

INF 2181, University of Toronto

Group Brief Report

DISRUPTING THE DRIFT:

WikiLeaks and the Espionage Act of 1917

by

Grant Patten & Adam Pugen

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Disrupting the Drift

With the brazen publication of thousands of classified and confidential documents, the international organization WikiLeaks has engendered a “love them or hate them” mentality in many people. While politicians and businessmen have cried a foul, (“WikiLeaks”, 2010) civil rights organizations have fought for and even celebrated WikiLeaks. (*ibid.*) Clearly, it is easy to get swept up in the passion of this debate and take a side on the matter. What is needed here, however, is not another exaltation of one side over the other, but rather a more reasoned and sober analysis of the issue and the various stakeholder opinions. Beyond bringing shape to the “entity of unknown form” (Graves, p. 219, 2008) that is WikiLeaks, we will apply policy analysis tools to the WikiLeaks debate in order to clarify the points of disagreement. Braman's forms of power, Schon & Rein's constitutional disputes, and Hacker's policy drift will be especially useful to us for this analysis. Ultimately, using the still emerging idea of a “global media policy”, (Raboy & Padovani, p. 150, 2010) some important questions will be asked about WikiLeaks and what should or should not be done to govern virtual organizations in the 21st century.

“WikiLeaks is an international public service that allows whistleblowers and journalists to get suppressed information out in the public domain as safely as possible.” (“Wikileaks Iraq”, n.d.) By using a modified version of the Tor anonymity network, (Zetter, 2010) WikiLeaks has ensured that it will be extremely difficult to uncover the origin of a document submission. Especially appealing to whistleblowers is that WikiLeaks does not expect them to identify themselves, unlike most traditional media outlets. The WikiLeaks FAQ page says, “other journalists try to verify sources. We don't do that, we verify documents.” (“Wikileaks Iraq”, n.d.) Not surprisingly, many journalists consider this a very questionable way of working. In reference to the leaked Afghanistan war documents, Mazzetti *et al.* express their concerns about sources with ulterior motives: “much of the information - raw intelligence and threat

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assessments gathered from the field in Afghanistan - cannot be verified and likely comes from sources aligned with Afghan intelligence, which considers Pakistan an enemy, and paid informants.” (2010) These documents are often obtained through hacking, (“WikiLeaks”, 2010) but sometimes they are obtained in a less aggressive manner by an employee of an organization who decides to leak their company's information. U.S. soldier Bradley Manning, for instance, obtained classified materials, including the infamous Collateral Murder airstrike video, through his official access to SIPRNet, the computer network used by the Department of Defense. (“SIPRNet”, 2010)

Information is treated as a constitutive force in society by stakeholders when they recognize that “information is not just affected by its environment, but affects its environment as well.” (Braman, p. 19, 2006) All of the major stakeholders in the WikiLeaks debate at least seem to agree that information should be treated as a constitutive force. WikiLeaks spokesman and editor-in-chief Julian Assange has said, “we want to get as much substantive information as possible into the historical record, keep it accessible and provide incentives for people to turn it into something that will *achieve political reform*.” (Nystedt, 2009) Clearly, then, Assange believes that the release of this classified information will initiate a process leading toward substantive change in society. Secretary of Defense Robert Gates, on the other hand, says, “the battlefield consequences of the release of these documents are potentially severe and dangerous for our troops, our allies and Afghan partners, and may well damage our relationships and reputation in that key part of the world.” (Savage, 2010) Gates, then, feels that the release of this information will compromise the safety of the troops and constitute a backlash against soldiers who were confided in by Afghan informants.

Braman notes that policy analysts have traditionally identified three forms of power that

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pervade our environment – instrumental, structural and symbolic. In our contemporary technological landscape, however, Braman asserts that a fourth type of power - informational - has come into the forefront as an important force shaping the other types of power. In the complex global terrain into which the groundbreaking information of WikiLeaks has exploded, we can see the massive potential of information to shape more traditional forms of power. One of the most disconcerting criticisms of WikiLeaks is the charge that its leaked documents may aid the instrumental power of the Taliban. Braman defines instrumental power as “power that shapes human behaviors by manipulating the material world via physical force.” (2006, p. 25) Critics of WikiLeaks note that the disclosure of the Afghan War Logs may help the Taliban by revealing the identities of informants who have aided coalition forces. Reporters have claimed that they have identified sensitive information about Afghan informants in these logs. (“Report: Afghan”, 2010) Such information includes the names and villages of these informants – facts that will likely be used by the Taliban in carrying out punitive measures. The spokesman for the Taliban, Zabiullah Mujahid, explicitly told the Channel 4 news in Britain that Taliban officials are studying the WikiLeaks documents for information on Afghan informants. Mujahid said, “we are studying the report. We knew about the spies and people who collaborate with U.S. forces. We will investigate through our own secret service whether the people mentioned are really spies working for the U.S. If they are U.S. spies, then we know how to punish them.” (Mackey, 2010) It is evident, then, that the informational power of WikiLeaks poses a dangerous influence to the use of instrumental power.

