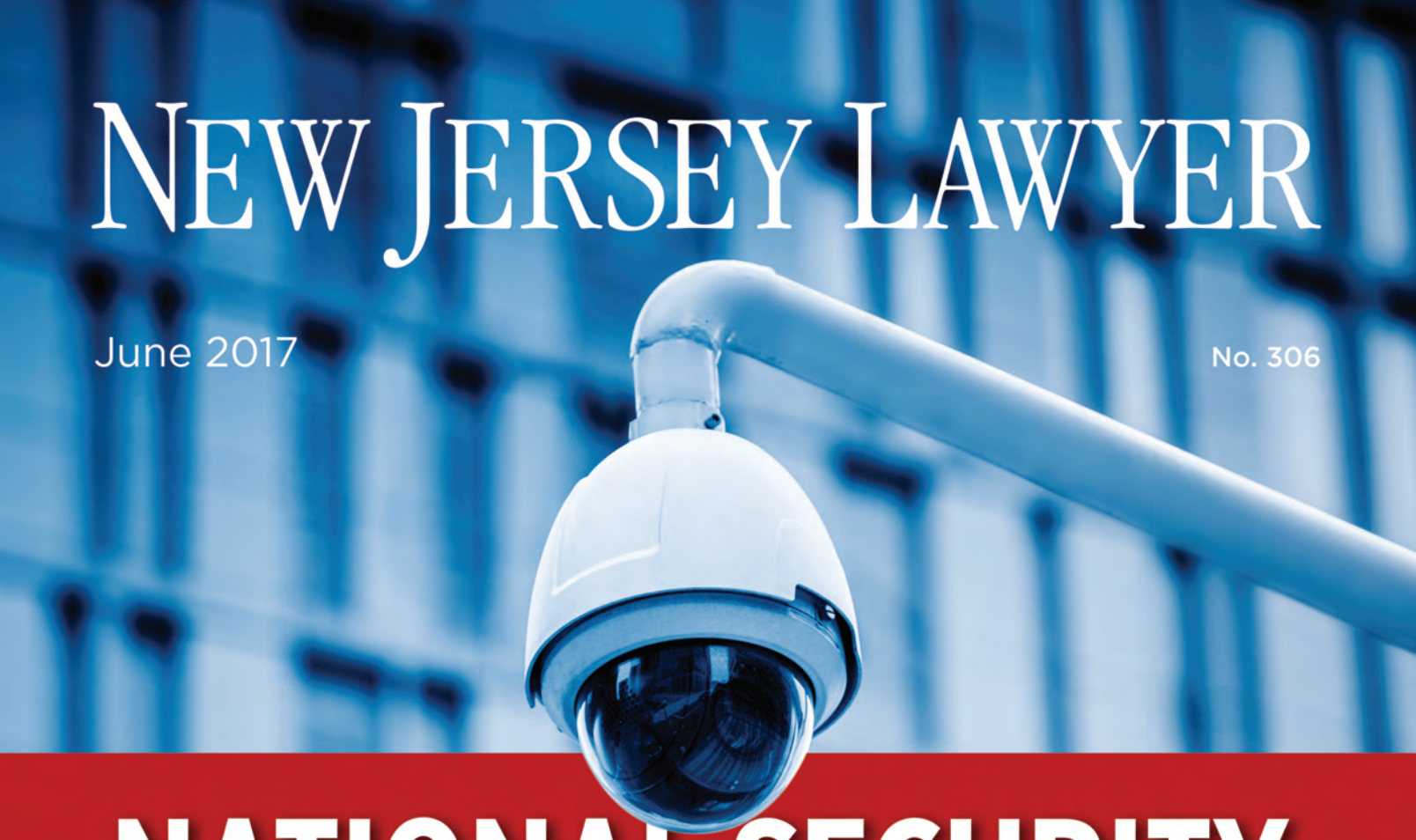
NEW JERSEY LAWYER

June 2017

No. 306



NATIONAL SECURITY vs. CIVIL LIBERTIES

The Delicate Balance of Security and Liberty in the Trump Era

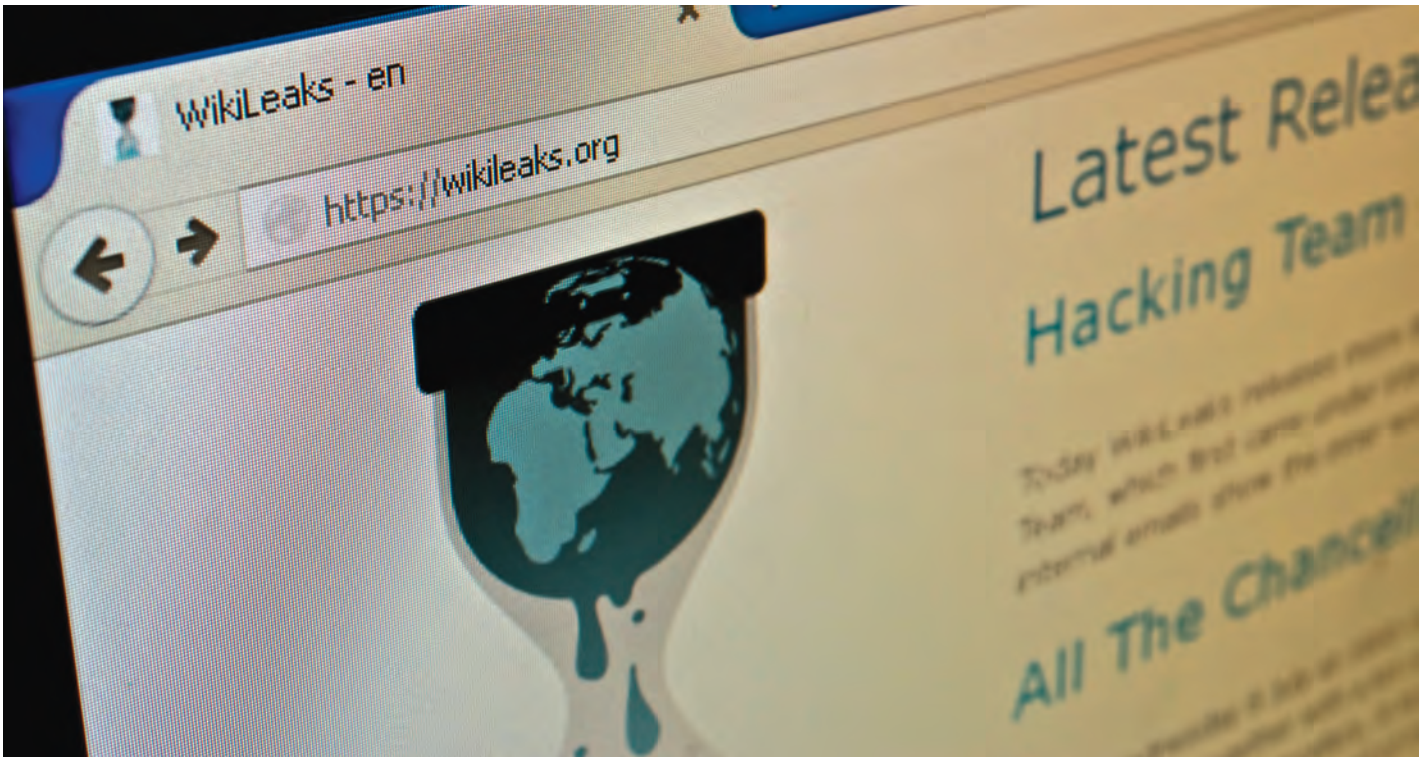
Discrimination, National Security and the Trump Travel Ban

Sanctuary Cities

Homophobia and National Security

The Reporter's Privilege

Biometrics Implementation



The Use of Prior Restraints on Publication in the Age of Wikileaks

by CJ Griffin and Frank Corrado

As James Madison put it, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[1] Free speech is essential to effective self-government. A democracy cannot function if its citizens do not know what their government is doing.

