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SUBPOENAED MEDIA MEMBERS AND THE 1917 ESPIONAGE ACT

Timothy Allen

Introduction

In a 2012 Rolling Stone interview with Julian Assange, the infamous instigator of Wikileaks, Assange spoke about a situation involving 24-year-old Army veteran Bradley Manning. Manning, an alleged informant of Wikileaks, has been kept in a military prison for the last 600 days as he has awaited trial and a possible life sentence. Assange is reportedly in contact with Manning’s defense, who stated that they believed Manning’s treatment was an attempt to get him to testify that Assange is a spy. He went on to talk about how the government’s plans to prosecute him and to interpret the Espionage Act in such a way that any media member who tries to solicit classified information from a government official could be prosecuted as a spy. The government’s future attempts at prosecuting Assange will give insight as to how they wish to handle the media and transparency in the future.

With recent events, such as Wikileaks, the question of prosecuting private individuals, members of the media, and news organizations for publishing classified information has become a topic of debate. In 1970, the Justice Department adopted guidelines for federal prosecutors that protected news organizations and journalists

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3 Id.
under the First Amendment in an attempt to promote greater government transparency. These guidelines state that source subpoenas should only be ordered when they “strike the proper balance between the public interest in the free dissemination of ideas and information and the public interest in effective law enforcement and the fair administration of justice.”

However, in direct opposition to these guidelines, the government has recently employed two tactics to limit the media and their sources. First, they have threatened to use the 1917 Espionage Act, which was enacted during World War I to protect the nation from spies, to prosecute the media along with their confidential sources. Over the years this act has created controversy; in 2006, Judge Ellis said that it is “unconstitutionally vague and might violate the First Amendment.”

Second, along with this threat of using the Espionage Act against the media, there have been high numbers of media source related subpoenas, which cause reporters to lose their confidential sources or go to jail for contempt.

In order to quell these threats on the media and protect the media’s important role in government transparency, 40 states and the District of Columbia have adopted forms of a shield law. These laws protect media members by establishing criteria for media subpoenas, which strike a balance between the media’s role to foster transparency and the government’s right to protect classified information. Although some states have shield laws, there are no federal laws that

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4 Title28: Judicial Administration § 50.10


afford the media such protection. Attempts to pass such federal laws have failed in the years 2005, 2007, and 2009. While a federal shield act would help limit the numerous source subpoenas, the use of the 1917 Espionage Act would continue to hamper the media’s ability to keep the government responsible for its actions and promote transparency. Therefore, to ensure protection of the media system, the 1917 Espionage Act must be partially amended so that it cannot be used against media and their sources when published information benefits the public more than it potentially harms national security. Both an amendment of certain parts of the Espionage Act and an adoption of a federal shield law are necessary to ensure protection of public interest through the role of the media.

Section one of this article will set forth what constitutes public interest and show the important role of the media in protecting public interest. Section two will then discuss how media subpoenas and the Espionage Act have been used to violate public interest by threatening the transparency provided by the media. Finally, section three will enumerate specific provisions for a federal shield law, to protect media members and their sources, and changes needed in the Espionage Act, to ensure protection of public interest.

Section One

While there is no consensus on what specifically constitutes public interest, it is often viewed as what is best for citizens of a country as a whole. Throughout the history of democratically established countries, especially the United States, it has been the role of the

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government to protect public interest. President Theodore Roosevelt concluded, “The object of the government is the welfare of the people.” The United States Constitution charges the government with the obligation to protect the public interest of each citizen by ensuring that each citizen has the right to assemble peaceably, keep and bear arms, practice religion, and enjoy privacy in all matters in which the rights of others are not violated. While these rights are explicitly outlined in the Constitution, over the years the United States government, in an effort to protect the welfare of the people, has become larger and more involved in the lives of its citizens. With this growth has come the increasing need for transparency to ensure that the government does not overstep its authority and, ironically, infringe upon public interest.

