Plugging the (Wiki)Leaks: The Classified Information Conundrum

Providing stolen secret military documents to enemies of the United States constitutes treason. And the cyber medium, through which these documents flow, is turning into a major asymmetric threat.

"The battlefield consequences of the release of these documents are potentially severe and dangerous for our troops, our allies and Afghan partners, and may well damage our relationships and reputation in that key part of the world," said Secretary of Defense Robert Gates after the leak of classified Afghanistan war documents through the website, WikiLeaks. [1] While WikiLeaks director Julian Assange may believe revealing information from whistle-blowers follows journalistic traditions, the Taliban have already gone after suspected collaborators indentified through the documents.[2] His actions could be viewed as supporting acts of espionage. Providing stolen secret documents to the enemy is just that.

Because little is ever done to stop it, leaks of classified information and other information security breaches are nothing new. In 1971, former military analyst Daniel Ellsberg released the Pentagon Papers, a top-secret 1968 Pentagon study of the Vietnam War, to *The New York Times* and other newspapers, hoping the study's revelations would help end the war in Vietnam. The question asked at the time was "who was he to make such a judgment?" In 2004, an illegally-leaked classified report by Major General Antonia M. Taguba, exposed by Seymour Hersh of the *New Yorker*, revealed the abuses at Abu Ghraib. No pursuit of the leaker was ever mounted. In 2009, Shamai Kedem Leibowitz, Israeli American lawyer plead guilty to disclosing classified communications intelligence to a blogger while working as a contract linguist to the FBI.[3]

A few of the cases of information security enforcement came from leaks to the press. In 2006, career CIA officer Mary McCarthy was fired after admitting to passing classified information on alleged secret prisons run by the CIA in Eastern Europe and other subjects to Dana Priest of the *Washington Post.*[4] In early 2010, former senior National Security Agency executive, Thomas Drake, was indicted for leaking classified information on alleged mismanagement of NSA programs to a Baltimore Sun reporter in 2006 and 2007.[5]

The Obama administration has already taken a tougher stance on leaks than its predecessor. Between 2005 and 2008, only 24 leak cases were investigated by the Department of Justice (DOJ) and none were prosecuted. In 2009, 30 suspected leaks were referred to the DOJ,

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[1] Charlie Savage, "Gates Assails WikiLeaks Over Release of Reports," *New York Times*, July 29, 2010, http://www.nytimes.com/2010/07/30/world/asia/30wiki.html?src=mv.
[2] Ron Moreau and Sami Yousafzai, "Taliban Seeks Vengeance in Wake of WikiLeaks," *Newsweek*, August 2, 2010, http://www.newsweek.com/2010/08/02/taliban-seeks-vengeance-in-wake-of-wikileaks.html.
[3] Laura Rozen, "Israeli-American FBI linguist pleas to docs leak," *Politico*, December 17, 2009, http://www.politico.com/blogs/laurarozen/1209/Israeli_FBI_linguist_pleas_to_docs_leak.html.
[4] Robert Windrem and Andrea Mitchell, **"**CIA officer fired after admitting leak," *NBC News*, April 21, 2006 http://www.msnbc.msn.com/id/12423825/.
[5] Josh Gerstein," Justice Dept. cracks down on leaks," *Politico*, May 25, 2010, http://dyn.politico.com/printstory.cfm?uuid=CC9C4ECD-18FE-70B2-A805B0934464FF46

including the Drake indictment and several pending prosecutions.[6] The White House has also taken steps against national-security leaks by requiring faster DOJ action, as well as tougher agency-level disciplinary sanctions.[7] Announcing the Drake indictment, Assistant Attorney General Lanny Breuer proclaimed that, "Our national security demands that the sort of conduct alleged here—violating the government's trust by illegally retaining and disclosing classified information—be prosecuted and prosecuted vigorously." This seems to be a new pattern and approach.

