The Prospect of Extraditing Julian Assange

Molly Thebes

Follow this and additional works at: http://scholarship.law.unc.edu/ncilj

Recommended Citation
Available at: http://scholarship.law.unc.edu/ncilj/vol37/iss3/7

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
The Prospect of Extraditing Julian Assange

Cover Page Footnote
International Law; Commercial Law; Law

This note is available in North Carolina Journal of International Law and Commercial Regulation: http://scholarship.law.unc.edu/ncilj/vol37/iss3/7
The Prospect of Extraditing Julian Assange

Molly Thebes†

I. Introduction ........................................................................................................... 889
II. Is Julian Assange a Journalist? ............................................................................ 894
III. The Feasibility of Extraditing Journalists .......................................................... 898
   A. Sweden ............................................................................................................. 899
   B. Iceland ............................................................................................................ 903
      1. Libel Tourism ............................................................................................... 904
      2. Source Protection ......................................................................................... 906
      3. Whistleblower Protections .......................................................................... 907
      4. International Effect of the Initiative ............................................................. 908
      5. Limitations of the Initiative ........................................................................ 909
   C. European Media Laws .................................................................................... 911
IV. Conclusion .......................................................................................................... 913

I. Introduction

The legal battle over the custody of Julian Assange has been well publicized in the media, with both Sweden and the United States vying for authority over the WikiLeaks founder and ex-computer hacker.1 While the United States is seeking jurisdiction over Assange for his well-documented involvement in the unauthorized acquisition and dissemination of a quarter of a million diplomatic cables2 and tens of thousands of wartime

†B.A. in Journalism and Political Science, 2009, University of North Carolina at Chapel Hill; J.D. expected, May 2012, University of North Carolina School of Law. The author would like to thank her family for their love and support and the members of the North Carolina Journal of International Law and Commercial Regulation for their aid and encouragement on this note.


documents related the Iraq and Afghan wars, Swedish authorities are seeking custody over Assange because of two domestic accusations of sexual misconduct and rape.

Prior to the accusations, Assange lived a largely nomadic and secretive life in which he regularly traveled between European nations, changing cell phones and hairstyles to avoid detection, in large part to evade law enforcement officers and deter threats of extradition to the United States. However, after the allegations of sexual misconduct, authorities in Sweden issued a European Arrest Warrant (EAW) for Assange, who on December 7, 2010, elected to turn himself into Scotland Yard and fight his pending extradition through legal processes. Shortly after his arrest, London’s High Court placed Assange under house arrest in England while the judicial system attempted to determine the legality of the EAW and by implication the legality of extraditing

---

3 Greg Jaffe & Joshua Partlow, "Mullen Says Leak Put Troops and Afghans in Danger," WASH. POST, July 30, 2010, at A4 (noting that since WikiLeaks’ official launch in 2007, WikiLeaks has released documents, which according to military and intelligence leaders may have endangered the lives of American servicemen and intelligence operators in Afghanistan); The Iraq Archive: The Strands of a War, N.Y. TIMES, Oct. 23, 2011, at A1 (discussing the release of several thousand documents regarding the war in Iraq).


6 The EAW, which was adopted in 2002, was designed to replace Europe’s “extradition system by requiring each national judicial authority (the executing judicial authority) to recognise [sic], ipso facto, and with a minimum of formalities, requests for the surrender of a person made by the judicial authority of another Member State (the issuing judicial authority).” European Arrest Warrant, EUROPA, http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l33167_en.htm (last visited Jan. 24, 2012).

Assange.\textsuperscript{8} For the majority of his time under house arrest, Assange has resided at Ellington Hall, a three-story Georgian mansion located on a 650-acre country estate in Suffolk County, England.\textsuperscript{9} This setting, which has been described as a “bucolic idyll,” provides a stark contrast to Assange’s previously itinerant and often times frantic lifestyle.\textsuperscript{10} Despite his efforts, Assange was unable to avoid legal confrontations as a result of the EAW, and his attempts to prevent extradition have thus far proved to be futile.\textsuperscript{11} The legal processes to extradite the WikiLeaks founder began in February 2011, when District Judge Howard Riddle ordered that Assange be extradited to Sweden.\textsuperscript{12} Then in November of the same year, London’s High Court affirmed the validity of the EAW and denied Assange’s appeal.\textsuperscript{13} One month later Assange exercised his right to petition the United Kingdom’s Supreme Court for an appeal of the High Court’s decision, which was granted and scheduled for hearing on February 1, 2012.\textsuperscript{14}

While Swedish authorities have publicly stated that they are only seeking custody to question Assange on the allegations against him, Assange has expressed concerns that once in Sweden the United States will attempt to extradite him, forcefully or otherwise, into the United States to stand trial for his involvement with WikiLeaks.\textsuperscript{15} For now, however, Assange, who has been

\begin{itemize}
  \item[9] Burns & Somaiya, supra note 8, at A10.
  \item[10] Id.
  \item[11] Traci Watson, WikiLeaks Founder Julian Assange Denied Bail, USA TODAY (Dec. 6, 2010), http://www.usatoday.com/news/washington/2010-12-06-wikileaks_N.htm (noting that EAWs tend to be difficult to overcome absent some mental or physical incapacity).
  \item[13] Robert Booth, Assange’s Options Narrow as High Court Rules He Must Face Swedish Rape Claim, GUARDIAN (London), Nov. 3, 2011, at 3.
\end{itemize}
released on bail with an ankle monitor and a 10 P.M. curfew at Ellingham Hall, is forced to remain in his self-described “gilded cage” until the judicial system determines the legality of Sweden’s extradition request.¹⁶

As Assange awaits the decision of the United Kingdom’s Supreme Court, the United States appears to be building a case against him. Although the United States has not formally stated under which law it would seek to prosecute Assange, the Justice Department has indicated on numerous occasions that it is developing a case.¹⁷ In 2010, Attorney General Eric Holder stated: “We have a very serious criminal investigation that’s underway, and we’re looking at all of the things that we can do to try to stem the flow of this information.”¹⁸ If the United States does bring Assange into its jurisdiction, it has been widely speculated that he will be charged with violations of the 1917 Espionage Act,¹⁹ a previously obscure piece of legislation that was passed in the midst of World War I and used primarily as a way to constrain speech that might be inimical to the nation’s military efforts.²⁰ In the relevant part, the act makes it a crime to possess or transmit unauthorized national security information—conduct which seemingly encompasses many of the actions that Assange has

http://www.joumalgazette.net/article/20110207/NEWSO4/302079983/1006/NEWS.

