



“WikiLeaks Documents Explosive”:¹ The Potentially Perverse Effects of Scholars’ Being Forced to Look to Third Parties Rather Than State Institutions for Classified Material

Samuel Brenner

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears . . . All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government.²

Federal and state institutions in the United States can be leery of providing researchers with unrestricted access to archival materials, especially when those materials relate to contentious or embarrassing events or historical periods. Following the terrorist attacks on September 11, 2001, that leeriness blossomed into outright distrust: in 2001, for example, then Attorney General John Ashcroft instructed the heads of all federal departments and agencies that, when faced with a records request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, they should effectively err on the side of refusing to disclose documents.³ Ashcroft’s policy explicitly superseded an existent policy⁴ establishing a “presumption” in favour of disclosure. Although that presumption was reinstated by President Barack Obama,⁵ there is now

¹ Howard LaFranchi, “WikiLeaks Documents Explosive, but no Pentagon Papers—Yet,” *Christian Science Monitor* (June 26, 2010), <http://www.csmonitor.com/USA/Military/2010/0726/WikiLeaks-documents-explosive-but-no-Pentagon-Papers-yet>.

² Presidential Memorandum for the Heads of Executive Departments and Agencies on the Freedom of Information Act (January 21, 2009), http://www.dol.gov/dol/foia/2009_FOIA_memo.pdf.

³ Memorandum from the Office of the Attorney General to the Heads of Departments and Agencies (October 12, 2001), <http://www.justice.gov/archive/oip/011012.htm> (“Any discretionary decision . . . to disclose information protected under the FOIA should be made only after full and deliberate consideration . . . [When you] decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions . . .”)

⁴ See Memorandum from the Office of the Attorney General to the Heads of Departments and Agencies (October 4, 1993).

⁵ See Presidential Memorandum for the Heads of Executive Departments and Agencies on Transparency and Open Government (January 21, 2009), http://www.gwu.edu/~nsarchiv/news/20090121/2009_transparency_memo.pdf; Presidential Memorandum for the Heads of Executive Departments and Agencies on the Freedom of Information Act (January 21, 2009), http://www.dol.gov/dol/foia/2009_FOIA_memo.pdf.

some evidence that agencies are still refusing to release any records that might detail internal administration decision-making.⁶ Moreover, even where state institutions are willing to release documents, given the nature of government bureaucracy it can take time and resources for scholars to obtain needed materials.

In this essay, in the context of explaining how I came into possession of many of the most important or revealing documents I described in my dissertation, I address one of the effects of the official reluctance to release documents: the increasing importance of independent third-party collectors and aggregators as critical research sources. With the development of the Internet and the concurrent rise of such Web sites as *Talking Points Memo*, *Huffington Post*, *The Daily Beast*, the *Drudge Report*, the gossip-oriented *Gawker*, and perhaps particularly and most recently *WikiLeaks*, it has become far easier for researchers looking for documents to go to these third-party sources rather than to approach governmental institutions directly. One perverse result of governmental reluctance or hesitation to release official documents is thus to add third parties, who may have their own motives, into the research process.⁷ This in turn may require scholars to base their research in part on material of uncertain provenance, running the risk of injecting increased uncertainty into the analyses of critically important government policies or historical events. Rather than *protecting* national interests, continued adherence in the *WikiLeaks* era to secretive policies may result in scholarly reliance on and dissemination of incorrect information that is harmful to national interests—not to mention the interests of posterity. Of particular interest to socio-legal scholars is the effect that this potential distortion of data might have on the development and understanding of statutes and even constitutional provisions.

Courts and legislatures have regularly looked to socio-legal data, such as what impact race has upon administration of the death penalty in the United States⁸ or the extent and effect of violence against women,⁹ in order

⁶ See, e.g., Daniel J. Metcalfe, “Sunshine Not So Bright: FOIA Implementation Lags Behind,” *Administrative and Regulatory Law News* 34 (2009), 5; “Audit: Agencies Lag in Following Obama’s Openness Order,” *Associated Press* (March 15, 2010); “Sunshine and Shadows: The Clear Obama Message for Freedom of Information Meets Mixed Results” (March 15, 2010), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB308/2010FOIAAudit.pdf>.

