

Update on 2016 releases

Since we released [this briefing](#), a number of developments have brought more information into the public record confirming WikiLeaks acted as a journalistic outfit in releasing DNC emails in 2016. We've also collated relevant commentary from intelligence officials and fellow journalists.

New York Court dismissed a DNC lawsuit against WikiLeaks

On July 21, 2019, SDNY Judge John Koetl [dismissed a lawsuit](#) by the Democratic National Committee (DNC) over WikiLeaks' publication of DNC documents in 2016.

[Court found Wikileaks 2016 publications involved “matters of the highest public concern”](#)

“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression.” – Buckley v Valeo, 424, US 1, 14 (1976)

In the 81-page [ruling](#), Judge Koetl emphasized the “newsworthiness” of WikiLeaks' publishing activities, describing them as “plainly of the type entitled to the strongest protection that the First Amendment offers” because the publication related to “matters of the highest public concern.” He elaborated:

“The DNC’s published internal communications [through WikiLeaks] allowed the American electorate to look behind the curtain of one of the two major political parties in the United States during a presidential election. This type of information is plainly the type entitled to the strongest protection that the First Amendment offers.”

The Judge drew a comparison to the Pentagon Papers case of 1971, where the U.S. Supreme Court upheld the right of the New York Times and Washington Post to publish secret documents on the Vietnam War provided by whistleblower Daniel Ellsberg. In that case the Nixon administration attempted to prevent the newspapers from publishing and threatened them with criminal prosecution.

“If WikiLeaks could be held liable for publishing documents [...] simply because the DNC labels them ‘secret’ and trade secrets, then so could any newspaper or other media outlet,” wrote District Judge John Koetl.

[US press freedom and civil liberties groups sided with WikiLeaks against the DNC](#)

The American Civil Liberties Union, the Reporters Committee for the Freedom of the Press and the Knight First Amendment Institute at Columbia University submitted an *Amici Curiae* brief in support of dismissing the lawsuit against WikiLeaks. In essence, they argued that “holding Wikileaks liable in this situation would also threaten freedom

of the press. [...] Journalists are allowed to request documents that have been stolen and to publish those documents”.

The First Amendment experts’ brief contains a detailed discussion of the case law to date on this issue. The *Amici* concluded:

“The legal question addressed here is one with significant implications for the free press: does an act of publication that would otherwise be protected by the First Amendment lose that protection simply because a source acquired the published information unlawfully? The Supreme Court has repeatedly held that it does not, in recognition of the First Amendment’s role in ensuring the public has access to the information it needs to hold those who seek and wield power to account. The press routinely relies on this First Amendment protection in performing its democratic function to inform the public on matters of public concern.”

[It is not illegal for journalists to solicit stolen material. It is actually common journalistic practice](#)

Judge Koeltl noted that “WikiLeaks did not play any role in the theft of the documents and it is undisputed that the stolen materials involve matters of public concern.” (p. 40)

He added: “Journalists are allowed to request documents that have been stolen and to publish those documents” and that this is in fact “common journalistic practice.” The principle elaborated in the case of *Bartnicki* is important for investigative journalists who often receive information from whistleblowers.

Judge Koeltl also noted that it is “constitutionally insignificant” whether WikiLeaks knew the published documents were acquired without permission, by hacking, or other means before they were obtained by WikiLeaks. “A person is entitled [to] publish stolen documents that the publisher requested from a source so long as the publisher did not participate in the theft.”

Judge Koeltl added: “[I]t is also irrelevant that WikiLeaks solicited the stolen documents from Russian agents. A person is entitled [to] publish stolen documents that the publisher requested from a source so long as the publisher did not participate in the theft. [...] Indeed, the DNC acknowledges that this is a common journalistic practice” (p. 43)

[Bartnicki v Vopper protected the right to publish](#)

Judge Koeltl cited *Bartnicki v Vopper*, a 2001 U.S. Supreme Court case in which the court ruled that publishing stolen or otherwise illicitly obtained material does not make a media outlet liable for how that material was obtained. “As Bartnicki makes clear, there is a significant legal distinction between stealing documents and disclosing documents that someone else had stolen previously,” he wrote.

Later in the ruling he writes, “Like the defendant in Bartnicki, WikiLeaks did not play any role in the theft of the documents and it is undisputed that the stolen materials involve matters of public concern.”

Finally, Judge Koetl dismissed the idea that WikiLeaks should be held accountable for the documents’ theft as an “after-the-fact coconspirator” because this argument would criminalize all journalists who publish hacked or otherwise unlawfully obtained material, something investigative journalists at the New York Times and the Washington Post do as a matter of course. “That argument would eviscerate Bartnicki,” Judge Koetl wrote, “such a rule would render any journalist who publishes an article based on stolen information a coconspirator in the theft.”

The Mueller Report: Findings

[No evidence of alleged Assange/WikiLeaks “collusion” with Russia/Russian agents](#)

The Mueller report concluded that the government found no evidence to substantiate the central claim of “collusion” between Assange/WikiLeaks and Russia/Russian agents. It found no evidence that Assange/WikiLeaks had done anything wrong:

“the government could not prove WikiLeaks (or Assange) joined an ongoing hacking conspiracy intending to further or facilitate additional computer intrusions”.

