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Uneasy Lies the Hand That Clicks the Mouse: Presidential Power and Wikileaks

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UNEASY LIES THE HAND THAT CLICKS THE MOUSE: PRESIDENTIAL POWER AND WIKILEAKS

Andrew Pekoe

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I. INTRODUCTION

In *Henry IV Part II*, William Shakespeare's protagonist King Henry IV lamented, "Uneasy lies the head that wears the crown."¹ To the casual observer, these pithy words remain among the more accurate statements regarding the burdens of leadership. These burdens continue to exist today in the Office of the President of the United States (except for the crown, of course). The burdens placed upon the Office of the President are created explicitly by the Constitution of the United States of America.² These burdens, however, exist implicitly as well.³ The use of these implied powers in protecting against leaks of confidential information is the subject of this paper.

1. William Shakespeare, *Henry IV Part II*, Act 3 Scene 1 Line 32.
2. See U.S. CONST. art. II.
3. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

In the past few years, Wikileaks⁴ has promulgated embarrassing and politically damaging diplomatic, military and intelligence information regarding the United States and its interests abroad.⁵ The information distributed by Wikileaks, and its founder Julian Assange, caused controversy and remains an ever-evolving topic.⁶ Utilizing Justice Robert Jackson's concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*⁷ this paper will show how the President can use several Congressional acts to solve the Wikileaks problem.

Part I of this paper will discuss the development of the Wikileaks situation. It will discuss the unique nature of the website, its stated goals and the various technological protections that were built into Wikileaks. It will also discuss the major weakness in the website – its dependence on leaked information – that the President can exploit in order to render the website ineffective in achieving its goals. It will also discuss the various legal challenges to Wikileaks and how those legal challenges have left Wikileaks immune to direct attack. Part I will then give a brief introduction of the *Youngstown* case, particularly Justice Jackson's concurring opinion. Finally, Part I will discuss the "State Secrets" doctrine: a procedural safeguard designed to prevent sensitive information from being subject to discovery.⁸

Part II will discuss how the President can find authority within the National Security Act (NSA) to restrict the flow of information into Wikileaks and remain at the highest level of executive power discussed in Jackson's concurrence. However, this power will be limited by the scope of the NSA, which primarily addresses Department of Defense intelligence organizations.⁹ Part III will discuss how the Freedom of Information Act (FOIA), coupled with the NSA's silence on diplomatic information and omission of the Defense Intelligence Agency (DIA), will place the President's authority to act with regard to those agencies in either Jackson's "zone of twilight" or "lowest ebb".¹⁰

Part IV will discuss how Congress can alter the NSA and FOIA to grant the President authority to exhibit greater control over the flow of information outside of the government. Finally, Part V will discuss how the State Secrets doctrine should prevent any litigation to curb

4. See www.wikileaks.org.

5. *What is Wikileaks?*, BBC NEWS (Dec. 7, 2010), available at <http://www.bbc.co.uk/news/technology-10757263>.

6. *Id.*

7. *Supra* note 3 at 634.

8. See discussion *supra*. p. 15.

9. See discussion *supra*. p. 19.

10. See discussion *supra*. p. 24.

such authority from ever reaching judgment by depriving a challenging party of standing.

II. HISTORICAL BACKGROUND

Before beginning the analysis, it is important to understand the characters that play a role in said analysis. Following in the Shakespearean vein of the introduction, a *dramatis personae*¹¹ of the characters to be involved must be presented. The characters include: (A) Wikileaks.org, (B) the *Youngstown* decision, and (C) the “State Secrets” doctrine. Additional characters will be revealed as appropriate throughout the analysis.

A. Wikileaks

From the outside, Wikileaks possesses very lofty ideals. In 2006, an Australian, Julian Assange, and several like-minded people¹² from across the world created the website, www.wikileaks.org.¹³ The purpose of the site is to allow “whistle-blowers and journalists who have been censored to get material out to the public.”¹⁴ Wikileaks describes itself as the instrument by which the citizens of the world can satisfy their need for government openness and transparency.¹⁵ Through this transparency, Wikileaks hopes to reduce corruption, improve government and strengthen democracy.¹⁶ Wikileaks seeks to provide greater scrutiny of government activities.¹⁷ The site “achieves” this goal by providing “a forum for the entire global community to relentlessly examine any document for its credibility, plausibility, veracity and validity.”¹⁸

While the above goals are abstract in nature, a more practical and tangible goal exists, the news gathering function. The ideals of

11. The *dramatis personae* is a list of important characters, most often used in the beginning of published stage plays. See “*dramatis personae*.” Merriam-Webster Online Dictionary. 2011. <http://merriam-webster.com> (13 Mar. 2011).

12. The website itself claims a list of founders including: “Chinese dissidents, journalists, mathematicians and startup company technologists, from the US, Taiwan, Europe, Australia and South Africa.” See <http://www.wikileaks.org/wiki/Wikileaks:About>.

13. *Profile: Wikileaks founder Julian Assange*, BBC NEWS (May 30, 2011), available at <http://www.bbc.co.uk/news/world-11047811>.

14. *Supra* note 5.

15. *Wikileaks:About*, WIKILEAKS, available at <http://www.wikileaks.org/wiki/Wikileaks:About>.

16. *Id.*

17. *Id.*

18. *Id.*

transparency and greater scrutiny can be achieved through a variety of means; leaked documents are only one such means. The news gathering goal, on the other hand, is always visible on the website. For Wikileaks, the news gathering function is a way to “make it easier for quality journalists to do their job of getting important information out to the community.”¹⁹ Therefore, Wikileaks gathers leaked documents in order to provide journalists and other interested parties with the tools to report the news, even the news that governments actively seek to keep confidential.

Beyond the goals of Wikileaks, the form and function of the website are equally important to understand. As the name suggests, Wikileaks operates very similarly to the online encyclopedia Wikipedia.²⁰ The process begins with the two most important aspects of the site’s existence, users and information.²¹ A user uploads a document to the website and specifies the language and the country (or industry) of origin.²² The document then enters a queue that obscures the time and date of the upload.²³ The document leaves the queue, backs up to internal backup servers and publishes.²⁴ Once published, the document is subject to peer review, analysis and comment.²⁵ The users of the website act as the editors, with misleading or otherwise irresponsible postings to the site fixed by other users, similar to Wikipedia.²⁶

Wikileaks prides itself on anonymity; one of the main aspects of its function.²⁷ Wikileaks creates a few layers of security.²⁸ The first layer exists at the upload level.²⁹ Wikileaks uses various technologies to encrypt the uploaded documents, thus providing anonymity and untraceability.³⁰ Wikileaks employs a modified version of “Tor” among its encryption techniques.³¹ Tor seeks to protect users from “traffic analy-

19. *Id.*

20. *See* <http://www.wikipedia.org/>.