Although WikiLeaks’ effect on instrumental power has only been surmised, its effect on structural power is a blatant reality. Braman defines structural power as “power that shapes human behaviors by manipulating the social world via rules and institutions.” (2006, p. 25) We

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have already discussed how WikiLeaks challenges the structural authority of the media by insisting on the verification of documents instead of sources, but WikiLeaks also challenges the even broader structural power of government. In outlining the development of Assange's ideology, Khatchadourian notes, "he believed that truth, creativity, love, and compassion are corrupted by institutional hierarchies and by patronage networks that contort the human spirit... governance was by definition conspiratorial – the product of functionaries in collaborative secrecy, working to the detriment of a population." (2010) As a result of such thinking, Assange and like-minded activists have used WikiLeaks to dismantle the structural power of government, which operates under standard protocols of classified information. For the WikiLeaks staff, classified government information should reside in the public domain. Such a circumvention of government policy, however, has incurred the anger of many U.S. officials. Robert Gates has also expressed outrage at WikiLeaks' disregard for institutional models of military privacy. Gates has said that the need to protect sources is "sacrosanct" (Hartenstein & Sheridan, 2010) and that WikiLeaks has shown no sense of responsibility. It is evident, then, that the current WikiLeaks controversy embodies a vigorous debate about the structural power of government, and the potential of information to change it.

WikiLeaks may also have an impact on symbolic power. According to Braman, symbolic power "shapes human behaviors by manipulating the material, social, and symbolic worlds via ideas, words, and images." (2006, p. 25) WikiLeaks' publication of government strategies has laid bare the symbolic power of governments, such as that evinced in propaganda models. One such instance is WikiLeaks' exposure of the U.S. government's PSYOP (psychological operations) in Afghanistan. "One of the WikiLeaks documents reports [the delivery of] twelve hours of PSYOP radio content programming to two radio stations in the province of Ghazni in

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2008, and [the payment of] \$3,900 for radio air time.” (Cook, 2010) Now that such questionable propaganda tactics have been exposed, it reasonable to suggest that the U.S. government might scale back their use of symbolic power out of embarrassment.

By taking a closer look at how the opposing stakeholders are using policy discourse, “or verbal exchange, or dialogue about policy issues,” (Schon & Rein, p. 31, 1994) we may be able to identify some insights on how to reach agreement. Schon & Rein write, “normal discourse proceeds under a shared set of rules, assumptions, conventions, criteria, and beliefs, all of which tell us how disagreements can be settled, in principle, over time...” (*ibid.*) The discourse surrounding “morality” and “right versus wrong” is at the core of the WikiLeaks debate. Another quote from Robert Gates is representative of this point: “my attitude on [WikiLeaks] is that there are two areas of culpability. One is legal culpability. And that’s up to the Justice Department and others. That’s not my arena. But there’s also a *moral culpability*. And that’s where I think the verdict is guilty on WikiLeaks.” (Miller, 2010) But by looking at what those who support WikiLeaks are saying, we can see a clear instance of policy discourse being framed differently. A poster on *The Economist* website writes, “exposure of government documents, particularly those related to war, is simply *the right thing to do*. Any individuals made vulnerable by these exposures were aware that their choice to involve themselves in international conflict places them in danger.” (aesimpleton, 2010) These conflicting definitions of morality point toward the occurrence of “abnormal discourse, [which happens] when agreed-upon criteria for reaching agreement are not present as a basis for communication among the contending actors.” (Schon & Rein, p. 31, 1994) The difficulty of reaching agreement is amplified when the debate hinges on a constitutional dispute. Schon & Rein compare distributional disputes, which are about concrete matters such as allocating funds, and