One way transparency in government has been established in the United States is through the media, which serves as a watchdog over government actions. In Richmond Newspaper v. Virginia, newspaper reporters solicited a review from the Supreme Court of Virginia regarding a closure order that denied the reporters the right to have access to a murder trial. These reporters argued that it was their right to attend the trial as stated in the First and Fourteenth Amendments to the Constitution. On appeal, the Supreme Court defended the media’s role as a watchdog over government actions, including those pertaining to the judicial branch. Justice Stevens, in offering a concurring opinion, referenced the position he took in another case regarding the media, Houching v. KQED, where he said that he was “convinced that...concealing...knowledge from the public by arbitrarily cutting off the flow of information at its source abridges the freedom of speech and the press protected by the First and Fourteenth Amendments to the Constitution.” He continued by stating that, in the case of Richmond Newspaper v. Virginia, the Court “unequivocally holds that an arbitrary interference with access to


12 U.S. Const. amend. I.

important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.”\textsuperscript{14}

Along with watching over the actions of the judicial branch by reporting on the rulings of court cases, the media also protects public interest by reporting on new legislation, politicians’ behavior, and incidents of corruption within the government. The information provided by the media influences how citizens vote and how they pressure government officials. The media serves as a safeguard against government actions and provides important information to citizens in order to promote an effective democratic system.

However, in recent years the government has employed two main tactics to mitigate the effectiveness of the media’s role in protecting public interest by attacking the media and their sources: media subpoenas and the Espionage Act of 1917. Media source subpoenas are court orders which force a media member to disclose their confidential source, who is often a member of a government organization, or go to jail for contempt. Meanwhile, The Espionage Act of 1917, enacted by Woodrow Wilson in order to deal with public concern over national security, is now being used by the government to prosecute media informants under the same laws as spies. Thus, these subpoenas and this Act cause fear among media sources and cripple the media system leaving the government unchecked and public interest undefended.

Section Two

The first method used by the government to impede the media’s role to protect public interest has been the use of media subpoenas. Informants often leak classified government material that they feel is in the public interest to know. Historically, the practice of leaking information to the media in this way was accepted by many members of government organizations, and the government did not attempt to find or prosecute the individuals.\textsuperscript{15} Recently, however, the govern-

\textsuperscript{14} Id.

ment has continuously sought to find and prosecute media informants through media-source subpoenas. For example, in 2006, Frontline news submitted a Freedom of Information Act (FOIA) request to the Justice Department inquiring about the number of media related subpoenas. They reported that there were “approximately 142 matters” spanning from 1991, the beginning of keeping such records, until October 2006. From those 142 subpoenas, it was reported that fewer than 20 were seeking a reporter’s confidential source. This number, however, is not fully inclusive of all source related subpoenas. According to the Justice Department’s Director of Public Affairs, the number of journalists who have received source subpoenas is unknown because the work of special prosecutors is “not run through the department.” In the FOIA request received by Frontline, there was not a recording of four of the most prominent cases of source subpoenas in recent years, including the Valery Plame investigation; furthermore, in just these four cases there were at least 20 reporters subpoenaed for sources.16

The experiences of New York Times reporter James Risen show how the government is impeding public interest when they subpoena media members for their sources. James Risen has won the Pulitzer Prize twice and reported on many of the biggest news breaks of the last decade.17 He was subpoenaed twice in 2008 and again in 2010 for the United States’ case against Jeffery Sterling.18 Upon having his subpoena reissued in 2010, Risen wrote an affidavit to the court in order to explain his lack of compliance. In his affidavit he wrote, “Reporting on intelligence and national security has often included major revelations of great public interest.” He goes on to state some of these revelations: the waterboarding of terrorist suspects, the CIA’s withholding of intelligence that showed Iraq had no weapons


of mass destruction, and the NSA’s eavesdropping on phone calls and emails of private U.S. citizens without congressional approval.