¹⁶ Kroft, supra note 5.


²⁰ See Derigan A. Silver, National Security and the Press: The Government’s Ability to Prosecute Journalists for the Possession or Publication of National Security Information, 13 COMM. L. & POL’Y 447, 461 (2008). The United States utilized the Espionage Act quite rarely following the dawning of WWI and was in large part relegated to a footnote in the history of American jurisprudence. Nevertheless, in light of the arduous First Amendment media protections that have been used to protect journalists from pre-publication governmental intrusion and prosecution following New York Times Co. v. United States, 403 U.S. 713 (1971), this arcane act has found new life among modern political and legal commentators because it raises the prospect that while journalists are largely immune from prior restraint, they may be charged not only for the publication of sensitive national security documents, but also for the mere retention of those documents. See id. at 463-67.
readily and unapologetically admitted to on numerous occasions.\(^{21}\)

The feasibility of successful prosecution under the Espionage Act and other potentially applicable statutes has resulted in calls for the extradition of Julian Assange to the United States.\(^{22}\) While this note will not speculate as to the likelihood of successfully prosecuting Assange, it will consider the obstacles that the United States would face should it attempt to extradite Assange at all. It contends that extradition is highly improbable, primarily due to the stringent media laws in Northern Europe, where Assange has developed significant ties and where he may retreat if he is fully released from Interpol custody.\(^{23}\)

The scope of this note also extends beyond the limited circumstances surrounding the proposed extradition of Julian Assange and will discuss the barriers to extradition from Northern Europe. Northern Europe has, in effect, created a nearly impenetrable wall that shields journalists from liability arising out of a wide array of previously illegal or unethical activities, such as the unauthorized acquisition and publication of classified governmental documents.\(^{24}\) These legal protections will enable the area to become a haven for hackers and disseminators of classified and sensitive information. In today’s era of instantaneous and worldwide communication via the Internet, this protective bastion will have a global effect since news sources originating in Northern Europe are broadcast throughout the world. This means that governmental institutions and private entities around the world will bear the consequences of Northern Europe’s media laws, which, in essence, prohibit media accountability through their zealous protection of the press.

Part II of this note will consider whether Assange legally qualifies as a journalist, which would entitle him to enjoy the freedoms widely afforded to the press. Part III of the note will consider the feasibility of extraditing Assange in light of Northern Europe’s robust media protections. This section will focus


\(^{22}\) See Serrano & Savage, supra note 18, at A9.

\(^{23}\) See infra Part III.A-B.

\(^{24}\) See infra Part III.
primarily on the legal protections bestowed by Sweden and Iceland and will consider Iceland's proposed legislation, the Modern Media Initiative, which was designed to surpass all other similar protective legal schemes.

II. Is Julian Assange a Journalist?

Before considering the effects of European media laws, one must first consider whether Assange qualifies as a journalist. Nation states are largely uncertain about how to classify journalists in general, which compounds the uncertainty surrounding Assange's high profile status. For example, the United States has not been able to precisely define who is a journalist. Perhaps the closest the United States has come to a concise definition of “journalism” was in the Free Flow of Information Act of 2007, which stalled in Congress; that act defined journalism as “the regular gathering, preparing, collecting, photographing, recording, writing, editing, reporting or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.” Despite this seemingly broad definition, the legislation was not adopted, and concerns related to

26 See Iceland to Become International Transparency Haven, INT’L MODERN MEDIA INST., http://immi.is/Icelandic_Modern_Media_Initiative#ICELAND_TO_BECOME_INTERNATIONAL_TRANSPARENCY_HAVEN (last visited Feb. 1, 2012) Birgitta Jonsdottir, the IMMI’s chief sponsor, stated: “Iceland will become the inverse of a tax haven; by offering journalists and publishers some of the most powerful protections for free speech and investigative journalism in the world.” Id.
27 The U.S. judicial system has never defined who a journalist is despite the confusion in the area with the advent of the digital era and the proliferation of bloggers. See, e.g., Jessi Hempel, Are Bloggers Journalists?, Bus. Wk. (Mar. 7, 2005) http://www.businessweek.com/technology/content/mar2005/tc2005037_7877_tc024.htm
granting legal protections and tactical advantages to terrorist organizations stemmed further discussion on the topic.\textsuperscript{30}

Major media organizations have also considered the matter, yet, like the U.S. government, no consensus has emerged regarding the definition of a journalist.\textsuperscript{31} In the past several media organizations have come to the defense of WikiLeaks in various times of legal strife,\textsuperscript{32} supporting the notion that Julian Assange may be considered a journalist. In 2008, during the lawsuit \textit{Bank Julius Baer v. WikiLeaks},\textsuperscript{33} many prominent news and nonprofit organizations, such as the Newspaper Association of America, the Associated Press, \textit{The Los Angeles Times}, and the Society of Professional Journalists, signed an amicus brief in support of WikiLeaks.\textsuperscript{34} The organizations argued that WikiLeaks should be afforded protections such as the freedom from prior restraint and governmental injunctions that are typically given to mainstream news organizations.\textsuperscript{35}

Additionally, following the threat of U.S. prosecution under the Espionage Act, members of the foreign press have been active in WikiLeaks’ defense.\textsuperscript{36} In Australia, Assange’s native country, editors of many of the major newspapers signed a letter opposing


\textsuperscript{33} 535 F. Supp. 2d 980 (N.D. Cal. 2008).