21. *Supra* note 15.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. The emphasis on Tor contained herein is purely for illustrative purposes; it is not the only technology Wikileaks claims to use. Wikileaks also uses modified versions of other technologies, including: MediaWiki, Open SSL, FreeNet, PGP and software designed by Wikileaks. *See Id.*

sis", a common method of internet surveillance,³² which focuses on the header contained within information uploaded to a website such as Wikileaks.³³ Tor enables a user to send data from his computer to its destination by using a system of relays to move the file along through a network en route to its ultimate destination.³⁴ At each leg of the relay, a "Tor node", only knows the information sent to it from the previous node.³⁵ Once the information arrives at its destination, the relays navigated should prevent internet eavesdroppers from using traffic analysis to link the source and destination.³⁶ In the Wikileaks context, a user can upload a document and send it to Wikileaks along the Tor nodes with relative security that it will remain anonymous. On the second layer, Wikileaks's main servers are housed in Sweden hosted by ISP PeReQuito.³⁷ By keeping its servers in a friendly jurisdiction, Wikileaks can operate as fully as any other website without being subject to the increased levels of scrutiny that it would likely receive in other jurisdictions. Finally, the document enters the third layer: the queue. The queue obscures the time and date of publication, thus preventing any would-be investigators from obtaining this valuable information to determine the source of any leaks.³⁸ With so many layers of protection, Wikileaks allows its users to upload and use the published leaks with relative peace of mind that their anonymity remains intact.

The function of Wikileaks is but a small portion of the Wikileaks story. Another equally important question must be asked: what has Wikileaks done to garner enough attention to be the subject of this essay? Although the website first aired in December of 2006, Wikileaks avoided controversy for a few years.³⁹ Several postings did cause a minor stir during the initial years of Wikileaks' existence,⁴⁰ including: a posting of the Standard Operating Procedures for Camp Delta, which detailed restrictions experienced by prisoners at Guantánamo Bay and a screenshot of former Vice Presidential candidate

32. *Tor:Overview*, TOR, available at <https://www.torproject.org/about/overview.html>.

33. The header includes "source, destination, size, timing and so on." See *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. PeReQuito (PRQ) is also known for hosting the file sharing website *The Pirate Bay*. Although Wikileaks has never expressly stated their reasons for hosting out of PRQ, the words of PRQ itself shed some light, "If it is legal in Sweden, we will host it, and keep it up regardless of any pressure to take it down." See *supra* note 5.

38. *Supra* note 15.

39. *Supra* note 5.

40. *Id.*

Sarah Palin's e-mail inbox, address book, and pictures during the 2008 Presidential Election.⁴¹ In April of 2010, however, Wikileaks burst into the news by publishing a video of a 2007 operation in Baghdad, Iraq, showing a United States Apache helicopter killing at least 12 people, two of whom were Reuters journalists.⁴² In October of 2010, Wikileaks posted nearly 400,000 secret US military logs detailing operations in Iraq.⁴³ Soon after the Iraq logs were uploaded, Wikileaks released 90,000 classified military records containing the military strategy used in Afghanistan.⁴⁴ Among the most infamous articles Wikileaks published were thousands of gossip-styled diplomatic cables from the US State Department.⁴⁵ As a result of these leaks, Wikileaks has gained the ire of many governments around the world.⁴⁶

Wikileaks has deflected legal challenges to enjoin the website from publishing such damaging information.⁴⁷ The most prominent example of such legal deflection comes from *Bank Julius Baer & Co. LTD. v. Wikileaks*.⁴⁸ In *Bank Julius Baer*, the plaintiff sought to enjoin Wikileaks and a co-defendant, Dynadot Co., from publishing its the plaintiff's bank documents.⁴⁹ The plaintiff initially succeeded, with the injunction going unopposed until late briefs were filed contesting the injunction.⁵⁰ The Court still ordered a later hearing, in spite of Wikileaks' and the co-defendant's failure to meet the deadlines.⁵¹ After the hearing, the US District Court for the Northern District of California, in what was probably dicta⁵², stated that the injunction against Wikileaks, or companies working with the website, violated the "right to receive information and ideas" contained within the First

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* For examples of the "gossip" within the State Department, see, *At a glance: Wikileaks cables*, BBC News, available at <http://www.bbc.co.uk/news/world-us-canada-11914040>. (e.g. While describing Italian Prime Minister Silvio Berlusconi as "feckless" and "vain", the State Department further stated, "Berlusconi admires [Russian PM Vladimir] Putin's macho, decisive, and authoritarian governing style, which the Italian PM believes matches his own." Many of the cables are similarly embarrassing).

46. *Id.*

47. *Id.*

48. 535 F. Supp. 2d 980 (N.D. Cal. 2008).

49. *Id.* at 982.

50. *Id.* at 983.

51. *Id.*

52. Before discussing the merits of an injunction, the Court expressed great concern (without making a ruling) that it lacked Subject Matter Jurisdiction over the matter because both parties in the suit are arguably foreign entities. Thus, the United States would lack jurisdiction. See *Id.* at 984.

Amendment.⁵³ The Court further stated that an injunction would be ineffective in most situations because with Wikileaks “the cat is [already] out of the bag.”⁵⁴ Wikileaks claims they have successfully defended over 100 other legal challenges.⁵⁵ Despite Wikileaks’ procedural failures, courts have been willing to give Wikileaks a chance to be heard. Once heard, courts, such as the *Bank Julius Baer* court, have been unwilling to grant injunctions for fear of committing constitutional violations.⁵⁶ In addition, an injunction would fail for lack of efficacy.⁵⁷ Thus, Wikileaks remains well protected from direct legal challenge.

The final characteristic of Wikileaks is its dependence on user uploads.⁵⁸ It is unlikely Wikileaks will ever acknowledge this dependence, but without a user, information cannot publish. It follows that without information, Wikileaks has nothing to post onto its website, and with nothing posted to the website, Wikileaks fails to realize its goals.⁵⁹ Therefore, any *legal* act to cut off the flow of information from the uploader into Wikileaks will most likely render Wikileaks ineffective. (emphasis added). Further, any act taken by the President to confront the leaks should target the ability to upload information.

B. Youngstown

In order to determine how the President can halt the flow of information into Wikileaks, one must understand the President’s power and its source. The most widely accepted analysis of Presidential power derives from Justice Robert Jackson’s concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*.⁶⁰ In *Youngstown*, on the eve of a labor strike in the nation’s steel industry, President Harry S. Truman promulgated Executive Order No. 10340; directing the Secretary of Commerce to take possession of most of the steel mills and continue their operation.⁶¹ *Youngstown Sheet and Tube Company*, one of the steel companies named in President Truman’s Order, took issue

53. *Id.* at 984-85.

54. *Id.* at 985. (alteration in original)

55. *Supra* note 5.

56. See *Kleindienst v. Mandel*, 408 U.S. 753 (1972), *Board of Education v. Pico*, 457 U.S. 853 (1982), see also *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir.1996).

57. 535 F.Supp.2d 980 at 985.

58. *Supra* note 15.

59. For a discourse on the goals see discussion *infra* pp.4-5.

60. 343 U.S. 579 (1952).

61. *Id.* at 583.

and brought suit.⁶² The District Court issued an injunction against the government and prevented the Secretary of Commerce from continuing the possession of the steel mills.⁶³ One of the issues the Supreme Court addressed was whether the President possessed the constitutional power to issue the Order.⁶⁴ Justice Hugo Black penned the majority decision, affirming the lower court's ruling and holding President Truman's Order unconstitutional.⁶⁵ Five other Justices wrote separate concurring opinions: Robert Jackson, Felix Frankfurter, William O. Douglas and Harold Burton concurred (joining Black in the opinion, but still writing separately), with Associate Justice Tom Clark concurring in the judgment but not in the opinion.⁶⁶ Three Justices – Chief Justice Fred Vinson and Associate Justices Stanley Reed and Sherman Minton – joined in a dissenting opinion penned by the Chief Justice.⁶⁷

In the time since the Supreme Court decided *Youngstown*, Justice Jackson's concurrence "has become the touchstone which the Supreme Court and legal commentators have employed to assess separation of powers questions that have arisen[.]"⁶⁸ Thus, most contemporary analyses of Presidential power use Justice Jackson's concurrence, not Justice Black's majority opinion.⁶⁹ The foundation of Justice Jackson's opinion is the three-pronged approach to test Presidential power – absent express Constitutional mandate, Presidential inherent power is found or not found in three situations: (1) when the President "acts pursuant to an express or implied authorization of Congress, his authority is at its maximum", (2) when the President "acts in absence of either a congressional grant or denial of authority, he can only rely upon his independent powers," but this power lies within a twilight zone where Congress may have concurrent authority and (3) when the President acts "incompatible with the express or implied will of Congress, his power is at its lowest ebb."⁷⁰ While expressing his fears that the typical judicial characteristic of "dealing with the largest

62. *Id.*

63. *Id.* at 584.

