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Is Assange Entitled to Full First Amendment Protection?

**By James C. Goodale**

At a recent [panel discussion](https://globalfreedomofexpression.columbia.edu/events/press-freedom-national-security-and-whistleblowers-from-julian-assange-to-the-white-house-2/) at Columbia University on Press Freedom, National Security and Whistleblowers, at which the case of Julian Assange was discussed, no one on the panel mentioned the application of the First Amendment to the defense of Julian Assange. Rather, members of the panel effectively suggested his actions could be judged by a public interest or public concern standard.

While few would disagree that whistleblowers like Assange are entitled to what is popularly known as a public interest defense, the First Amendment provides much more protection – and more to the point, it is what the law demands. A public interest defense involves a balancing of the publication by WikiLeaks against the damages of such publication. This balancing process is inherently vague and unpredictable. This approach therefore to the defense of Assange is misplaced and does not provide him the full protection of the First Amendment.

There should be no question whether Julian Assange is entitled to full First Amendment protection for publication of the Afghanistan war logs, Iraq war logs, and State Department cables for which he was indicted on 11 April 2019 and on 23 May 2019. Further, there is no doubt that the test of such protection should be some iteration of the “clear and present danger test” as used in the [Pentagon Papers case](https://supreme.justia.com/cases/federal/us/403/713/).

Don’t take my word for it, just read Geoffrey R. Stone’s essay [“WikiLeaks and the First Amendment”](https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1623&context=fclj) written at the time of the publication by WikiLeaks, the New York Times, the Guardian, El Pais, Der Spiegel and Le Monde, of the leaks of classified information by Chelsea Manning. Stone is a renowned First Amendment expert and is the former Dean of the University of Chicago Law School and Provost of the University. Since the publication of Stone’s article, as we all know, [Assange has been indicted](https://www.justice.gov/opa/pr/wikileaks-founder-julian-assange-charged-18-count-superseding-indictment) under the Espionage Act. Stone states unequivocally that prosecution under that Act “violates the First Amendment unless, at the very least, it is expressly limited to situations in which the individual knows that the dissemination of the classified material poses a clear and present danger of grave harm to the Nation.”

Those steeped in the law and lore of the First Amendment reject balancing of a sort suggested by the Columbia panel because it amounts to what First Amendment advocates refer to as “ad hoc balancing.” Since such balancing does not provide sufficient contours for the First Amendment analysis, First Amendment experts believe that it should be avoided at all costs. Instead “categorical analysis” is preferred in which each category of speech has its own particular test, i.e., one for commercial speech, one for broadcast speech etc., and particularly one for national security cases, i.e., clear and present danger. While Justice Thomas has cast some doubt on this form of analysis in his opinion in [Reed v. Town of Gilbert](https://supreme.justia.com/cases/federal/us/576/13-502/#tab-opinion-3422819) his comments would seem to be not relevant to national security cases such as Assange’s. The test to be applied to national security cases is, as Stone points out, the Pentagon Papers version of the clear and present danger test (per Stewart “direct, immediate and irreparable damage to our Nation or its people”).

For those who would balance Assange’s rights under the First Amendment, they could follow the reasoning of Justice Breyer’s concurring opinion in [Bartnicki v. Vopper](https://supreme.justia.com/cases/federal/us/532/514/#tab-opinion-1960905). His test for the First Amendment is “whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences.” In short, Justice Breyer’s approach to the First Amendment is a form of “ad hoc balancing” and as noted, highly disfavored in the First Amendment world.

In Bartnicki, a Philadelphia radio station broadcast an illegally acquired tape of a phone call of a union leader threatening the safety of managerial negotiators, i.e., “we’re gonna have to go to their homes . . . To blow off their front porches.” The issue for the Bartnicki Court was whether the broadcast of this phone call was protected by the First Amendment. Writing for himself and Justices Kennedy, Souter, and Ginsberg, Justice Stevens said the station was protected by the First Amendment but did not precisely articulate which First Amendment test he was adopting. Instead he cited a series of cases that used the so-called [Daily Mail standard](https://supreme.justia.com/cases/federal/us/443/97/) for privacy cases which holds that truthful speech about a matter of public concern cannot be subject to criminal or civil sanctions absent an overriding interest of the “highest order.”

Justice Breyer, concurring in this opinion along with Justice O’Connor, concluded the test Stevens adopted amounted to “strict scrutiny.” This test requires the government cite a compelling interest narrowly tailored, i.e., using the least restrictive alternative to carry out that interest. Breyer criticized the use of the test as follows: “What this Court has called strict scrutiny -with its strong presumption against constitutionality – is out of place where, as here, important competing constitutional interests are implicated.” What was “in place” was Breyer’s ad hoc balancing test.