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constitutional disputes, which are about rights and basic values, pointing out how much harder it is to solve constitutional disputes. (p. 18, 1994) Representatives of WikiLeaks seem confident that they will always be protected against U.S. legislation by the First Amendment, and indeed they were rescued by pressure groups using First Amendment arguments in the Bank Julius Baer case of 2008. (“WikiLeaks”, 2010) Based on this history, “WikiLeaks would argue that, no matter the language in the statute, it would enjoy First Amendment protection from all prosecutions.” (Light, 2010) But perhaps WikiLeaks should not be so confident, as history has shown that the First Amendment is not exactly inviolable, even on a legal level. Courts have used the Espionage Act of 1917 to cleverly work around the First Amendment and convict people of “interfering in military operations, supporting America's enemies during wartime, promoting insubordination in the military, or interfering with military recruitment.” (“Espionage Act”, 2010)

Assange, then, would do well to seriously consider whether or not these historical Espionage Act convictions could potentially be applied to his organization. The first case, *Schenck v. United States*, is from 1919. Schenck was a socialist who was sentenced to prison for distributing anti-draft pamphlets. The judge argued it was reasonable to punish free speech here because Schenck's actions presented a “clear and present danger” to the government. (*ibid.*) In *Brandenburg v. Ohio* from 1969, a KKK leader was sentenced to prison for making hate speeches at a rally. But that decision was reversed because the “clear and present danger” test was deemed to be too ambiguous, so the test was changed to whether or not the speech provoked “imminent lawless action”. The Supreme Court reversed the decision, claiming that imminent lawless action was not evident in the case. (*ibid.*) As of 2010, the imminent lawless action test is still used as the determinant in First Amendment cases. At least

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under extant American legislation, then, it will have to be demonstrated that WikiLeaks has incited imminent lawless action if they are to be convicted of anything. Assange, then, ought not to be overly confident that WikiLeaks will be protected by the First Amendment. However, those who want to prosecute him should also keep in mind that convicting anyone under the Espionage Act is always controversial and never easy. The language, for instance, is rather abstract and ambiguous. The definition of “imminent” for one judge may be different for another. True to Schon & Rein's claim, then, constitutional disputes are extremely difficult to settle. (p. 18, 1994)

In reference to the hitherto unreleased Afghan war documents, “the Washington Post reported that the US Justice Department is considering use of the Espionage Act to prevent WikiLeaks founder Julian Assange from posting the remaining 15,000 secret war documents.” (“US to use”, 2010) The U.S. government, then, seems to be making a real attempt at applying the Espionage Act to WikiLeaks. But as lawyer Gilead Light writes, “the WikiLeaks case highlights the central flaw in espionage laws, namely that they are grossly outdated, drafted in an age when all information was tangible and not electronic.” (2010) No doubt, those writing the Espionage Act in 1917, or even the revisionists in 1969, did not anticipate cyberspace. The development of the virtual organization has rendered the Espionage Act less effective, as the legal decisions that have been made using the Act have all applied to U.S. citizens or spies on U.S. soil. While the Act, then, likely applies to Bradley Manning, it does not necessarily affect WikiLeaks as an organization. Although it is difficult to say definitively, there have been reports indicating that WikiLeaks does not even maintain servers in the U.S. anymore. (Eagle, 2010) Assange seems to live out of a suitcase and, apparently, does not have a permanent residence. (“Julian Assange”, n.d.) And there is the additional ambiguity over whether or not

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WikiLeaks should even be considered a member of the press. If they are an official member of the press, according to Light, they may be exempted from Espionage Act legislation. (2010) But some argue that a website that “devotes itself exclusively to leaking documents” (*ibid.*) should not be considered a member of the press.

All of these concerns have constituted a change in the effect of the Espionage Act without a significant change in the policy's structure. That is to say, the Espionage Act is now less effective largely because it has failed to change with the times. This has resulted in a classic case of what Yale political science professor Jacob Hacker would call “policy drift”. (p. 246, 2004) Hacker states, “the major cause of drift in the social welfare field is a shift in the social context of policies, such as the rise of new or newly intensified social risks with which existing programs are poorly equipped to grapple.” (*ibid.*) WikiLeaks is no doubt considered to be a new social risk by many stakeholders; the aforementioned comments by Robert Gates exemplify those concerns. Unlike the corporations that benefited from allowing the Employee Retirement Income Security Act to drift, (*ibid.*) however, those in the anti-WikiLeaks camp are not at all benefiting from the drift of the Espionage Act. On the contrary, WikiLeaks supporters should be more than happy to see the Espionage Act keep drifting because of how obviously difficult it is to get such an outdated and controversial piece of legislation to incriminate a virtual organization in the 21st century. “The question for policymakers [then] becomes whether and how to respond to the growing gap between the original aims of a policy and the new realities that shifting social conditions have fostered.” (*ibid.*) Republican senator John Ensign of Nevada thinks he has an answer to this question. In proposing a bill to amend the Espionage Act, Ensign has stated, “my legislation will *extend* the legal protections for government informants, such as the Iraqis named in this latest document dump, and will prevent an

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organization such as WikiLeaks from hiding like a coward behind a computer mainframe while putting lives in jeopardy.” (Chatterjee, 2010) It is crucial to pay attention to the language that Ensign is using here. He is talking about “extending” the Espionage Act rather than eliminating it and putting an entirely new law in its place, which would be what Hacker calls formal “revision”. (p. 247, 2004) Why, then, are the Republicans not trying to replace the Espionage Act with brand new legislation more directly suited to their ends? Why are they trying to work within the confines of this ineffective Act?

