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WikiLeaks Would Not Qualify to Claim Federal Reporter's Privilege in Any Form

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WikiLeaks Would Not Qualify to Claim Federal Reporter’s Privilege in Any Form

Jonathan Peters*

I.	INTRODUCTION	668
II.	THE REPORTER’S PRIVILEGE, GENERALLY	671
III.	THE QUALIFIED FIRST AMENDMENT-BASED PRIVILEGE	672
	A. <i>Efforts by the Federal Circuit Courts to Decide Who Has Status to Raise the Privilege</i>	674
	B. <i>Investigative Reporting Involves More Than the Mere Dumping of Documents</i>	676
	C. <i>WikiLeaks Has Not Taken Steps Consistently to Minimize Harm</i>	683
	D. <i>Summary</i>	688
IV.	THE CONGRESSIONAL SHIELD BILLS	688
	A. <i>WikiLeaks and the House Bill</i>	688
	B. <i>WikiLeaks and the Senate Bill</i>	691
	C. <i>Summary</i>	694
V.	CONCLUSION	694

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I. INTRODUCTION

Supreme Court Justice Sonia Sotomayor, in August 2010, told a group of students at the University of Denver that her Court likely would be called upon again to address the uneasy balance between national security and free speech.¹ She made that remark in response to a question about WikiLeaks, an online clearinghouse for confidential information that had released, one month earlier, more than 76,000 classified U.S. documents about the war in Afghanistan.² The government reaction had been fast and furious.

The Pentagon condemned the website and demanded, through the news media, that its staff return the documents and any other documents not yet released.³ All four branches of the armed services issued internal memoranda to personnel barring them from accessing WikiLeaks,⁴ and the Department of Justice began to eye Julian Assange, the site's founder and public face, for charges under the Espionage Act of 1917.⁵ Meanwhile, an Army intelligence analyst, already suspected of leaking a classified video and diplomatic cables to WikiLeaks, was sitting in a military prison in Kuwait, where he instantly became a person of interest in the Pentagon's growing investigation into the source of the Afghanistan documents.⁶ WikiLeaks would not confirm whether the analyst was the source.⁷

To be clear, that was only the government reaction in the week or two following the July 2010 release. Experts and commentators also whipped

1. David Batty, *WikiLeaks War Logs Posting 'Will Lead to Free Speech Ruling,'* GUARDIAN.CO.UK (Aug. 27, 2010), <http://www.guardian.co.uk/media/2010/aug/27/wikileaks-war-logs-free-speech-supreme-court>.

2. Noam N. Levey & Jennifer Martinez, *A Whistle-Blower with Global Resonance: WikiLeaks Publishes Documents from Around the World in Its Quest for Transparency*, L.A. TIMES, July 27, 2010, at A4.

3. Craig Whitlock, *Pentagon Demands WikiLeaks Reports*, WASH. POST, Aug. 6, 2010, at A6.

4. Rowan Scarborough, *Military Orders All Personnel to Stay Away From WikiLeaks Site*, WASH. TIMES, Aug. 6, 2010, at 1.

5. *Charging WikiLeaks: The Justice Department Weighs a Criminal Case*, WASH. POST, Aug. 18, 2010, at A14.

6. Kevin Poulsen & Kim Zetter, *U.S. Intelligence Analyst Arrested in Wikileaks Video Probe*, THREAT LEVEL (June 6, 2010, 9:31 PM), <http://www.wired.com/threatlevel/2010/06/leak/>; Ginger Thompson, *Early Struggles of Soldier Charged in Leak Case*, N.Y. TIMES (Aug. 8, 2010), available at <http://www.nytimes.com/2010/08/09/us/09manning.html> (explaining that the analyst eventually was moved to Quantico, Virginia); see also Scott Shane & John F. Burns, *U.S. Subpoenas Twitter over WikiLeaks Supporters*, N.Y. TIMES (Jan. 8, 2011), available at <http://www.nytimes.com/2011/01/09/world/09wiki.html>.

7. Jonathan Fildes, *Wikileaks Site Unfazed by Arrest of US Army 'Source,'* BBC NEWS (June 8, 2010), <http://www.bbc.co.uk/news/10265430>.

themselves into a frenzy,⁸ and special interests representing the journalism industry began criticizing WikiLeaks. Groups like the Society of Professional Journalists and the Newspaper Association of America had been working for years with members of Congress to pass a federal reporter's shield law, only to see their efforts imperiled by WikiLeaks, considered by key legislators to be a threat to national security.⁹ As a result, the groups stated publicly that the website does not engage in journalism and thus the shield would not provide protection.¹⁰

Since then, WikiLeaks has released more than 2,000 U.S. diplomatic cables,¹¹ and nearly 400,000 classified U.S. documents about the war in Iraq.¹² It plans to release an additional 15,000 documents about the war in Afghanistan, withheld originally so the website could edit them.¹³ WikiLeaks also plans in 2011 to "take down" a major American bank and reveal an "ecosystem of corruption" by releasing data from an executive's hard drive.¹⁴ Meanwhile, the U.S. Department of Justice has demanded records from Twitter about the account activity of several people linked to WikiLeaks,¹⁵ and Assange himself is on house arrest in Britain after

8. See, e.g., Eugene Robinson, *Futility's Open Secret*, WASH. POST, July 27, 2010, at A17; Jerrold Nadler, *Opposing View on Afghanistan: 'Bring Our Troops Home,'* USA TODAY, July 27, 2010, at 10A; Tim Rutten, *Call in the Wiki Plumbers*, L.A. TIMES, July 28, 2010, at A15 (explaining "the Times' publication of the Afghan reports will have had the unintended consequence of undermining both governmental openness and national security"); Mitchell LaFortune, *Learning from WikiLeaks*, N.Y. TIMES (July 31, 2010), available at <http://www.nytimes.com/2010/08/01/opinion/01lafortune.html>; Amy Davidson, *Leaks*, NEW YORKER, Aug. 9, 2010, at 21.

9. See, e.g., Paul Farhi, *WikiLeaks Is Barrier to Shield Arguments: Leak of Secret Papers Complicates Debate on Guarding News Sources*, WASH. POST, Aug. 21, 2010, at C1; Charlie Savage, *After Afghan War Leaks, Revisions in a Shield Bill*, N.Y. TIMES (Aug. 3, 2010), available at <http://www.nytimes.com/2010/08/04/us/04shield.html> (discussing the "media shield" bill and its support from the Newspaper Association of America).

10. Douglas Lee, *Trying to Exclude WikiLeaks from Shield Law Stinks*, FIRST AMENDMENT CENTER (Aug. 25, 2010), <http://www.firstamendmentcenter.org/commentary.aspx?id=23303>.

11. *How Many Documents Has WikiLeaks Published?*, NAT'L PUB. RADIO (Dec. 28, 2010), <http://www.npr.org/2010/12/28/132416904/how-many-documents-has-wikileaks-published>; see also Scott Shane & Andrew W. Lehren, *Leaked Cables Offer Raw Look at U.S. Diplomacy*, N.Y. TIMES (Nov. 28, 2010), available at http://www.nytimes.com/2010/11/29/world/29cables.html?_r=1; Shane & Burns, *supra* note 6.

12. *The Iraq Archive: The Strands of a War*, N.Y. TIMES (Oct. 22, 2010), available at <http://www.nytimes.com/2010/10/23/world/middleeast/23intro.html>.

13. Raphael G. Satter et al., *WikiLeaks to Publish 15,000 More Afghan War Papers*, BLOOMBERG BUS. WK. (Oct. 23, 2010), available at <http://www.businessweek.com/ap/financialnews/D9J1B34G0.htm>.

14. Nelson D. Schwartz, *Facing Threat from WikiLeaks, Bank Plays Defense*, N.Y. TIMES (Jan. 2, 2011), available at http://www.nytimes.com/2011/01/03/business/03wikileaks-bank.html?_r=1&ref=wikileaks.

15. Shane & Burns, *supra* note 6.

surrendering to authorities in December 2010 and spending nine days in prison.¹⁶ He is challenging extradition to Sweden, where he is wanted on charges of sexual molestation and coercion.¹⁷ Assange has said repeatedly that he is innocent, and his lawyers have suggested that the accusations are “part of a political conspiracy to silence WikiLeaks.”¹⁸

Further, around the time Assange was detained, a group of hackers brought down the Swedish government’s website and attacked the sites of companies that had cut ties with WikiLeaks, such as Visa, PayPal, Amazon.com, and MasterCard.¹⁹ One of the hackers said that “[t]he idea is not to wipe them off but to give the companies a wake-up call” and that the group would “fire at anything or anyone that tries to censor WikiLeaks, including multibillion-dollar companies”²⁰ In that shadow and amid that drama, just before the new year, Assange signed a book deal reportedly worth \$1.7 million, which he intends to use to pay legal bills.²¹ A spokesman for the publishing house said the book would be “a complete account of his life through the present day, including the founding of WikiLeaks and the work he has done there.”²²

The narrative is changing every day, and one of the issues that has arisen involves privilege—that is, whether WikiLeaks could claim a federal reporter’s privilege if the U.S. government or a U.S. entity tried to compel one of the site’s staff members to disclose the source(s) of any documents it has released.²³ Against that backdrop, Part I of this Article explores briefly the origins of the reporter’s privilege. Part II discusses the qualified First Amendment-based privilege, highlighting efforts by the federal circuit courts to determine who has status to raise it. I argue that WikiLeaks would

16. Ravi Somaiya, *WikiLeaks Founder Is Released on Bail*, N.Y. TIMES (Dec. 16, 2010), available at <http://www.nytimes.com/2010/12/17/world/europe/17assange.html?ref=wikileaks>.