Many of the stories published by Risen revealed information that hurt and embarrassed the Bush administration, but he states that he has never published information, even if it was newsworthy and true, if it would cause real harm to national security. This did not stop the Bush administration from organizing picketing outside Risen’s office, along with hate mail from right wing groups, including “personal threats.” Public threats of prosecution or contempt continued throughout the case, and Congressman Peter Hoekstra said that Risen and his associates would “be sitting in jail by the end of the year until they reveal their sources.” No matter the amount of public support or public interest involved, the government continued to threaten Risen into the Obama administration. The government did not care that Risen was merely informing the people of an illegal government action against the public, such as when the U.S. illegally tapped into Americans’ phones. Presidential administrations and other organizations, such as the CIA, that keep information confidential for reasons other than national security want to stop the media from reporting those secrets. They cover their mistakes and misconducts and want to claim national security to silence the media from revealing information that has public interest in mind.

James Risen is just one example when it comes to media being threatened and undermined by the government. Judith Miller, a reporter for the New York Times, was subpoenaed to reveal her source of information in relation to Valery Plame. Plame was an undercover CIA officer who had her identity leaked to various members of the media by “Scooter” Libby, Vice President Cheney’s Chief of Staff at the time. Libby was reportedly angered by Plame’s husbands’ criticism

19 Myron Kukla, Hoekstra Predicts Jailing of Reporters (NYT Traitors To Be Jailed By Year End), GRAND RAPIDS PRESS, Aug. 31, 2006 at B1.


of the Bush administration. Both Libby and Miller were convicted, but Miller alone spent six months in jail. Libby was commuted of his 30 month sentence by President Bush. Notably, Miller never actually published an article outing Plame; that was done by Robert Novak. Miller just had the information and refused to give up her source when in court. In fact there were many reporters subpoenaed in this case, which goes against the common practice of only subpoenaing media members for their sources if there is no other way to get the same information. Miller’s situation further shows the disregard for media and in turn public interest. The administration leaks information to hurt political opponents and protect their own politicians, while subpoenaing public interest minded media members. Public interest cannot be protected if the government is manipulating the media in these ways.

The second way the government has been attacking the media and their sources is the current and threatened potential use of the 1917 Espionage Act. Established far prior to the contemporary practice of media subpoenas, Woodrow Wilson enacted the 1917 Espionage Act in order to deal with public concern over national security during World War I. The United States had never before engaged in such an international altercation, so the nature and provisions of the 1917 Espionage Act naturally followed a more radical nature. Some provisions simply expounded on the Sedition Act of 1798, but


26 Title28: Judicial Administration § 50.10.
others represented a drastic departure from previous legislation.\textsuperscript{27} The minority opposition deemed these controversial provisions an infringement on individual freedoms and liberties.

One of the first uses of the 1917 Espionage Act came in 1919 when Charles Schenck was prosecuted for passing out fliers that compared conscription in the army to slavery.\textsuperscript{28} In \textit{Schenck v. United States}, it was decided that the act was not a violation of free speech; the ruling judge stated that freedom of speech is not protected when it is encouraging insubordination. This set the standard “clear and present danger” test concerning what was protected by the First Amendment and eligible for prosecution under the Espionage Act. The “clear and present danger” doctrine set forth the famous example of yelling “fire” in a crowded theater, showing that originally the Espionage Act could be used for prosecuting people who made a “clear and present danger” to the public. Other than the clear obstruction of peaceful protest, this case shows that the Espionage Act’s range of use was originally very broad, and while it is no longer used for such cases, its original wording creates an unreasonably wide range for it to be interpreted. The “clear and present danger” doctrine was slowly weakened by several rulings ending with \textit{Branzburg v. Ohio} (1969), in which the current precedent was set at any speech that would incite “imminent lawless action.”\textsuperscript{29}

The next major case the law was used in was in the 1970’s, when the government attempted to stop the publication of the “Pentagon Papers.”\textsuperscript{30} In \textit{The New York Times Co. v. US}, the government tried to stop the publication of documents that detailed classified aspects of the Vietnam War. The judge ruled that the government could not continue its injunction but never officially ruled whether or not


\textsuperscript{28} Schenck v. US, 249 U.S. 47, 49-50 (1919).

