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WikiLeaks and Julian Assange: Time to Update U.S. Espionage Laws

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Almost everyone seems to be asking the same question with respect to the WikiLeaks saga: What, if anything, can Julian Assange, and those who have worked closely with him, be prosecuted for?

Most Americans have a visceral reaction that Assange did something wrong and must be held to account for disclosing classified documents involving sensitive national security matters. Secretary of State Hillary Clinton has gone so far as to claim that his acts are “an attack” on the United States, and Assange himself seems to describe his opposition to America in military terms.¹ But federal prosecutors will still have a difficult time finding an appropriate criminal charge and making it stick.

Impetus for Reform. Beyond the issue of whether Assange would be extradited for any criminal offense that the United States might lodge,² there are complex legal issues involving vague U.S. espionage laws, the nature of the disclosures (some of which are not classified), and modern American First Amendment jurisprudence. This is not to let the Department of Justice off the hook for not trying earlier to make its case. If it had spent the same energy after the first release of classified information that it is reportedly now employing, WikiLeaks may have been shut down last summer. No more stalwart defender of press freedoms than Floyd Abrams, who successfully defended *The New York Times* in the Pentagon Papers case, has said he believes the current protections for traditional press outlets would likely not shield Assange’s actions.³

Even so, any prosecution of Assange under current law would have to traverse murky waters, including a distinction between the protections afforded traditional media organizations that are commenting on the WikiLeaks releases and Assange’s more direct involvement in the initial disclosures. As a result, the WikiLeaks affair has begun to generate legislative ideas on Capitol Hill, and that is as it should be. Indeed, WikiLeaks may well provide the impetus for a welcome updating of America’s outdated laws relating to the disclosure of classified materials.

Outdated Law. At present, the main law addressing illegal disclosures is the World War I-era Espionage Act provision,⁴ whose text is, as one scholar has put it, “marred by profound and frustrating ambiguities.”⁵ As currently interpreted, the law is vague and of uncertain application to situations that many would consider legitimate activities (such as whistleblowers or reports in the press).

Worse yet, the law dates from a time when acts of espionage were acts of personal disclosure and when the most sophisticated means of communication were the telegraph and the radio. Little in the current law has any real application to the modern

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challenges of the Internet, where espionage may occur at a distance and its perpetrators can readily hide behind the cloak of anonymity.

These ambiguities are problematic for two inter-related reasons. First, as Heritage has argued in another context,⁶ vague laws do not give citizens notice of what it is that is prohibited. Second, vague laws may cause uncertainty in lawful prosecutions of those, like WikiLeaks, who clearly have a malevolent intent but whose actions may be immunized from prosecution by a lack of clarity in the law. The Espionage Act's language is capacious and could be read to criminalize all sorts of lawful activity protected by the First Amendment to the U.S. Constitution. Accordingly, it has been interpreted narrowly to save it from First Amendment attack, but that has made it less effective. Surely, something more targeted can be drafted that both respects important press freedoms and still punishes more direct breaches of classified national security information.

Thus, Senators John Ensign (R–NV), Joseph Lieberman (I–D–CT), and Scott Brown (R–MA) are to be commended for putting on the agenda a proposal to modify the law by making it illegal to publish the names of human intelligence informants to the United States military and intelligence community. It is a good first attempt at addressing this problem.⁷ Their proposal merits careful consideration.

Balancing Transparency and Security. Any revisions to the Espionage Act should carefully balance legitimate societal interests and rights (with appropriate transparency) against a well-grounded understanding of the nature of current threats to legitimate areas of government secrecy. In the new session of Congress, representatives would be wise to take up this matter with urgency and craft a comprehensive response.

No new criminal law can be given retroactive effect, but it could be used against any new or possibly even “continuing” violations. Thus, it might have the effect of shutting down existing Web sites as well as preventing further actors intent on harming American national security from engaging in similar conduct. Even if it has no impact on the current WikiLeaks saga, it is past time for Congress to update American espionage laws to prevent future harms.

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1. The authors of this paper refuse to visit the WikiLeaks Web site, but according to press accounts, Assange is reported to have bragged that “the first serious infowar is now engaged. The field of battle is WikiLeaks.” See, e.g., Marc Theissen, “You’re Either with Us, or You’re with Wikileaks,” *The Washington Post*, December 7, 2010, at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/06/AR2010120603074.html> (December 8, 2010).
2. At the time of writing, Assange is being held by the British government pending possible extradition to Sweden on two sexual assault charges. MSNBC.com, “Arrested Wikileaks Chief Denied Bail in U.K.,” December 7, 2010, at http://www.msnbc.msn.com/id/40544697/ns/us_news-wikileaks_in_security (December 8, 2010).
3. C-SPAN, “WikiLeaks Legal Issues,” December 6, 2010, at <http://www.c-spanvideo.org/program/296910-4> (December 8, 2010).
4. 18 U.S.C. 793(e).
5. Stephen I. Vladeck, “The Espionage Statutes: A Look Back and a Look Forward,” testimony before Subcommittee on Terrorism and Homeland Security, Judiciary Committee, U.S. Senate, May 12, 2010, at <http://judiciary.senate.gov/pdf/10-05-12VladecksTestimony.pdf> (December 8, 2010).
6. See Overcriminalized.com, at <http://overcriminalized.com>.
7. Mark Rockwell, “Senators Go After WikiLeaks with Legislation,” GSN, December 3, 2010, at http://www.gsnmagazine.com/node/21977?c=federal_agencies_legislative (December 8, 2010); Securing Human Intelligence and Enforcing Lawful Dissemination (SHIELD) Act, S. 4004, 111th Cong. (2nd Sess. 2010).