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"Exposing Injustice or Airing Gossip? How U.S. Criminal Law Should Look at WikiLeaks"

Corporate Counsel

Rarely does a single news story raise as many compelling legal quandaries as does the recent disclosures of confidential government information by WikiLeaks.

Besides raising numerous questions with no clear answers — such as whether WikiLeaks even falls under U.S. jurisdiction, or whether or not it deserves First Amendment Protection — the story explodes the fault line of a historic tension in American law: the balance between government secrecy in the name of national security and the public's right to transparent government.

The most recent WikiLeaks document dump raises another question regarding criminal liability for unauthorized disclosures of national security information: should the intentions of the leaker matter?

The question arises because the massive leak of classified diplomatic cables documenting American perspectives of foreign leaders across the globe seems less like "whistleblowing" than an exercise in "secrecy destruction."

There was no particular target of the leak, such as an allegedly unjust war; no particular crime to expose, such as the murder of civilians; and no specific cause to champion, such as human rights violations hidden by the government. By publishing the entirety of these cables, WikiLeaks decided to air as much of the U.S. government's "dirty laundry" as it could gather.

WikiLeaks, which fashions itself as a whistleblower web site, has effectively become the TMZ.com of the national security arena. There is an undeniable gossip appeal to the latest leaks, which expose the deepest suspicions and frank assessments of U.S. diplomats regarding foreign countries, their leaders, and their intentions.

This should not be misunderstood as a trivialization of the importance of these views. The ability to frankly assess the personality of foreign leaders is a critical part of diplomacy. Furthermore, far more critical information embedded in the cables may have real-world impact on leaders allied with the U.S.

The motivation for divulging such potentially damaging information seems unclear here. Thus something feels very different about this particular leak as opposed to other famous leaks in American history.

The leak of the Pentagon Papers sought to expose how our government misled the public and Congress for years regarding the scope, goals, and successes or failures of the Vietnam War. The leak of information in the Watergate scandal sought to expose a government conspiracy to cover up the involvement of Nixon administration officials in illegal activities ranging from wiretapping of political opponents to the break-in at the Democratic National Committee's headquarters. The leak of President Bush's warrantless wiretapping sought to expose a government violation of the public's constitutional rights.

Where is the similarly noble purpose in exposing an individual U.S. diplomat's observation that Libya's Muammar el-Qaddafi likes to travel with a particular tall blonde woman?

There is also something strikingly different about the actual leakers themselves. Daniel Ellsberg, Mark Felt ("Deep Throat") and Thomas Tamm were all government employees who made unauthorized disclosures of classified information to call attention to a larger problem. They broke the law because they believed the law was being broken.

We can only guess at the true reasons for the actions of the leaker of the WikiLeaks documents, widely believed to be U.S. Army PFC Bradley Manning. But the sheer size and haphazard breadth of the leak suggests a cavalier disrespect for authority rather than the conscientious actions of a

whistleblower.

The difference is worth noting as Congress eyes an overhaul of both U.S. espionage laws and the larger framework of laws protecting national security. Thoughtful changes will be welcome. Our outdated laws never envisioned a document dump of millions of pages of documents because when the laws, some a century old, were drafted, such technology was inconceivable. The sheer size of these leaks alone, something inevitable in the digital age, should send legislators scrambling to the drawing board.

Congress may even seek to criminalize the republication of leaked information by a third party, whether it is a secretive web site like WikiLeaks or an established journalistic institution such as *The New York Times*. From a deterrence perspective, considering how easy it has become for massive amounts of classified data to be stored on tiny flash drives, punishing the "leak facilitator" or the publisher of the information may seem like the only solution. Of course, whether such a law would survive First Amendment scrutiny remains to be seen.

But Congress would make an important distinction by accounting for the underlying intent of either the leaker or the "wikileaker" in any new legislation.

Intent matters in criminal law. When dealing with a homicide, the law provides more stringent punishments for premeditated conduct, where there was "intent to kill," than it does for reckless or negligent conduct. Similarly, in the current espionage statutes, some provisions specifically criminalize disclosure of national defense information with the intent to injure the U.S. or give the advantage to a foreign nation.

As it moves to address the problem of WikiLeaks, Congress will surely be tempted to tighten the reins on the ever-expanding universe of classified electronic data. The balancing act between national security and the free press will become more challenging than ever — but this balancing, hard as it may be, is an American ideal.

To succeed, Congress will need to find a way to differentiate between different kinds of leaks. When classified information is exposed simply for the sake of exposing it, then the leaker should not be allowed to hide behind the First Amendment. On the other hand, the publication of classified information that is leaked for an authentic "whistle-blowing" purpose demands a real degree of protection in our legal system. Any new law that fails to make these distinctions will ultimately fall short of our ideals.

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