64. *Id.*

65. *Id.* at 588.

66. See *id.* at 634 (Jackson, J., concurring), *id.* at 593 (Frankfurter, J., concurring), *id.* at 629 (Douglas, J., concurring), *id.* at 655 (Burton, J., concurring), *id.* at 660 (Clark, J., concurring in the judgment).

67. *Id.* at 667 (Vinson, C.J., dissenting).

68. Christopher Bryant and Carl Tobias, *Youngstown Revisited*, 29 HASTINGS CONST. L.Q. 373, 416 (alteration in original).

69. *Id.*

70. 343 U.S. at 635-39 (Jackson, J., concurring).

questions in the most narrow way” would eventually upset the balance of power in the United States,⁷¹ Justice Jackson created one of the most concise definitions of any rule promulgated by the Supreme Court.⁷²

The three “over-simplified”⁷³ situations imagined by the Justice are fairly plain to analyze. Under the first situation, the President utilizes maximum authority when acting with express or implied grant from Congress.⁷⁴ Thus, if Congress passes an act, either giving the President authority or the President acts in concert with some Congressional act, his power is at its greatest and such acts “executed by the President[. . .]would be supported by the strongest of presumptions and the widest latitude of interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”⁷⁵ When Congress is silent and the President acts, his actions fall under the twilight zone of Presidential power.⁷⁶ Thus, Congressional silence may “enable, if not invite, measures on independent presidential responsibility” and any test of such Presidential exercise “is likely to depend on the imperatives of events[. . .]rather than on abstract theories of law.”⁷⁷ In the third situation, the President acts in opposition to the express or implied Congressional will, such an act falls into the “lowest ebb” of the President’s power.⁷⁸ Thus, the incompatible act “must be scrutinized with caution” because, as the Justice warns, “what is at stake is the equilibrium established by our constitutional system.”⁷⁹

Using his own framework, Justice Jackson quickly eliminated the first two situations.⁸⁰ The United States government admitted, “no congressional authorization exists for this seizure.”⁸¹ Thus, the first situation is eliminated. Justice Jackson disposed of the second situation with equal promptness, finding that Congress had acted with three statutes inconsistent with the seizure.⁸² Therefore, Congress was not silent. The Justice further admonished the President for his claim that Congress failed to act specifically “upon the occasions,

71. *Id.* at 634-35 (Jackson, J., concurring).

72. *See generally*, 29 HASTINGS CONST. L.Q. 373.

73. *Id.* at 635 (Jackson, J., concurring).

74. *Id.*

75. *Id.* at 636 (Jackson, J., concurring) (alteration in original).

76. *Id.* at 637 (Jackson, J., concurring).

77. *Id.* (alteration in original).

78. *Id.*

79. *Id.* at 638 (Jackson, J., concurring).

80. *Id.* at 638-39 (Jackson, J., concurring).

81. *Id.* at 638 (Jackson, J., concurring).

82. *Id.* at 639 (Jackson, J., concurring).

grounds and methods for seizure of industrial properties," thus creating the requisite Congressional silence.⁸³

With the prompt dismissal of the first two situations, Justice Jackson turned his attention to the third situation.⁸⁴ In this case, the Justice dictated that the only way the President's Order would survive scrutiny would be if the seizure was "within his domain and beyond control by Congress."⁸⁵ To begin, Justice Jackson reminded the reader that the President indeed possesses inherent powers; not simply those delegated to him by the Constitution.⁸⁶ To hold such rigid views of power would render clauses of the Constitution "unworkable, as well as immutable."⁸⁷ Justice Jackson then analyzed three specific contentions of the Solicitor General in order to determine if the authority to seize the steel mills fell within the President's domain.⁸⁸ Justice Jackson dismissed the first of the Solicitor General's contentions – the Constitution granted *all* executive powers within the governments capabilities to the President – with the same vigor used to dispose of the first two "situations".⁸⁹ The Justice referred to the first contention, as within "the prerogative exercised by George III", and questioned that the forefathers created the executive power in George's image.⁹⁰ The Solicitor General then argued that the President had power as Commander-in-Chief to order the seizures.⁹¹ Justice Jackson quickly eliminated this argument as well, finding that while the President possesses fairly broad power as Commander-in-Chief to deal with foreign entities, when the President uses that power domestically, "not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence."⁹² Finally, Justice Jackson eliminated the third argument, which was the "take care" clause of Article II⁹³ - the seizures were done to faithfully execute the law.⁹⁴ The Justice asserted that in the context of the seizures, the

83. *Id.*

84. *See Id.* at 640-653 (Jackson, J., concurring).

85. *Id.* at 640 (Jackson, J., concurring).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* (emphasis added).

90. *Id.* at 641 (Jackson, J., concurring).

91. *Id.*

92. *Id.* at 645 (Jackson, J., concurring).

93. "He shall take Care that the Laws be faithfully executed. . ." *see* U.S.CONST. art. II, s. 3.

94. 343 U.S. at 646 (Jackson, J., concurring).

Fifth Amendment due process guarantee⁹⁵ must counter any faithful execution and thus the assertion of “take care” power to seize steel mills failed in the face of the Fifth Amendment.⁹⁶ In an argument of last resort to find implied Presidential power, the Solicitor General premised the seizures on non-specific and “nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations.”⁹⁷ Justice Jackson promptly disposed of this argument, finding that if the Framers wished to give the President express power to confront national crises they would have done so.⁹⁸ With the absence of express constitutional authority, coupled with the finding of express Congressional incompatibility with the use of seizures,⁹⁹ Justice Jackson determined that the President exceeded his power.¹⁰⁰

C. *The “State Secrets” Privilege*

The “State Secrets” privilege is an evidentiary rule that traces its origins to the English common law.¹⁰¹ In the United States, the leading state secrets privilege case is *United States v. Reynolds*.¹⁰² In *Reynolds*, the wives of three civilian observers killed when an Air Force bomber crashed sought relief under the Federal Torts Claim Act.¹⁰³ During discovery, the plaintiffs moved for the government to produce the “Air Force’s official accident investigation report and the statements of the three surviving crew members, taken in connection with the official investigation.”¹⁰⁴ The government objected on grounds other than “state secrets”, but the District Judge determined that good cause existed to grant the plaintiffs’ discovery requests.¹⁰⁵ Shortly after the decision, the Secretary of the Air Force wrote to the District Court refusing to comply with the discovery requests and asserting that compliance with the requests would not be in the public inter-

95. “No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .” See U.S.CONST. amend. V.

96. 343 U.S. at 646 (Jackson, J., concurring).

