' imposition of additional requirements in order for the government to obtain a conviction under the Espionage Act,[98] including the possibility of further revealing information that could be detrimental to national security during the course of the trial.[99]

1. The Ruling of Judge Ellis

The importance of the *United States v. Rosen* to the potential U.S. prosecution of Julian Assange lies not within the disposition of the case, but instead in the ruling of Judge Ellis regarding the elements of intent and "bad faith" needed for a conviction under the Espionage Act.[100] In discussing the requirements for conviction under Section 793 of the Espionage Act, Judge Ellis held that "the government in this case must prove beyond a reasonable doubt that the defendants knew the information was NDI [national defense information], *i.e.,* that the information was closely held by the United States and that *disclosure of this information might potentially harm the United States*, and that the persons to whom the defendants communicated the information were not entitled under the classification regulations to receive the information."[101] In addition, Judge Ellis imposed a "bad faith" requirement for conviction under Section 793, finding that the United States must prove beyond a reasonable doubt that the defendants communicated the information they had received from their government sources with "a bad purpose either to disobey or to disregard the law."[102] Due to the common law system used in the United States, and, as this case is the first and last time that the United States has brought an

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[96] *Id.*; *See also* 18. U.S.C. §793(d) ("Whoever, lawfully having possession of, access to, control over, or being entrusted with any . . . information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates . . . the same to any person not entitled to receive it.").

[97] Neil Lewis, *U.S. to Drop Spy Case Against Pro-Israeli Lobbyists*, N.Y. TIMES, May 1, 2009, *available at* http://www.nytimes.com/2009/05/02/us/politics/02aipac.html.

[98] Robert Epstein, Comment, *Balancing National Security and Free Speech: Why Congress Should Amend the Espionage Act*, 15 COMMLAW CONSPECTUS 483, 503–04 (2008).

[99] Lewis, *supra* note 97.

[100] *See generally* Abrams, *supra* note 79.

[101] *Rosen*, 445 F. Supp. 2d at 625 (emphasis added).

[102] *Id* (quoting *United States v. Morison*, 844 F.2d 1057, 1071 (4th Cir. 1988)).

Espionage Act prosecution against a non-government employee, any attempt to prosecute Assange under this Act would be required to adhere to the aforementioned substantive requirements imposed by Judge Ellis.

2. Overcoming the "Bad Faith" Requirement

This precedent provides a difficult hurdle for the United States to overcome in prosecuting Assange under the Espionage Act, because the *United States v. Rosen* is the first attempted prosecution of non-government employees under the Espionage Act, and also because Judge Ellis has increased the procedural barriers for the government in allowing for a successful prosecution through the imposition of the intent and bad faith requirements.[103] Thus, the Department of Justice will have to establish beyond a reasonable doubt that Assange and *WikiLeaks* wanted to do more than merely act as a media source, proving that it was in fact known and intended for the United States to incur harm from the publication of the NDI information on the *WikiLeaks* website, and that Assange was acting with "bad faith", or conscious disregard to the law.[104] This will, in fact, be a daunting task for the Department of Justice attorneys, as the stated intent of the *WikiLeaks* website is to act simply as a *media outlet*, informing citizens of the activities of governments and militaries around the world.[105] To be successful, the United States will have to distinguish Assange from a typical reporter or news outlet, and thereby classify him as a criminal acting with the intent to harm the United States.

III. PROCEDURAL CHALLENGES TO PROSECUTION

If the United States is able to build a substantive case against Julian Assange using the Espionage Act or another criminal statute, there are still several remaining procedural challenges. Arguably the most significant procedural challenge the United States will face in prosecuting Julian Assange is the process of extradition.[106] This section seeks to illuminate the challenges that the United States may face in extraditing Assange based on his current location and the criminal charges facing him in Sweden. This assessment is accomplished

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[103] *Id*.

[104] Abrams, *supra* note 79 (". . . But if Mr. Assange were viewed as simply following his deeply held view that the secrets of government should be bared, not withstanding the consequences, he might escape legal punishment").

[105] *See supra*, at notes 1–2.