⁷ On January 25, 2011, *The Cutline* blog reported that the *New York Times* is considering creating an “in-house submission system” that would allow readers to leak material directly to the paper. Michael Calderone, “NY Times Considers Creating an ‘EZ Pass Lane for Leakers,’” *The Cutline* (January 25, 2011), http://news.yahoo.com/s/yblog_theoutline/20110125/ts_yblog_theoutline/ny-times-considers-creating-an-ez-pass-lane-for-leakers. This move would mirror *Al Jazeera*’s creation of a “Transparency Unit” designed to accomplish the same task. See Raffi Khatchadourian, “A WikiLeaks Arms Race?” *The New Yorker* blog (January 24, 2011), www.newyorker.com/online/blogs/newsdesk/2011/01/transparency-unit-wikileaks.html#ixzz1C7Uapeac.

⁸ See *McCleskey v. Kemp*, 481 US 279 at 286–87, 308 (1987) (addressing the import of “two sophisticated statistical studies” regarding the correlation between race and imposition of the death penalty).

⁹ See *United States v. Morrison*, 529 US 598 at 629–34 (2000) (citing findings Congress made on the basis of numerous studies before enacting the Violence Against Women Act, parts of which the Supreme Court struck down as unconstitutional).

to understand the import and impact of various statutory schemes. In the absence of reliable information, the provenance of which all parties respect, analysis of the effects laws have on society—by courts, legislators, and socio-legal scholars—will suffer.¹⁰

Conspiracists and Conspiracy Buffs

In retrospect, my trip to southern California to research my dissertation seems somewhat surreal. In my first two years as a doctoral student at Brown University in Providence, RI, I had settled on a fascinating subject for study: the rise of ultra-conservative, “Americanist” organizations in the mid-twentieth century, the start of the era of modern US conservatism. “Americanists,” as they wished to be called, were members of various ultra-conservative, anti-communist, and even conspiracist movements that combined beliefs in religiosity, free market economics, opposition to liberalism and socialism, and the importance of personal autonomy, with a deep and abiding concern about what they viewed as the perfidy and danger posed to the United States by an international communist conspiracy that, in the eyes of many Americanists, had already spread its tentacles throughout US government and society. Despite holding some positions that led to them wrongfully being conflated with members of the Ku Klux Klan, the American Nazi Party, or paramilitary organizations, Americanists instead on the whole sought to expose and oppose what they viewed as the communist conspiracy through tangible and non-violent daily “educational” activities, such as writing letters, circulating petitions, distributing literature, and sponsoring and attending talks and seminars.

Among the groups I was most interested in was the John Birch Society, the conspiracist views of which (notably including the belief that fluoridation of public water supplies was a communist plot perhaps designed to weaken the brains of Americans¹¹) were famously parodied in Stanley Kubrick’s *Doctor Strangelove: Or, How I Learned to Stop Worrying and Love the Bomb*. The secretive Birch Society, which was founded in 1958 by Robert Welch, the inventor of the Sugar Daddy caramel lollipop, had initially been based in Belmont, Massachusetts. When, in the 1980s, the Society finally moved its headquarters out of Massachusetts and into Wisconsin, near the grave of Joseph McCarthy, it disposed of decades of confidential files. Many of these were later collected and given to the John Hay Library at Brown University. After spending months sifting through those files, and working with

¹⁰ For an example, in a related context, of how governmental action reducing available accurate information causes difficulties for those attempting to understand the effects of particular laws (here gun control laws) on society, see Michael Luo, “N.R.A. Stymies Firearms Research, Scientists Say,” *New York Times* (January 25, 2011), <http://www.nytimes.com/2011/01/26/us/26guns.html> (arguing that after lobbying by the National Rifle Association, the government no longer provides funding to researchers investigating links between gun ownership and violence).