For that reason, the First Amendment significantly limits the government's ability to control the flow of information to the public. In particular, the First Amendment renders prior restraints on speech presumptively unconstitutional.[2] Even if the government could punish the speech after the fact, it cannot—absent a heavy burden of justification—prohibit the publication of that speech.

The rationale for that principle is simple: If the government can ban publication of speech, it can control what the public knows about governmental operations, and thereby deprive citizens of their ability to make intelligent decisions about governmental action. Too often, government favors secrecy over disclosure. The presumption against prior restraints ensures that officials cannot indulge that propensity. It prevents the government from enjoining purportedly 'secret' or 'sensitive' information that may really be embarrassing, or unsavory, or indicative of government illegality or abuse.

Of course, legitimate reasons exist for government secrecy. As the Supreme Court said in *Near v. Minnesota*,[3] the seminal case on prior restraints, "no one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number or location of troops."[4] But given the First Amendment values involved, such circumstances are viewed as the exception, not the rule. Under the Constitution, the government cannot simply invoke a 'national security' shibboleth as a basis to prohibit speech.

The most famous example of this is *New York Times v. United*

States,[5] in which the government sought to prohibit *The New York Times* and *The Washington Post* from publishing excerpts from the Pentagon Papers, a government-compiled history of the United States' involvement in the Vietnam War. The *Times* and the *Post* obtained the papers from Daniel Ellsberg, a former Defense Department employee, who leaked them in "hop[es] that they would help expose government deception" and end the war.[6] The Supreme Court rejected the government's claim that publication of the papers would endanger national security. Instead, it affirmed the trial court's determination that the government had not justified an injunction but merely feared "embarrassment…we must learn to live with."[7]

Today, with the advent of the internet, the tension between the government's legitimate need for secrecy and the public's right to information has increased exponentially. As a result, the issue of when a prior restraint is justified has acquired new urgency.

In the last decade, the most prominent purveyor of 'secret' information about the inner workings of government has been Wikileaks.[8] In 2010, Wikileaks published leaked documents about the Iraq and Afghanistan wars.[9] It gained national attention again in 2016, when it was accused of conspiring with Russia to influence the presidential election by publishing leaked (or hacked) emails from the Democratic National Committee and Hillary Clinton's campaign manager, John Podesta.[10]

In March of this year, Wikileaks released the "largest ever publication of confidential documents on [the CIA],"[11] which it titled "Vault 7." Wikileaks claims the Vault 7 documents demonstrate the CIA has the capability to hack encrypted smartphones and personal computers, and to turn smart televisions into eavesdropping devices.[12]

While the CIA has not acknowledged that the documents are authentic, former CIA chiefs have said leaking these documents has made the U.S. and the world less safe. One CIA agent anonymously told the media the disclosure was more significant than the Edward Snowden leaks.[13] In Wikileaks's own words, the leaked documents detail the CIA's entire "hacking arsenal."[14]

Meanwhile, intelligence officials and computer security experts are preparing for Wikileaks's next possible move—publication of the CIA's computer code for its alleged cyberweapons.[15] Wikileaks has said it would not release the code "'until a consensus emerges on the technical and political nature of the C.I.A.'s program' and how the cyberweapons could be disarmed."[16]

Today, with the advent of the internet, the tension between the government's legitimate need for secrecy and the public's right to information has increased exponentially. As a result, the issue of when a prior restraint is justified has acquired new urgency.

Although the government says Wikileaks's prior leaks have harmed national security and has suggested it might one day prosecute Wikileaks for leaking such information,[17] it has never attempted to restrain Wikileaks's publications, perhaps because it was not aware in advance of the leaks. But Vault 7 presents a scenario where the government is aware in advance of a possible publication that it deems to be a threat to both national security and the privacy of citizens.

Although Wikileaks claims it will not release the actual code until technology companies have been given time to repair the security flaws in their products,[18] Wikileaks has demonstrated its repeated intention to disclose as many government secrets as possible. Inevitably, then, the government will be faced with a scenario in which it is aware of a pending leak that it deems harmful to national security.