17. *Id.*

18. *Id.*; see also John F. Burns & Ravi Somaiya, *Confidential Swedish Police Report Details Allegations Against WikiLeaks Founder*, N.Y. TIMES (Dec. 18, 2010), available at <http://www.nytimes.com/2010/12/19/world/europe/19assange.html?ref=wikileaks> (discussing some individuals’ beliefs that there is a conspiracy against Assange).

19. Colin Fernandez & Laura Caroe, *Army of Hackers Targets Swedish Government, Sarah Palin and Credit Card Giants in WikiLeaks ‘Operation: Payback,’* MAIL ONLINE (Dec. 9, 2010), <http://www.dailymail.co.uk/news/article-1336806/WikiLeaks-hackers-Operation-Payback-cyber-war-targets-Swedish-Government.html>.

20. *Id.*

21. Ravi Somaiya, *WikiLeaks Founder Signs Book Deal*, N.Y. TIMES (Dec. 27, 2010), available at <http://www.nytimes.com/2010/12/28/world/europe/28wiki.html?ref=wikileaks>.

22. *Id.*

23. For this Article, I discuss whether WikiLeaks would be able to claim a federal reporter’s privilege, I am discussing whether someone on the site’s staff would be able to claim it. In addition, I am assuming proper jurisdiction in federal court. Clearly, there is reason and room for others to explore the jurisdiction and technology issues.

not have such status for two reasons: one, the website does not engage in investigative reporting; and two, it has not taken steps consistently to minimize harm.

Part III discusses congressional attempts to pass a federal shield law. Examining the two most recent bills (H.R. 985 and S. 448) proposed in the 111th Congress, I argue that WikiLeaks was an ill fit for their definitions of “covered person.” Although the bills died in January 2011, it is worthwhile to examine them because any future shield bills would be drafted in contemplation of H.R. 985 and S.448.²⁴ Plus, WikiLeaks would be part of the debate about any future bills.²⁵ Part IV concludes that WikiLeaks is a strange bedfellow to the journalism industry, that the site would not qualify to claim a federal reporter’s privilege in any form, and that certain questions remain unanswered.

II. THE REPORTER’S PRIVILEGE, GENERALLY

Who is a journalist? What is a journalism organization? Those sound like pie-in-the-sky questions more suitable for a doctoral program in journalism than the federal courts.²⁶ However, the answers often have major legal implications.²⁷ Reporters and news organizations ordinarily are not exempt from laws of general application—the legal rules that apply to the public also apply to them.²⁸ That said, people who qualify as journalists may have “special standing to assert a qualified privilege in legal proceedings to refuse to divulge the identity of sources and to reveal

24. H.R. 985, when it was introduced, was the same bill the House had passed once before, and S. 448, when it was introduced, was the same bill the Senate had considered once before. See Donald R. Winslow, *Senate Reintroduces Federal Shield Law; Similar to House Bill Last Week*, NAT’L PRESS PHOTOGRAPHERS ASS’N (Feb. 17, 2009), http://www.nppa.org/news_and_events/news/2009/02/shield01.html.

25. The website already is part of the debate. See, e.g., *Editorial: Shield Law Passage Good for Democracy*, DALL. MORNING NEWS, Sept. 6, 2010, at A14; Farhi, *supra* note 9.

26. Indeed, the journalism academe has addressed those questions in a variety of ways. See, e.g., Bill Kovach & Tom Rosenstiel, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* (1st ed. 2001); DAVID T. Z. MINDICH, *JUST THE FACTS: HOW “OBJECTIVITY” CAME TO DEFINE AMERICAN JOURNALISM* (1998); BARBIE ZELIZER, *TAKING JOURNALISM SERIOUSLY: NEWS AND THE ACADEMY* (2004); G. Stuart Adam, *The Education of Journalists*, 2 JOURNALISM 315 (2001); Mark Deuze, *What Is Journalism? Professional Identity and Ideology of Journalists Reconsidered*, 6 JOURNALISM 442 (2005); Jane B. Singer, *Who Are These Guys? The Online Challenge to the Notion of Journalistic Professionalism*, 4 JOURNALISM 139 (2003).

27. See generally Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411 (1999).

28. See, e.g., *Associated Press v. Nat’l Labor Relations Bd.*, 301 U.S. 103, 132–33 (1937) (“The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and nondiscriminatory taxes on his business.”).

unpublished information.”²⁹ The issue, then, is who qualifies.

The reporter’s privilege today is a many-headed beast. It can be found in federal First Amendment jurisprudence, in state statutes and constitutions, and in case law.³⁰ The federal courts tend to recognize the privilege by way of the First Amendment,³¹ while the states tend to recognize it by way of other sources.³² Congress at different times, too, has considered legislation to create a federal shield law, one that would protect the identity of confidential sources and unpublished information unless exceptional circumstances existed.³³ The most recent attempts came in 2009, when two versions of the Free Flow of Information Act,³⁴ H.R. 985 and S. 448, failed to make it through the 111th Congress.³⁵

III. THE QUALIFIED FIRST AMENDMENT-BASED PRIVILEGE

Where it is recognized, the qualified First Amendment-based privilege is traced to *Branzburg v. Hayes*, a Supreme Court decision from 1972 finding that journalists do not have constitutional protection when they refuse to reveal their sources.³⁶ The facts were colorful. After interviewing a number of people, Paul Branzburg, a reporter, wrote a story about young people synthesizing and using drugs.³⁷ State prosecutors wanted to know the names of his sources, and on two occasions they subpoenaed him to testify before grand juries.³⁸ Branzburg refused.³⁹ Similarly, in the cases of *In re Pappas* and *United States v. Caldwell*, decided together with *Branzburg*, state prosecutors subpoenaed two different reporters, each covering the Black Panther organization, to testify

29. Calvert, *supra* note 27, at 413.

30. *Id.*

31. The majority of federal appellate courts, in non-grand jury settings, have read the concurring and dissenting opinions in *Branzburg v. Hayes*, 408 U.S. 665 (1972) to create a qualified reporter’s privilege. *See, e.g.*, *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *see also* Lee Levine, *Introduction to Branzburg v. Hayes: The Law of Reporter’s Privilege*, COMM. LAW. (Am. Bar Ass’n), Spring 1997, at 1 (“[B]uilding on the various opinions in *Branzburg*, [lower appellate courts] have almost unanimously fashioned a First Amendment-based privilege protecting journalists from compelled disclosure of their confidential sources and other species of unpublished information.”).

32. For an excellent overview of information about the privilege in each state and federal circuit, see *Privilege Compendium*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/privilege/> (last visited Apr. 14, 2011).

33. WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 343–48 (2008).

34. Free Flow of Information Act of 2009, H.R. 985, 111th Cong. (2009); Free Flow of Information Act of 2009, S. 448, 111th Cong. (2009).

35. Free Flow of Information Act of 2009, H.R. 985, 111th Cong. (2009); Free Flow of Information Act of 2009, S. 448, 111th Cong. (2009).

36. *Branzburg*, 408 U.S. at 667.

37. *Id.* at 667–68.

38. *Id.* at 668–69.

39. *Id.*

before grand juries.⁴⁰ Pappas and Caldwell, like Branzburg, also refused.⁴¹ They all argued that the First Amendment protected them from compelled disclosure of the identity of their sources. The idea was, if reporters were forced to reveal their sources, then people would be reluctant to speak to reporters; the free flow of information would suffer.⁴²

The Supreme Court, in a five-to-four decision written by Justice Byron White, said flatly that a journalist has the same duty as any other citizen to testify when called upon.⁴³ However, Justice Lewis F. Powell, the fifth vote to reject the privilege on the facts in *Branzburg*, would not go that far.⁴⁴ In a concurring opinion, he left open the possibility that the First Amendment might protect a reporter under other circumstances:

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.⁴⁵

Further, the dissent by Justice Potter Stewart outlined in more detail the need for a reporter's privilege and explained how it would work. To begin, he said that a reporter's right to a confidential relationship with his source "stems from the broad societal interest in a full and free flow of information to the public,"⁴⁶ that "the right to publish is central to the First Amendment and basic to the existence of constitutional democracy,"⁴⁷ and that the "corollary of the right to publish must be the right to gather news."⁴⁸ Then he outlined the three basic criteria that the government must satisfy whenever it wants to subpoena a reporter to testify:

Governmental officials must . . . demonstrate that the information sought is *clearly* relevant to a *precisely* defined subject of governmental inquiry. They must demonstrate that it is reasonable to think the witness in question has that information. And they must show that there is not any means of obtaining the information less destructive of First Amendment liberties.⁴⁹

40. *See id.* at 672–73.

41. *Id.* at 673.

42. KENT R. MIDDLETON, ROBERT TRAGER & BILL F. CHAMBERLIN, *THE LAW OF PUBLIC COMMUNICATION* 442 (2000).

43. *Branzburg*, 408 U.S. at 691.

44. *Id.* at 709–10.

45. *Id.* at 710 (Powell, J., concurring) (citation omitted).

46. *Id.* at 725 (Stewart, J., dissenting).

47. *Id.* at 727.

48. *Id.*

49. *Id.* at 740 (citations omitted).