¹¹ See, e.g., Samuel Brenner, *Shouting at the Rain: The Voices and Ideas of Right-Wing Anti-Communist Americanists in the Era of Modern American Conservatism, 1950–1974* (Ann Arbor, MI: University Microfilms International, 2010), 27–28, 413–15.

various other archival collections at the John Hay, I began looking farther afield for new sources. I visited the Herbert Hoover Presidential Library in Iowa to research the famed columnist Francis James Westbrook Pegler, examined the papers of the influential Americanist writer and broadcaster Dan Smoot in College Station, Texas, and researched Barry Goldwater's and Ronald Reagan's connections to extremists at the Hoover Institution in Palo Alto, California. What I really wanted to see, however, were the Federal Bureau of Investigation's (FBI) own extensive files regarding Americanist organizations—but there I ran into difficulties. When I began to make some inquiries into the possibility of filing FOIA requests, I was told that I might have to wait literally years before receiving any information.¹² Waiting for years is not something doctoral students, who often depend on the relatively meagre stipends provided by their universities, and who must make regular progress towards earning their degrees, can safely do.

From the moment I began researching and writing about ultra-conservative anti-communist conspiracists, I had become aware of the existence of a large, loose, national network of conspiracy theorists and buffs similarly fascinated by organizations such as the John Birch Society. Sometimes these buffs contacted me directly to share theories about what they viewed as the “true nature” of the communist (or, to some, the Jewish) threat, or about who had “really” been behind the assassination of John F. Kennedy. Occasionally, when there was some indication that the individuals in question had examined important documents and were more interested in studying conspiracists than unmasking conspiracies, I contacted them to ask about their sources. One partially anonymous “independent researcher” in particular was intriguing; he not only claimed to have seen many of the FBI files that I wanted to examine, he claimed to possess hundreds of thousands of pages of documents, which he had collected over the course of years by filing FOIA requests, collecting dissertations, and sending away for copies of papers from archives. After tracking down several online accounts and an old postal address, I finally found myself speaking on the phone with this individual—and in possession of a gracious offer to stop by his apartment in a desert town in southern California to see some of these documents.

As I remember, I was very nervous as I drove up to his apartment. Those interested in conspiracies, I had learned from experience, were not always

¹² FOIA, which was enacted in 1966, applies to departments and agencies in the executive branch of the US government, but does not apply to Congress, the federal courts, or parts of the Executive Office of the Presidency. Although it does not apply to state governments, every state has freedom of information statutes. To file a FOIA request, interested parties must simply write detailed letters to the relevant agencies explaining what information they are seeking, and they should ideally receive responses as well as information about fees. In the event an agency responds in an unsatisfactory fashion, the information-seeker can file an administrative appeal. Each agency maintains a Web site with information about how to seek information from that agency through FOIA, together with sample FOIA request letters. The Web site of the National Security Archive at George Washington University also provides useful information about FOIA and how to seek information through FOIA requests (www.gwu.edu/~nsarchiv/nsa/foia/howtofoia.html), as does the National Archives itself (www.archives.gov/foia/).

closely connected to reality, and this man had refused to tell me much about his past or why he found ultra-conservatives so interesting. Once I reached his apartment, however, I found that he had not been exaggerating about the materials he had gathered. His living room was stacked with documents from government, university, and private archives. I filled my rental car, spent the next two days at a copy shop and shipped heavy boxes of papers back home. Over the next few years, these papers formed the basis for several of my dissertation chapters. They contained surprising and fascinating information regarding the relationship (or lack thereof) between the FBI and Americanists, who viewed J. Edgar Hoover as the leading anti-communist in the United States, and also about the activities and beliefs of individuals such as Welch, the disgraced former major general and segregationist Edwin A. Walker, and Dr Fred Schwarz, the founder of the Christian Anti-Communism Crusade.

Even as I relied on these documents, I made sure to cross-check and authenticate my sources as much as possible. I am confident about the provenance of the materials I received from this independent researcher, but it does not escape my attention that, had he *wanted* to falsify some fact, or remove a critical document, it is likely he could have done so without my noticing. What I found surprising then, and still find surprising today, is that—despite the fact that many of the documents I found came from government archives and others were doubtlessly replicated in government archives but were still classified—to obtain these materials the easiest thing for me to do was to fly to Los Angeles, drive into the desert, and meet a somewhat mysterious (though gracious and helpful) conspiracy buff in an apartment filled with papers. In other words, by erecting barriers to open access to documents under its control, the government had created a perverse incentive for researchers to turn to third parties such as (in my case) these conspiracy buffs, all of whom necessarily have their own motives and prejudices. For scholars writing on any potentially sensitive subjects, the government's reticence thus unnecessarily interjects an additional link in the chain of historical evidence.