\textsuperscript{35} See Gillmor, supra note 31.

prosecution. The Committee to Protect Journalists and the Board of Investigative Reporters and Editors, both of which are dedicated to aiding and protecting journalists worldwide, have issued statements and letters urging the government not to prosecute.

Nevertheless, the support of WikiLeaks has not been universal among the press. As WikiLeaks' methods and ideologies continue to ignite controversy, other major media organizations such as the American Society of Magazine Editors and the National Association of Broadcasters have been silent on the matter of WikiLeaks. Others such as the National Society of Professional Journalists have issued neutral and even contrasting statements on the matter of WikiLeaks as they attempt to establish a proper place for this new form of information sharing. Recently, more media organizations have issued statements that are increasingly critical of WikiLeaks; in 2011, after WikiLeaks disseminated its full, unredacted archive of more than 250,000 secret U.S. diplomatic cables, even media organizations that had previously partnered with WikiLeaks condemned the release.

Although Assange refers to himself as "editor in chief," many of WikiLeaks' pieces do not share the characteristics of traditional media. They lack much of the balance, objectivity, and impartiality that often characterize modern journalistic standards.

37 Id.
38 Id.
39 Id.

40 Id. ("The Society of Professional Journalists issued a tortured, somewhat inscrutable press release, saying their members could not reach a consensus on the probity of WikiLeaks' actions and whether it should be considered journalism, but they seemed to accept the possibility of prosecution, writing, 'If laws were broken in obtaining [information], then the legal process will move forward.'") (quoting Press Release, Society of Professional Journalists, SPJ Statement on Ethical Journalism in Response to Latest WikiLeaks Release (Dec. 2, 2010), available at http://www.spj.org/news.asp?ref=1022).


43 See id.; see generally Stephen J. A. Ward, Global Journalism Ethics, CTR.
They are not articles that have intertwined multiple sources and points-of-view in order to create a balanced and comprehensive perspective; rather, WikiLeaks' pieces sometimes are not articles at all. At times, they are simply raw documents provided by anonymous sources, unaccompanied by description or analysis. Instead of a staff of investigative journalists, the web site largely exists as an interface in which people may "leak secret documents to the public without fear of retribution—either from the person from whom the documents were stolen or from the government itself in the form of criminal liability." Such a system, while similar in many communicative aspects to journalism, has been critiqued as unethical and even illegal.

In spite of the lack of worldwide consensus, it is likely that governments in Northern Europe would consider Assange a journalist. In addition to widespread media support of Assange, the Council of Europe has formally defined the term journalist as "any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication." This wording

45 Id. at 212; see also About WikiLeaks, http://www.wikileaks.org/media/about.html (noting that the website provides "high security anonymous drop box fortified by cutting-edge cryptographic technologies").
46 Meier, supra note 44, at 212 (stating that the actions of WikiLeaks "[go] far beyond journalism; some of these actions cross the line into the realm of blatant espionage").
47 The Council of Europe, whose membership includes forty-seven countries, seeks to "develop throughout Europe common and democratic principles based on the European Convention on Human Rights." Its permanent judicial body is the European Court of Human Rights. For more information on the Council of Europe, see COUNCIL OF EUROPE, http://www.coe.int/ (last visited Jan. 12, 2012).
conveys a broad interpretation of the definition of a journalist.⁴⁹ Although there are some ethical questions about WikiLeaks' methods of acquiring and reporting information, the organization certainly communicates and disseminates information to the public, at times even including commentary or analysis along with the uploaded raw documents.⁵⁰ As a result, this note will assume that WikiLeaks' content is considered journalism and that Assange is a journalist.

III. The Feasibility of Extraditing Journalists

Assuming that Assange qualifies as a journalist, his formal status as a member of the press will render an extradition attempt much more difficult. Extraditions are primarily effectuated through bilateral treaties.⁵¹ The United States has bilateral treaties with many European countries including Sweden and Iceland.⁵² These agreements contain a list of extraditable offenses, which are primarily offenses that have been characterized as historically and universally condemned by the international community.⁵³ For example, both lists of extraditable offenses include crimes such as murder, arson, robbery, fraud, counterfeiting, embezzlement, perjury, rape, piracy, and forgery.⁵⁴ Despite the breadth of recognized extraditable offenses, neither treaty mentions crimes violating media laws, which provides the countries with legal

---

⁴⁹ Id. at 10.
⁵⁰ See Khatchadourian, supra note 21.
⁵¹ Pursuant to the Ker-Frisbie Doctrine, the method in which a defendant comes into U.S. territory will not deprive the courts of jurisdiction to hear the case. See Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886). Although this doctrine is applicable, it is unlikely that the United States would act unilaterally in extraditing Assange for political reasons, a consideration of which is outside the scope of this note. For the purposes of this note, only bilateral extradition will be considered.
⁵² Convention on Extradition, U.S.-Swed., Oct. 24, 1961, 14 U.S.T. 1845 [hereinafter Sweden Treaty]; Treaty for Extradition, U.S.-Den., Jan. 6, 1902, 32 Stat. 1906, Jan. 6, 1902 [hereinafter Iceland Treaty]. The Iceland Treaty is a product of the 1905 Supplementary Convention, which binds Iceland to adhere to Denmark's treaties because the nation was a colony of Denmark until 1918. See Arnbjornsdottir-Mendler v. United States, 721 F.2d 679 (9th Cir. 1983) (holding that although Denmark terminated the treaty subsequent to Iceland's declaration of independence, Icelandic historical endorsement of the treaty indicates that it is still bound by the treaty).
⁵³ See Sweden Treaty, supra note 52, art. II; Iceland Treaty, supra note 52, art. II.
⁵⁴ See Sweden Treaty, supra note 52, art. II; Iceland Treaty, supra note 52, art. II.
rationales for refusing extradition. As noted in Article III of both treaties, if neither of the host nations recognize the underlying offense as a significant breach of legal norms, it is unlikely that either nation will consent to extradition.