Reading the Powell concurrence as a check on the majority, and the Stewart dissent as a how-to guide, many lower courts have relied on the fractured and “peculiar configuration”⁵⁰ of the *Branzburg* opinions to create a qualified First Amendment-based privilege.⁵¹ Until the late 1990s, though, few of them had discussed “who, beyond those employed by the traditional media,” could claim it.⁵² Some, including the Supreme Court, said it would be too difficult to figure out who would qualify, even though today that is the threshold question in reporter’s privilege cases.⁵³

A. Efforts by the Federal Circuit Courts to Decide Who Has Status to Raise the Privilege

The U.S. Court of Appeals for the Third Circuit was the first to address the question head on, in *In re Madden*, decided in 1998.⁵⁴ The court articulated a three-prong test, holding that anyone asserting the privilege must satisfy these elements: “(1) the claimant was engaged in investigative reporting; (2) the claimant was gathering news; and 3) the claimant possessed the intent at the inception of the newsgathering process to disseminate the news to the public.”⁵⁵ Thus the test requires the courts to define “two equally complex concepts, investigative reporting and news.”⁵⁶ Although the Third Circuit did not fill in the gaps, it did note that the test automatically “does not grant status to any person with a manuscript, a web page or a film.”⁵⁷ In other words, the mere running of a website does not transform someone into a journalist.⁵⁸

Other federal circuits, too, have flirted with defining what qualifies a person to invoke the reporter’s privilege, but overall their efforts did not

50. MIDDLETON ET AL., *supra* note 42, at 441.

51. For a discussion of this phenomenon, see Stephen Bates, *Overruling a Higher Court: The Goodale Gambit and Branzburg v. Hayes*, 14 NEXUS 17, 18 (2009) (“No longer did *Branzburg* reject a reporter’s privilege; it created one. Lower courts generally cited the Powell concurring opinion for the proposition that reporters are entitled to some sort of privilege, and then applied the test from the Stewart dissent.”); Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951 (2006).

52. *In re Madden*, 151 F.3d 125, 128 (3d Cir. 1998).

53. *See, e.g., Branzburg*, 408 U.S. at 703–04 (“The administration of a constitutional newsman’s privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.”).

54. *See In re Madden*, 151 F.3d 125.

55. Calvert, *supra* note 27, at 426.

56. *Id.*

57. *In re Madden*, 151 F.3d at 129.

58. Calvert, *supra* note 27, at 428.

produce bright-line tests like the one articulated by the Third Circuit.⁵⁹ That being said, the best efforts came out of the Second and Ninth Circuits. In *Von Bulow v. Von Bulow*, the Second Circuit held that “the individual claiming the privilege must demonstrate, through competent evidence, the intent to use material -- sought, gathered or received -- to disseminate information to the public and that such intent existed at the inception of the newsgathering process.”⁶⁰ The opinion went on to say two important things. One, the person invoking the privilege need not be a member of the “institutionalized press” as long as she is engaged in “activities traditionally associated with the gathering and dissemination of news”⁶¹ Two, “[t]he intended manner of dissemination may be by newspaper, magazine, book, public or private broadcast medium, handbill or the like, for ‘the press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.’”⁶² These principles, the Second Circuit held, are consistent with the purpose of the privilege, which “emanates from the strong public policy supporting the unfettered communication of information by the journalist to the public.”⁶³

Meanwhile, the Ninth Circuit said in *Shoen v. Shoen* that “[t]he journalist’s privilege is designed to protect investigative reporting.”⁶⁴ As a result, courts should focus on the activity of the person invoking the privilege, rather than the professional affiliation of that person. “What makes journalism journalism,” the court said, “is not its format but its content.”⁶⁵ For those reasons, the privilege would protect information

59. See, e.g., *In re Grand Jury Subpoenas*, No. 01-20745, n.4 (5th Cir. Aug. 17, 2001) (per curiam) (unpublished), <http://www.cff.org/htdocs/freedomline/current/america/appendix.pdf> (noting that the Fifth Circuit has not defined what constitutes journalism or who is a journalist, but saying that if the issue arose, it would look to the three-prong test devised by the Third Circuit); *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998) (suggesting that the focus of the analysis should be the intent of the person gathering and disseminating the information and whether the information relates to a matter of public concern); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436–37 (10th Cir. 1977) (extending the privilege to a filmmaker producing a documentary); *Tripp v. Dep’t of Defense*, 284 F. Supp. 2d 50, 57–58 (D.D.C. 2003) (concluding that the privilege applies to members of the news media, suggesting that it would not restrict that definition to people working for established publications or programs, and indicating that the question is whether the person invoking the privilege intended to disseminate the information gathered to the public).

60. *Von Bulow v. Von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987).

61. *Id.* at 142.

62. *Id.* at 144 (quoting *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)).

63. *Id.* at 142.

64. *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993).

65. *Id.* Although the dictum about content-over-form is critical to extend the privilege to the Internet, the Ninth Circuit panel in 2006 that heard video journalist Josh Wolf’s appeal of a civil contempt order did not explicitly address whether Wolf qualified as a journalist to invoke the privilege. *Wolf v. United States*, 201 Fed. App’x 430 (9th Cir. 2006). On the

gathered in the pursuit of news,⁶⁶ and although the Ninth Circuit has not defined news, it has noted the importance of “‘newsworthy’ facts on topical and controversial matters of great public importance.”⁶⁷

From those leading cases emerge four general principles: (1) the *medium* alone does not determine whether a person is a journalist; (2) the *intent* of the person asserting the privilege is pivotal, because she must intend to disseminate information to the public; (3) the *activity* is pivotal, too, because the person must be engaged in investigative reporting; and (4) the *content* disseminated must be news.⁶⁸

Applying those principles here, they are hurdles for WikiLeaks to jump and they are subparts of the threshold question: Would WikiLeaks have standing to raise the First Amendment-based privilege? The answer is no, because it is not engaged in investigative reporting, a process that involves more than the mere dumping of documents and requires the minimization of harm.

B. Investigative Reporting Involves More Than the Mere Dumping of Documents

WikiLeaks could clear hurdles one and two because the medium (here, the Internet) is not dispositive, and the intent of the website always has been to disseminate information to the public.⁶⁹ Hurdle three, the requirement that the person asserting the privilege be engaged in investigative reporting, is the problem. WikiLeaks describes itself as a “not-for-profit media organisation”⁷⁰ that has adopted “journalism and ethical principles”⁷¹ to guide its operations, characterized on the site as journalistic in nature:

When information comes in, our journalists analyse the material, verify

contrary, the panel suggested that the California state shield would not apply because Wolf produced no evidence that the content at issue was made while Wolf was connected with or employed by a newspaper, magazine, periodical publication, or by a press association or wire service. *Id.* at 432 n.1 (citing CAL. CONST. art. I, § 2(b)).

66. *Shoen*, 5 F.3d at 1293.

67. *Id.*

68. Calvert, *supra* note 27, at 430–31.

69. WikiLeaks says on its website that its “goal is to bring important news and information to the public,” that it is “fearless in [its] efforts to get the unvarnished truth out to the public,” and that “publishing improves transparency, and this transparency creates a better society for all people.” *About, WIKILEAKS*, <http://wikileaks.ch/About.html> (last visited Apr. 14, 2011); see also Joby Warrick, *Exposing Secrets Through Secrecy: Cloaked in the Virtual World, WikiLeaks Gives Whistleblowers a Powerful Platform*, WASH. POST, May 20, 2010, at 1 (Daniel Schmitt, one of the website’s directors, said, “The message of WikiLeaks to the controllers of information is this: You can either be transparent, or transparency will be brought to you.”).

70. *About, WIKILEAKS*, *supra* note 69.

71. *Id.*

it and write a news piece about it describing its significance to society. We then publish both the news story and the original material in order to enable readers to analyse the story in the context of the original source material themselves. Our news stories are in the comfortable presentation style of Wikipedia⁷²

Not only is journalism a big part of the site's brand, it is also a reference point, a way for the site to put itself in context. First, "[l]ike other media outlets conducting investigative journalism," it says it accepts information from anonymous sources.⁷³ Second, it says a "healthy, vibrant and inquisitive journalistic media plays a vital role in achieving these goals," before adding, "We are part of that media."⁷⁴ Finally, WikiLeaks says it "has provided a new model of journalism. . . . We don't hoard our information; we make the original documents available with our news stories. . . . Like a wire service, WikiLeaks reports stories that are often picked up by other media outlets."⁷⁵

Taking stock, then, WikiLeaks sees in its reflection a media organization filled with journalists who do journalism, guided by journalistic principles. That self-perception, however, is not conclusive. It is also a bit off. WikiLeaks may be a media organization. It may even have adopted some journalistic principles. But it is not engaged in investigative reporting, the activity protected by the First Amendment-based privilege.

Investigative reporting involves more than the mere dumping of documents. It is a "watchdog journalistic process of investigating wrongdoing . . . with the goal of holding power-wielders accountable for their actions. [It] often involves in-depth, long-term research and multi-article reporting revealing new information. It is based on documentary research, extensive interviewing, and undercover reporting and surveillance."⁷⁶ The "great temptation in investigative reporting is to lay out the facts and let the reader draw the conclusions."⁷⁷ But the process demands more. Investigative reporters "must make an understandable story out of the mountain of information that they have gathered They must judge the story material in a detached manner and then organize and write a story for persons who have no prior knowledge of the subject."⁷⁸ They

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Ideology, Public Opinion, and Media: Glossary*, AM. POLITICS, <http://www.laits.utexas.edu/gov310/IPOM/glossary.html> (last visited Apr. 14, 2011).