97. *Id.*

98. *Id.* at 650 (Jackson, J., concurring).

99. See discussion *infra* p. 12.

100. 343 U.S. at 646 (Jackson, J., concurring).

101. *United States v. Reynolds*, 345 U.S. 1, 7 (1953).

102. 345 U.S. 1 (1953).

103. *Id.* at 3.

104. *Id.*

105. *Id.* at 4.

est.¹⁰⁶ At rehearing, the Secretary then furnished a "Claim of Privilege", stating once again that furnishing the crash report would "seriously hamper national security," among other concerns.¹⁰⁷ The District Court, however, continued to order production of the documents.¹⁰⁸ Eventually, the case reached the Supreme Court, where the Court, in an opinion by Chief Justice Vinson, ruled that the Air Force could properly assert the state secrets privilege but declined to dismiss the action because facts about the crash could be discovered through different means.¹⁰⁹

Chief Justice Vinson's opinion set out a clear guide for when the privilege applies. The state secrets privilege belongs solely to the Government.¹¹⁰ The privilege cannot be claimed nor waived by any *private* party.¹¹¹ In order for the Government to claim the privilege, the head of the department with control of the information must file a formal claim of privilege, after carefully and personally considering its invocation.¹¹² As the Chief Justice warned, the privilege "is not to be lightly invoked."¹¹³ In addition, the Court stated that although judicial discretion exists to determine the use of the privilege,¹¹⁴ when "the occasion for the privilege is appropriate. . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."¹¹⁵ The integrity of the privilege should thus be maintained. As to the depth of inquiry into the appropriateness of invoking the privilege, the Court said, "[w]here there is a strong showing of necessity, the claim of privilege should not be lightly accepted . . . [but] where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail."¹¹⁶ The Chief Justice then warned, "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."¹¹⁷ The depth of the inquiry, therefore, depends

106. *Id.*

107. *Id.* at 4-5.

108. *Id.*

109. *Id.* at 12.

110. *Id.* at 7.

111. *Id.* at 8 (emphasis added).

112. *Id.*

113. *Id.* at 7.

114. "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *See Id.* at 9-10.

115. *Id.* at 10.

116. *Id.* at 11 (alteration in original).

117. *Id.*

ultimately on the circumstances of each separate case, but even when circumstances show that the necessity for information is high, the assertion of military secrets trumps that necessity.

A higher profile case that dealt with the state secrets privilege and set out another important aspect of the privilege was *Ellsberg v. Mitchell*.¹¹⁸ *Ellsberg* involved the “Pentagon Papers” controversy.¹¹⁹ Daniel Ellsberg leaked sensitive information to the *New York Times*, detailing how Presidential administrations from Dwight D. Eisenhower through Richard M. Nixon misled the American public about the progress (or lack thereof) of the military action in the Vietnam War.¹²⁰ Ellsberg later sued the government, alleging Constitutional violations stemming from secret electronic wiretapping.¹²¹ During the suit, as in *Reynolds*, a dispute arose surrounding certain pieces of evidence included in a discovery request.¹²² The Government filed four privilege claims per *Reynolds* and attempted to answer the plaintiffs’ requests as fully as possible.¹²³ The Plaintiffs, however, were unsatisfied and compelled further responses, but the District Court ruled that the evidence was protected by the privilege.¹²⁴ As a result, the Government filed a motion *in limine* and received a partial final judgment, subject to appellate review.¹²⁵ The United States Court of Appeals ruled that the privilege applied to all evidence in question except for the names of Attorneys General who authorized the wiretaps.¹²⁶

Ellsberg followed precisely the instruction given by the Supreme Court in *Reynolds* as to how to handle a state secrets proceeding.¹²⁷ In addition, *Ellsberg* clearly defined the consequences of a successful privilege claim.¹²⁸ The Court of Appeals found the “successful assertion [of the privilege] may be fatal to the underlying case” because the evidence prohibited by the privilege may prevent the

118. 709 F.2d 51 (D.C. Cir. 1983).

119. In the context of this article, the use of *Ellsberg* is particularly ironic, Wikileaks uses the example of Daniel Ellsberg as the inspiration behind the concept of Wikileaks. See *supra* note 15. But see Derek E. Bambauer, *Consider the Censor*, 1 WAKE FOREST J.L. & POL’Y __ (2011), available at <http://ssrn.com/abstract=1757890>. (Arguing critical ethical and practical differences between Wikileaks and Daniel Ellsberg render any positive connection between the two false).

120. 1 WAKE FOREST J.L. & POL’Y at ____.

121. 709 F.2d 51 at 53.

122. *Id.*

123. *Id.* at 55.

124. *Id.* at 56.

125. *Id.*

126. *Id.* at 60.

127. *Id.* at 56-58.

128. *Id.*

plaintiff from establishing a *prima facie* case.¹²⁹ Therefore, any successful assertion of the privilege will, in all likelihood, end a challenge brought against the government. These pronouncements by the Supreme Court and the Court of Appeals for the D.C. Circuit, establish the state secrets privilege.¹³⁰

III. PRESIDENTIAL POWER AT ITS HIGHEST

As previously discussed, the President should take a course of action to cut off the flow of information from potential uploaders to the website.¹³¹ With *Youngstown* in mind, however, the President must first find an authority on which to base his actions. The President's actions should be directed toward the leakers from within the United States. Even though Wikileaks hosts on servers in Sweden and can be accessed almost anywhere an internet connection is available¹³², use of the broad foreign relations power afforded to the President does not solve the internal nature of leaking documents. Therefore, the President cannot rely upon the broad foreign relations powers. Although Wikileaks has posted countless volumes of United States military documents, the President cannot use his power as Commander-in-Chief, because to do so would be contrary to Justice Jackson's warnings about the use of such power "turned inwardly."¹³³ With little Constitutional authority left on which the President can rely, he should then find his authority in a Congressional act.

A. *The Authority: The National Security Act*¹³⁴

The President can find a limited amount of authority to act against Wikileaks within certain provisions of the NSA.¹³⁵ Subchapter V provides authority for the President to instruct the heads of the respective intelligence agencies to take measures necessary to prevent unauthorized disclosure of classified operational files.¹³⁶ Subchapter V, entitled "Protection of Operational Files", empowers the Directors of the Central Intelligence Agency (CIA)¹³⁷, the National Geospatial-In-

129. *Id.* (alteration in original).

130. *See* 345 U.S. 1, *See also* United States v. Reynolds, 709 F.2d 51 (1953).

131. *See* discussion *infra*. p. 9.

132. *See* discussion *infra*. p. 6.

133. *See* discussion *infra*. p. 14.

134. 50 U.S.C. Ch. 15 (2005).

135. 50 U.S.C. §§431-432 (2005).

136. *Id.*

137. 50 U.S.C. §431.

telligence Agency (NGA)¹³⁸, the National Reconnaissance Office (NRO)¹³⁹ and the National Security Agency¹⁴⁰, with the cooperation of the Director of National Intelligence, to exempt their respective “operational files” from the provisions of the Freedom of Information Act¹⁴¹ “which require[s] publication, disclosure, or search or review in connection therewith.”¹⁴² The NSA defines “operational files” generally as the files of each agency that “document the means by which foreign intelligence or counterintelligence is collected through scientific or technical means.”¹⁴³ In other words, the documents that detail how intelligence and counterintelligence was obtained may be exempt from disclosure and remain classified.¹⁴⁴

Besides operational files, the NSA imposes criminal liability for those who leak information regarding the identities of undercover intelligence officers, informants, agents and sources.¹⁴⁵ The NSA imposes punishments according to the level of information clearance that the leaker possesses.¹⁴⁶ For instance, anyone who has direct access to the information that identifies undercover entities and intentionally disseminates such information is subject to fine and imprisonment for no fewer than 10 years.¹⁴⁷ Those with access to other classified information, however, who happen to learn the identity of an undercover entity and intentionally disseminate the information are subject to a fine and imprisonment for no fewer than five years.¹⁴⁸ Regardless of who exposes such information, Congress clearly intended to keep such information classified, or it would not have imposed such harsh penalties.