Nevertheless, in order to fully examine the feasibility of an extradition it is necessary to look beyond the texts of the bilateral treaties. Since the treaties refer to domestic law as a means of determining whether offenses may be considered significant enough to warrant extradition, it is important to analyze the domestic legal protections offered by Sweden and Iceland in order to determine if any actions taken by WikiLeaks will be protected under applicable legal schemes. In addition to considering the legal regimes of Sweden and Iceland, both of which Assange has utilized in furtherance of his objectives for WikiLeaks, this section will also consider the European legal regime, as its laws are applicable in Sweden and potentially in Iceland, which is vying for admission into the European Union.

A. Sweden

It is important to examine the legal regime of Sweden because WikiLeaks is primarily based in Sweden. Sweden stands out as a paradigm for strong press protection, especially in the realm of Internet protection, which is especially appealing to Assange and WikiLeaks. In Sweden, the laws are particularly favorable to

---

55 See Sweden Treaty, supra note 52, art. III; Iceland Treaty, supra note 52, art. III.
56 See Sweden Treaty, supra note 52, art. III; Iceland Treaty, supra note 52, art. III; see also Serrano & Savage, supra note 18, at A9.
57 See Sweden Treaty, supra note 52, art. II; Iceland Treaty, supra note 52, art. II.
58 Nils Rekke, the head of the legal department at the Swedish prosecutor's office, has stated that should Sweden gain custody of Assange and the United States make an extradition bid, Assange would have the protections of European law. Adam Gabbatt, Julian Assange in Court for Extradition Hearing, GUARDIAN (London) (Feb. 7, 2011) http://www.guardian.co.uk/media/2011/feb/07/julian-assange-court-extradition-hearing.
60 Alex Spillius, WikiLeaks Promises to Publish Millions of Secret Files, DAILY TELEGRAPH (London) Nov. 23, 2010, at 18.
journalists because they protect both sources and whistleblowers.\textsuperscript{62} The law also renders it extremely difficult for government officials to launch investigations into the identity of anonymous sources, which provides a safety net for both journalists and leakers.\textsuperscript{63} Sweden’s basic law, known as Grundlag, not only discourages source disclosure, but also imposes criminal penalties, including imprisonment, on journalists who reveal the identities of sources.\textsuperscript{64} The majority of Sweden’s protections come from the Freedom of the Press Act,\textsuperscript{65} which has been subsumed into the nation’s constitution.\textsuperscript{66} The act states that citizens have the right to publish printed material:

without prior hindrance by a public authority . . . , and not to be prosecuted thereafter on grounds of its content other than before a lawful court, or punished therefor [sic] other than because the content contravenes an express provision of law, enacted to preserve public order without suppressing information to the public.\textsuperscript{67}

Sweden’s legal regime is especially beneficial to organizations such as WikiLeaks because it guarantees protections for both print and digital media.\textsuperscript{68} This protection has encouraged major media

\footnotesize{62 See id.}


64 See Eric Pfanner, Mixed Results in Europe on Shielding News Sources, N.Y. TIMES, Sept. 20, 2010, at B8 (stating that with the exception of national security cases, “[n]ot only are reporters largely protected from disclosing their sources, they are generally forbidden to do so”); see also TRYCKFRIHETSFRÖRDNINGEN [TF] [CONSTITUTION] 3:5 (Swed.), available at http://www.riksdagen.se/templates/R_Page_6313.aspx.

65 TRYCKFRIHETSFRÖRDNINGEN [TF] [CONSTITUTION].


67 TRYCKFRIHETSFRÖRDNINGEN [TF] [CONSTITUTION] 1:1 (Swed.).

68 The Freedom of the Press Act protects materials produced by a printing press or copied by a similar device. Id. Digital media, however, is covered by The Fundamental Law on Freedom of Expression, which protects, among other forms, material that is published in electronic form and stored in a database. See}
and human rights organizations to relocate to areas such as Stockholm, often in order to evade intrusive governmental interferences in their home countries, such as gag orders, forced redactions, and even prosecution. Much like the other organizations that have taken refuge in Sweden, WikiLeaks sought protection for its digitally stored data, relying on the legal regime that, according to one Swedish parliamentary source, treats Internet media akin to print media if a website "registers with the public authorities and can prove it has an editor-in-chief." The hosting company, PRQ, which stores much of the data accumulated by WikiLeaks, is one such website claiming protection under Swedish law. The controversial company, which operates from an unidentified location within Sweden, states: "If it is legal in Sweden, we will host it, and we will keep it up regardless of any pressure to take it down.

WikiLeaks also has supporters in the Swedish government, which may add another obstacle to any U.S. extradition attempt. Indeed, the Pirate Party, a small political party, has gone so far as to offer the use of its servers to WikiLeaks, reasoning that "it would be even more difficult for authorities to seize servers owned by a political group."

Nevertheless, Sweden's laws have limitations to their broad-based protection. Chapter Two of the Freedom of the Press Act

---


70 Swedish Law Gives Shelter to Controversial Wikileaks Site, EURACTIV.COM (Apr. 9, 2010), http://www.euractiv.com/infosociety/sweden-gives-legal-shelter-controversial-wikileaks-site-news-426138; see also Rising, supra note 61 (noting that a variety of cyber activists from a "Chechen rebel site to the file-sharing hub The Pirate Bay" have taken advantage of Sweden's liberal protections).