\textsuperscript{29} Branzburg v. Hayes, 408 U.S. (1972).

the Espionage Act could be used against a publication. Possibly because the papers were already leaked, the newspapers were not charged further under the Espionage Act, but the two men who copied and handed out the papers were punished. Anthony Russo and Daniel Ellsburg believed that what the United States had done in Asia was wrong and wanted the public to know exactly what happened. While the contents of the documents did show that the Johnson Administration had lied, they were classified as top secret, and whoever knowingly gave them out qualified for prosecution under the Espionage Act.

The case was eventually dismissed by the judge when Ellsburg’s psychiatrist’s office was burglarized and the FBI lost tapes that may have been used to illegally record phone conversations. The judge of the case was also reportedly offered the position of FBI Director during the trial. The details of the Russo and Ellsburg case show that the Espionage Act can be used to prosecute people who are trying to inform the public of the truth, not cause significant damage to national defense. The case was more of a means to cover embarrassment and discredit the men who leaked the information. The fact that the judge threw out the case when he realized how much government corruption was involved highlights the need for informants to be able to leak documents that are defined as classified. These men clearly had public interest in mind when they leaked the information, but there was nothing in the law which allowed them to fulfill their duty to public interest.

The 1917 Espionage Act gives several relatively vague guidelines as to what type of information should not be published. One part of the law states that anything “concerning the communication intelligence activities of the United States or any foreign government” is classified information. Judge Young said in his memorandum of

US v. Morison that the jury can decide what is or is not a matter of national defense, but the Espionage Act merely states that the government needs to prove willfulness in knowingly transmitting information to prosecute an individual for leaking confidential information. He goes on to say that the jury only needs to determine two things to decide whether something is a matter of national defense: first, that the information could be potentially damaging to the US or could be useful to an enemy of the US, and second, that the information was something that the US was trying to keep secret.34 This shows a key problem with the potential of prosecutions under this law, because while information could be potentially damaging and had been keep secret by the government, there is nothing that allows for a beneficial function of releasing the information to supersede the potential damage to the nation.

In the last thirty years, courts have continued to convict media members unjustly under the Espionage Act. In 1985, a United States intelligence analyst for the Navy was charged and imprisoned for two years for publishing three photographs in a British defense magazine. The photos were of a Soviet nuclear powered aircraft carrier. This analyst, Samuel Morison, said that he published them so the United States and Britain could see what they were up against and increase funding for their own defense programs.35 Much later, in 2001, he received a presidential pardon from Bill Clinton. In this case, a publisher of information was technically prosecuted under the Espionage Act, and Morison was still prosecuted even though all parties admitted that the photos did not harm national defense.

This flaw in the Act was also shown more recently when Stephen Jin-Woo Kim, a senior analyst for the Office of National Security, was convicted under the Espionage Act in 2010 for telling a reporter

that North Korea would be testing a nuclear bomb in the near future.\textsuperscript{36} The threat of using the Espionage Act against publications and the practice of convicting minor offenses with no damages to national security show a pattern of executive branch attempts at causing fear among potential whistle blowers. Public interest is protected by the media, and the media is losing its ability to keep confidential sources and publish news about government due to the use of media subpoenas and the 1917 Espionage Act.

\textbf{Section Three}

This media threat is not stagnant but is actually being supported in a way to make the Espionage Act even stronger and hurt the role of the media even more. In contrast to the obvious need to protect media and public interest, last year legislators pushed a bill called The Shield Act (s4004). However, far from the shield acts passed in most states that protect media sources, this act, the Securing Human Intelligence and Enforcing Lawful Dissemination Act, proposed to widen the already broad prosecution powers of the 1917 Espionage Act. For example, it defined a transnational threat as any group or individual that threatens national security. Then, it made publishing information that could have been deemed beneficial to any of these transnational threats a crime punishable under the Espionage Act.\textsuperscript{37} Even though this bill did not pass, it is disturbing to think that some members of the government promoted something that would have hurt free press even more. It shows a concerted effort in the last year to stop any potentially sensitive or embarrassing information from leaving government oversight. With the public interest afforded from media already under attack, the government is still seeking to frighten journalists and informants alike. There needs to be legislation that will strengthen and protect the media’s ability


to communicate with confidential sources and in turn protect public interest. The following will prescribe a federal shield act as well as a public interest clause added to the Espionage Act.