It's no surprise that the government itself may be partly to blame by sending mixed messages; protecting or divulging information according to its interests. As Henry Kissinger used to say, "I never leak. I de-classify." Lewis "Scooter" Libby, former Chief of Staff to Vice President Dick Cheney was indicted in the 2003 leak of Valerie Plame's identity as a CIA officer. It was considered to be retribution for her husband's criticism of the Bush administration in his *New York Times'* Op-Ed. In a 2006 statement, the White House confirmed that President George W. Bush had authorized the leak of classified information about pre-Iraq-war intelligence to a reporter in July 2003. Despite Bush's frequent criticisms of leaks, the White House statement described the leak as beneficial to the public interest.[8] If this was the case, one might ask why a specific and official de-classification was not made.

Astonishingly, in a 2009 sentencing hearing for leaking classified information, a federal court judge, T.S. Ellis, III of the Eastern District of Virginia, suggested that while disclosing classified information to an unauthorized person may be unethical or illegal, the leaking may be acceptable if the leakers accept full responsibility for their actions. While claiming that noble motives didn't justify the public disclosure of classified information, he added that as an act of civil disobedience, "Disclosing it was okay, if a person is willing to stand up and say, 'I did it. Give me the consequences'."[9] Again, this hints at authorizing the leak of classified information – vital secrets – that may be fatal to the U.S. military, allies, and informants. Such commentary clearly is not acceptable.

The cyber age has amplified in the ambiguities and challenges of information security. In the past, only governments had the resources to pursue and steal valuable information. Now the abundance and availability of open-source information allows competent individuals and organizations to develop useful intelligence.[10] This is apart and distinct from the criminal act of "leaking" of classified national security information.

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[6] "Obama Administration Taking Tougher Stance On Classified Leaks Though More Cases Were Handled During Bush Years" *Huffington Post*, June 21, 2010, http://www.huffingtonpost.com/2010/06/21/obama-administration-taki_n_619541.html.

[7] Michael Isikoff, "Classified Info Crackdown," *Newsweek*, June 11, 2010, http://www.newsweek.com/blogs/declassified/2010/06/11/classified-info-crackdown.html.

[8] Tom Hamburger and Peter Wallsten, "White House defends Iraq leak; Bush reportedly OKd details' release in the public interest," *San Francisco Gate*, April 8, 2006, http://articles.sfgate.com/2006-04-08/news/17288661_1_information-about-pre-iraq-war-intelligence-bush-s-frequent-criticisms-national-intelligence-estimate.

[9] Josh Gerstein, "Leniency for AIPAC leaker," *Politico*, June 11, 2009, http://www.politico.com/news/stories/0609/23671.html.

[10] Adam Elkus, "WikiLeaks and Information Strategy," *Huffington Post*, July 29, 2010, http://www.huffingtonpost.com/adam-elkus/wikileaks-and-information_b_662991.html.

Information technology advancements and dependency have also made it easier to access and distribute sensitive materials. In July 2007, documents containing sensitive and classified information, including the Pentagon's network infrastructure diagrams and IP addresses, and information from five Department of Defense information security system audits were found on file sharing networks. These had been inadvertently exposed by individuals downloading P2P software on systems that held the data.[11]

Also disconcerting are changing perceptions about sensitive materials. Early reports indicate that WikiLeaks'source, intelligence analyst Pfc. Bradley Manning's actions may have been inspired by his "ambition to do something that would get attention."[12] One expert noted, "We have huge amounts of information being generated and stored, but at the same time, there is a whole body of people in the IT world, primarily among the younger people, who believe in 'digital libertarianism' – that all information should be free and accessible and that all these official secrets and classifications are old-fashioned."[13] This view, if widely held, presents a major problem in the leaking secret documents, as well as creating a problem of ethics and all that it implies.

Manning will be prosecuted for leaking classified material under U.S. military law. An example needs to be made, clear to all. But what consequences will WikiLeaks and other rogues like them face?

