THE TRADITIONAL PRESS' BLIND SPOT IN AIDING THE ENEMY

This post by Kevin Gosztola lays out many of the implications of the news — revealed in Bradley Manning's statement to the court yesterday — that he tried to publish the Iraq and Afghan cables with WaPo, NYT, and Politico before he turned to WikiLeaks. He describes, as Michael Calderone has laid out at length, how NYT and WaPo claim to have no memory of Manning's pitch.

He wonders what the NYT and WaPo would have done had they actually gotten exclusive dibs on Manning's trove of information.

> Had the *Times* or *Post* obtained the logs and begun to examine them for publication, what would the organizations have done? Would they have published? Would they have notified the government they now possessed the documents? The *Times*communicated with the government when preparing to publish State Department cables:
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> > Because of the range of the material and the very nature of diplomacy, the embassy cables were bound to be more explosive than the War Logs. Dean Baquet, our Washington bureau chief, gave the White House an early warning on Nov. 19. The following Tuesday, two days before Thanksgiving, Baquet and two colleagues were invited to a windowless room at the State Department, where they encountered an unsmiling crowd. Representatives from the White House, the State Department, the Office of the Director of National Intelligence, the

> > C.I.A., the Defense Intelligence Agency, the FBI and the Pentagon gathered around a conference table. Others, who never identified themselves, lined the walls. A solitary note-taker tapped away on a computer.
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> What would have happened to Manning? Would they have been able to protect the identity of the lower-level soldier who had passed on information because he believed they were "some of the most significant documents of our time, removing the fog of war and revealing the true nature of 21st Century asymmetric warfare."

The example of Jeffrey Sterling, where NYT's apparent consultation with the government on whether to publish Risen's story about Merlin appears to have launched the investigation into Sterling, heightens this concern.

And I would also ask whether the papers would sit on the information, using it as their exclusive data, rather than releasing it to be crowd sourced and accessed by people with more expertise on particular areas. A WikiLeaks trove would have made (and to some extent has in any case) the NYT brand for some time. Would the paper have put more stock in that than in sharing the information.

After raising questions about whether NYT would expose its source in such a case, Gosztola concludes, shows the value of organizations like WikiLeaks.

> > This is why leaks organizations like WikiLeaks are needed. Not only do they have the power to reveal what governments are doing in secret, they also are uniquely positioned—if constructed appropriately—to protect the identity of sources in a such way that

> makes it near impossible for governments to pursue those blowing the whistle. It creates the possibility that employees in militaries or national security agencies can reveal what they are seeing, be conscientious citizens and at the same time keep their job and, perhaps, not risk their livelihood.

I'd add two points to that.

NYT's normally excellent ombud, Margaret Sullivan, suggested that the paper could continue the "time-tested way" of sourcing leaks directly to reporters. Dan Froomkin argues this news proves the need for a whistleblower drop box.

Both are ignoring a very dangerous new reality of the war on leakers. They ignore the strong suggestion that DOJ's relatively new Domestic Investigations and Operations Guide treats National Security Letters, which they can use to get call data, differently than they do subpoenas.

> Department of Justice policy with regard to the issuances of subpoenas for telephone toll records of members of the news media is found at 28 C.F.R. § 50.10. **The regulation concerns only grand jury subpoenas, not National Security Letters (NSLs) or administrative subpoenas**. (The regulation requires Attorney General approval prior to the issuance of a grand jury subpoena for telephone toll records of a member of the news media, and when such a subpoena is issued, notice must be given to the news media either before or soon after such records are obtained.) — [my emphasis]

And while FBI does require some oversight, there appear to be at least some instances where the only oversight is sign-off by someone like a

Special Agent in Charge.

The outlines of this new policy with regards to journalists who were witnesses (that is, recipients of a leak) were first reported by Charlie Savage, so the NYT shouldn't be able to plead ignorance.

In other words, it's not enough to make it easier for low level whistleblowers to reach out to journalists (I'm reminded that Jonathan Landay's Iraq reporting was so much better than NYT's because he worked with middle level officers rather than Dick Cheney). It's not enough to improve the papers' already notorious security vulnerabilities. There needs to be a way to counter the Administration's assault on journalistic privacy.

Ultimately, though, big media needs to come to grips with the reality Yochai Benkler lays out. The government has already made clear (or at least claimed) they do not distinguish Manning's leak to WikiLeaks from another whistleblower's leaks to NYT.

> The prosecution case seems designed, quite simply, to terrorize future national security whistleblowers. The charges against Manning are different from those that have been brought against other whistleblowers. "Aiding the enemy" is punishable by death. And although the prosecutors in this case are not seeking the death penalty against Manning, the precedent they are seeking to establish does not depend on the penalty. It establishes the act as a capital offense, regardless of whether prosecutors in their discretion decide to seek the death penalty in any particular case.
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> [snip]
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> Aiding the enemy is a broad and vague offense. In the past, it was used in hard-core cases where somebody handed over information about troop movements

> directly to someone the collaborator believed to be "the enemy," to American POWs collaborating with North Korean captors, or to a German American citizen who was part of a German sabotage team during WWII. But the language of the statute is broad. It prohibits not only actually aiding the enemy, giving intelligence, or protecting the enemy, but also the broader crime of communicating—*directly or indirectly*—with the enemy without authorization. That's the prosecution's theory here: Manning knew that the materials would be made public, and he knew that Al Qaeda or its affiliates could read the publications in which the materials would be published. Therefore, the prosecution argues, by giving the materials to WikiLeaks, Manning was "indirectly" communicating with the enemy. Under this theory, there is no need to show that the defendant wanted or intended to aid the enemy. The prosecution must show only that he communicated the potentially harmful information, knowing that the enemy could read the publications to which he leaked the materials. This would be true whether Al Qaeda searched the WikiLeaks database or the *New York Times'.*

Again, the NYT should know this. In Jeffrey Sterling's case, the government argued that it was worse for Sterling to leak to James Risen and thereby get it published in the NYT than for a paid spy to leak information directly to, say, Iran.

> The defendant's unauthorized disclosures, however, may be viewed as more pernicious than the typical espionage case where a spy sells classified information for money. Unlike the typical espionage case where a single foreign country or intelligence

> agency may be the beneficiary of the unauthorized disclosure of classified information, this defendant elected to disclose the classified information publicly through the mass media. Thus, every foreign adversary stood to benefit from the defendant's unauthorized disclosure of classified information, thus posing an even greater threat to society.

Incidentally, kudos to Josh Gerstein, who recognized when he first reported this passage that the government would use the logic to go after WikiLeaks.

The government has said, in Bradley Manning's case and in Jeffrey Sterling's, that it considers the production of news to be a far more pernicious threat than spies operating in the dark.

And yet the country's most esteemed newspaper is still assuming we can just operate the old way, with direct contact with journalists.

Benkler's penultimate paragraph asks,

> If Bradley Manning is convicted of aiding the enemy, the introduction of a capital offense into the mix would dramatically elevate the threat to whistleblowers. The consequences for the ability of the press to perform its critical watchdog function in the national security arena will be dire. And then there is the principle of the thing. However technically defensible on the language of the statute, and however well-intentioned the individual prosecutors in this case may be, we have to look at ourselves in the mirror of this case and ask: Are we the America of Japanese Internment and Joseph McCarthy, or are we the America of Ida Tarbell and the Pentagon Papers? What kind of country makes communicating with the

> press for publication to the American public a death-eligible offense?

These are the stakes both of Manning’s prosecution and of the government’s stance more generally. We’re long past the time of hotlines.