[106] Extradition is defined as, "The official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged; the return of a fugitive from justice, regardless of consent, by the authorities where the fugitive is found." International extradition is defined as, "Extradition in response to a demand made by the executive of one nation on the executive of another nation. This procedure is generally regulated by treaties." BLACK'S LAW DICTIONARY (9th ed. 2009).

through an analysis of the extradition treaty between the United States and Sweden,[107] as well as the extradition treaty between the United States and the United Kingdom.[108]

In December of 2010, Swedish prosecutors issued a European arrest warrant for Assange,[109] charging him with "unlawful coercion, sexual molestation and rape"[110] of two Swedish women. Therefore, Sweden is currently seeking the extradition of Assange from the United Kingdom in order to prosecute him for the aforementioned charges. The British court initially granted the extradition of Assange to Sweden,[111] but Assange has appealed the ruling to the High Court in London.[112] The date set for the extradition appeal is July 12, 2011.[113] Currently, Assange is under electronic house arrest at the country estate of a friend in England, with bail set at $360,000.[114] In light of these circumstances, the most foreseeable places for the United States to seek the extradition of Julian Assange are from either Sweden (if extradition from the United Kindgom is approved, and Sweden proceeds with the pending rape charges against Assange) or the United Kindgom (if the United States chooses to seek extradition before Assange is extradited to Sweden).

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[107] *See* Convention on Extradition Between the United States of America and Sweden, U.S.-Sw., Oct. 24, 1961. 14.2 U.S.T. 1845. *See also* Supplementary Convention on Extradition Between the United States of America and the Kingdom of Sweden, art. 6, U.S.–Sw., Sept. 24, 1984, 35 U.S.T. 2501.

[108] *See* Extradition Treaty Between the United States of America and The United Kingdom of Great Britain and Northern Ireland, U.S.–U.K., Mar. 31, 2003, *available at* http://www.fco.gov.uk/en/treaties/treaties-landing/records/06300/06304.

[109] *See* John F. Burns, *WikiLeaks Founder in Court to Fight Extradition Effort*, N.Y. TIMES, Feb. 8, 2011, at A9; *See also* Esther Addley, *Accused or Charged? Legal Confusion for Assange*, GUARDIAN (LONDON), Dec. 18, 2010, at 4 ("Four [charges] were outlined at the hearings: That Assange 'unlawfully coerced' Miss A by using his body weight to hold her down in a sexual manner; That he 'sexually molested' Miss A by having sex with her without a condom when it was her 'express wish' that one should be used; That he 'deliberately molested' Miss A 'in a way designed to violate her sexual integrity'; That he had sex with a second woman, Miss W, without a condom while she was sleeping.").

[110] Burns, *supra* note 109.

[111] Karla Adam, *Assange's Extradition Ordered*, WASH. POST, Feb. 25, 2011, at A06.

[112] *Assange Appeal Date*, TIMES (LONDON), Apr. 7, 2011, at 18. ("Julian Assange, the WikiLeaks founder, has been given a date for his appeal against extradition to Sweden, where he faces allegations of sexual assault. A two-day hearing has been listed at the High Court in London beginning on July 12. Mr Assange is appealing against a ruling by District Judge Howard Riddle at Belmarsh Magistrates' Court in South London that extradition would not breach his human rights.").

[113] *See id*.

[114] Adam, *supra* note 111.

Assange and his legal team argue that the Swedish rape allegations against him are "politically motivated," and that if Assange were extradited to Sweden, he would be at a higher risk of facing extradition to the United States.[115] Assange ultimately claims that the Swedish charges are being brought solely to aid the efforts of the United States in extraditing Assange, by creating a "holding case," thus providing additional time for the United States to build a criminal case against him.[116] This speculation by Assange and his legal team may stem from Article VI of the extradition treaty between the United States and Sweden, which provides that if the person sought for extradition is being prosecuted by the surrendering state for an offense other than the one being requested, extradition can be deferred until after prosecution in the surrendering country.[117] In addition, the treaty provides the option that the surrendering state can temporarily extradite the relator for prosecution in the requesting country, and be returned after the conclusion of the proceedings.[118] Therefore, even if Assange is being prosecuted or serving time in Sweden, the United States has the option of deferring extradition until after his prosecution and sentencing, or of extraditing and prosecuting him immediately, only to be returned to Sweden after the proceedings.

A. Dual Criminality Requirement

Both the extradition treaty between the United States and Sweden as well as the extradition treaty between the United States and the United Kingdom provide that in order for an offense to be extraditable, the charges must meet

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[115] *Id*.

[116] *See id*.