71 Swedish Law Gives Shelter to Controversial Wikileaks Site, supra note 70.

72 Id. (internal quotation marks omitted).


74 Rising, supra note 61.

provides a list of circumstances in which official documents may be restricted from public dissemination, including situations involving “the security of the Realm or its relations with another state or an international organisation [sic].”\(^{76}\) This statement leaves much room for interpretation, and therefore it is possible that extraditing Assange could be justified as maintaining relations with the United States. Regardless, it is unclear whether Sweden’s security interest could be extended to include the interests of allies, such as coalition forces in Iraq and Afghanistan.\(^{77}\) There is, however, evidence that Sweden may not consider the foreign implications of its media’s actions when weighing extradition requests.\(^ {78}\) Recently, the Swedish prosecutor in charge of media issues “rejected Russian calls for an investigation into a Swedish-based Chechen rebel website, saying the country’s laws are aimed at protecting public order in Sweden, not in ‘Russia or elsewhere in the world.’”\(^ {79}\)

Despite the limited exceptions that might render WikiLeaks’ publication unprotected by the Freedom of the Press Act, the Swedish government is unlikely to interpret Assange’s actions to be an extraditable offense.\(^ {80}\) Swedish Foreign Minister Carl Bildt has said he believes that Assange’s actions raise question of ethics rather than legality.\(^ {81}\) Additionally, while Swedish authorities

\(^{76}\) TRYCKFRIHETSFRÖRORDNINGEN [TF] [CONSTITUTION] 2:2 (Swed.). The Freedom of the Press Act allows the restriction of official documents in situations involving:

- (1) the security of the Realm or its relations with a foreign state or an international organization;
- (2) the central finance policy, monetary policy, or foreign exchange policy of the Realm;
- (3) the inspection, control or other supervisory activities of a public authority;
- (4) the interest of preventing or prosecuting crime;
- (5) the public economic interest;
- (6) the protection of the personal integrity or economic conditions of private subjects; or
- (7) the preservation of animal or plant species.

\(^{77}\) Rising, supra note 61.

\(^{78}\) See id.

\(^{79}\) Id. (noting, to the contrary, that prior to the conviction of the four men who created the Pirate Bay file sharing website, there were extensive communication between United States-based lobbying groups and the Swedish government, indicating that the United States may be able to exercise some influence over the decisions to prosecute).

\(^{80}\) As the United States government has not formally charged Assange with any crime, it is beyond the scope of this note to speculate on which actions he may be charged.

\(^{81}\) Rising, supra note 61.
have confirmed that they would "seriously weigh any request," they also "noted that their treaty with the United States does not cover crimes that are political or military in nature." 82 Recent history also indicates that Sweden has not cooperated with foreign demands to intervene with the nation's media. 83 In 2009, Bildt "dismissed demands by Israel for the government to condemn a Swedish newspaper article that claimed Israeli soldiers harvested organs from dead Palestinians." 84 Sweden's history and legal regime make it unlikely that it will consider Assange's actions illegal, thus rendering the country unlikely to cooperate in extradition efforts. 85

B. Iceland

Perhaps the starkest examples of very strong media protections are those that are anticipated to be adopted in Iceland. 86 Assange and WikiLeaks have a long history in Iceland; the island nation is where Assange chose to work on "Project B," a now infamous video taken in an American Apache helicopter that "depicted American soldiers killing at least eighteen people, including two Reuters journalists" during an operation in Iraq in 2007. 87 Yet, Assange's links to Iceland are far more extensive than simply a preferred place to work. On June 16, 2010, Assange

83 Rising, supra note 61 (noting Sweden's refusal to cooperate in shutting down a Chechen rebel organization using Swedish servers).
84 Id.
85 In addition to restrictions from the extradition treaties, Sweden is unlikely to extradite Assange for several other reasons. Sweden has a reputation for protecting asylum seekers and has stated that it is less likely to extradite to the United States than to a European Union country. See Faiola & Markon, supra note 82, at A1; Even if U.S. Indicts, Assange Extradition Not Certain, MSNBC (Dec. 10, 2010, 2:06 PM), http://www.msnbc.msn.com/id/40606371/ns/us_news-wikileaks_in_security/t/even-if-us-indicts-assange-extradition-not-certain/#.TqhX5GBEPF4.
87 Khatchadourian, supra note 21.
consulted with members of the Icelandic Parliament to draft a proposal, known as the Icelandic Modern Media Initiative ("IMMI"), purporting to strengthen the nation's existing legal framework protecting journalistic expression. The initiative, which was subsequently unanimously passed, has garnered much attention in Iceland and internationally. The proposal's chief sponsor, Parliamentary Member Birgitta Jonsdottir, hailed the proposal for creating an international haven in which investigative journalists could escape the constraints of governmental interference. The law has several important components, a few of which will be discussed in Parts B.1-5 of this note. The initiative was proposed to shelter journalists through a wide array of legal protections, yet, if codified, the law could have the effect encouraging the continued questionable actions by organizations such as WikiLeaks.

1. Libel Tourism

One of the central issues that the initiative addresses is libel tourism, which occurs when a plaintiff in a libel action forum shops internationally. Libel tourism is perpetuated as a result of the single publication rule, which states that "if a single edition of a [publication] containing a defamatory statement is published nationally or even internationally, a plaintiff is limited to choosing only one jurisdiction of publication in which to sue." In the digital era, however, instantaneous and worldwide dissemination

---

88 Iceland to Become International Transparency Haven, supra note 26.
89 Id. While the initiative has been passed by Parliament, it has not been implemented as the IMMI necessitates that Iceland update its current laws or codify new laws in order to realize the goals of the IMMI. See id.
90 Id. (stating that Iceland will become a haven for journalists "by offering journalists and publishers some of the most powerful protections for free speech and investigative journalism in the world").
91 See id.; see also Michelle Feldman, Putting the Breaks on Libel Tourism: Examining the Effects Test As a Basis for Personal Jurisdiction Under New York's Libel Terrorism Protection Act, 31 CARDOZO L. REV. 2457, 2460-61 (2010) ("[A]n action for libel requires a libelous statement that causes reputational harm. To bring a libel suit in a particular jurisdiction, a plaintiff must have suffered damages there. In other words, the plaintiff must have had a reputation in that territory and must show that the libelous material was published there.").
92 Feldman, supra note 91, at 2461 (citing RESTATEMENT (SECOND) OF TORTS § 577A (1977)).
has led the single edition rule to evolve into an invitation for nearly any court to exercise jurisdiction and to apply its own country's substantive libel laws, regardless of the place of publication.93