The report added:

“[w]ithout knowledge, the intent cannot exist” and “persons cannot retroactively conspire to commit a previously consummated crime”.

The only evidence Mueller found was that WikiLeaks’ role in the 2016 DNC and Podesta publications had been that of “disseminating” information that it had received from a third party, nothing more. In particular, Mueller:

- - Could not find any evidence WikiLeaks participated in any manner in the alleged source’s hacking of the email server.
 - Could not find any evidence of WikiLeaks having any “knowledge” of the alleged source’s “hacking”, nor of their “criminal objective”.
 - Could not find any evidence WikiLeaks “was aware of”, or “intended to join”, “a criminal venture” with the alleged source.
 - Could not even find any evidence WikiLeaks was “willfully blind to” the alleged source’s ongoing “hacking efforts”.
 - Could not find any evidence of an agreement, express or tacit, with the alleged source to further a “criminal objective”.
 - Could not establish an “implicit working relationship” between the alleged source and WikiLeaks.

Prosecuting Assange/WikiLeaks over the 2016 publications would run afoul of the First Amendment

The Mueller report acknowledged there was no evidence (referred to as “fundamental” “factual hurdles”) to bring a case against Assange/WikiLeaks.

Furthermore, the report acknowledged a fundamental legal hurdle: WikiLeaks’ conduct was constitutionally protected by the First Amendment.

The leading case in this area of the law is *Bartnicki v Vopper*, which established that “the First Amendment protects a party’s publication of illegally intercepted communications on a matter of public concern, even when the parties knew or had reasons to know of the intercepts’ unlawful origin”.

The significance of the Mueller report’s findings on Assange/WikiLeaks’ role in the 2016 elections

After three years of in-depth investigations, the Mueller report concluded that claims that Assange/WikiLeaks “colluded” with Russia or its agents are, and have always been, **literally baseless**.

The report also establishes WikiLeaks acted no differently to other mainstream US media that was reporting on the documents from the Clinton campaign.

The DoJ concealed the Mueller report’s findings concerning Assange/WikiLeaks until 2 November 2020

The Mueller report’s conclusions finding no evidence of “collusion” between Assange/WikiLeaks and Russia or its agents were inexplicably blacked out from the text when the report was initially published on 18 April 2019.

On November 2, 2020, the Department of Justice released a reprocessed version of [Mueller’s report](#) (PDF) following litigation under the Freedom of Information Act.

The report’s publication just one day before the 2020 U.S. presidential election meant the findings received little news coverage. This is extraordinarily telling as one of the central tenets of the “Russian interference” narrative was precisely allegations of “collusion” between Assange/WikiLeaks and Russia/Russian agents, which these passages of the Mueller report show to be unfounded.

US Intelligence Chiefs' earlier statements also acknowledged lack of evidence of "collusion"

US intelligence chiefs acknowledge intelligence gathering has yielded no evidence of "collusion" nor of any "ties" to Russia. The "emerging consensus" among U.S. officials by late August 2016 was that Assange/WikiLeaks "probably have no direct ties to Russian intelligence services", reported the *New York Times*.

Then-Director of National Intelligence James Clapper, at a Congressional hearing in November 2016, stated, "As far as the Wikileaks connection, **evidence there is not as strong** and we **don't have good insight** into the sequencing of the [DNC/Podesta] releases or when the data may have been provided."

Then-Director of the FBI James Comey, at a hearing before the House Intelligence Committee in March 2017 said Russian officials "didn't deal directly with WikiLeaks".

An unclassified US intelligence report of 6 January 2017 asserted it had "high confidence", but **no actual evidence**, that Russian agents relayed material to WikiLeaks.

The Mueller report itself uses vague and qualified language when advancing the claim that Wikileaks obtained its DNC publications from Guccifer 2.0. For example, Mueller's report states: "'Unit 26165 [GRU] officers appear to have stolen thousands of emails and attachments, which were later released by WikiLeaks in July 2016" (Mueller report, p.41, emphasis added). [\[Further reading\]](#)

The FBI itself never obtained access to the hacked DNC server. The investigation was instead carried out by CrowdStrike, a cybersecurity firm hired by the DNC. The FBI did not carry out its own forensic analysis of the server.

CrowdStrike's CEO Shawn Henry [admitted](#) to Congress that, while there was evidence that the servers were hacked, CrowdStrike's investigation found no concrete evidence that emails were actually exfiltrated from the server. [\[Also see this thread\]](#)

What has Assange said about US reports on hacked DNC/Podesta emails and the WikiLeaks publications?