Hacker says that revision, “whether through reform, replacement, or elimination,” will only occur when the policy in question is “easily convertible and situated in a change-conducive political-institutional setting.” (*ibid.*) Despite the clear political outrage against WikiLeaks, it would be a stretch to say that the Espionage Act is easily convertible. With the sheer volume of bills that are received, it is rarely easy to pass legislation through Congress. (Dera, 2007) It has also been hypothesized that the Republicans won a majority in the House of Representatives in November 2010 largely because of citizens' unhappiness with high unemployment under the Democrats. (“United States House”, 2010) Representatives may be more motivated, then, to give precedence to laws that are more directly and obviously affecting voters. But the would-be Espionage Act reformers are also likely wary about provoking their opponents too openly. Completely eliminating the Espionage Act and starting over with a new bill may be interpreted by certain stakeholders, such as the Reporters Committee for Freedom of the Press (RCFP), as an unfair attack on the media. With their success in the Bank Julius Baer case, groups such as the RCFP, the Electronic Frontier Foundation (EFF) and the American Civil Liberties Union (ACLU) have proven that they are “powerful support coalitions” (Hacker, p. 257, 2004) and should be taken very seriously. Rather than launching an all-out

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attack on the Espionage Act, then, politicians may – at least initially – face less obstruction by attempting reform in a more subtle manner and instead “layering new policies onto the old.” (p. 248, 2004) We can see indications of layering by paying attention to the discourse that politicians are currently using, such as Ensign's use of the word “extend.” Furthermore, top brass in Washington have been speaking out against WikiLeaks. When asked about his thoughts on the organization, Press Secretary Robert Gibbs said, “it's not the content as much as it is the names, operations, logistics, sources - all of that information out in the public has the potential to do harm.” (Raddatz *et al.*, 2010) The culmination of these factors may lead one to reasonably predict that layering will be successfully enacted within the next few years, perhaps even during the Obama administration. Hacker writes, “when the political barriers have declined in response to favorable electoral or political winds, [politicians] have successfully layered new policies that embody new goals on top of existing change-resistant programs.” (p. 258, 2004) While pressure groups such as the RCFP, the EFF and the ACLU are not to be taken lightly, they are nevertheless not as powerful as politicians with direct connections to the presidency. We have seen that both Democrats and Republicans have expressed animosity toward WikiLeaks, and this is no doubt leading toward a decline in political barriers to reforming the Espionage Act.

Nevertheless, even if layering is successfully applied to the Espionage Act, the jurisdictional ambiguity that was a major factor in overthrowing the Bank Julius Baer decision (“WikiLeaks”, 2010) will likely remain. U.S. politicians may have the power to update the Espionage Act to more clearly apply to cyberspace-related activity within the country, but can federal legislation really apply to a virtual organization with no firm connections to any one country? The global nature of the WikiLeaks operation means that the organization is subject

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to dealing with many different types of legislation amongst “dispersed policy venues.” (Raboy & Padovani, p. 152, 2010) For this reason, the emerging field of global media policy may be an important site for decision makers in various countries to consider. Raboy & Padovani tell us that global media policy is about promoting “the recognition of principles and the evolution of norms that inform state-based policy-making, *as well as non-state based standard setting self-governing arrangements.*” (p. 161, 2010) Although there may be much to admire about the actions of WikiLeaks, the concerns that have been raised about potentially putting innocent lives in danger do not seem unreasonable. The development of a global media policy that transcends state-based jurisdictional concerns and allows for a more effective regulation of virtual organizations such as WikiLeaks may be one solution. No doubt, this will be a very complicated and ambitious project, and careful attention will have to be paid to finding an appropriate balance that does not overly stifle the freedoms of controversial organizations. But states must accept that, no matter the legislation, organizations like WikiLeaks will not simply die off in our increasingly information-based society. By collectively accepting this fact and having an open dialogue about it through the context of developing a global media policy, a reasonable compromise may be found.

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