Given the absence of any recent Supreme Court precedent on prior restraints where national security issues are at stake, and given the Trump administration's proclaimed anger against the media's use of anonymous sources sharing leaked confidential information,[19] it is plausible that the government may seek prior restraints against Wikileaks or other media agencies. To do so, it would need to establish that the matter at hand constituted one of the exceptional cases referred to in *Near* and *New York Times v. United States*.

The decision in *United States v. The Progressive*[20] suggests how a court might rule in a prior restraint case involving the types of disclosures at issue in Vault 7. In *Progressive*, a magazine was about to publish an article titled "The H-Bomb Secret; How We Got It, Why We're Telling It."[21] The government sought an order barring the magazine from publishing parts of the article that "describe[d] the essential design and operation of thermonuclear weapons."[22]

In response, the *Progressive* argued that the public had a right to know and debate over the use of such weapons by the government.[23] The case thus presented "a basic confrontation between the First Amendment right to freedom of the press and national security."[24]

The *Progressive* court distinguished the *New York Times* case by noting that the Pentagon Papers contained "historical data" that was anywhere from three to 20 years old, while the case before it presented technical data about a current

hydrogen bomb program.[25] Importantly, the court noted that in *New York Times,* the government had only proven that "embarrassment" would result if the Pentagon Papers were released, but the *Progressive's* publication of the technical data created a serious national security issue. Though the court held that the technical data probably did not provide a "do-it-yourself guide" that would assist individuals in building a hydrogen bomb, it found that information could nonetheless "possibly provide sufficient information to allow a medium size nation to move faster in developing a hydrogen weapon."[26] Given that only five other nations currently had a hydrogen bomb, the court feared disclosure might contribute to the proliferation of such weapons.[27]

The court then focused on a key tension between the First Amendment and national security. In a lengthy discussion, the court concluded that where serious questions of life or death are concerned the First Amendment must yield to national security: "While it may be true in the long-run, as Patrick Henry instructs us, that one would prefer death to life without liberty, nonetheless, in the short-run, one cannot enjoy freedom of speech, freedom to worship or freedom of the press unless one first enjoys the freedom to live."[28]

Ultimately, the court found that the portion of the article that promoted "public knowledge of nuclear armament" and presented a "debate on national policy questions" was protected First Amendment speech, but that the technical data was not protected because it fell within *Near*'s narrow exception. In the court's mind, while *Near* referred to the location of troops and ships during times of war, "[t]imes have changed significantly since 1931 when *Near* was decided. Now war by foot soldiers has been replaced in large part by war by machines and bombs. No longer need there be any advance warning or any preparation time before a nuclear war could be commenced."[29]

Today, nearly 40 years after *Progressive* was decided and in the absence of other prior restraint cases on point, the government would likely argue that *Near*'s narrow exemption should apply to publication of its surveillance capabilities and the actual code used to hack into smartphones and other devices, as well as other classified information Wikileaks has leaked. Wikileaks itself seems to recognize the harm that could occur from its publication, and perhaps even recognizes that disclosure of the CIA's actual hacking code might come closer to the *Near/Progressive* exception, because it has indicated it will provide technology companies sufficient time to patch security flaws in their products before it releases the code.[30]

Case law establishes that the government cannot obtain a prior restraint against publication of information unless it can prove, convincingly, that publication would create grave and substantive security concerns, on a par with identifying the locations of troops and ships during a time of war. In balancing the media's interest against that national security interest, *Progressive* teaches courts to look closely to determine whether publication will contribute to robust public debate on important issues—speech at the core of the First Amendment[31]—or disclose sensitive technical data and tools that could be used against the United States and its citizens. ⚖

CJ Griffin *is a partner at Pashman Stein Walder Hayden, P.C., in Hackensack, where she is a member of the firm's media law practice.* ***Frank Corrado*** *is a partner at Barry, Corrado, & Grassi, P.C., in Wildwood, where he practices civil rights and constitutional law, with an emphasis on the First Amendment.*