77. THE MISSOURI GROUP, NEWS REPORTING AND WRITING 393 (1980) (internal quotation omitted).

78. WILLIAM C. GAINES, INVESTIGATIVE REPORTING FOR PRINT AND BROADCAST 107 (2d ed. 1997).

must “lay out the facts,” but also “tell the reader what they add up to.”⁷⁹ “[I]n his or her simplest and most complex tasks . . . [the reporter] adopts words and metaphors, solves a narrative puzzle and assesses and interprets.”⁸⁰ Accordingly, investigative reporting is a process—“storytelling with a purpose.”⁸¹

The elements of that process are evident in decisions of the federal courts that have recognized the privilege. In *Cusamano v. Microsoft*, the First Circuit extended the privilege to two business professors who conducted a number of interviews before writing a book about the rivalry between two large corporations.⁸² The court said the interviews were protected because their “sole purpose” was “to gather data so that [the professors] could compile, analyze, and report their findings [about] management practices in the internet technology industry.”⁸³ In *Summit Technology, Inc. v. Healthcare Capital Group, Inc.*, the District of Massachusetts held that the privilege protected the reports of a financial advisor who performed independent research on publicly traded companies for institutional investors.⁸⁴ The court noted that the reports, based partly on interviews, contained analysis and recommendations and conclusions.⁸⁵ Meanwhile, the Western District of New York in *Blum v. Schlegel* found that the privilege applied to a student journalist who interviewed the associate dean of his school for a newspaper article.⁸⁶ The article exposed and described, in the journalist’s own words, a controversy at the school, quoting some of the people involved.⁸⁷

Ten years later, in *Tripp v. Department of Defense*, the District Court for the District of Columbia extended the privilege to a writer for the military publication *Stars and Stripes*.⁸⁸ Concluding that the writer had “engaged in newsgathering,” the court said “[t]he article itself indicates that [the writer] interviewed a number of individuals while researching [the

79. VIR BALA AGGARWAL, *ESSENTIALS OF PRACTICAL JOURNALISM* 224 (2006).

80. G. Stuart Adam, *Journalism Knowledge and Journalism Practice: The Problems of Curriculum and Research in University Schools of Journalism*, 14 CAN. J. COMM. 70, 75 (1989).

81. *Principles of Journalism*, PEW RES. CENTER’S PROJECT FOR EXCELLENCE IN JOURNALISM, <http://www.journalism.org/resources/principles> (last visited Apr. 14, 2011).

82. *Cusamano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998).

83. *Id.* at 715.

84. *Summit Tech., Inc. v. Healthcare Capital Grp., Inc.*, 141 F.R.D. 381 (D. Mass. 1992).

85. *Id.* at 383 (“His business is to perform independent research and analysis of publicly traded companies”); *see also id.* at 382 (“The ultimate conclusion of the report was the recommendation that stock in Phoenix be purchased.”).

86. *Blum v. Schlegel*, 150 F.R.D. 42 (W.D.N.Y. 1993).

87. *Id.* at 43–44.

88. *Tripp v. Dep’t of Defense*, 284 F. Supp. 2d 50, 62 (D.D.C. 2003).

article], an activity which is a ‘fundamental aspect’ of investigative journalism.”⁸⁹ The court also noted that the “plaintiff’s own document request suggests that [the writer] engaged in traditional newsgathering activities such as keeping notes.”⁹⁰

In *U.S. Commodity Futures Trading Commission v. McGraw-Hill Co.*, the District Court for the District of Columbia applied the privilege to a publisher that produced regular indices and price ranges in the natural gas market.⁹¹ Stating that the “reporter’s privilege is available only to reporters,” and referring in that respect to the importance of “engaging in editorial judgments,” the court emphasized that the reports took into account extra-market factors affecting “supply and demand, such as severe weather or recent legislative activity. . . . As such, [the publisher] engages in journalistic analysis and judgment in addition to simply reporting data.”⁹²

Those cases illustrate the nature of investigative reporting: interviews that allowed professors to compile, analyze, and publish their findings in a book; reports about publicly traded companies containing analysis, recommendations, and conclusions; a newspaper article describing a controversy in the journalist’s own words and through quotes; a writer who “engaged in traditional newsgathering activities,” and a “‘fundamental aspect’ of investigative journalism,” by interviewing people and keeping notes; a publisher that “engaged in editorial judgments” and in “journalistic analysis and judgment.” Those cases show that the process of investigative reporting involves more than the mere dumping of documents—that the person asserting the privilege “adopts words and metaphors, solves a narrative puzzle and assesses and interprets,” all by his or her own effort.⁹³

In contrast, the backbone of WikiLeaks is a high-security drop box that allows people anonymously to submit documents for the site’s staff to review.⁹⁴ As noted above, when a document comes in, WikiLeaks verifies the authenticity of the document as follows:

We assess all news stories and test their veracity. We send a submitted document through a very detailed examination a (sic) procedure. Is it real? What elements prove it is real? Who would have the motive to fake such a document and why? We use traditional investigative journalism techniques as well as more modern rtechnology-based (sic) methods. Typically we will do a forensic analysis of the document,

89. *Id.* at 58.

90. *Id.*

91. *U.S. Commodity Futures Trading Comm’n v. McGraw-Hill Co.*, 390 F. Supp. 2d 27 (D.D.C. 2005).

92. *Id.* at 32.

93. Adam, *supra* note 80, at 75.

94. Alternatively, the site accepts material in person and via postal drops, but it recommends and prefers the electronic drop box. *About, WIKILEAKS*, *supra* note 69.

determine the cost of forgery, means, motive, opportunity, the claims of the apparent authoring organisation, and answer a set of other detailed questions about the document. We may also seek external verification of the document.⁹⁵

Once the document is verified, it is posted on the website with a related news story. Although that process may look a little like journalism, investigative or otherwise, it is no such thing. WikiLeaks does not engage in multi-article reporting. It does not do extensive interviewing for its news stories. It does not provide meaningful context or journalistic analysis. It does not, in short, “make an understandable story out of the mountain of information” it has gathered.

Rather, the modus operandi of the website is to dump documents, sometimes hundreds of thousands of them, on the world; and to those dumps it appends a news story that truly is a press release,⁹⁶ announcing what the site has done, to enable an outside reporter to write about it. For example, when WikiLeaks released the Iraq War Logs, nearly 400,000 classified U.S. documents about the war in Iraq, it posted a news story only three paragraphs in length, totaling 202 words.⁹⁷ It featured no quotes, no storytelling, and the third paragraph in its entirety was an eight-word plea for money: “Please donate to WikiLeaks to defend this information.”⁹⁸

The rest of the story appeared to be directed at the news media and designed to generate publicity for the website: “At 5pm EST Friday 22nd October 2010 WikiLeaks released the largest classified military leak in history. . . . [The reports] detail events as seen and heard by the US military troops on the ground in Iraq [They] detail 109,032 deaths in Iraq The majority of the deaths (66,000, over 60%) of these are civilian deaths.”⁹⁹ In fairness, the story did provide some context (“For comparison, the ‘Afghan War Diaries’, previously released by WikiLeaks, covering the

95. *Id.* In addition, the website says that before the release of the “Collateral Murder” video, it sent a team of journalists to Iraq to interview the victims and observers of the helicopter attack featured in the video. The team obtained copies of hospital records, death certificates, eyewitness statements, and other corroborating evidence. *Id.*

96. A news release is “[i]nformation prepared as an article for issuance to the press or broadcast media with the hope that it will be published or broadcast as news.” Am. Bar Ass’n, Glossary of Communication Terms (2010), <http://apps.americanbar.org/dch/committee.cfm?com=IL104000&edit=1> (scroll down to Section B.5.g.15 and click on “Glossary of Communication Terms – PDF”).

97. Although the story is no longer available on the WikiLeaks website, it can be found on EconomicsJunkie, where it was reposted. *Iraq War Crimes Surface; Probably Greatest War-Leak in Military History*, ECONOMICSJUNKIE (Oct. 22, 2010), <http://www.economicsjunkie.com/iraq-war-crimes-surface-on-wikileaks-probably-greatest-leak-in-military-history/>.

98. *Id.*

99. *Id.*

same period, detail the deaths of some 20,000 people”).¹⁰⁰ But it also editorialized, suggesting that the U.S. has not prosecuted the war transparently (the leaked reports “are the first real glimpse into the secret history of the war that the United States government has been privy to throughout”).¹⁰¹

Needless to say, that is neither a fair nor a comprehensive account of the narratives told by the documents.¹⁰² The story posted by WikiLeaks, in other words, was not thorough.¹⁰³ It did not feature any response from the U.S. government,¹⁰⁴ it did not chronicle the life-and-death decisions lurking in the documents, or offer color or texture, or illuminate the human condition, other than the death toll.¹⁰⁵ In addition, it failed to distinguish between opinion and news,¹⁰⁶ not the first time the website had blurred that line.¹⁰⁷

Similarly, when WikiLeaks began to release the U.S. diplomatic cables in November 2010, it posted a 329-word “editorial” containing no quotes and no meaningful analysis or context.¹⁰⁸ It contained no government response, either. The piece simply announced, in the spirit of a press release, the number of cables that would be published and that they

100. *Id.*

101. WIKILEAKS, <http://wikileaks.ch/> (last visited Apr. 14, 2011).

102. The Society of Professional Journalists Code of Ethics (hereinafter “SPJ Code of Ethics”) says, “[P]ublic enlightenment is the forerunner of justice and the foundation of democracy. The duty of the journalist is to further those ends by seeking truth and providing a *fair and comprehensive* account of events and issues.” *SPJ Code of Ethics*, SOC’Y OF PROF. JOURNALISTS, <http://www.spj.org/ethicscode.asp> (last visited Apr. 14, 2011) (emphasis added).

103. The SPJ Code of Ethics says, “Conscientious journalists from all media and specialties strive to serve the public with *thoroughness* and honesty.” *Id.* (emphasis added).

104. The SPJ Code of Ethics says, “Journalists should . . . [d]iligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing.” *Id.*

105. The SPJ Code of Ethics says, “Journalists should . . . [t]ell the story of the diversity and *magnitude of the human experience* boldly, even when it is unpopular to do so.” *Id.* (emphasis added).