Assange has stated:

“Has at least one state actor hacked the DNC? Probably. Now this is a separate question to the release of our emails” ([Video: Going Underground](#))

“In the US media there’s been a deliberate conflation between DNC leaks, which is what we’ve been publishing, and DNC hacks of the US Democratic party...” ([Video: Going Underground](#))

““The emails that we have released are different sets of documents to the documents of those [that] people have analyzed... The real story is what these emails contain, and they show collusion at the very top of the Democratic Party” to derail Sanders’ campaign.” ([NBC News](#))

“There’s no forensic traces on our [2016] publications at all tying them to Russia—at all! it’s clearly completely different material, and there’s been a very sneaky attempt to conflate various hacks that have occurred with our publications.” ([The New Yorker](#))

Computer forensics in the era of Marble Framework

Some commentators have pointed out that, in the era of malware designed to hamper forensic investigators and anti-virus companies from attributing viruses, trojans and hacking attacks to their true origins, any cyberforensic analysis is inherently unreliable. For example, WikiLeaks published a leak revealing state-sponsored malware called “[Marble](#)” that

“permit[s] a forensic attribution double game, for example by pretending that the spoken language of the malware creator was not American English, but Chinese, but then showing attempts to conceal the use of Chinese, drawing forensic investigators even more strongly to the wrong conclusion”.

While the Marble Framework specifically is attributed to the CIA, other countries are suspected of use similar methods of obfuscation.

***New York Times* editor: Publish newsworthy material regardless of source**

New York Times executive editor Dean Baquet discussed WikiLeaks' publication of the Democracy Party files in an [interview](#) with the BBC in December 2016. Baquet said that he believes newsworthy material should be published regardless of its source: "I don't think it matters where [source materials] come from, to be perfectly frank."

"If I get a leak that really offers tremendous insight into how government or big business works and it's something important that people should know, I think even if the source makes me uncomfortable, I think I still have to do it... There are things that journalists should not withhold."

Baquet called WikiLeaks a "clear public service".

Multiple US media organisations sourced from and communicated with Guccifer 2.0 and DCLeaks

See [WikiLeaks' filing in the DNC case](#)

Leaks allegedly provided by Guccifer 2.0 were [published](#) in at least 11 different media outlets, including the *Washington Post*, *Politico*, *Buzzfeed* and *The Intercept*.

Leaks allegedly provided by DCLeaks were [published](#) in at least 17 different media outlets, including the *Washington Post*, *New York Times*, *Wall Street Journal*, *CNN* and *Forbes*.

The materials published by WikiLeaks were reprinted and/or covered in at least 23 different media outlets, including the BBC, NBC, ABC, *The Guardian*, Fox News and *USA Today*.

The Telegraph published a [report](#) on 17 June 2016 with a link to a disclosure of a 231-page report on Donald Trump; the article stated that Russian intelligence was being blamed for this hack from Guccifer 2.0.

Politico [reported](#) on Guccifer 2.0, linking to an article on 4 October 2016 in which Guccifer 2.0 [reveals](#) the results of its hacking into the Clinton Foundation. The *Politico* article noted, "Some cybersecurity experts believe Guccifer 2.0 is an invented identity that the Russian government is using to release files it obtains through hacking."

One of the most notable conduits for Guccifer 2.0 material was *The Hill* (see below). Neither *The Hill* nor any other media organisations were singled out by Mueller or the

US government, only WikiLeaks, even though in the cases of these publications there is clear evidence of communications with, and sourcing from, Guccifer 2.0

The Hill's direct sourcing from Guccifer 2.0

The Hill is a top US political website operating out of Washington DC and is widely read among insiders in US policy-making circles. It was in contact with Guccifer 2.0 in 2016 and covered and cited its document releases, sometimes in exclusive leaks, while simultaneously suggesting that it was likely to be run by Russian intelligence.

On 13 July, Guccifer 2.0 released a cache of DNC documents to *The Hill*. Its article noted: “The files provided by Guccifer 2.0 to *The Hill* includes [sic] a folder with a list of objectionable quotes from Palin and an archive of the former Alaska governor’s Twitter account assembled in 2011 —before Palin decided against running for president.” A follow-up article five days later stated that Guccifer 2.0’s “techniques bare the fingerprints of known Russian intelligence hacker groups.”

On 23 August 2016, *The Hill* cited documents “obtained by Guccifer 2.0 and exclusively leaked to The Hill.” These documents highlighted efforts by Democrats to prevent Mike Parrish from winning the party’s primary for a contested House seat in Pennsylvania. The same article stated, “Guccifer 2.0 is widely believed to be a cover identity for Russian intelligence, which many posit is trying to bolster Donald Trump’s bid for the White House.” *The Hill* tweeted a link to this article 10 times on 24 August 2016.

On 31 August 2016, *The Hill* reported that Guccifer 2.0 had publicly released documents on the WordPress blog from Democratic Senator Nancy Pelosi which, it said, “were a small subset of a larger batch given exclusive to The Hill.” The article stated that US intelligence officials say that “Guccifer 2.0 is a cover identity for previously identified Russian hackers affiliated with the Kremlin.”

On 15 September 2016, an article in *The Hill* cited “documents from the Democratic Congressional Campaign Committee leaked to The Hill by the hacker or hackers Guccifer 2.0.” *The Hill* tweeted a link to this article 10 times on 15 and 16 September 2016, stating “Guccifer 2.0 leaks new documents on Dems in key battleground state.”

The Hill published this information after it reported that “Guccifer 2.0, who has claimed credit for the DNC hack, is widely thought to be a front for Russian intelligence agencies.”