Aggregators and Aggravators

It is still sometimes hard to grasp how easy it is to disseminate and discuss information in the modern Internet-driven era. Particularly illustrative is the release in 2010 and 2011 by the online site *WikiLeaks* of hundreds of thousands of classified leaked documents, including the United States' diplomatic cables and documents from the wars in Afghanistan and Afghanistan.¹³

¹³ See, e.g., Ellen Nakashima and Joby Warrick, "WikiLeaks Takes New Approach in Latest Release of Documents," *Washington Post* (July 26, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/25/AR2010072503356.html>; "Huge Wikileaks release shows US 'ignored Iraq torture,'" *BBC News* (October 23, 2010); James Ball, "WikiLeaks publishes full cache of unredacted cables," *Guardian* (September 2, 2011). *WikiLeaks* is certainly not the only Web site publishing and publicizing once-secret documents (even government documents) for public scrutiny. *Talking Points Memo*, a liberal site publishing commentary, has a companion site, *TPMMuckraker*, that seems dedicated to publishing and discussing documents and other evidence describing

Just as important as the structure of the Internet, which permits widespread dissemination of leaked governmental materials, is the nature of modern data storage, which permits extremely rapid copying and transfer of enormous amounts of information by even low-level soldiers or employees.¹⁴ The existence of popular third-party aggregators, such as *Talking Points Memo*, the *Huffington Post*, and the *Drudge Report*, is now well-understood and accepted. What is sometimes overlooked is that these third-party aggregators—and, indeed, almost any third parties—have biases and prejudices driving their actions, and that their biases are probably not always perfectly evident. *Talking Points Memo* is an avowedly liberal news site, as is the *Huffington Post*; *The Drudge Report*, in contrast, is conservative in tone. *WikiLeaks*, on the other hand, is hard to characterize. It might be most accurate to say that it is anti-authority.¹⁵ Regardless, it is evident that some of these third-party aggregators are also *aggravators*; they want to bring about a particular political or social outcome, and collect, link to, or release material in order to achieve that end. Careful scholars can try to correct for the biases inherent in source collection, but any analysis that results from such correction is obviously somewhat less trustworthy than an analysis produced on the basis of information from a trusted objective source.

In the era of easy access to information, scholars will likely turn to the avenues that offer information in the easiest fashion—especially if they are barred from getting that information by the very government whose policies or history they wish to examine. What this means is that if the government erects any barriers—temporal, monetary, or logistical—to obtaining information from governmental (and so presumably trusted) sources, scholars engaged in socio-legal research are simply going to look elsewhere.

governmental corruption. In 2009, *Wired* identified and published a secret government document that was actually part of the prospective Anti-Counterfeiting Trade Agreement. David Kravets, “Here’s That Leaked Copyright Treaty Document,” *Wired* (November 6, 2009), <http://www.wired.com/threatlevel/2009/11/acta/>. Early in 2011, *Al Jazeera* and the *Guardian* jointly published what became known as the “Palestinian Papers,” which were files reportedly revealing information about the Palestinian bargaining positions during negotiations with Israel in 2008. See, e.g., Edmund Sanders, “Leaked Documents Show Palestinians Ready to Deal at 2008 Peace Talks,” *Los Angeles Times* (January 26, 2011), <http://www.latimes.com/news/nationworld/world/la-fg-palestinian-papers-20110126,0,3588449.story>.

¹⁴ See, e.g., John Hudson, “The Web Braces for Biggest Wikileaks Dump to Date,” *Atlantic Wire* (September 10, 2010) (“Pfc. Bradley Manning, who has been charged with improperly downloading and leaking classified information, disclosed to a former hacker in May that he had given WikiLeaks a database covering 500,000 events in the Iraq War between 2004 and 2009”). To protect against future leaks, the United States military has modified most of its computers to prevent individuals from downloading data onto memory sticks, DVDs, or similar media, and the White House has established a host of new security rules. See Eric Schmitt, “White House Orders New Computer Security Rules,” *New York Times* (October 6, 2011), <http://www.nytimes.com/2011/10/07/us/politics/white-house-orders-new-computer-security-rules.html>.