106. The SPJ Code of Ethics says, “Journalists should . . . [d]istinguish between advocacy and news reporting.” *Id.* (emphasis added).

107. In April of 2010, WikiLeaks released a 2007 video of a U.S. Army helicopter in Baghdad repeatedly opening fire on a group of men that included a Reuters photographer and his driver. Days later, the comedian Stephen Colbert said to Assange, who was a guest on his show, “And you have edited this tape, and you have given it a title called ‘Collateral Murder.’ That’s not leaking. That’s a pure editorial.” Assange, in response, said he was trying to create “maximum possible political impact . . .” *The Colbert Report* (Comedy Central broadcast Apr. 12, 2010), available at <http://www.colbertnation.com/the-colbert-report-videos/260785/april-12-2010/exclusive---julian-assange-extended-interview>; see also Toby Harnden, *Julian Assange’s Arrest Warrant: A Diversion from the Truth*, DAILY TELEGRAPH, Aug. 22, 2010, at 15.

108. *Secret US Embassy Cables (Cablegate), 1966-2010*, WIKILEAKS, [http://mirror.wikileaks.info/wiki/Secret_US_Embassy_Cables_\(Cablegate\),_1966-2010/](http://mirror.wikileaks.info/wiki/Secret_US_Embassy_Cables_(Cablegate),_1966-2010/) (last visited Apr. 14, 2011).

would come out “in stages over the next few months.”¹⁰⁹ It also commented on their “importance” and accused the U.S. government of lying to the public.¹¹⁰

A week later, the website posted a few hundred words about PayPal’s decision to discontinue its relationship with WikiLeaks.¹¹¹ The story quoted Assange, who said, “What we are seeing here are dangerous moves towards a digital McCarthyism.”¹¹² The sub-headline was a variation on that theme: “Digital McCarthyism [sic] in the United States?”¹¹³ Most notably, though, in perhaps a Freudian slip, WikiLeaks labeled the post as both an “editorial” and a “press release.”¹¹⁴

Admittedly, a few of the WikiLeaks stories did provide some context and analysis,¹¹⁵ but even those did not quote anyone other than a WikiLeaks spokesperson, nor did they include responses from the governments and people accused in the stories of committing various bad acts or of harboring ignoble views. Two newspaper columnists, commenting on the release of the Afghanistan war documents, made the point that WikiLeaks actually has affirmed the value of journalism

First, Anne Applebaum of *The Washington Post* wrote:

By releasing . . . intelligence documents . . . onto the laptops of an unsuspecting public, the proprietor of WikiLeaks has made an iron-clad case for the mainstream media . . .

To see what I mean, try reading this: “At 1850Z, TF 2-2 using PREDATOR (UAV) PID insurgents emplacing IEDs at 41R PR 9243 0202, 2.7km NW of FOB Hotal, Kandahar . . .”

Did you get that? I didn’t, at least not at first. I understand it somewhat better now, however, because the New York Times helpfully explains on its Web site that this excerpt from one of the WikiLeaks documents describes a Predator drone firing a missile at men who were planting roadside bombs.¹¹⁶

109. *Id.*

110. *Id.*

111. *Editorial - PayPal Freezes WikiLeaks Donations*, WIKILEAKS, <http://213.251.145.96/PayPal-freezes-WikiLeaks-donations.html> (last visited Apr. 14, 2011).

112. *Id.*

113. *Id.*

114. *Id.*

115. See, e.g., Natalia Viana, *Latin America - Paraguay President May Need “A Little Help From ‘Upstairs’ to Govern” Says U.S.*, WIKILEAKS (Dec. 19, 2010), <http://www.wlmirror.com/Paraguay-president-may-need-a.html>; WikiLeaks Staff, *Sri Lanka - Ambassador Reports Sri Lankan President Responsible for “Alleged War Crimes,”* WIKILEAKS (Dec. 1, 2010), <http://www.wikileaks.lu/Ambassador-reports-Sri-Lankan.html>; Natalia Viana, *Brazil - Cablegate : How the US Sees the Landless Movement in Brazil*, WIKILEAKS (Dec. 22, 2010), <http://www.wikileaks.lu/Cablegate-how-the-US-sees-the.html>.

116. Anne Applebaum, *WikiLeaks’ Defense of Journalism*, WASH. POST, July 29, 2010, at A23.

Second, Dick Polman of the *Philadelphia Inquirer* wrote:

WikiLeaks could have simply posted all that raw military data online, straight to your laptop. But [Julian Assange] instead decided to share most of his material . . . with three key Western newspapers . . . Assange wanted the papers to translate the military jargon for the lay reader. They did. He wanted the papers to vet, analyze, and contextualize the material. They did.¹¹⁷

Generally, then, it is clear that WikiLeaks has passed on to the mainstream media the burden of investigative reporting—of adding value to the leaked documents by examining them and explaining their meaning and significance. Therefore, for privilege purposes the website is not engaged in investigative reporting, a process that involves more than the mere dumping of documents.

C. *WikiLeaks Has Not Taken Steps Consistently to Minimize Harm*

Proceeding again from the premise that investigative reporting is a process, WikiLeaks deviates from it in one other significant way. The website has not taken steps consistently to minimize harm to people who could be affected by its actions.¹¹⁸ This is deviant because it is common (indeed, expected) for those involved in investigative reporting to ask and answer a number of ethics questions before publishing any story or series. “Two of the most important are: Who will be hurt, and how many? Who will be helped, and how many?”¹¹⁹ The idea is to “[b]e wary of treating people as a means”¹²⁰ and to “[w]eigh the harms and the benefits of publication”¹²¹ The harm-versus-benefit concept is derived from philosophers, and journalists tend to rely on John Stuart Mill’s version of it.¹²² That is,

[i]f Mill were editor, he would ask his staff to (1) list all persons likely

117. Dick Polman, *Rules of Engagement*, PHILA. INQUIRER (Aug. 2, 2010), available at http://www.philly.com/philly/blogs/americandebate/Rules_of_Engagement.html.

118. It has been argued that the site has not taken steps consistently to minimize harm to national security either, but that is a subject for another paper. See, e.g., Andrew Porter, *WikiLeaks Is Threatening National Security, Says Downing Street*, TELEGRAPH (Nov. 29, 2010), available at <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8167816/WikiLeaks-is-threatening-national-security-says-Downing-Street.html>; Andrew Zajac, *U.S. Denounces Leak of Crucial Overseas Sites*, L.A. TIMES, Dec. 7, 2010, at A3.

119. FRED FEDLER, JOHN R. BENDER, LUCINDA DAVENPORT & MICHAEL W. DRAGER, *REPORTING FOR THE MEDIA* 594 (8th ed. 2005); see also CAROLE RICH, *WRITING AND REPORTING NEWS: A COACHING METHOD* 332 (4th ed. 2005) (“Robert M. Steele, associate director in charge of ethics at The Poynter Institute, suggests that journalists ask . . . questions before making decisions in ethical dilemmas . . . [including.] What are the likely consequences of publication? What good or harm could result?”).

120. MELVIN MENCHER, *NEWS REPORTING AND WRITING* 571 (10th ed. 2006).

121. RICH, *supra* note 119, at 332.

122. *Id.*

to be affected; (2) decide the likely consequences of each option; (3) weigh the benefit or harm that would result, giving added weight to the major benefit or harm; and (4) choose the consequence that provides the most benefit to the largest number of people or the least harm to the smallest number of people.¹²³

It is unclear how WikiLeaks strikes that balance. On the one hand, Assange “has placed a doomsday card on the table: he has said that if [the site’s] existence is threatened, the organization would be willing to spill all the documents in its possession out into the public domain, ignoring the potentially mortal consequences.”¹²⁴ Assange’s lawyer called this the “thermonuclear device,”¹²⁵ and at least one commentator has argued that such an act “is something no journalistic organization would ever do, or threaten to do.”¹²⁶ On the other hand, WikiLeaks has said it follows “journalism and ethical principles”¹²⁷ and that it is “developing and improving a harm minimisation procedure.”¹²⁸ That procedure would require the site in special cases to “remove or significantly delay the publication of some identifying details from original documents to protect life and limb of innocent people.”¹²⁹ But as of this writing, the nuts and bolts of the procedure, like much of the site’s operations,¹³⁰ are unknown.

When WikiLeaks released the Afghanistan war documents in July 2010, it withheld roughly 15,000 said to be particularly sensitive, but it did not remove the names of Afghan intelligence sources from the documents it did release.¹³¹ U.S. Secretary of Defense Robert Gates accused the website of endangering lives, and Admiral Mike Mullen, chairman of the Joint Chiefs of Staff, said WikiLeaks “might already have on their hands the blood of some young soldier or that of an Afghan family.”¹³² A Taliban spokesman, after the release, told the *New York Times* it had formed a nine-member commission to review the documents and “find about people who

123. *Id.* at 332–33.

124. David Carr, *WikiLeaks Taps Power of the Press*, N.Y. TIMES (Dec. 12, 2010), available at <http://www.nytimes.com/2010/12/13/business/media/13carr.html>.

125. Stephen Kurczyk, *Will WikiLeaks’ Julian Assange, Now Arrested, Take the ‘Nuclear’ Option?*, CHRISTIAN SCI. MONITOR (Dec. 7, 2010), <http://www.csmonitor.com/World/Europe/2010/1207/Will-WikiLeaks-Julian-Assange-now-arrested-take-the-nuclear-option> (internal quotation omitted).

126. Carr, *supra* note 124.

127. *About*, WIKILEAKS, *supra* note 69.