Libel tourism has received attention in recent years due to the popular application of English libel law.94 Because English libel law is perceived to be plaintiff-friendly, legal actions that have seemingly little connection to England are nevertheless brought in English courts.95 For example, in one well-known case, Dr. Rachel Ehrenfeld, an American consultant and expert on terrorist financing, authored the book Funding Evil: How Terrorism Is Financed—and How to Stop It, which was published in the United States and stated that Saudi banker Khalid bin Mahfouz provided financial support to Osama bin Laden and al Qaeda.96 Despite its domestic publication, twenty-three copies of the book were sold online and shipped to England.97 In court documents, bin Mahfouz cited these scant online purchases and sued Ehrenfeld in England, despite the fact that neither he nor Ehrenfeld claimed English citizenship or resided in the country.98 In the United States, state legislatures began to recognize the need to protect its citizens from such libel actions; for example, New York adopted the Libel Terrorism Protection Act,99 which provides that New York state courts are not required to enforce foreign libel judgments if such judgments are contrary to the First Amendment to the U.S. Constitution.100

The Icelandic proposal is modeled after the Libel Terrorism Protection Act, but also extends further.101 The initiative seeks to

---

93 Id.
95 Feldman, supra note 91, at 2464.
96 Feldman, supra note 91, at 2457.
97 Id.
98 Id. at 2457, 2487.
100 Feldman, supra note 91, at 2459 (citing N.Y. C.P.L.R. 302, 5304 (McKinney 2008)). The Act also provides the court with jurisdiction to hear counterclaims against the libel tourists themselves. Id.
101 Libel Tourism Protection, supra note 94.
encourage free expression by protecting journalists against foreign prosecution and by providing a forum to counterclaim the original allegations.\textsuperscript{102} In tandem with Iceland’s proposed source protection laws, considered \textit{infra} Part B.2, this law will allow journalists such as Julian Assange to isolate themselves in Iceland and receive and publish potentially unethically or illegally begotten sources, while remaining immune from foreign judgments.

2. \textit{Source Protection}

Iceland’s proposal also seeks to increase source protection, thereby allowing journalists to refuse to name sources in more circumstances than what is currently allowed.\textsuperscript{103} Supporters of Iceland’s initiative expect the law to strongly augment source protection such that it would “far exceed” the mandates established by the Council of Europe,\textsuperscript{104} which has directed member nations to establish “explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms,” except in limited circumstances in which some other interest outweighs the interest in non-disclosure.\textsuperscript{105}

Iceland has elected to model its law on Sweden’s strict source protection laws,\textsuperscript{106} which generally discourage disclosure and even carry criminal penalties—a maximum penalty of six months imprisonment—should the journalist be criminally convicted for disclosing his or her source’s identity.\textsuperscript{107} In addition to this

\textsuperscript{102} \textit{Id.}

\textsuperscript{103} \textit{See id.} (noting that under current Icelandic law, the government may require journalists to disclose their sources only upon a court ruling mandating disclosure).

\textsuperscript{104} \textit{Id.}


\textsuperscript{106} \textit{Frequently Asked Questions, INTERNATIONAL MODERN MEDIA INSTITUTE}, http://immi.is/FAQ (last visited Jan. 12, 2012); \textit{c.f. supra} notes 63-65 and accompanying text (describing Sweden’s laws).

\textsuperscript{107} \textit{Frequently Asked Questions, supra} note 106.
disincentive to disclose one’s sources, the IMMI also provides that Iceland’s current media law, which states that “journalists have a right to refuse to expose sources except when a court ruling states otherwise,” seems to be an “overly broad exception,” indicating that even Iceland’s judiciary would be significantly limited in its ability to control its nation’s press should the IMMI be enacted. In situations where journalists regularly receive and publish stolen or illegally obtained information, the protection of sources will only serve to perpetuate the information security problems.

3. Whistleblower Protections

The initiative also addresses the issue of whistleblower protections. Whistleblower laws are essential to stringent media protections, as they allow journalists to keep their sources confidential, establishing the bedrock of trust that must exist for open communication between the journalists and their sources.

Europe, in large part, has lagged behind the United States in offering protections to those attempting to expose harmful corporate or governmental practices. Iceland’s initiative would bring the nation in line with the United States, and perhaps even eclipse the protections offered to American citizens. The proposal’s sponsors seek to enact legislation that will permit official employees to “break their duty of silence in the case of extreme circumstances of public interest.” While it is unclear what an extreme circumstance of public interest would entail, it is quite possible that it would encompass much of WikiLeaks’

112 Whistleblower Protection, supra note 109.
contents, which although potentially damaging to national security, relate to matters of international interests, including banking practices, war, and governmental corruption.  

4. International Effect of the Initiative

Icelandic officials drafted the initiative to have an extraterritorial effect. In 2010, Jonsdottir noted that the initiative has garnered “an incredible amount of dialogue between journalists in different countries.” The Member of Parliament further stated, “I have already heard from journalists who can’t wait to move here or to have a second base here, including some very prominent producers. . . . I think it’s important to have one place in the world that is a haven for transparency.”

It is likely that the initiative will be implemented fully. In addition to the support of Parliament, the initiative has the support of the people, who in the wake of the 2008 financial collapse of Iceland, will likely support measures for increased governmental transparency and an independent and responsible press as a measure to prevent another massive financial crisis.

The initiative is arguably in the best interest of Iceland, which is still reeling from the financial meltdown that led to the collapse of three of the nation’s largest commercial banks and left the government in crisis. The initiative would encourage organizations to route their information through Iceland’s borders,

---


114 See Hirsch, supra note 59.

115 Id.


117 Hirsch, supra note 59 (quoting Kristinn Hrafnsson, an Icelandic investigative journalist and news presenter, who said, “most people agree that the press were not doing a good job of holding business tycoons to account. We were leaving it up to the business specialists, and instead of being critical of the business tycoons, they were in bed with them.”).