The Free Flow of Information Act has been introduced as a federal shield act on four occasions. Currently, the bill has been referred to the Subcommittee on the Constitution.\textsuperscript{38} In its previous introduction, the bill died on the Senate floor even though it seemed like there was a good amount of support for it.\textsuperscript{39} The only public arguments made against the bill claim that it negatively affects criminal investigations, but, compared to state shield laws, the proposed federal version contains strong provisions to prevent the law from interfering with criminal investigations.\textsuperscript{40} For example, the proposed act specifically details that anyone involved in a criminal investigation who is a sole witness does not qualify for the act’s protection. This proposed bill would allow judges to see “that the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.”\textsuperscript{41} Media source subpoenas would still happen, and people could still be compelled to testify in a criminal case; however, this would be done only when necessary to national security and would not jeopardize public interest.

While this bill does have many positives, media is not defined explicitly in the current form of the bill.\textsuperscript{42} There have been conflicts


\textsuperscript{40} H.R. 2932, 112th Cong. (2011).

\textsuperscript{41} Id.

\textsuperscript{42} Id.
in state cases about who should qualify to use the protection.\textsuperscript{43} The bill’s sponsor, Representative Mike Pence, stated, “The Free Flow of Information Act is not about protecting reporters; it is about protecting the public right to know.”\textsuperscript{44} Since the bill is not meant to give special rights to media members, it should protect anyone who is providing the role of media.

This type of federal shield law still has some details to iron out; however, the repeated rejection of such bills is due in larger part to widespread antagonism, apathy, and ignorance. Public support of the bill must rise, and pressure must be placed on members of Congress and the President for the bill to pass. The public’s role is especially imperative due to many high ranking government officials who would not like to provide the public with transparency by letting the media operate freely.\textsuperscript{45} Experience can guide future amendments to the law, but it needs to be in place so that public interest will be protected as soon as possible.

Along with the federal shield law, an amendment must be added to the 1917 Espionage Act to fully protect the role of the media and thus, public interest. While a federal shield act would protect media members from losing their sources and going to jail, their sources could still face prosecution under the Espionage Act. This amendment would be a public interest clause, allowing public interest to be weighed much like is done in the Free Flow of Information bill. This clause would allow a judge to decide if the leaked information significantly hurt national security or was done with malice. If the information was leaked with intent to inform the public of something important, such as an illegal operation by the government, and if the benefit to public interest outweighed potential damage to national security, then the individual would not be guilty of espionage. Much


\textsuperscript{44} Derrick, \textit{supra} note 7.

\textsuperscript{45} \textit{Supra} note 38.
like the shield act, the details of this amendment would have to be fine-tuned over time, but it is imperative to first implement the law.

These two laws, when implemented together, would help protect the media’s vital role in government. They would not be passed to protect the media, but to protect public interest. In *US v. Steelhammer*, Judge Bryan of the 4th Circuit Court overturned a judgment of contempt for two reporters that had refused to testify. He wrote that his “decision now is but the product of a balancing of two vital considerations: protection of the public by exacting the truth versus protection of the public through maintenance of free press... Weighing in the scales in favor of this solution is its avoidance of unnecessary incurrence of any potential danger of sterilizing the sources of newsworthy items.” 46 This process, written into law via a federal shield law and amendment to the Espionage Act, would protect public interest from the strong hand of government. It would promote transparency, honesty, trust, and public education while attacking corruption, ineffective government, and crime. That is why these two laws which protect the public must be passed. A federal shield law in congruence with the amended Espionage Act will protect well-intentioned journalists and allow the media to fulfill its role as an important check and balance to America’s government.