[117] Article IV of the Supplementary Extradition Treaty between the U.S. and Sweden provides: "If the extradition request is granted in the case of a person who is being prosecuted or is serving
a sentence in the territory of the requested State for a different offense, the requested State may:
(a) defer the surrender of the person sought until the conclusion of the proceedings against that person, or the full execution of any punishment that may be or may have been imposed; or (b) temporarily surrender the person sought to the requesting State for the purpose of prosecution. The person so surrendered shall be kept in custody while in the requesting State and shall be returned to the requested State after the conclusion of the proceedings against that person in accordance with conditions to be determined by mutual agreement of the Contracting States." Supplementary Convention on Extradition Between the United States of America and the Kingdom of Sweden, *supra* note 107.

[118] Supplementary Convention on Extradition Between the United States of America and the Kingdom of Sweden, *supra* note 107.

the requirement of dual criminality.[119] The dual criminality principle[120] requires that in order for there to be extradition, the act(s) that the relator is charged with must be defined as criminal in both the requesting and the requested nations.[121] However, this principle is not rigid, and "does not demand that the laws of the surrendering and requesting states be carbon copies of one another,"[122] only that the criminal laws of each country are *substantially analogous*.[123] If the United States chooses to prosecute Assange under the Espionage Act, it is likely that the court will find that the dual criminality requirement is met for both the United Kingdom and Sweden, as both countries have laws that can be interpreted as substantially analogous to its American counterpart.[124]

1. United Kingdom

In the United Kingdom, the law which will likely be found to be substantially analogous, and as such meeting the dual criminality requirement, is the United Kingdom Official Secrets Act of 1989.[125] Section Five of the Official Secrets Act of 1989, titled "Information Resulting from Unauthorized Disclosures or Entrusted in Confidence," criminalizes the knowing, unlawful disclosure of confidential information that in any way relates to or affects national security.[126]

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[119] *Id*. ("An offense shall be an extraditable offense only if it is punishable under the laws of both Contracting States by deprivation of liberty for a period of at least two years."); *See also* Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, art. 2, U.S.–U.K., Mar. 31, 2003, *available at* http://www.fco.gov.uk/en/treaties/treaties-landing/records/06300/06304. ("An offense shall be an extraditable offense if the conduct on which the offense is based is punishable under the laws in both States by deprivation of liberty for a period of one year or more or by a more severe penalty.").

[120] The dual-criminality principle is defined as "The rule prohibiting the international extradition of a fugitive unless the offense involves conduct that is criminal in both countries." BLACK'S LAW DICTIONARY, (9th ed. 2009),

[121] To satisfy the dual criminality requirement, "'the law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.'" EDWARD M. WISE, ET AL., INT. CRIM. LAW: CASES AND MATERIALS 478 (LexisNexis, 3rd ed. 2010) (quoting *United States v. Van Cauwenberghe,* 934 F.2d 1048 (9th Cir. 1991)).

[122] *Id*. at 480.

[123] *See id*.

[124] "The inquiry into dual criminality requires courts to compare the law of the surrendering state that purports to criminalize the charged conduct with the law of the requesting state that purports to accomplish the same result. If the same conduct is subject to criminal sanctions in both jurisdictions, no more is exigible." *Id.*

[125] Official Secrets Act, 1989, c. 6 (U.K.).

[126] *Id.* § 5 ("For the purposes of this section information or a document or article is

Similar to the Federal Espionage Act, the Official Secrets Act includes an element of intent for conviction, requiring that a person may only be held liable if the disclosure was done with the reasonable knowledge that it would be damaging.[127]

2. Sweden

In Sweden, Chapter Nineteen of the Swedish Penal Code, titled "Crimes Against Security of the Realm," has several provisions that are substantially analogous to the Federal Espionage Act. Sections Five[128] and Six[129] of Chapter Nineteen describe and establish liability for the crime of "espionage," which is defined as:

> A person who, in order to aid a foreign power, without authorization obtains, transmits, gives or otherwise reveals information concerning a defense facility, arms, supplies, imports, exports, means of production, negotiations, decisions or other conditions, the disclosure of which to a foreign power can cause harm to the total defense of the Realm, or otherwise to the security of the Realm.[130]

This definition of espionage comports with the United States definition of espionage under the Espionage Act of 1917, which also requires an element of

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protected against disclosure by the foregoing provisions of this Act if--(a) it relates to security or intelligence, defense or international relations").

[127] *Id*. § 3 ("A person is not held liable for the disclosure of classified information unless (a) the disclosure by him is damaging; and (b) he makes it knowing, or having reasonable cause to believe, that it would be damaging.").