The NSA grants further authority to make it more difficult to leak documents.¹⁴⁹ Subchapter VI, titled “Access to Classified Information”, details in part the procedures imposed upon the agency directors to control access to classified information.¹⁵⁰ Section 435 of

138. 50 U.S.C. §432.

139. 50 U.S.C. §432a.

140. 50 U.S.C. §432b.

141. 5 U.S.C. §552 (2009).

142. 50 U.S.C. §431(a). *See also* 50 U.S.C. §432(a). *See also* §432a(a). *See also* §432b(a) (alteration in original).

143. 50 U.S.C. §431(b). *See also* 50 U.S.C. §432(a)(2)(A). *See also* §432a(a)(2)(A). *See also* §432b(b).

144. *Id.*

145. 50 U.S.C. §421 (1999).

146. *Id.*

147. §421(a).

148. §421(b).

149. 50 U.S.C. §435 (2002).

150. *Id.*

Title 50 includes an express grant to the President “[to] establish procedures to govern access to classified information [that] shall be binding upon all departments, agencies, and offices of the executive branch of Government.”¹⁵¹ The statute prescribes the minimum procedures to determine access to classified information, such as background investigations¹⁵² and financial disclosure.¹⁵³ In an effort to maintain fairness, the statute also directs agency directors who revoke access to give appropriate notice to the employee losing access.¹⁵⁴ The NSA, however, also includes a catchall provision, giving authority to deny or terminate access to classified information if national security so requires.¹⁵⁵ The agency director may only use this power when following the procedures for revocation of access would be inconsistent with national security.¹⁵⁶

The last grant of Congressional authority can be derived from FOIA.¹⁵⁷ FOIA created a list of nine exceptions to the rule that government agencies were to provide information to the American public and established a system by which Americans could access government documents.¹⁵⁸ The foremost exception grants the President authority to exempt from FOIA information “to be kept secret in the interest of national defense or foreign policy.”¹⁵⁹ In addition, the President must properly classify exempt information controlled by the Executive Order.¹⁶⁰ Another important exemption, Exemption 3, applies to information specifically exempted in another statute.¹⁶¹ For instance, the files exempted by the NSA fall under Exemption 3. FOIA allows the President to keep files unavailable to the public if the interests of national security are best served or if a different statute prevents public disclosure.¹⁶²

151. 50 U.S.C. §435(a) (alteration in original).

152. §435(a)(1-2).

153. §435(a)(3-4).

154. §435(a)(5).

155. §435(b)(1).

156. *Id.*

157. 5 U.S.C. §552 (2011).

158. §552(b).

159. §552(b)(1)(A).

160. §552(b)(1)(B).

161. §552(b)(3).

162. *Id.*

B. Applying Youngstown

Turning to *Youngstown*, the President can use the abovementioned sections of the NSA and FOIA to issue an Executive Order placing greater restrictions on classified information.¹⁶³ With greater restrictions, the flow of information into a website such as Wikileaks should slow down, or even cease. The NSA specifically exempts “operational files” from FOIA’s government openness mandate.¹⁶⁴ Thus, any properly written Executive Order maintaining the confidentiality of CIA, NGA, NRO and National Security Agency operational files will fall directly in line with Congressional intent.¹⁶⁵ The FOIA national security exemption also grants the President authorization to restrict information that best serves national security interests.¹⁶⁶ Therefore, the President may use an Executive Order to restrict information if it protects national security.

The Congressional authority granted the President, however, only extends so far in the context of the NSA.¹⁶⁷ The President can only exempt information covered by the NSA; information possessed by the CIA, NGA, NRO and National Security Agency.¹⁶⁸ Thus, if the President attempts to draft a similar Executive Order instructing, for example, the Secretary of the Interior to restrict access to the Department of the Interior’s operational files, he most likely will exceed his authority because no Congressional authority exists that would satisfy Justice Jackson’s first category.¹⁶⁹ Although the NSA does not prevent the dissemination of *all* information from the US government, it allows the President to restrict dissemination from the US intelligence agencies.¹⁷⁰

The method the President should employ to restrict information leaks would be the issuance of an Executive Order instructing the directors of the agencies covered by the NSA to make security clearances more difficult to obtain and keep. The Executive Order must follow at least the minimum procedural requirements for issuance and maintenance of a security clearance covered by the NSA.¹⁷¹ Under Justice

163. 50 U.S.C. §431-432, 5 U.S.C. §552.

164. 50 U.S.C. §431(a). *See also* 50 U.S.C. §432(a). *See also* §432a(a). *See also* §432b(a).

165. *Id.*

166. 50 U.S.C. §552(b)(1)(A).

167. *See* 50 U.S.C. §431(a). *See also* 50 U.S.C. §432(a). *See also* §432a(a). *See also* §432b(a).

168. *See* discussion *infra*. p. 19.

169. *See supra* note 3 (Jackson, J. concurring).

170. 50 U.S.C. §431-432

171. *See* 50 U.S.C. §435.

Jackson's view of Presidential power, any act by the President in contravention of the Congressional mandated procedural requirements would fall within the lowest realm of Presidential power.¹⁷² The Executive Order will need, at least, provisions handling background checks and financial disclosures during the period when an employee seeks a higher security clearance and while the employee maintains that security clearance.¹⁷³ The President may, however, impose stricter limits on the issuance of security clearances.¹⁷⁴ The President also must ensure that the agency directors give appropriate notice should they revoke an employee's security clearance.¹⁷⁵ By following the procedural minimums, an Executive Order restricting security clearances will be within the maximum of Presidential power as defined by Justice Jackson's *Youngstown* concurrence.¹⁷⁶ The Order should place classified information in the hands of those the agency directors trust the most, and the leaking of sensitive information onto Wikileaks should cease.

IV. THE "TWILIGHT ZONE" AND THE "LOWEST EBB"

A. *The Authority (or Lack Thereof): NSA and FOIA*

FOIA contains no direct references to the State Department.¹⁷⁷ Rather, the State Department falls under the broad definition of "agency" under FOIA.¹⁷⁸ Exemption 1 of FOIA may apply to the State Department, but it grants no specific affirmation of power from Congress to the President.¹⁷⁹ Exemption 3 does not apply in the Wikileaks situation because no statute specifically exempts the State Department's intra-department cables from FOIA.¹⁸⁰ With no specific

172. 343 U.S. at 647 (Jackson, J. concurring)

173. See 50 U.S.C. §435(a)(1-4).

174. See §435(a).

175. See §435(a)(5).

176. 343 U.S. at 634-655 (Jackson, J. concurring)

177. See 5 U.S.C. §552.

178. 5 U.S.C. §552(f). ("[A]gency' as defined. . . includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency") (alteration in original).

