

ABBE LOWELL'S LEAK AS GOVERNANCE THEORY

Josh Gerstein links to this fascinating filing from Abbe Lowell, the lawyer who successfully got leak charges against AIPAC employees dismissed, and now representing a former State Department contractor, Stephen Kim, alleged to have leaked Top Secret information on North Korea to Fox. Gerstein explains:

Stephen Kim, who worked at State as an intelligence adviser before being dismissed as a result of the leak probe, was indicted last August on one count of disclosing classified information and another of lying to the FBI. The charges appear to stem from information that Fox News reporter James Rosen received in June 2009 about North Korea's plans to conduct a nuclear test.

In motions filed earlier this week, Kim's defense team, Abbe Lowell, Paul Thompson and James Commons, argue that the charges against Kim should be dismissed because they're legally flawed. One argument is that the Espionage Act under which Kim was charged is too vague when it comes to situations involving verbal statements to someone outside government rather than giving classified documents to someone. (Kim was not charged with espionage.)

The defense lawyers also mount a defense of leaking as routine and vital to modern American government and note that the law gives no indication of who is "entitled to receive" closely-held defense secrets and who isn't.

The last bit is what I find particularly interesting. Lowell is obviously doubling down on his successful defense in the AIPAC case by

arguing that leaking classified information is central to our system of governance.

Government leaking is not a new phenomenon. **What makes these prosecutions particularly worthy of close scrutiny is the fact that the Executive Branch leaks classified information often to forward several of its goals and then prosecutes others in the same branch for doing the same thing.** In fact, this country has a long and storied history of government officials leaking information to the press. In one of the earliest leaks in this country's history, Benjamin Franklin publicly confessed to leaking letters authored by loyalist Thomas Hutchinson which were later published in the Boston Gazette. 5 *Albert Henry Smyth The Writings of Benjamin Franklin* 448 (1905). President George Washington was incensed upon discovering that the confidential terms of Jay's Treaty had been leaked to a newspaper editor. Todd Estes *The Art of Presidential Leadership: George Washington and the Jay Treaty*, 109 *Virginia Magazine of History and Biography* (2001). In one of the most storied leaks in history, the New York Times published sections of the so-called "Pentagon Papers" a top-secret Department of Defense report on America's political and military involvement in Vietnam. Neil Sheehan *Vietnam Archive: Pentagon Study Traces Decades of Growing U.S. Involvement*, N.Y. Times June 13, 1971, at A1. The leak revealed a deliberate pattern of government deception to mislead the country about the government's intentions to expand the war efforts in Vietnam. Id. The Abu Ghraib prison abuse scandal is another example of a leak that called into question important policies the government had tried to keep secret. Seymour M. Hersh, *Torture*

at Abu Ghraib, *The New Yorker*, May 10, 2004, at 42. **And the disclosure of Valerie Plame as an operative for the CIA was a government leak, at the highest levels, to advance an important policy interest of the Bush Administration.** David Corn Plamegate *Finale: We Were Right; They Were Wrong*, *The Nation* (Oct. 22, 2007). In this country's history, sensitive information has routinely been leaked to the press by officials at all levels of government, causing *New York Times* reporter James Reston to remark, "[t]he ship of state is the only known vessel that leaks from the top." David E. Rosenbaum, *First a Leak, Then a Predictable Pattern*, *N.Y. Times*, October 3 2003.

The practice of leaking has evolved over time and has become so widespread that it is not uncommon to open a national newspaper and find multiple articles attributing their sensitive content to anonymous government sources. During meetings with the press, government officials and members of their staffs routinely disclose sensitive information to further a variety of legitimate policy objectives. Members of the press then publish the information for consumption by the populace. **As the government has imposed ever-more stringent restrictions on information, while simultaneously broadening its definition of what constitutes classified information, leaking has become essential to provide context for messages delivered to the public through official channels. Although reliance on a "leak system" is counterintuitive for a nation that prides itself on open government and places immense value on democratic traditions, it has become a necessary practice, facilitating the exchange of information between the**