[128] **"**A person who, in order to aid a foreign power, without authorisation obtains, transmits, gives or otherwise reveals information concerning a defence facility, arms, supplies, imports, exports, means of production, negotiations, decisions or other conditions, the disclosure of which to a foreign power can cause harm to the total defence of the Realm, or otherwise to the security of the Realm, shall be sentenced, whether the information is correct or not, for *espionage* to imprisonment for at most six years. This also applies if person with the intent here described, produces or takes possession of a writing, drawing or other object containing such information without authority." BROTTSBALKEN [BrB] [criminal code] 19:5 (Swed.).

[129] "If a crime referred to in Section 5 is regarded as gross, imprisonment for a fixed term of at least four and at most ten years, or for life, shall be imposed for *gross espionage*. In assessing whether the crime is gross, special attention shall be paid to whether the act was of an especially dangerous nature in view of an ongoing war or concerned matters of great importance or whether the perpetrator disclosed something entrusted to him by reason of his position in public or private service." BROTTSBALKEN [BrB] [criminal code] 19:6 (Swed.).

[130] BROTTSBALKEN [BrB] [criminal code] 19:5 (Swed.).

intent to aid a foreign power and/or harm the United States.[131] Sections Seven and Eight of Chapter Nineteen enumerate the crimes of "unauthorized dealing with secret information"[132] and "gross unauthorized dealing with secret information,"[133] which are similar to the crimes listed in Sections Five and Six, just lacking the requirement of intent. The crime of "unauthorized dealing with secret information" is defined as:

> A person who, without intent to aid a foreign power, without authority obtains, transmits, gives or reveals information concerning matters of a secret nature, the disclosure of which to a foreign power can cause harm to the defense of the Realm or to the maintenance of necessary supplies to the people during war or during extraordinary conditions caused by war, or otherwise to the security of the Realm.[134]

There is little doubt that a court would find that the provisions of Chapter Nineteen are substantially analogous to the provisions of Espionage Act of 1917, as the inquiry of the court into dual criminality is limited to determining if the "same conduct is subject to criminal sanctions in both jurisdictions."[135] Simply put, both Chapter Nineteen of the Swedish Penal Code and the Espionage Act of 1917 seek to punish those who release classified information to the detriment of national security.

B. The Political Offense Exception

Both treaties also contain a potential defense for Assange if extradition was to be requested from Sweden or Great Britain, which is known as the

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[131] *See supra* Section II (description of the Espionage Act of 1917).

[132] "A person who, without intent to aid a foreign power, without authority obtains, transmits, gives or reveals information concerning matters of a secret nature, the disclosure of which to a foreign power can cause harm to the defence of the Realm or to the maintenance of necessary supplies to the people during war or during extraordinary conditions caused by war, or otherwise to the security of the Realm, shall be sentenced, whether the information is correct or not, to *unauthorized dealing with secret information* to a fine or imprisonment for at most two years." BROTTSBALKEN [BrB] [criminal code] 19:7 (Swed.).

[133] "If a crime under the provisions of Section 7 is regarded as gross, imprisonment for at most four years shall be imposed for *gross unauthorised dealing with secret information.* In assessing whether the crime is gross special attention shall be paid to whether the act involved assistance of a foreign power or was of an especially dangerous nature having regard to an ongoing war, or related to a matter of great significance, or whether the accused disclosed what had been confided to him by reason of public or private service." BROTTSBALKEN [BrB] [criminal code] 19:8 (Swed.).

[134] BROTTSBALKEN [BrB] [criminal code] 19:7 (Swed.).

[135] Wise, *supra* note 121, at 478; *see also supra* Section IIA.

"political offense exception."[136] Political offenses are defined as crimes "directed against the security or government of a nation, such as treason, sedition, or espionage," which, "[u]nder principles of international law, the perpetrator of a political offense cannot be extradited."[137] The political offense exception is based on various justifications, including: the belief that individuals have a right to resort to political activism to incite political change, the belief that individuals should not be returned through extradition to countries where they may be subjected to unfair legal treatment because of their political opinions and actions, and the belief that governments should not intervene with the political struggles of other nations.[138]

1. Pure versus Relative Political Offenses

There are two categories of political offenses, "pure political offenses"[139] and "relative political offenses."[140] As espionage is considered to be a "pure political offense," it is generally not extraditable.[141] Therefore, if charged under the Espionage Act, Assange may be able to fight extradition to the United States by claiming that his charges are of a purely political character, and thus do not provide for extradition.