179. See 5 U.S.C. §552(b)(1)(A).

180. The Department of State has successfully claimed FOIA exemptions for files that would endanger the intelligence gathering process. But the diplomatic cables released by Wikileaks in 2010 do not mention the intelligence gathering process and are thus not controlled by the FOIA precedent. See *e.g.* *Agee v. Central Intelligence Agency*, 524 F.Supp. 1290 (D.D.C. 1981).

authority either granting or proscribing Presidential ability to control information inside the State Department, action taken by the President to control State Department files falls into the twilight zone of power.

Unlike the Department of Defense intelligence organizations named throughout the NSA, the Department of State is seldom named.¹⁸¹ When the State Department receives mention, it comes in the form of a restriction on the ability to handle classified information.¹⁸² Under Section 435 of Title 50, the Director of the CIA must certify that the State Department fully complies with directives created by the Director himself for the handling, retention and storage of classified materials.¹⁸³ Thus, it appears that Congress did not intend for the State Department to have much control over classifying information.

Another aspect of the NSA worth noting deals with the Defense Intelligence Agency (DIA). The DIA was initially included with the group of Department of Defense intelligence agencies exempt from disclosure of operational files.¹⁸⁴ Much like its counterparts in the Department of Defense, the Director of the DIA possessed the authority to exempt operational files from disclosure under FOIA.¹⁸⁵ In 2007, however, the section relating to the DIA was allowed to terminate.¹⁸⁶ By allowing the DIA coverage in Section 432 to terminate, Congress eliminated the DIA's authority to make decisions that could cut the flow of information.¹⁸⁷

B. *Youngstown Applied, Again*

Applying Justice Jackson's concurrence in *Youngstown*, Presidential power to alter the classification of information within the State Department and the DIA falls under categories two and three: the twilight zone and the "lowest ebb".¹⁸⁸ The results, however, may end up the same – the President lacks power to affect the information.

181. See 50 U.S.C. Ch. 15 (2005), see also discussion *infra*. pp. 19-22.

182. Limitation on handling, retention, and storage of certain classified materials by the Department of State, 50 U.S.C. §435a (2000).

183. §435a(a).

184. 50 U.S.C. §432c, *repealed*. 2007. See also 50 U.S.C. §432. See also §432a.

185. §432c(a-b).

186. §432c.

187. See PL 109–163, 2006 HR 1815.

188. *Id.*, see also *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 647 (Jackson, J. concurring).

Since FOIA is silent about the State Department, the President's ability to limit the flow of information falls within the twilight zone. Thus, any Presidential action must be looked upon through the individual circumstances of each case. The State Department documents leaked to Wikileaks were diplomatic cables detailing personal, and often insulting, observations about foreign officials and situations.¹⁸⁹ Essentially, the President would have to control the classification of officially documented gossip. Although the presumption of twilight zone issues leans towards permitting Presidential power, action to halt the leaking of gossip will likely run afoul of the First Amendment.¹⁹⁰ Much like Justice Jackson's concern that the seizure of steel mills will fly in the face of the Fifth Amendment Due Process rights¹⁹¹, the information contained within the cables appears to be little more than gossip, which falls short of most classified information. Therefore, any Presidential restriction imposed on the State Department would likely run counter to First Amendment guarantees.¹⁹² Exercising Presidential power in the twilight zone to limit access to information otherwise available under FOIS is precarious. Thus, the leaking of diplomatic cables such as the December 2010 cables may continue with few impediments.

Should the President attempt to strengthen the classification of State Department files under the NSA, the President will find himself in the "lowest ebb" of his power. The President may be able to *indirectly* influence the classification and handling of security clearances in the State Department records through the provision granting the Director of the CIA control over such handling.¹⁹³ That would be indirect, however, and a direct mandate from the President to the Secretary of State or any State Department agency heads would be incompatible with Congress' intent.¹⁹⁴ Congress stripped the State Department of control over the handling of confidential information, sending a clear message that the State Department was not to handle classified materials unless approved by the CIA.¹⁹⁵ An Executive Order giving such authority to the State Department would thus run

189. *At a glance: Wikileaks cables*, BBC NEWS, available at <http://www.bbc.co.uk/news/world-us-canada-11914040>.

190. *See generally*, U.S.CONST. amend. I.

191. *See discussion infra*. p. 14.

192. *See generally*, U.S. CONST. Amend. I.

193. 50 U.S.C. §435a. (emphasis added).

194. *Id. see also* Youngstown, 343 U.S. at 647 (Jackson, J. concurring).

195. 50 U.S.C. §435a

contrary to the will of Congress.¹⁹⁶ Therefore, such an order would have a strong presumption against it.¹⁹⁷

With regards to the DIA, the President would fall into the lowest ebb of Presidential authority should he seek to restrict the accessibility of DIA operational files. By repealing Section 432c, Congress performed the negative act by omitting the DIA's ability to exempt files from FOIA and thus maintaining the secrecy of such files.¹⁹⁸ Although the President could argue that the inaction by Congress places this within the twilight zone of power – therefore giving him the presumptive power to issue an Executive Order – the fact that the DIA once possessed the power¹⁹⁹ to limit the availability of operational files but was stripped of that power suggests that Congress no longer intended for the DIA to possess this power. An Executive Order instructing the Director of the DIA to further restrict DIA access to operational files would run counter to Congress' withholding of the power to classify.²⁰⁰ If the President has no power to promulgate such an Executive Order, Wikileaks remains free to publish these documents.

V. HOW CONGRESS MAY GRANT MORE POWER

Having determined that the President has either the tenuous power of the twilight zone or no power at all to instruct the State Department or the DIA to exert greater control over their own documents, the question is then what can Congress do to address the situation? With no express Constitutional authority, the President needs Congressional authorization to avoid finding confidential information from the State Department and DIA uploaded to Wikileaks.²⁰¹

For the DIA, the grant of power is rather simple; reinstate section 432c of the NSA. Reinstatement of the statute would give the DIA the same ability to exempt its operational files that it once shared with its Department of Defense counterparts.²⁰² With regard to the ability to make security clearances more difficult to obtain, the DIA is included with its counterparts in the NSA.²⁰³ Thus, the President may

196. See discussion *infra*. pp. 24-26.

197. See 343 U.S. at 647.

198. See 50 U.S.C. §432c.

199. *Id.*

200. *Id.*

201. See generally, *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 647 (Jackson, J., concurring).

202. See 50 U.S.C. §431-432.

203. *Id.*

direct the DIA to make security clearances more difficult to obtain and keep.²⁰⁴ The concern for the DIA is the sudden loss of its ability to maintain the secrecy of their operational files and how to get that power back, thus making it more difficult for such information to upload to Wikileaks.

The State Department is a different matter since there is no statute to reinstate. Instead, a new statute must be created. The statutes of Subchapter V of Chapter 15 of Title 50 provide a good template to model such a statute. The statute should look similar to this²⁰⁵:

Operational Files of the Department of State

(a) Exemption by Secretary of State

The Secretary of State may exempt operational files of the Department of State from the provisions of section 552 of title 5 (Freedom of Information Act) which require publication or disclosure, or search or review in connection therewith.

(b) "Operational files" defined

In this section the term "operational files" means the files of the Department of State that document the conduct of foreign relations officers pertaining to the legal functions of the Department of State.