118 See Jonas Moody, Global Financial Crisis Claims Iceland, TIME, Jan. 26, 2009, http://www.time.com/time/world/article/0,8599,1874036,00.html. For more information about Iceland’s financial meltdown, arguably the worst in global history, see id.
providing the country much needed financial and reputational relief.\textsuperscript{19} Iceland's legal protections are made practicable by the nation's vast structural telecommunications framework; Iceland is already capable of routing information throughout the world as "it has fast undersea cables to some of the world's largest consumers of information, and its clean green power and cool temperatures are attractive to those running internet services."\textsuperscript{120}

The law will create a safe haven for investigative journalists by combining elements of the world's strongest media laws, likely generating the most robust and comprehensive protection available.\textsuperscript{121} The initiative will not only protect the actions taken by journalists inside Iceland, but it will also shield journalists from extraterritorial liability, as the package includes "provisions that will stop the enforcement of overseas judgments that violate Icelandic laws."\textsuperscript{122}

5. Limitations of the Initiative

There are, however, limitations to the law's effectiveness. One such limitation concerns the definition word of the "publish" contained in the law; although the IMMI was designed to protect publishers of information in Iceland from governmental intrusion, there is confusion about when the publication of online materials occurs.\textsuperscript{123} If the publication occurs at the point of download, rather than upload, this may not necessarily protect servers in Iceland from liability in foreign courts where residents have


\textsuperscript{120} A Vision for Iceland, supra note 69 (noting that "distance and communications capacity, server costs and legal environment" are important factors in rendering decisions about where to publish).

\textsuperscript{121} Archie Bland, Iceland Rewrites Law to Create Haven for Investigative Reporting, INDEPENDENT (London), Jun. 17, 2010, http://www.independent.co.uk/news/world/europe/iceland-rewrites-law-to-create-haven-for-investigative-reporting-2002591.html (highlighting Birgitta Jonsdottir's statement that, "[w]e're taking the best laws from around the world and putting them into one comprehensive package that will deal with the fact that information doesn't have borders any more.").

\textsuperscript{122} Id.

\textsuperscript{123} Stray, supra note 63.
uploaded the offending document.\textsuperscript{124} There is authority supporting the proposition that publication occurs at the time of download rather than upload.\textsuperscript{125} Although \textit{Dow Jones & Co. Inc. v. Gutnick} was heard by the High Court of Australia in 2002, it has had precedential effect on later cases internationally.\textsuperscript{126} In that defamation suit, the court held that although no one in Australia had read the libelous article at issue except the plaintiff's lawyers, the article was downloaded in Australia, and, therefore, Australian law applied.\textsuperscript{127} This precedent will enable plaintiffs to sue in "libel-friendly jurisdictions... and thereby circumvent all the protections the IMMI is meant to offer."\textsuperscript{128}

Additionally, the law is not expected to have immediate effect, limiting its practical application for quite some time.\textsuperscript{129} Once the changes in law go into effect, judicial interpretation of its nuances will likely take years.\textsuperscript{130} It is also unlikely the law will inspire other nations to be so open with their media laws, especially when the liberal media laws infringe upon important government interests. Professor Monroe Price, founder of Oxford University's comparative media law program, stated "if it's a significant issue like a national security question, then the charging jurisdiction will figure out ways of asserting its power."\textsuperscript{131}

The IMMI also faces legal obstacles within Iceland.\textsuperscript{132} If passed, the initiative's content would require the legislature to modify an estimated thirteen laws so that they may be in accord with the initiative's directives.\textsuperscript{133} The initiative also may

\textsuperscript{124} Id. (noting that "if nothing else, it would probably prevent your servers from being forcibly shut down").

\textsuperscript{125} \textit{Dow Jones & Co Inc v. Gutnick} (2002) 210 CLR 575 (Austl.).


\textsuperscript{127} Id.

\textsuperscript{128} Id.

\textsuperscript{129} See \textit{Iceland to Become International Transparency Haven}, supra note 26 (describing that the initiative means that the government must redraft its legislative regime to conform with the initiative).

\textsuperscript{130} See Bright, supra note 126.

\textsuperscript{131} Bland, supra note 121.

\textsuperscript{132} Hirsch, supra note 59.

\textsuperscript{133} Id.
compromise Iceland’s international obligations.\textsuperscript{134} Iceland is currently a candidate for membership in the European Union, which has its own legal regime regarding issues involving the media.\textsuperscript{135} Therefore, the initiative may hinder the nation’s ability to join the European Union, due to inconsistencies between the initiative and EU law, especially in the area of recognition of foreign judgments.\textsuperscript{136} EU law requires its Member States to both recognize and enforce foreign judgments, whereas Iceland’s initiative would prevent Iceland from doing so, bringing it in direct conflict with current EU law.\textsuperscript{137}

\textbf{C. European Media Laws}

In addition to their own domestic laws, Sweden and Iceland may also rely on the stringent protections of the press encouraged by European laws, specifically source protection and whistleblower laws, which protect journalists and deter extradition requests. The European Convention on Human Rights offers strong protection for journalists who refuse to divulge their sources, and the European Court of Human Rights ("ECHR") has indicated that it favors strong media protections.\textsuperscript{138} In a recent and highly anticipated case, \textit{Sanoma Uitgevers B.V. v. The Netherlands},\textsuperscript{139} involving a Dutch magazine that refused to surrender certain photographs to the police, the court upheld the necessity of procedural safeguards in the protection of sources.\textsuperscript{140} In essence, the ECHR held that "journalists could not be forced to hand over information unless the police, having demonstrated that disclosure was essential to the investigation of a serious crime, first obtained a warrant from a judge."\textsuperscript{141} In rendering its opinion, the court noted that the right to protect sources was an essential

\begin{itemize}
  \item \textsuperscript{134} \textit{Id.}
  \item \textsuperscript{135} \textit{See id.} (stating although Iceland is currently in talks regarding its membership, surveys have shown that eighty percent of citizens opposing joining the European Union).
  \item \textsuperscript{136} \textit{Id.}
  \item \textsuperscript{137} Hirsch, \textit{supra} note 59.
  \item \textsuperscript{138} \textit{See Pfanner, supra} note 64.
  \item \textsuperscript{140} \textit{Id.} ¶ 88.
  \item \textsuperscript{141} Pfanner, \textit{supra} note 64.
\end{itemize}
journalistic privilege that is protected by the European Convention on Human Rights.142 Geoffrey Robertson, the attorney representing a group of media organizations who supported the beleaguered magazine, hailed this decision as “an acid test for the court and for media freedom across Europe,” and noted that it will “set a high benchmark for protection of journalistic materials.”143