This isn’t the first time Breyer has tried to reshape First Amendment jurisprudence. He’s been doing it for decades but has never succeeded. His approach has driven some members of the Court nuts. Justice Kennedy once remarked that Justice Breyer would do well to read the book [“The Elements of Law”](https://www.amazon.com/Elements-Law-Eva-H-Hanks-ebook/dp/B00B025B0G) so that he could understand basic First Amendment jurisprudence. I have written several essays in which I have pointed out that were the Court to follow Justice Breyer’s analysis it would fall into “Breyer’s Patch.”1

Not unsurprisingly Stone disses ad hoc balancing with respect to Assange’s case noting, “the mere fact that dissemination might harm the national interest does not mean that harm outweighs the benefits of publication. Second, a case-by-case balancing of harm against benefit would ultimately prove unwieldly, unpredictable and impractical.”

He goes on to say, “we have learned from our own history, there are great pressures that lead both government officials and the public itself to underestimate the benefits of publication and overstate the potential harm of publication in times of national security. A strict clear and present danger standard serves as a barrier to protect us against this danger.”

Accordingly, for the government to convict Julian Assange for the publication of the Afghanistan war logs and other material leaked to him by Chelsea Manning, it must show that such publication caused a clear, present and imminent danger to national security. Additionally, such proof must be beyond a reasonable doubt since it is a criminal case.

It would seem that such proof would create a high bar for the government to jump – particularly, when the government has never stated once whether there has been damage to anybody as a consequence of Assange’s publication. It has, of course, said such publication caused general damage to national security but has not particularized any harm to anyone such as for example, its’ Afghanistan sources. Since Assange’s publication took place ten years ago, the government has had ten years to come up with evidence that shows damage to national security but has not.

Not only should the First Amendment apply to the publication by Assange of Manning leaks – after all such publication was not dissimilar from that of the New York Times, the Guardian, et. al. – but it should also apply to the efforts of Assange to obtain those leaks. While the members of Columbia’s panel did not have the time to go into the details of actions by Assange, there have been others that have raised concern that the First Amendment only protects Assange’s publication and not his newsgathering efforts. The reason for making a distinction between publication and newsgathering can be traced to Bartnicki. In that case, Stevens made it clear that he was not deciding a case where a publisher or a radio broadcaster participated in the illegal activity that led to the broadcast of the phone call in that case. Many commentators have assumed therefore that the only First Amendment protection in a leak case is where a newspaper or other leakee is totally passive. In other words, if a reporter does a little above waiting around and having a leak magically dropped on his or her desk, then he/she would be “participating” in the leak.

Frequently the Times’ publication of the Pentagon Papers is cited as an example of passive publication. This is because commentators seem to believe that New York Times reporter, Neil Sheehan, who obtained the Pentagon Papers from Daniel Ellsberg received them passively as part of a data dump by Ellsberg.

Nothing could be further from the truth and I speak with some authority since I led the legal team in the [Pentagon Papers case](https://supreme.justia.com/cases/federal/us/403/713/). As set out in my book, [“Fighting for the Press,”](https://www.amazon.com/Fighting-Press-James-Goodale-ebook/dp/B00BR6G6JK/ref=tmm_kin_swatch_0?_encoding=UTF8&qid=&sr=) Sheehan received a small cache of Pentagon Papers from a source other than Ellsberg and then pursued Ellsberg day and night to get the rest. Ellsberg was hesitant to give them to Sheehan or to give permission to Sheehan (and the Times) to use them. Only after Sheehan secretly xeroxed Ellsberg’s set of the Pentagon Papers, without Ellsberg’s permission, did Ellsberg finally give in to Sheehan’s blandishments.

If the First Amendment only protects the passive receipt of classified information, Sheehan could have been convicted as a co-conspirator for violating the Espionage Act along with Ellsberg. Indeed a grand jury was convened in Boston to indict Sheehan for that purpose. The government ultimately gave up on trying to indict Sheehan and others and disbanded the grand jury.

Had Sheehan been indicted, his defense would have been that actively pursuing Ellsberg to let him see and publish the full Pentagon Papers was fully protected by the First Amendment because it did not present a clear and present danger to the national security of the United States anymore than did the publication of the Papers themselves. The same protection that applied to Sheehan should apply to Assange. And such protection should be based on the rule of the Pentagon Papers case and not by balancing the benefits of publication against the harm such publication causes.

It would be a grave mistake it is suggested for the defenders of Assange and the defenders of First Amendment press rights to propose a balancing standard of harm to national security against the public benefit of publication as the test to be applied to defend Assange. It should be for the reasons stated above and as Geoffrey Stone suggests some iteration of the clear and present test, since the First Amendment requires no less.

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