The Departments of Justice and Defense are currently working together to investigate the leaks. Assange and other editors, who are foreign nationals, could and should be indicted by the U.S. and brought to justice through international law enforcement cooperation. A 1989 Justice Department memo justified direct action: "The President, acting through the Attorney General, has the inherent constitutional authority to deploy the FBI to investigate and arrest individuals for violating United States law, even if those actions contravene customary international law."[14]

Prosecuting the website, however, is unclear. The U.S. has never charged a media outlet with receiving and republishing classified information. As one observer contends, "It's far from certain whether the site's conduct would constitute a crime under U.S. law, whether U.S. law applies abroad for these kinds of incidents, whether any other country would extradite Assange or others who could be charged, and even whether other countries would enforce a

[11] Jaikumar Vijayan, "Classified U.S. military info, corporate data available over P2P, Inadvertent data leakage worse than thought, experts tell Congress, *Computerworld*, July 25, 2007, http://www.computerworld.com/s/article/9027949/Classified_U.S._military_info_corporate_data_available_over_P2P.

[12] Ginger Thompson, "Early Struggles of Soldier Charged in Leak Case," *New York Times*, August 8, 2010, http://www.nytimes.com/2010/08/09/us/09manning.html?pagewanted=1&hp.

[13] Howard Lafranchi, "WikiLeaks: When is it 'right' to leak national security secrets?" *Christian Science Monitor*, August 2, 2010, http://www.csmonitor.com/USA/Military/2010/0802/WikiLeaks-When-is-it-right-to-leak-national-security-secrets.

[14] U.S. Department of Justice, "Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities," June 21, 1989, http://www.fas.org/irp/agency/doj/fbi/olc_override.pdf.

subpoena in such a case."[15] Yet, WikiLeaks, as a website, enjoys no immunity from prosecution, and could also be prosecuted for hosting classified information. The U.S. should consider some of these avenues. An opportunity also exists for the U.S. to set a precedent; by not tolerating the leaking of secret and sensitive national security information.
The U.S. could ask foreign governments that host the website's servers to shut them down. WikiLeaks' maintains its content on more than twenty servers around the world and on hundreds of domain names. The number of locations, including Iceland and Sweden, and these countries' shield laws makes this a problem.[16] Regardless, aggressive action is warranted.

In the meantime, the Obama administration is pressing Western governments, like the United Kingdom, Germany, and Australia (who all have troops stationed in Afghanistan) to consider opening criminal investigations against Assange and to severely limit his international travel.[17]

In lieu of legal ambiguities, the U.S. does have other measures in their arsenal. It can take diplomatic and economic sanctions actions against countries that refuse to cooperate or enforce extradition laws, including trade embargoes, travel bans, restricting sales of military goods, and removal of diplomatic ties. The U.S. could conduct cyber attacks on known WikiLeaks networks; possibly even on countries that protect those who leak classified information. The U.S. also has the option to take action "offline". Although covert action may be initially unpopular, the imminent danger posed by the leaks could likely garner widespread political support.

The WikiLeaks case sets a dangerous precedent. Unless immediate and decisive action is taken, leaks – and the threats they pose – are only going to increase. Manning, Assange, and their accomplices must be fully and vigorous prosecuted. Otherwise, the only people who will face the consequences of their actions – perhaps even fatal – will be the soldiers and civilians on the battlefield.

Whatever actions the U.S. decides to take, there is already considerable harm done. The leaked documents are unrecoverable. Operations, tactics and affiliates have been compromised. Despite acknowledging the "collateral damage," WikiLeaks said recently that it will continue publishing more secret government files. They should be stopped now. Indications are that their intent is to be defiant of the Department of Defense and the U.S. government. Unless there is an aggressive and focused response, more compromises of national security – with their dangerous results – will be forthcoming. Until then, there will be no holding back the deluge.

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[15] Josh Gerstein, 'Holder: DOJ probing WikiLeaks Afghan Leaks," *Politico*, July 28, 2010, http://dyn.politico.com/blogs/joshgerstein/index.cfm/tag/Wikileaks.
[16] "The most dangerous man in Iceland," *The Economist*, June 11, 2010, http://www.economist.com/blogs/democracyinamerica/2010/06/wikileaks.
[17] Phillip Shenon, "U.S. Urges Allies to Crack Down on WikiLeaks," *The Daily Beast*, August 10, 2010, http://www.thedailybeast.com/blogs-and-stories/2010-08-10/a-western-crackdown-on-wikileaks/?om_rid=Nh0$L4&om_mid=_BMYUegB8R02P$R&.