(c) Search and review for Information

Notwithstanding subsection (a) of this section, exempted operational files shall continue to be subject to search and review for information concerning—

- (1) United States citizens or aliens lawfully admitted for permanent residence who have requested information on themselves pursuant to the provisions of section 552 of Title 5 (Freedom of Information Act) or section 552a of Title 5 (Privacy Act of 1974);
- (2) any special activity the existence of which is not exempt from disclosure under the provisions of section 552 of Title 5 (Freedom of Information Act); or
- (3) the specific subject matter of an investigation by the congressional committees, the Department of Justice, Office of the Legal Adviser of the Department of State, Office of General Counsel of the Office of Inspector General of the Department of State, or the Office of Investigation of the Department of State for any impropriety, or violation of law, Executive Order, or Presidential directive in the conduct of a foreign relations activity.

(d) Information derived or disseminated from exempted operational files

204. *Id.*

205. This sample statute is based heavily off 50 U.S.C. §431 (2005). The author would like to credit the drafters of §431 for providing the template and structure that this sample statute is based. In addition, this sample statute skips over technical portions that would be included otherwise (e.g. a supersedure clause).

(1) Files that are not exempted under subsection (a) of this section which contain information derived or disseminated from exempted operational files shall be subject to search and review.

(2) The inclusion of information from exempted operational files in files that are not exempted under subsection (a) of this section shall not affect the exemption under subsection (a) of this section of the originating operational files from search, review, publication, or disclosure.

(3) Records from exempted operational files which have been disseminated to and referenced in files that are not exempted under subsection (a) of this section and which have been returned to exempted operational files for sole retention shall be subject to search and review.

* * *

**(f) Allegation; improper withholding of records;
judicial review**

Whenever any person who has requested agency records under section 552 of Title 5 (Freedom of Information Act) alleges that the Department of State has improperly withheld records because of failure to comply with any provision of this section, judicial review shall be available under the terms set forth in section 552(a)(4)(B) of Title 5, except that—

(1) in any case in which information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign relations which is filed with, or produced for, the court by the Department of State, such information shall be examined *ex parte*, in camera by the court;

(2) the court shall, to the fullest extent practicable, determine issues of fact based on sworn written submissions of the parties;

(3) when a complaint alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence;

(4)(A) when a complainant alleges that requested records were improperly withheld because of improper exemption of operational files, the Department of State shall meet its burden under section 552(a)(4)(B) of Title 5 by demonstrating to the court by sworn written submission that exempted operational files likely to contain responsive records currently perform the functions set forth in subsection (b) of this section; and

(B) the court may not order the Department of State to review the content of any exempted operational file or files in order to make the demonstration required under subparagraph (A) of this paragraph, unless the complainant disputes the Department of State's showing with a sworn written submission based on personal knowledge or otherwise admissible evidence;

(5) in proceedings under paragraphs (3) and (4) of this subsection, the parties shall not obtain discovery pursuant to rules 26 through

36 of the Federal Rules of Civil Procedure, except that requests for admission may be made pursuant to rules 26 and 36;

(6) if the court finds under this subsection that the Department of State has improperly withheld requested records because of failure to comply with any provision of this section, the court shall order the Department of State to search and review the appropriate exempted operational file or files for the requested records and make such records, or portions thereof, available in accordance with the provisions of section 552 of Title 5 (Freedom of Information Act), and such order shall be the exclusive remedy for failure to comply with this section; and

(7) if at any time following the filing of a complaint pursuant to this subsection the Department of State agrees to search the appropriate exempted operational file or files for the requested records, the court shall dismiss the claim based upon such complaint.

* * *

Such a statute empowers the State Department to exercise control and maintain the confidentiality of its own statutorily defined operational files. By defining the operational files under section (b), the State Department has control over a large portion of its own files.²⁰⁶ Use of the term "legal" reminds the State Department that only legal communications may be exempted from FOIA requests.²⁰⁷ Section (c) provides for exceptions, namely information regarding State Department employees under investigation for illegal activities, leaving State Department employees to answer for their misconduct.²⁰⁸ Section (d) allows information that may not be exempted, but contained in documents with exempted information, to be subject to FOIA requests.²⁰⁹ Section (d) also allows for the exempted information that comingles with non-exempted information to remain subject to exemption, keeping the confidentiality of documents intended to remain classified.²¹⁰ Section (f) assures that mistaken exemption is easily corrected by judicial review but maintains the confidentiality of files that would damage national security interests.²¹¹ The President could then rely upon a statute as described above to create an Executive Order instructing the Secretary of State to take measures to keep operational files of the State Department classified.²¹² Such an order would fall in line with Congressional intent contained within the statute and place

206. See §(b) *infra*. p. 29.

207. *Id.*

208. See §(c) *infra*. p. 29.

209. See §(d) *infra*. p. 30.

210. *Id.*

211. See §(f) *infra*. p. 30.

212. *Id.*

the order in the highest realm of Justice Jackson's vision of Presidential power.²¹³ By limiting the access available for operational files, it should become much more difficult for Wikileaks to obtain sensitive government documents meant to remain confidential.

VI. THE STATE SECRETS PRIVILEGE

If the President takes the above recommended course, Wikileaks will struggle to publish classified information about the United States at the same rate as previously. That, however, does not mean Wikileaks, or its supporters, will go without a fight. On the contrary, Wikileaks and its supporters²¹⁴ may bring suit, challenging the Presidential exercise of power and alleging First Amendment violations. The state secrets privilege will pose an additional and critical impediment to their lawsuits.²¹⁵

As discussed in Part I.C., the state secrets privilege is an evidentiary rule designed to prevent the release, during litigation discovery, of classified documents that would threaten national security.²¹⁶ In a potential lawsuit alleging First Amendment freedom of press violations, the state secrets privilege will prevent plaintiffs from making a *prima facie* case for violation.²¹⁷ The head of the department from which Wikileaks would seek discovery must file a formal claim of privilege and follow the procedures Chief Justice Vinson set out for invocation of the privilege.²¹⁸ Once followed, it will be up to the judge to decide whether the privilege applies or not.²¹⁹ Wikileaks most likely would assert that the necessity for the information is high, because it is the evidence necessary for Wikileaks to make a case that their freedom of press rights were violated. Thus, the Court would carefully scrutinize the assertion of the privilege.²²⁰ If the lawsuit centers on the desire to leak military documents, the assertion of military secrets would trump any assertion of necessity on the part of Wikileaks.²²¹ If the lawsuit centers on non-military issues, such as diplomatic files,

213. See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (Jackson, J., concurring).

214. For the purposes of this article, we will assume *arguendo* that the supporters have standing to bring suit.

215. See discussion *infra*. pp. 15-18.

216. See discussion *infra*. pp. 15-18.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

Wikileaks' necessity argument would hold a strong advantage. The government, however, could assert that given the damaging nature of the previous Wikileaks US diplomatic leaks and the importance of healthy foreign diplomatic relations to national security, the privilege must still apply. While a close call, the government assertion of the state secrets privilege would be reasonable and not conspicuous, and in all likelihood, would succeed in preventing discovery and ending litigation against the US during the pre-trial phase.

Wikileaks may argue that to prevent discovery of leaked documents on account of the state secrets privilege is pointless because the "cat's already out of the bag." Executive Order No. 13526 states, however, "[c]lassified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information."²²² In other words, information meant to be classified remains classified, even if leaked onto a website such as Wikileaks. Thus, Wikileaks' possible attempts to force discovery because the information is technically no longer secret will fail.