128. *Id.*

129. *Id.*

130. Warrick, *supra* note 69; see also Peter Eisler & Gregory Korte, *Whistle-Blowing Website Shrouded in Its Own Secrecy*, USA TODAY, July 27, 2010, at 2A.

131. John F. Burns & Ravi Somaiya, *WikiLeaks Founder on the Run, Trailed by Notoriety*, N.Y. TIMES, Oct. 24, 2010, at A1.

132. Noam Cohen, *A Renegade Site, Now Working with the News Media*, N.Y. TIMES, Aug. 2, 2010, at B3 (quotations omitted).

are spying.”¹³³

In response, Assange said the “grounds of Iraq and Afghanistan are covered with real blood,” and that “Secretary Gates has overseen the killings of thousands of children and adults in these two countries.”¹³⁴ He also blamed the U.S. military for putting its own Afghan sources at risk: “This material was available to every soldier and contractor in Afghanistan It’s the US military that deserves the blame for not giving due diligence to its informers. We are appalled that the US military was so lackadaisical with its Afghan sources. Just appalled.”¹³⁵ Further, Assange said that since the launch of WikiLeaks, as far as he knew, nobody ever had been harmed because of any post on the site.¹³⁶

Shortly thereafter, however, a coalition of leading human rights groups sent a letter to Assange criticizing his decision not to redact the names and saying that the Afghans identified in the documents would be targets of the Taliban.¹³⁷ Among those who signed the letter were Amnesty International, the Campaign for Innocent Victims in Conflict, the Open Society Institute, the Afghanistan Independent Human Rights Commission, and the International Crisis Group.¹³⁸ Reporters Without Borders released a statement, too, castigating WikiLeaks for its “incredible irresponsibility.”¹³⁹

This time, Assange fired back through Twitter, insinuating that the human rights groups, namely Amnesty International, had refused to help WikiLeaks by underwriting the cost of editing the documents: “Pentagon wants to bankrupt us by refusing to assist review. Media won’t take responsibility. Amnesty won’t. What to do?”¹⁴⁰ In a separate tweet, he estimated the cost of the “harm minimization review,” ostensibly the effort to edit the 15,000 documents WikiLeaks withheld from the initial release, at \$700,000.¹⁴¹ It is unclear how Assange arrived at that figure.¹⁴²

133. Burns & Somaiya, *supra* note 18.

134. Cohen, *supra* note 132 (quotations omitted).

135. *WikiLeaker Julian Assange Rejects Blood-on-Hands Claim*, AUSTRALIAN, Aug. 2, 2010, at 11 (quotations omitted).

136. *Id.*

137. Eben Harrell, *WikiLeaks Comes Under Fire from Rights Groups*, TIME (Aug. 12, 2010), available at <http://www.time.com/time/world/article/0,8599,2010309,00.html>.

138. *Id.*

139. Jean-François Julliard & Clothilde Le Coz, *Open Letter to Wikileaks Founder Julian Assange: “A Bad Precedent for the Internet’s Future,”* REPORTERS WITHOUT BORDERS FOR PRESS FREEDOM (Aug. 12, 2010), <http://en.rsf.org/united-states-open-letter-to-wikileaks-founder-12-08-2010,38130.html>.

140. See David Gura, *Pentagon Says It Will Not Cooperate with WikiLeaks Request for Help*, AP Reports, THE TWO-WAY: NPR’S NEWS BLOG (Aug. 18, 2010, 2:22 PM), <http://www.npr.org/blogs/thetwo-way/2010/08/18/129279469/pentagon-says-it-will-not-cooperate-with-wikileaks-ap-reports>.

141. *Id.*

142. *Id.*

In contrast, the *New York Times*, the *Guardian*, and *Der Spiegel*, the newspapers that jointly published stories about the Afghanistan leak,¹⁴³ took steps to minimize harm and to remove from the documents the names of any Afghan sources.¹⁴⁴ *Guardian* editor Alan Rusbridger said, “We were very careful to vet everything we published . . . We also tried to influence Julian Assange to redact names.”¹⁴⁵ Nick Davies, the *Guardian* reporter who brokered the deal to get access to the WikiLeaks documents, said,

The first time I spoke to Julian Assange . . . before I saw the documents, I said there are two issues: one, there may be nothing of interest here, and two, there must be a risk that publication would put people on the ground at risk. . . . Each [document] was read from top to toe with the conscious aim of excluding anything that might harm people on the ground.¹⁴⁶

The *New York Times* was just as cautious, and, like the *Guardian*, it encouraged WikiLeaks to withhold potentially harmful material. In a “Note to Readers,” the newspaper said:

The Times and the other news organizations agreed . . . that we would not disclose—either in our articles or any of our online supplementary material—anything that was likely to put lives at risk or jeopardize military or antiterrorist operations. We have, for example, withheld any names of operatives in the field and informants cited in the reports. We have avoided anything that might compromise American or allied intelligence-gathering methods such as communications intercepts. We have not linked to the archives of raw material. At the request of the White House, The Times also urged WikiLeaks to withhold any harmful material from its Web site.¹⁴⁷

Eric Schmitt, who reviewed and wrote about the Afghanistan documents for the *New York Times*, said:

We redacted . . . the names and other identifying details from the incident reports we published in the Times. Before publication, we asked the White House, CIA and Defense Department if they had any objections to specific information being made public. They had a couple of specific requests, which we honoured¹⁴⁸

143. *Piecing Together the Reports, and Deciding What to Publish*, N.Y. TIMES, July 26, 2010, at A8. WikiLeaks made the documents available to those newspapers on the condition that they not report on the data until July 25, 2010, when the website would post the material on the Internet. The newspapers wrote independently, and WikiLeaks was not involved in their research, reporting, analysis, or writing. *Id.*; see also David Leigh, *Media: ‘A Transformative Moment’: Three of the World’s Biggest Newspapers Spent Weeks Working with WikiLeaks on a Journalistic Effort that Broke New Ground*, GUARDIAN, Aug. 2, 2010, at 4.

144. See Harrell, *supra* note 137.

145. Chris Elliott, *Open Door: The Readers’ Editor on... the Moral and Legal Implications of Publishing the War Logs*, GUARDIAN, Aug. 9, 2010, at 27.

146. *Id.*

147. *Piecing Together the Reports, and Deciding What to Publish*, *supra* note 143.

148. Elliott, *supra* note 145.

WikiLeaks said it also contacted the Pentagon for assistance after releasing the first batch of documents, apparently seeking help to review the 15,000 documents the site originally withheld.¹⁴⁹ The nature of that contact remains an open question.¹⁵⁰

Since the Afghanistan dump, the website appears to be taking more seriously the task of minimizing harm. Indeed, going forward it may *have* to be more careful, because bills pending in both houses of Congress would make it unlawful to publish the names of military or intelligence informants.¹⁵¹ In any case, besides developing a “harm minimisation procedure,” secret as it is, WikiLeaks did remove potentially harmful information from the diplomatic cables it began releasing in November¹⁵² and the Iraq war documents released in October.¹⁵³ There were, however, a few catches. First, when the website edited the cables, it did so *after* providing them to various news outlets.¹⁵⁴ The U.S. State Department announced in early 2011 that it had “helped relocate a number of people in other countries who . . . could be in danger because their names have appeared in diplomatic cables revealed by Wikileaks.”¹⁵⁵ Second, when the site edited the Iraq documents, it removed so much information that one commentator accused the site of redacting “to the point of incoherence” and of using an algorithm to edit the documents, rather than human beings.¹⁵⁶

149. Mark Hosenball, *Pentagon Says WikiLeaks Is Fibbing*, NEWSWEEK (Aug. 18, 2010), available at <http://www.newsweek.com/blogs/declassified/2010/08/18/pentagon-says-wikileaks-is-telling-fibs.html>.

150. *Id.*; see also Mark Hosenball, *WikiLeaks Lawyer Says Pentagon Given Access to Unpublished Secret Documents*, NEWSWEEK (Aug. 20, 2010), available at <http://www.newsweek.com/blogs/declassified/2010/08/20/wikileaks-lawyer-says-pentagon-has-been-given-codes-granting-access-to-unpublished-secret-documents.html>; Glenn Greenwald, *Why Won't the Pentagon Help WikiLeaks Redact Documents?*, SALON.COM (Aug. 20, 2010, 12:21 PM), http://www.salon.com/news/opinion/glenn_greenwald/2010/08/20/wikileaks.

151. Gautham Nagesh, *Rep. King Introduces Anti-WikiLeaks Bill*, HILL (Dec. 9, 2010), <http://thehill.com/blogs/hillicon-valley/technology/132939-rep-king-introduces-anti-wikileaks-bill-in-the-house>.

152. Shane & Lehren, *supra* note 11.

153. Jeff Bercovici, *In Growing Up, Did Wikileaks Also Sell Out?*, FORBES (Oct. 25, 2010), <http://blogs.forbes.com/jeffbervovici/2010/10/25/in-growing-up-did-wikileaks-also-sell-out/>.

154. See Colum Lynch & Peter Finn, *Human Rights Groups Fearful over WikiLeaks Releases*, WASH. POST (Nov. 30, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112905743.html>.

155. Jill Dougherty, *State Department Relocating People Identified in Wikileaks Releases*, CNN.COM (Jan. 7, 2011), <http://www.cnn.com/2011/US/01/07/wikileaks.relocations/>.

156. John Cook, *Did Wikileaks Blink?*, GAWKER (Oct. 25, 2010), <http://m.gawker.com/5672992/>; see also Bercovici, *supra* note 153.