ENDNOTES

1. James Madison, letter to W.T. Barry, August 4, 1822, in *Writings*, 9:103-09.
2. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).
3. 283 U.S. 697 (1931).
4. *Id.* at 716.
5. *New York Times v. United States*, 403 U.S. 713 (1971).
6. Kyle Lewis, Wikifreak-Out: The Legality of Prior Restraints on Wikileaks' Publication of Government Documents, 38 *Wash U.J.J. & Pol'y* 417, 427 (2012).
7. *United States v. New York Times Co.*, 328 F. Supp. 324, 331 (S.D.N.Y. 1971).
8. *See* http://www.wikileaks.org.
9. Lewis, *supra* note 8, at 418.
10. Adam Entous, Secret CIA Assessment Says Russia Was Trying to Help Trump Win White House, *Wash. Post* (Dec. 9, 2016), available online at https://www.washingtonpost.com/world/national-security/obama-orders-review-of-russian-hacking-during-presidential-campaign/2016/12/09/31d6b300-be2a-11e6-94ac-3d324840106c_story.html?utm_term=.be24c0d8882d.
11. Press Release, Vault 7: CIA Hacking Tools Revealed, (March 7, 2017), available online at https://wikileaks.org/ciav7p1/.
12. *Ibid.*
13. Sheera Frenkel, US Intelligence Officials: Latest WikiLeaks Drop 'Worse Than Snowden' Docs, Buzzfeed (March 7, 2017), available online at https://www.buzzfeed.com/sheerafrenkel/us-intelligence-officials-latest-wikileaks-drop-worse-than-s?utm_term=.gvGrBBOVRl#.lpYp22Px1D.
14. Eric Geller, Wikileaks Dumps Alleged Secret CIA 'Hacking Arsenal,' *Politico* (March 7, 2017), available online at http://www.politico.com/story/2017/03/wikileaks-cia-hacking-file-235764.
15. Elizabeth Weise and Jon Swartz, Next WikiLeaks Worry: the Release of the Code, *USA Today* (March 8, 2017), available online at http://www.usatoday.com/story/tech/news/2017/03/08/wikileaks-cia-cyberwar-pearl-harbor-cyberweapons/98878016/.
16. *Ibid.*
17. *See* Charlie Savage, U.S. Tries to Build Case

for Conspiracy by WikiLeaks, *NY Times* (Dec. 15, 2010). Whether the First Amendment would permit Wikileaks to be prosecuted after it posts leaked or hacked material; however, is unclear and depends on the circumstances by which the records were obtained. The Supreme Court has ruled that the First Amendment does not permit punishment where the "publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully." *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001). The Court has not answered "whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." *Ibid.* For a more thorough analysis on this issue, *see* Tim Bakken, The Prosecution of Newspapers, Reporters, and Sources for Disclosing Classified Information: The Government's Softening of the First Amendment, 45 *U. Tol. L. Rev.* 1, 12-16 (2013); Melissa Hannah Opper, Wikileaks: Balancing First Amendment Rights with National Security, 31 *Loy. L.A. Ent. L. Rev.* 237 (2001).

18. John Bacon, WikiLeaks will give tech firms access to CIA hacking tools: Assange, *USA Today* (March 9, 2017), available online at http://www.usatoday.com/story/news/world/2017/03/09/wikileaks-provide-tech-firms-access-cia-hacking-tools-assange/98946128/.
19. Nancy Benac and Mary Clare Jalonick, Trump Condemns Anonymous Sources As Staff Demands Anonymity, *Wash. Post* (Feb. 25, 2017), available online https://www.washingtonpost.com/politics/trump-condemns-anonymous-sources-as-staff-demands-anonymity/2017/02/25/959beb04-fb2d-11e6-aa1e-5f735ee31334_story.html?utm_term=.d3a002151497.
20. *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.), *dismissed*, 610 F.2d 819 (7th Cir. 1979).
21. *Id.* at 991.
22. *Id.* at 993.
23. *Ibid.*
24. *Ibid.*
25. *Id*. at 994.
26. *Id.* at 995.
27. *Ibid.*
28. *Ibid.*
29. *United States v. Progressive, Inc.*, 467 F. Supp. at 996.
30. Bacon, *supra* note 20.
31. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).