

What's at stake for the American press if WikiLeaks is prosecuted?

Many things can be said about WikiLeaks founder Julian Assange. One can consider him a journalist, or an instigator. One can empathize with his vaguely Anarchist politics, or not. One can choose to believe that his disclosure of reams of State Department cables were either critical to the national debate, or merely an exercise in political provocation.

All of these things have been discussed at great length in the months since WikiLeaks became a household name. However, at some fundamental level, Assange and his on-line enterprise are peripheral to a much larger matter.

That matter involves the future of journalistic freedom in the United States. If the government chooses to prosecute Julian Assange for the publication of classified information, the collateral effects on the American press will be long lasting, and profound.

The Espionage Act of 1917

For several months, rumors have circulated about whether the Department of Justice (DOJ) will bring charges against Assange or other WikiLeaks principals under 18 U.S.C. 793– 798 – otherwise known as the Espionage Act of 1917. Jack Goldsmith – former head of the DOJ's Office of Legal Counsel – recently told a Columbia University audience that he believes that such charges are inevitable. “The political pressure,” he said, “is enormous.”

The Espionage Act was passed during World War I, and was utilized by the Woodrow Wilson administration to prosecute foreign spies and others. The statutes aim to protect military secrets from unauthorized exposure by subjecting violators to fines, and up to ten years in prison.

Central to any publication-based case against WikiLeaks would be 18 USC 793 (e), which prohibits persons with unauthorized access to defense information from willfully communicating, delivering, or transmitting such material if they have “reason to believe (it) could be used to the injury of the United States or to the advantage of any foreign nation.”

So how does the American legal system square such a law – which can punish someone for the dissemination of defense information – with the Constitution’s First Amendment, which states that Congress shall make no law abridging the freedom of speech, or of the press?

Prosecution for publication

Proponents of publication-related charges for Assange make the following points. Most First Amendment case law regarding publication hinges on the issue of “prior restraint.” This legal doctrine was first articulated in the Supreme Court’s “Near v. Minnesota” decision, which held that it is generally impermissible for the government to impose restraints on the publication of news material. That premise was later echoed in the 1971 “New York Times Co. v. United States” decision, in which the Court ruled against Nixon administration attempts to enjoin the publication of the classified military documents known as the “Pentagon Papers.”

The Espionage Act, in contrast, does not seek to prevent the publication of specific materials. Rather, it can be used to punish individuals who have engaged in publication after the fact. If, for instance, a prosecutor viewed the publication of leaked military reports under the rubric of “transmitting defense information,” then the person who published the leaks could potentially be charged with an Espionage Act violation.

Since the Espionage Act does not impose a prior restraint, defenders of the law contend that it would not implicate the First Amendment if used to punish members of the press. If this argument sounds familiar, it is due to the fact that it was repeatedly advanced by allies of the Bush administration after the New York Times published its 2005 story on warrantless National Security Agency (NSA) wiretapping.

The New York Times NSA leak

From 2006 forward, congressional Republicans openly called for the prosecution of New York Times personnel after the paper ran Eric Lichtblau and James Risen’s NSA story. On several occasions, Bush administration officials stated that they were investigating such options, but legal action against the Times never materialized. To understand the possible reasons for this, one can look to the construction of the Espionage Act itself.

To prosecute a member of the press for disseminating defense information, prosecutors would first have to clear some basic hurdles. They would have

to show that the journalist had unauthorized possession of the materials in question, and that they transmitted those materials to others who were also not authorized to have them - say, to the public, or to other members of the press. Then, prosecutors would have to prove what is essentially an intent element. They would need to show that the journalist disseminated the information with reason to believe that the information would be used against the United States, or to the benefit of a foreign nation.

The issue of intent is the stickiest part, and the Times' NSA reportage underscores the difficulty of demonstrating it. In the case of the NSA stories, reporters Lichtblau and Risen did not disclose significant operational details of the NSA's surveillance program. Rather, their reporting largely focused on the legal justification of the program itself – specifically its warrantless nature.

Prior to going to press, the Times also met with administration officials, removed some material for security reasons, and withheld publication for a year pending additional review and fact verification. Given all of this, proving the intent element would be a difficult proposition.

Over and above that, there would be a First Amendment hurdle to clear. The publication of the Times NSA story served a purpose similar to the disclosure of the Pentagon Papers – disclosure that was crucial to informing the public about controversial conduct of the executive branch. This is a classic First Amendment purpose that courts could be expected to protect. Such publication would likely not breach the barrier of strict scrutiny, wherein a “compelling governmental interest” can sometimes trump the expression of a constitutional right.

Comparing and contrasting

Whether WikiLeaks could successfully avail itself of a similar defense is somewhat of an open question. In theory, its pre-publication actions mirror those of the New York Times, although its redaction of source information has been inconsistent – a fact which could work to the prosecution's benefit if it was trying to demonstrate harm.