VII. CONCLUSION

In late 2006, Julian Assange and his crew of "Chinese dissidents, etc." created Wikileaks with the purpose of exposing government and corporate documents, intended to remain confidential, to the worldwide public.²²³ Over the next four years, Wikileaks released countless diplomatic and military documents that have proved embarrassing and detrimental to US interests.²²⁴ Wikileaks has developed a series of technological protections that make direct action on the website, such as interception of documents before upload or tracing users to their locations, nearly impossible.²²⁵ Wikileaks, however, cannot exist without two important elements: users and information.²²⁶ Today, after four years of embarrassment and fruitless efforts to halt the flow of information into Wikileaks by other means, the time has come for Presidential intervention that will severely damage the flow of information into Wikileaks; an indirect attack on the website but a direct attack on the ability to upload from within the US government.

Presidential power, however, cannot exist without authority. The Constitution appears to provide little power to the President to

222. Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) (alteration in original).

223. See discussion *infra* p. 4.

224. See discussion *infra* pp. 7-8.

225. See discussion *infra* pp. 6-7.

226. See discussion *infra* pp. 9-10.

confront Wikileaks. Using Justice Robert Jackson's concurring opinion in *Youngstown*, the President can find implied power by acting in concert with Congressional intent. The President can use affirmative Congressional authorization, found in the National Security Act, to direct the heads of select intelligence agencies to exempt their respective operational files from public disclosure, thus strengthening the files' status as confidential.²²⁷ The President has further authority within the NSA to make the process of granting and keeping security clearances significantly more difficult, thereby placing sensitive secret documents in the hands of individuals the agency directors trust the most. These individuals will be screened and scrutinized to ensure they are not internal security risks and are least likely to ever leak information to any outside source, including Wikileaks.²²⁸ Without sources who possess high security clearances, Wikileaks would lose access to the sensitive information it covets as well as lose website visitors due to the lack of desired leaked documents.

Presidential power does not extend into all areas of the government that have experienced, or are vulnerable to, breaches onto Wikileaks. FOIA's silence with regards to the Department of State places any action into Justice Jackson's twilight zone of power, a zone where the President has presumptive authority. Potential for First Amendment violations, however, may prove the President has no such power in spite of FOIA's silence. Furthermore, under the NSA, instructing the Secretary of State to take control of classified materials would be incompatible with Congressional intent.²²⁹ Congress drafted the NSA to give the Director of the CIA the ability to supervise and ultimately be responsible for the handling of classified files inside the State Department.²³⁰ Thus, an instruction to the Secretary of State to classify State Department files would run contrary to Congressional intent.²³¹ With respect to the DIA, Congress purposely allowed the termination of the statute granting similar authority given to the other Department of Defense intelligence organizations to classify documents.²³² By this withdrawal of authority, Congress expressed its intent that the DIA was not to exempt their operational files from

227. See discussion *infra*. pp. 19-22.

228. See discussion *infra*. pp. 22-24.

229. See discussion *infra*. pp. 24-28.

230. *Id.*

231. *Id.*

232. *Id.*

FOIA.²³³ Therefore, any Presidential instruction to restrict access to operational files of the DIA is incompatible with Congress' will.

Congress may authorize the President to affect the classification of information within the DIA and State Department.²³⁴ Congress may reenact the portion of the NSA that originally granted FOIA Exemption 3 status to DIA operational files.²³⁵ Congress may also draft legislation, similar to the abovementioned draft, which would give similar ability to the State Department to ensure that its own sensitive documents may legally become more classified.

Finally, should a dispute arise and Wikileaks bring suit based upon First Amendment violations, any such case would fail at the *prima facie* level.²³⁶ The "State Secrets" privilege would prevent the discovery of evidence necessary to establish that Wikileaks cannot publish the sensitive materials it typically publishes.²³⁷ Any attempt to reason that leaked information can be discovered because it is no longer a "secret" also fails, because past Executive Orders dictate that classified information remains so even after a leak.

While these proposals are not foolproof, if the President follows *Youngstown* and the path described in this article, he may be able to legally and constitutionally stop the dissemination of volumes of classified information by Wikileaks. This is by no means censorship, since what ends up on the website is there, and cannot be taken down. But by eliminating users and cutting off the flow of information onto the website, Wikileaks will have less to post and little new to view. Interest in the website would, in all likelihood, decline.

The President faces a tough but necessary decision to stop the flow of information into Wikileaks. But if decisions were not tough, then Shakespeare's timeless lament would not be timeless at all. In the case of Wikileaks, uneasy lies the hand that clicks the mouse.

VIII. EPILOGUE²³⁸

In the months that passed between the original draft of this paper and publication, a lot has happened to change the face of the Wikileaks issue.

233. *Id.*

234. *See* discussion *infra*. pp. 28-33.

235. *Id.*

236. *See* discussion *infra*. pp. 33-35.

237. *Id.*

238. Given recent events, the author feels compelled to include this epilogue.

On October 7, 2011, President Obama signed Executive Order 13587.²³⁹ Titled “Structural Reforms To Improve the Security of Classified Networks and the Responsible Sharing and Safeguarding of Classified Information,” Executive Order 13587, establishes a head of each agency to appoint a senior official to oversee the safeguarding of confidential communications.²⁴⁰ The appointed official is tasked with the implementation of programs designed to detect insider threats, conduct internal reviews and assign staff to a “Classified Information Sharing and Safeguarding Steering Committee”.²⁴¹ The Steering Committee is tasked with enforcing senior-level accountability, among other responsibilities.²⁴² The Order creates the “Classified Information Sharing and Safeguarding Office”, which is tasked with providing support to the Steering Committee, among other tasks.²⁴³ The Order also grants to the Secretary of Defense and the Director of the National Security Agency the title of “Executive Agent for Safeguarding Classified Communications on Computer Networks”.²⁴⁴ The Executive Agents are charged with creating technical systems for the protection of classified information, among other responsibilities.²⁴⁵ Finally, the Order creates the Insider Threat Task Force, an interagency program designed “for deterring, detecting, and mitigating insider threats, including the safeguarding of classified information from exploitation, compromise, or other unauthorized disclosure, taking into account risk levels, as well as the distinct needs, missions, and systems of individual agencies.”²⁴⁶ It appears that Executive Order 13587 lays out the groundwork to combat the flow of information into the Wikileaks website.²⁴⁷

October, 2011 also brought significant changes to Wikileaks. Wikileaks founder Julian Assange announced that Wikileaks could no longer publish classified documents.²⁴⁸ Assange said that a blockade of Wikileaks’ financial resources by US companies “destroyed 95% of

239. 76 Fed.Reg. 63811 (Oct. 7, 2011).

240. *Id.*

241. *Id.*

242. *Id.* at 63812.

243. *Id.*

244. *Id.* at 63813.

245. *Id.*

246. *Id.*

247. Executive Order 13587 would also make a good topic for a companion article. Although the portions relating to the Executive Agent can find authority in the aforementioned National Security Act. See 50 U.S.C. Ch.15 (2005).

248. *Struggling Wikileaks stops publishing classified files*, BBC NEWS, at <http://www.bbc.co.uk/news/world-europe-15434493>.

[their] revenue.”²⁴⁹ The blockade, led by private actors, Bank of America, Visa, MasterCard, PayPal and Western Union, caused the loss of “tens of millions in [] donations at a time of unprecedented operational costs.”²⁵⁰ Sadly, the shut down lasted only a month²⁵¹, but it should leave an indelible mark on Wikileaks. Perhaps Julian Assange may now appreciate the burdens of leadership and help make it easier for the hand that clicks the mouse.

249. *Id.*

250. *Id.*

251. *Id.*