Additionally, in 2007, in the case of Tillack v. Belgium144 the ECHR stressed the importance of the ability of journalists to protect their sources.145 The court stated that “the right of journalists to protect their sources is not a ‘mere privilege to be granted or taken away’ but that it is a fundamental component of the freedom of the press.”146

The Council of Europe also recently reaffirmed the importance of whistleblower laws to freedom of the press. When evaluating Turkey’s bid to become a member of the European Union, the Council stated that Turkey should adopt legislation to protect whistleblowing through the media if it had no laws or if its laws were dysfunctional.147 Turkish courts have had numerous suits brought regarding whistleblowers.148 Since 2007, thousands of suits have been filed against newspapers, reporters, and television stations.149 Turkish Justice Minister Sadullah Ergin recently stated that between June 2007 and October 2009, 4,139 lawsuits were filed against journalists, alleging violations of “confidentiality, influencing the independence of the judiciary and violating the confidentiality of preliminary investigations.”150

143 Pfanner, supra note 64.
145 See Bozkurt, supra note 144.
146 Id.
147 See id.
148 Id.
149 Id.
150 See Bozkurt, supra note 144.
found that Turkey’s current law, the Witness Protection Law, did not adequately protect those who expose secrets.\textsuperscript{151} The Council’s strict position on whistleblower protections in Turkey indicates that much of the European community may favor the stringent laws that Iceland’s initiative proposes.

IV. Conclusion

Having Julian Assange extradited to the United States would permit the United States to officially convey its condemnation of WikiLeaks. The extradition process, however, is likely to be difficult and arduous.\textsuperscript{152} Extradition treaties with Sweden and Iceland, where Assange has developed significant professional ties, do not necessitate an extradition. Rather, national laws might actually prohibit an extradition.\textsuperscript{153} Both Swedish and Icelandic laws are extremely press-friendly, which would hinder U.S. efforts to extradite.\textsuperscript{154} Additionally, these strong laws are a point of pride for many citizens,\textsuperscript{155} indicating that there may be a lack of political will to extradite Assange.

With the difficulties involved in extraditing Assange from either Sweden or Iceland, the United States could pursue other alternatives. The United States may seek an extradition from the United Kingdom, where Assange currently resides, after the matter of Sweden’s arrest warrant is resolved. The United Kingdom is one of the “most U.S.-friendly extradition regimes in Europe,” with the two nations signing a fast-track extradition treaty in 2003.\textsuperscript{156} Additionally, the United States may also attempt to financially harm WikiLeaks. In 2010, the United States took this approach; the U.S. Department of State asked companies, such as MasterCard and PayPal, to avoid interaction with the web site, and several businesses, including the aforementioned, complied with

\textsuperscript{151} See id.
\textsuperscript{152} See Faiola & Markon, supra note 82, at A1.
\textsuperscript{154} See Satter, supra note 153; see also Hirsch, supra note 59.
\textsuperscript{155} See Hirsch, supra note 59.
\textsuperscript{156} See Satter, supra note 153.
the demands.\textsuperscript{157}

The United States also has other, increasingly severe, options available. As the digital age has progressed, the U.S. Department of Defense has developed "sophisticated cyber warfare capabilities" that may be capable of shutting down or causing major disruptions to the operations of WikiLeaks.\textsuperscript{158} Although there was some speculation that the United States already attempted such a cyber attack on the website on or around November 19, 2010, Department of Defense spokesman Marine Col. Dave Lapan denied such an attack by the government.\textsuperscript{159} Even if the government has not yet acted, several officials have urged that such action be taken,\textsuperscript{160} and it appears that the Department of Defense is preparing fiscally for the possibility. In 2010, the Defense Department has allocated $150 million "on a new command to lead cyberwar efforts."\textsuperscript{161}

The United States may also seek to exert increased political pressure on Sweden or Iceland in an attempt to gain cooperation in the extradition process. The United States recently exerted such pressure against Thailand in a successful bid to gain custody of Russian arms dealer Viktor Bout.\textsuperscript{162} In that case, the United States Ambassador to Thailand offered both warnings and promises in an effort to accelerate the extradition process.\textsuperscript{163}

With cooperative extradition not likely to occur, the United States will increasingly be forced to choose between taking more drastic action in order to deter organizations such as WikiLeaks


\textsuperscript{159} \textit{Id.} (noting that the United States has never acknowledged attacking a foreign computer network).

\textsuperscript{160} \textit{Id.} (noting that former State Department official Christian Whiton stated, "[A]ssaulting the company electronically is something worth trying. . . . [I]t buys you time to go after the organization in other ways").

\textsuperscript{161} \textit{Id.} (noting that the mission of the command is "aimed principally at defending military computer networks or attacking those of the enemy").

\textsuperscript{162} Elliot, \textit{supra} note 17.

\textsuperscript{163} \textit{Id.} The United States cautioned of a setback in relations should "corruption and undue influence" affect the extradition process and utilized reaffirmations of the Drug Enforcement Agency's commitment to the nation's drug trafficking problem. \textit{Id.}
and remaining passive in the face of the dissemination of its secrets. The advent of robust media laws in Northern Europe will only exacerbate this growing problem, making it difficult for the United States to prosecute journalists such as Assange, and potentially necessitating alternative measures to counter the flow of leaked national security information.