¹⁵ For analysis of some of the motives behind Wikileaks, see Bill Keller, “Dealing With Assange and the WikiLeaks Secrets,” *New York Times*, January 26, 2011, http://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html?_r=1; David Leigh & Luke Harding, *WIKILEAKS: Inside Julian Assange’s War on Secrecy* (London: Guardian Books, 2011).

Obviously, there are limits; if the barriers to governmental information are *de minimis*, and the alternative is to look to (and cite) information from a source that seems untrustworthy, scholars will probably wait for access to the government sources. If, however, the government requires researchers to fill out innumerable forms and to wait years before obtaining documents that the researchers could obtain far more easily, and with *almost* as much credibility in the result, by turning to third-party Web sites, independent researchers, or even conspiracy buffs, it seems obvious what most of those researchers will do. In my case, although I would have preferred to obtain records directly from the government, it was clear what I should do: given the constraints of my budget and the need to make progress toward my degree, and given that (after cross-checking extensively) I was confident in the genuineness of the documents I received, I simply ignored the FOIA request process and instead relied upon the materials I was so generously provided in the southern California desert.

Conclusion

In describing my research odyssey in southern California, I do not mean to cast aspersions on the independent researcher who provided me with so many invaluable documents. That he enjoys researching and discussing Americanist organizations is something with which I obviously empathize; that he does so apart from any academic institution is surely not dispositive to the question of whether the materials he has gathered are trustworthy.¹⁶ I also do not mean to suggest that the government should not keep any information confidential, so as to prevent scholars and researchers from looking to third parties for source material; some information is, of course, so sensitive that releasing it would endanger both national interests and lives. Nor, finally, do I mean to suggest that the problem of third parties potentially contaminating sources arises only when researchers must look outside universities and governmental archives to Internet aggregators and interested third parties. The John Birch Society Papers I examined at the John Hay Library were rescued from a dumpster and donated to Brown University by members of the liberal Political Research Associates,¹⁷ who surely counted themselves as opponents of the Society. The Dan Smoot Papers at Texas A&M University were donated by Smoot himself. In either case—or indeed in the cases of any papers or documents dealing with contentious and potentially embarrassing issues—there is always the chance that the material

¹⁶ Indeed, in recent years, he has been cited as a source on the John Birch Society by Rachel Maddow on MSNBC, as well as by journalists interested in the right wing. See, e.g., *The Rachel Maddow Show* (December 23, 2009); Alexander Zaitchik, *Common Nonsense: Glenn Beck and the Triumph of Ignorance* (Hoboken, NJ: John Wiley & Sons, 2010), 217; Alex Heard, “The Department of Forgetting,” *Slate* (June 24, 2008), <http://www.slate.com/id/2191902/>. Some of his collected papers are now archived at New York University’s Tamiment Library & Robert F. Wagner Labor Archives, <http://dlib.nyu.edu/findingaids/html/tamwag/lazare.html>.

¹⁷ See, e.g., “Special Collections at Brown University: A History and Guide,” <https://library.brown.edu/guide/12b.html>.

researchers have before them has been tampered with, or was simply preserved so selectively that it obfuscates rather than clarifies the truth. This all said, however, in the end it still seems that governments have the opportunity to remove some of the uncertainty from the work of those studying modern society, law, politics, and policy, but have generally continued to adhere to policies, perhaps inspired by caution and perhaps inspired by bureaucratic inertia, shame, or fear of humiliation, that lead scholars and analysts instead to look to the materials gathered by third parties, often with little attention paid to exactly what biases those third parties themselves have brought to the process. Given that governments, in shaping policy and passing laws, often rely upon exactly the sorts of research performed by socio-legal scholars and analysts, by unnecessarily adhering to these overly protective policies, current governments may be effectively blinding their future selves.

Samuel Lawrence Brenner, JD, PhD
Associate, Ropes & Gray LLP
Boston, MA
USA
sbrenner@umich.edu