D. Summary

By and large, WikiLeaks has passed on to the mainstream media the burden of investigative reporting—of adding value to the leaked documents by examining them, contextualizing them, and explaining their meaning and significance. That is, the site has not made understandable stories out of the mountain of information it has gathered. Nor has it taken steps consistently to minimize harm, whether it is redacting too little or too much, or making threats about a “thermonuclear device.” For these reasons, WikiLeaks would not survive the threshold inquiry set forth by the federal courts and would not qualify to claim the First Amendment-based privilege.

IV. THE CONGRESSIONAL SHIELD BILLS

For years, special interests representing the journalism industry have worked with members of Congress to pass a federal reporter’s shield law, one that would protect the identity of confidential sources and unpublished information unless exceptional circumstances existed.¹⁵⁷ Most recently, in March 2009, the House passed H.R. 985,¹⁵⁸ the Free Flow of Information Act, and referred it to the Senate. At the time, the Senate was considering a different version of the bill, S. 448,¹⁵⁹ also called the Free Flow of Information Act. The purpose of both was “[t]o maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.”¹⁶⁰

As noted earlier, both bills died in January 2011, when the 111th Congress ended. It is worthwhile, though, to examine them here because any future bills would be drafted in contemplation of H.R. 985 and S. 448, whose fate was sealed by WikiLeaks. The website appears to be a synecdoche for the balance between national security and free speech.

A. WikiLeaks and the House Bill

Sponsored by Rich Boucher, Democrat from Virginia,¹⁶¹ and co-sponsored by fifty others, H.R. 985 applied in both criminal and civil

157. *Special Report: Shields and Subpoenas: The Reporter’s Privilege in Federal Courts*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Nov. 19, 2009), http://www.rcfp.org/shields_and_subpoenas.html#shield.

158. Free Flow of Information Act of 2009, H.R. 985, 111th Cong. (2009).

159. Free Flow of Information Act of 2009, S. 448, 111th Cong. (2009).

160. Free Flow of Information Act of 2009, H.R. 985, 111th Cong. (2009); Free Flow of Information Act of 2009, S. 448, 111th Cong. (2009).

161. Rep. Boucher lost his bid for re-election in 2010. See *GOP’s Griffith Ousts 14-term Va. Democratic Rep. Boucher*, VIRGINIAN PILOT (Nov. 2, 2010), <http://hamptonroads.com/2010/11/gops-griffith-ousts-14term-va-democratic-rep-boucher>.

contexts to protect not only confidential sources and information, but also documents and information obtained during the newsgathering process.¹⁶²

Section 2(a) read:

In any matter arising under Federal law, a Federal entity may not compel a covered person to provide testimony or produce any document related to information obtained or created by such covered person as part of engaging in journalism¹⁶³

Those protections, however, were not absolute. The bill went on to state exceptions that would allow the government to overcome the shield in some circumstances, essentially to protect public interests other than the gathering of news.¹⁶⁴ It said the court had to balance the “interest in compelling disclosure” with the “interest in gathering or disseminating news or information.”¹⁶⁵ The shield did not apply if the court determined, for example, that “the party seeking to compel production . . . has exhausted all reasonable alternative sources” and that “the testimony or document sought is critical to the investigation or prosecution” of a criminal case. Nor did the shield apply if the court determined that “disclosure . . . is necessary to prevent, or identify any perpetrator of, an act of terrorism against the United States or its allies,” or if the court determined that “disclosure . . . is necessary to prevent imminent death or significant bodily harm”¹⁶⁶ In addition, most pertinent here, the bill defined narrowly who could invoke the shield:

The term “covered person” means a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person’s livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person.¹⁶⁷

On the one hand, WikiLeaks appears to fit the definition of “covered person.” Besides the U.S. diplomatic cables and the documents about Iraq and Afghanistan, all discussed previously, the website has released, since 2007, documents about corruption in the family of former Kenyan leader Daniel Arap Moi,¹⁶⁸ documents about the treatment of prisoners at

162. *H.R. 985 Bill Summary & Status*, THOMAS, <http://thomas.loc.gov/home/LegislativeData.php?&n=BSS&c=111> (select “111” Congress; search for “H.R. 985”; click on “H.R. 985” hyperlink; click on “All Information” hyperlink) (last visited Apr. 14, 2011); *see also* Free Flow of Information Act of 2009, H.R. 985, 111th Cong. (2009).

163. Free Flow of Information Act of 2009, H.R. 985, 111th Cong. (2009).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. Xan Rice, *The Looting of Kenya*, GUARDIAN.CO.UK (Aug. 31, 2007),

Guantanamo Bay,¹⁶⁹ documents about websites to be blacklisted or otherwise banned under Australian law,¹⁷⁰ and many others.¹⁷¹ In other words, WikiLeaks regularly has gathered information for dissemination to the public about national and international events and matters of public interest, just as H.R. 985 required.¹⁷²

On the other hand, the site's staffers, including Assange, have not always done those things "for a substantial portion of [their] livelihood or for substantial financial gain."¹⁷³ WikiLeaks, which relies on donations to fund its operations, has created an elaborate network to obscure its finances.¹⁷⁴ The site has done so because groups in the past have threatened its funding.¹⁷⁵ Primarily, it draws money from a foundation in Germany, because the law there prohibits the disclosure of donor names. At the same time, the site is registered variously as a library in Australia, a foundation in France, and a newspaper in Sweden.¹⁷⁶ It has two tax-exempt charitable organizations in the United States, too, which act as fronts for the site.¹⁷⁷ Its financial stability has waxed and waned since its launch,¹⁷⁸ and how much it needs annually to fund its operations is uncertain.¹⁷⁹

<http://www.guardian.co.uk/world/2007/aug/31/kenya.topstories3>.

169. Jane Sutton, *Guantanamo Operating Manual Posted on Internet*, REUTERS (Nov. 15, 2007), <http://www.reuters.com/article/idUSN1424207020071114?pageNumber=1>.

170. Vivian Wai-yin Kwok, *Aussie Internet Blacklist Has Grey Areas*, FORBES (MAR. 19, 2009), <http://www.forbes.com/2009/03/19/australia-internet-censorship-markets-economy-wikileaks.html>.

171. WikiLeaks also has released a classified U.S. report about prison conditions in Fallujah; a draft of the Anti-Counterfeiting Trade Agreement; a gag order preventing the *Times* of London from reporting on a toxic waste dump; documents showing that a Swiss bank has avoided paying taxes to the Swiss government; and a report on the Shriners organization and corruption in its children's hospitals. For a full list of the documents the website has published, see WIKILEAKS, <http://www.wikileaks.ch/wiki/Draft:Newfront> (last visited Apr. 14, 2011).

172. Free Flow of Information Act of 2009, H.R. 985, 111th Cong. (2009).

173. *Id.*

174. Jeanne Whalen & David Crawford, *How WikiLeaks Keeps Its Funding Secret*, WALL ST. J. (Aug. 23, 2010), available at <http://online.wsj.com/article/SB10001424052748704554104575436231926853198.html>.

175. See, e.g., David Leigh & Rob Evans, *WikiLeaks Says Funding Has Been Blocked After Government Blacklisting*, GUARDIAN.CO.UK (Oct. 14, 2010), <http://www.guardian.co.uk/media/2010/oct/14/wikileaks-says-funding-is-blocked>; Andy Greenberg, *Visa, MasterCard Move to Choke WikiLeaks*, FIREWALL (Dec. 7, 2010, 10:16 AM), <http://blogs.forbes.com/andygreenberg/2010/12/07/visa-mastercard-move-to-choke-wikileaks/>; Andrew Gilligan, *Now WikiLeaks Suffers Its Own Leaks*, TELEGRAPH (Dec. 12, 2010), <http://www.telegraph.co.uk/news/worldnews/wikileaks/8196946/Now-Wikileaks-suffers-its-own-leaks.html>.

176. Whalen & Crawford, *supra* note 174.

177. *Id.*

178. *Id.*

179. Daniel Schmitt, formerly a WikiLeaks spokesman, said in August 2010 that the site needs about \$200,000 to cover its annual operating expenses, i.e., network fees, rent, and

Although the site for years did not pay salaries to its staff, including Assange,¹⁸⁰ it began doing so in late 2010.¹⁸¹ Salaries had been a “sensitive subject” for the site because outsiders questioned the need for them.¹⁸² Nonetheless, WikiLeaks now pays “key personnel based on a salary structure developed by the environmental activist organization Greenpeace”¹⁸³ This is believed to be an attempt “to legitimize [the] organization by moving away from purely volunteer-based work”¹⁸⁴

Again, to qualify as a “covered person” under H.R. 985, the person must engage in various activities “for a substantial portion of [her] livelihood or for substantial financial gain”¹⁸⁵ It seems, then, the bill did not cover the work carried on by the site’s unpaid staff, who did not gain financially; yet it did cover the work carried on by the paid staff, who did gain financially. Of course, separating the two would be difficult. Some projects likely involved both paid and unpaid staff, and some people likely worked on projects initially as unpaid staff and later as paid staff. In any case, an amendment to the Senate bill would have blackballed WikiLeaks. It was sure to get through any conference committee (where members from each house work out the differences between their bills) and get into the final version of the shield law. That amendment is discussed in the next section.

B. *WikiLeaks and the Senate Bill*

Sponsored by Arlen Specter, Democrat from Pennsylvania, and co-sponsored by fifteen others,¹⁸⁶ S. 448 applied in both criminal and civil contexts to protect the identity of confidential sources and communications data, as well as documents or information obtained on a promise of confidentiality.¹⁸⁷ Section 2(a) reads:

storage fees for the servers, as well as hardware and travel costs. *See id.* That number, however, may have increased since then. As noted in Part III.C of this Article, WikiLeaks now is developing a harm-minimization process, and Assange estimated once that the review of the 15,000 withheld Afghanistan documents alone would cost \$700,000. *See Gura, supra* note 140.