However, the actions of Julian Assange do not seem to fall within the scope of the general definition of "espionage," which is defined as: "The practice of using spies to collect information about what another government or company is doing or plans to do."[142] If, based on this traditional definition of espionage, the reviewing court feels that the crime(s) that Assange is being charged with is not a "pure political offense" but instead may be a "relative political offense," then the court has more discretion to determine whether or not the specific charges are extraditable, through the determination of whether

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[136] Convention on Extradition Between the United States of America and Sweden, *supra* note 107, at art. 5 ("Extradition shall not be granted in any of the following circumstances: (5) If the offense is regarded by the requested State as a political offense or as an offense connected with a political offense"); Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, *supra* note 108, at art. 4 ("Extradition shall not be granted if the offense for which extradition is requested is a political offense.").

[137] BLACK'S LAW DICTIONARY (9th ed. 2009).

[138] Wise, *supra* note 121, at 516.

[139] Pure political offenses include acts aimed directly at the government, which include treason, sedition, and espionage. *Id*.

[140] Relative political offenses include "otherwise common crimes committed in connection with a political act" or "common crimes committed for political motives or in a political context." *Id*. at 517.

[141] *Id*. at 516.

[142] BLACK'S LAW DICTIONARY (9th ed. 2009).

the offense is a relative political offense. "Relative political offenses" are ones that may be politically motivated or in connection with a political act, but are not aimed directly at the government.[143]

2. The Incidence Test

In determining whether an offense is a relative political offense, Anglo-American courts use what is known as the "Incidence Test."[144] The Incidence Test protects relative political offenses that are found to be "incidental to" a "political uprising."[145] For the purposes of the incidence test, an "uprising" refers to "a people rising up, in their own land, against the government of that land."[146] Clearly, the actions of Julian Assange do not warrant protection as a relative political offense under the American Incidence Test, as the global publication of classified national security information is not incidental to an uprising of people against their own government.[147] Therefore, if the reviewing court determines that the charge(s) against Assange do(es) not constitute a pure political offense, then it may be found, through the American Incidence Test, that the offense is not worthy of protection as a relative political offense, and thereby extraditable. Although there may be some conceivable way around this successful assertion of the political offense exception by Assange, overall, this principle provides a significant barrier for the United States in successfully extraditing Assange from Sweden or the United Kingdom, and is a foreseeable point of contention in future legal proceedings. This exception alone may be sufficient to deter the United States from seeking to prosecute Assange under the Espionage Act of 1917.

IV. CONCLUSION

The Department of Justice will face significant substantive and procedural barriers in its attempt to criminally prosecute Julian Assange. The two most

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[143] *See* Wise, *supra* note 121, at 516–17.

[144] In addition to the Anglo-American "Incidence Test", courts also use the French "objective" test and the Swiss "proportionality" test to determine if an offense constitutes a relative political offense. Wise, *supra* note 121, at 517 (quoting *Quinn v. Robinson,* 783 F.2d 776 (9th Cir. 1986)). The Incidence Test was used as a point of analysis as the United States is one of the hypothetical parties to the Assange extradition, as well as the fact that the United Kingdom often utilizes the Incidence Test.

[145] Wise, *supra* note 121, at 516–25 (*quoting Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986)).

[146] *Id*. at 525.

[147] The actions of Assange would likely not be protected as a relative political offense, as the information published on WikiLeaks is not incidental to a political uprising. The information published concerns governments and people all around the world, and does not represent the political will of an indigenous population against their government.

similar prosecutions, the Pentagon Papers case and *United States v. Rosen*, were both dismissed before a conviction was made. As such, these cases do not supply binding precedent—only amorphous theoretical and legal guidance. Additionally, regardless of the criminal theory that is used by the United States to prosecute Assange, the procedural barrier of extradition remains considerable, especially with the potential defense of the political offense exception remaining.

Although there is great uncertainty as to which criminal theory the United States will use to prosecute Assange, it is clear that Congress will need to establish new policies that address the global dissemination of classified national security information through the World Wide Web. Ulimately, the future of a *Wikileaks* prosecution is shrouded in uncertainty. The only thing that remains certain today is that with the prosecution of Julian Assange, the United States will be establishing new legal territory.