Likewise, the organization's loose, international character might make it more difficult to convince a jury that the purpose of its disclosures was to enhance America's policy debate, rather than to cause a purely political result through the embarrassment of the U.S. government. Indeed, Assange

has intimated such quasi-political motivations in past interviews and press conferences.

Of course, either purpose – pure newsgathering or political haymaking - would be protected by the First Amendment. However, the political dimension of WikiLeaks might be seen by prosecutors as a soft target, thus inviting charges against Assange or others.

Since WikiLeaks published its Afghanistan war documents, the Obama administration has tried to downplay Assange's assertions that he is a journalist, thereby attempting to distance WikiLeaks from whatever public sympathy might be afforded to the journalistic profession. Vice President Joe Biden has called Assange a "high-tech terrorist." State Department officials have characterized him an "anarchist." Could such rhetoric be a prelude to formal legal action?

The stakes for the press

One does not have to view Julian Assange as a journalist to worry about the impact of a WikiLeaks prosecution on press freedom more broadly. Prosecuting Assange for publication alone would imperil many other press entities. The central business of WikiLeaks – publishing information gleaned from sources who leaked classified materials – is part and parcel of the national affairs reporting conducted by every major American news organization. Such activities have been undertaken by the Washington Post and the New York Times for decades.

If Assange is convicted of (or even charged with) violating 18 USC 793 (e), it will severely limit the ability of the press to report on sensitive national security matters, due to the pronounced chilling effect that would result. Any journalist would think twice before discussing classified materials with a source, fearing sanction by the government. In this kind of environment, important articles like the Pentagon Papers or warrantless wiretapping stories might never have been published.

A successful prosecution of WikiLeaks might also establish case law that treats government classification as a broadly reliable mechanism to defeat strict scrutiny, potentially allowing the government to shut down First Amendment freedoms at the behest of the executive branch.

Prosecuting the leaker

Abandoning a publication-based prosecution of Assange does not mean that the government is without recourse in matters of national security leaks. There could indeed be a successful prosecution brought under the Espionage Act - but the prosecution would be of the government employee who leaked the materials to WikiLeaks. There is certainly precedent for such action. In the 1980s, the Fourth Circuit Court of Appeals upheld the prosecution of defense contractor Samuel Morrison, who gave three classified photos of a Russian sub to Jane's Defense Weekly. In its opinion, the court noted that a leak would still be a crime under the Espionage Act, even if it was motivated by "the most laudable motives, or any motive at all."

Are there secrets whose disclosure only serves to harm the United States? Certainly. Both nuclear weapons data and real-time troop movements come readily to mind. The Espionage Act can serve a legitimate function in helping to deter leaks of defense information from within the government. However, even here we must recognize that classification cannot be allowed to become a panacea – and a cover for illegal activity. One way around this problem is to strengthen federal whistleblower protections, so that insiders with access to information about illegal actions are given conduits to raise alarms – and legal protections for doing so.

Ironically, the most recently proposed federal reforms were stymied in 2010 – largely as a result of the controversies surrounding the WikiLeaks disclosures.

Looking ahead

Will WikiLeaks be a long-term player in the media landscape, or a transitional enterprise? It seems likely that the later scenario will come to pass. Recent press coverage of the relationship between Assange and the New York Times paints a picture of rocky discussions as both organizations worked to publish the Afghanistan and Iraq war logs obtained by WikiLeaks. Within the last couple months, outlets from the Times, to the Guardian, to Al-Jazeera have floated plans to develop their own "drop-boxes" for classified material – mimicking WikiLeaks, but placing their own controls in place. Former WikiLeaks staffers have also split off to form their own site, OpenLeaks.

Despite their reported problems, the New York Times seems ready to stand by Assange in the face of prosecution, since the papers fears the negative

changes in the First Amendment landscape that would result. But will the Obama administration really prosecute WikiLeaks?

The Justice Department has not made its intentions clear, but spokespeople have repeatedly stated that the DOJ is reviewing facts and case law to determine if WikiLeaks personnel can be criminally charged. However, the DOJ review will likely turn up the same nest of problems that congressional researchers have recently uncovered. Last month, the Congressional Research Service (CRS) published a report that examined the statutory landscape surrounding the potential prosecution of WikiLeaks. The CRS opinion? “There may be First Amendment implications that would make such a prosecution difficult,” wrote author Jennifer Elesa, “not to mention political ramifications based on concerns about government censorship.”

Of course, this does not mean that charges will not be issued - particularly if enough political pressure is brought to bear. Both Senators Mitch McConnell and Dianne Feinstein have publicly stated that they believe that the prosecution of Julian Assange is warranted.

In a recent speech at the 2011 Conservative Political Action Conference, pundit Ann Coulter received thunderous applause when she quipped that more journalists should be jailed. If the Obama administration moves ahead with plans to prosecute WikiLeaks for the publication of classified material, we may eventually get to see Coulter’s wish come to pass.

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