180. Kim Zetter, *WikiLeaks Cash Flows in, Drips out*, THREAT LEVEL (July 13, 2010, 8:07 PM), <http://www.wired.com/threatlevel/2010/07/wikileaks-funding/>; *see also* Whalen & Crawford, *supra* note 174.

181. Joshua Norman, *WikiLeaks’ Julian Assange Now Making \$86k/year*, CBS NEWS (Dec. 24, 2010), http://www.cbsnews.com/8301-503543_162-20026597-503543.html.

182. Whalen & Crawford, *supra* note 174.

183. Norman, *supra* note 181.

184. *Id.*

185. Free Flow of Information Act of 2009, H.R. 985, 111th Cong. (2009).

186. S. 448 *Bill Summary & Status*, THOMAS, <http://thomas.loc.gov/home/LegislativeData.php?&n=BSS&c=111> (select “111” Congress; search for “S. 448”; click on “All Information” hyperlink) (last visited Apr. 14, 2011).

187. Free Flow of Information Act of 2009, S. 448, 111th Cong. (2009).

In any proceeding or in connection with any issue arising under Federal law, a Federal entity may not compel a covered person to comply with a subpoena, court order, or other compulsory legal process seeking to compel the disclosure of protected information . . .¹⁸⁸

The bill included exceptions similar to those in H.R. 985 that would allow the government in some circumstances to overcome the shield. It said the court had to balance the “interest in compelling disclosure” with the “interest in gathering or disseminating the information or news”¹⁸⁹ The shield did not apply if the court determined, for example, that “the party seeking to compel . . . has exhausted all reasonable alternative sources” and that the information sought is “essential to the investigation or prosecution or to the defense against the prosecution” in a criminal case.¹⁹⁰ Further, in a “matter other than a criminal investigation or prosecution,” the information sought had to be “essential to the resolution” in order to overcome the shield.¹⁹¹

The shield also did not apply if the court determined that the information sought was “reasonably necessary to stop, prevent, or mitigate a specific case of . . . death . . . kidnapping . . . substantial bodily harm . . . a specified offense against a minor . . . or . . . incapacitation or destruction of critical infrastructure”¹⁹² And it did not apply if the court determined that the information sought “would materially assist the Federal Government in preventing or mitigating . . . an act of terrorism [or] other acts that are reasonably likely to cause significant and articulable harm to national security.”¹⁹³ Unlike the House bill, the Senate version defined broadly who could invoke the shield:

The term “covered person”--

(A) means a person who--

(i) with the primary intent to investigate events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest, regularly gathers, prepares, collects, photographs, records, writes, edits, reports or publishes on such matters by--

(I) conducting interviews;

(II) making direct observation of events; or

(III) collecting, reviewing, or analyzing original writings, statements, communications, reports, memoranda, records, transcripts, documents, photographs, recordings, tapes, materials, data, or other information whether in paper, electronic, or other form;

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

- (ii) has such intent at the inception of the process of gathering the news or information sought; and
- (iii) obtains the news or information sought in order to disseminate the news or information by means of print (including newspapers, books, wire services, news agencies, or magazines), broadcasting (including dissemination through networks, cable, satellite carriers, broadcast stations, or a channel or programming service for any such media), mechanical, photographic, electronic, or other means¹⁹⁴

WikiLeaks again appears to fit the definition of “covered person.” As discussed earlier, in the analysis of the House bill, for years the website has gathered and published documents about diplomacy, war, corruption, censorship, and prisoner treatment, i.e., “information concerning local, national, or international events or other matters of public interest”¹⁹⁵ Notably, the site has done so with the general intent “to bring important news and information to the public,”¹⁹⁶ and the catch in the House bill—whether the staff did the work for financial gain—did not apply in the Senate bill. Two senators, however, took action specifically to exclude WikiLeaks from S. 448’s protections.¹⁹⁷

Senators Charles Schumer and Dianne Feinstein, Democrats of New York and California, respectively, drafted an amendment to make clear that the shield did not extend to websites that serve as conduits for the “mass dissemination of secret documents.”¹⁹⁸ Schumer said in August 2010 that two parts of the bill already excluded the website. First, he said, “the site does not fit the bill’s definition of a journalist, which requires that the covered party regularly engage in legitimate newsgathering activities.”¹⁹⁹ (Nevermind that S. 448 said nothing of “legitimate newsgathering activities,” and the site does seem to fit the definition, as explained above.) Second, Schumer said, “the bill allows a judge to waive the privilege altogether if critical national security concerns are at stake.”²⁰⁰ Therefore, he concluded that WikiLeaks was not covered. He and Feinstein nonetheless drafted an amendment “to remove even a scintilla of doubt” about it.²⁰¹

Neither Schumer nor Feinstein ever revealed the amendment, although Feinstein said in September 2010 it was “ready to go whenever

194. *Id.*

195. *Id.*

196. *About*, WikiLeaks, *supra* note 69; *see also* Warrick, *supra* note 69.

197. Savage, *supra* note 9.

198. *Id.*

199. Press Release, Senator Charles E. Schumer, *Schumer to Add New Language to Senate Media Shield Bill to Affirm WikiLeaks Doesn’t Qualify for Protection* (Aug. 4, 2010), <http://schumer.senate.gov/record.cfm?id=326952&>.

200. *Id.*

201. *Id.*

the bill is called up for a vote.”²⁰² Reportedly the amendment focused on the definition of “covered person,” rather than the conditions for compelled disclosure or the breadth of the exceptions. Senate aides said the idea was “to add language bolstering a section defining who would be covered by the law as a journalist,” chiefly to show “judges that Congress did not intend for the law to cover [WikiLeaks-type] organizations.”²⁰³

C. Summary

To qualify as a “covered person” under the House bill, the person must engage in various journalistic activities “for a substantial portion of [her] livelihood or for substantial financial gain.”²⁰⁴ It is hard to say whether WikiLeaks would have qualified in that regard, because the site only began to pay salaries in late 2010. It seems the bill did not cover the work carried on by the unpaid staff and yet did cover the work carried on by the paid staff. Separating the two would be difficult. No matter, an amendment to the Senate bill would have blackballed WikiLeaks. It was sure to get through any conference committee, and it made clear that the shield did not extend to websites that serve as conduits for the “mass dissemination of secret documents.”²⁰⁵

V. CONCLUSION

As a general question, it is difficult today to define journalism and to describe the people who do it. Newspapers, magazines and broadcast outlets all share the media landscape with bloggers, citizen journalists and sites that feature user-generated content. Some traditional news media even have created sites that allow people to shape the news they report by submitting personal videos and photos. CNN, for example, runs an initiative called iReport, a platform for people to submit their own content about breaking news.²⁰⁶

It is unclear where WikiLeaks stands on that landscape, in a philosophical sense. The site has made a name for itself by using a high-security online drop box and a well-insulated website to release hundreds of thousands of classified U.S. documents and materials: field reports about the wars in Iraq and Afghanistan, diplomatic cables from embassies around the world, a military airstrike video; the list goes on. Maybe WikiLeaks is just a “new wrinkle on an old idea,” an iteration of the journalistic tradition

202. David Saleh Rauf, *Shield Law Showdown*, AM. JOURNALISM REV. (Sept. 2010), <http://www.ajr.org/Article.asp?id=4959> (quotations omitted).

203. Savage, *supra* note 9.

204. Free Flow of Information Act of 2009, H.R. 985, 111th Cong. (2009).

205. Savage, *supra* note 9.

206. See iReport, <http://ireport.cnn.com> (last visited April 14, 2011).

that needs “people to leak and people to dig.”²⁰⁷ Or maybe it is the “anti-matter of journalism,”²⁰⁸ or the crest of a new wave of journalism.

At the very least, WikiLeaks has “emerged as something of a strange bedfellow to a beleaguered industry.”²⁰⁹ The site fights for free expression and open government, but embeds those “principles in a framework of cyberlibertarianism that is frequently at odds with the institutional ethics of journalists and editors.”²¹⁰ Adding another layer to those ideas, this Article shows that for privilege purposes, WikiLeaks is not part of the journalistic in-crowd. Under the First Amendment-based privilege, the site is not engaged in investigative reporting, a process that involves more than the mere dumping of documents. Nor has it taken steps consistently to minimize harm to the people who could be affected by its actions. Under the two most recent shield bills, WikiLeaks was an ill fit for their definitions of “covered person.” Plus, the Senate amendment was waiting in the wings to blackball the site.

It is debatable, of course, whether the U.S. government or a U.S. entity could compel WikiLeaks to disclose its sources because of jurisdictional issues, and it is possible that the technology the site uses would make a subpoena impracticable. Those issues are ripe for consideration. For now, suffice it to say that WikiLeaks would not qualify to claim a federal reporter’s privilege in any form.

207. Samuel Axon, *The WikiLeaks Debate: Journalists Weigh in*, MASHABLE (Aug. 20, 2010), <http://mashable.com/2010/08/20/wikileaks-journalism>.

208. Sarah Ellison, *The Man Who Spilled the Secrets*, VANITY FAIR (Feb. 2011), available at <http://www.vanityfair.com/politics/features/2011/02/the-guardian-201102?currentPage=all>.

209. Lisa Lynch, “*We’re Going to Crack the World Open*,” 4 JOURNALISM PRACTICE 311, 317 (July 2010), <http://www.informaworld.com/smpp/content~db=all~content=a924099554~frm=titlelink>.

210. *Id.*