government and its constituency. Such practices have become so critical that, when Congress passed a bill that would have made disclosure of classified information a felony, President Clinton vetoed the bill, reasoning that "[a]lthough well-intentioned, [the bill] is overbroad and may unnecessarily chill legitimate activities that are at the heart of a democracy." 146 Cong. Rec. H11852 (Nov. 13, 2000) (statement of Pres. Clinton). In asking President Clinton to veto the legislation executives from the Washington Post, CNN, the Newspaper Association of America, and the New York Times wrote that "[a]ny effort to impose criminal sanctions for disclosing classified information must confront the reality that the 'leak' is an important instrument of communication that is employed on a routine basis by officials at every level of government." Raymond Bonner, *News Organizations Ask White House to Veto Secrecy Measure* N.Y. Times, Nov. 1, 2000, at A32. As discussed in more detail below, Bob Woodward's *Obama's Wars* is yet another example of senior government officials and administration staff leaking information whenever it is convenient.

[snip]

For centuries the government has leaked information, to the media and others, when it is convenient or advantageous to do so. Leaking is widespread and has become an essential tool that is frequently employed by officials at every level of government. As one former Director of Central Intelligence has explained:

[T]he White House staff tends to leak when doing so may help the President politically. The

Pentagon leaks, primarily to sell its programs to Congress and the public. The State Department leaks when it's being forced into a policy move that its people dislike. The CIA leaks when some of its people want to influence policy but know that's a role they're not allowed to play openly. The Congress is most likely to leak when the issue has political manifestations domestically.

S. Turner *Secrecy and Democracy* 149 (1985). **In fact, one survey of senior federal officials revealed that 42 percent of those officials had deliberately leaked what certainly could be described as "sensitive information to the press."** While this statistic suggests that an astonishingly high percentage of government officials leak information, it comports with the high frequency with which news articles attribute "sensitive" information to an anonymous government source.

[snip]

In a dramatic example of opportunistic leaking by the Executive Branch, Bob Woodward's *Obama's Wars* reveals details of the administration's inner workings and describes several highly classified programs and reports. The information contained in Woodward's book could only have come from senior government officials.⁶ The book describes in great detail the planning leading up to President Obama's decisions concerning the wars in Iraq and Afghanistan. Specifically, the very first chapter of the book describes President Obama's first post-election intelligence briefing from Mike McConnell, then the Director of National Intelligence.

"Because the briefing contained highly classified information about ' sources and methods ' McConnell explained, only those ' designated to take a top national security cabinet post' could attend. Jack Goldsmith, *Classified Information in Woodward's Obama's Wars* Lawfare (September 29, 2010).

Nonetheless, in the book, Mr. Woodward recounts that highly classified information in detail, including several classified CIA and NSA programs (despite the inclusion of sources and methods information). The book also reveals that the CIA created, controls, and pays for a clandestine 3,000-man paramilitary army of local Afghans known as Counterterrorism Pursuit Teams. The book describes a new National Security Agency capability that has dramatically increased the speed at which intercepted communications can be turned around into useful information for intelligence analysts and covert operators. The book even contains a previously classified six-page "terms sheet" that the President dictated himself. **Most importantly, the book reveals that Woodward, while not a government official, received unprecedented access to classified information from the Obama administration. Thus, here is the latest example of the Executive Branch acting out of both sides of its mouth-it gives a specific journalist a vast amount of national defense information without blinking an eye and it indicts Mr. Kim for what, even if the allegations in the indictment are all true, is far less.**

Given the prevalence of government leaking to the media, even at the highest levels of government, and the relative paucity of Section 793 prosecutions for such disclosures, it is virtually impossible to determine the circumstances under which Section 793

will be enforced. [my emphasis]

Now, I presume Lowell is not relying on his argument that leaking has become a central tool of government to win this motion (indeed, I highly doubt this motion will succeed in any case). Rather, he seems to be setting up the same thing he set up with the AIPAC case: a reason to subpoena high ranking members of the Administration trying to prosecute a leak to demonstrate that his client was being prosecuted for actions that are elsewhere condoned.

But in the midst of debates about secrecy partly—though not entirely—focused on Wikileaks, the argument deserves to be fully fleshed out, particularly as the Obama Administration proves more aggressive on leak prosecutions than the Bush Administration.

Leaking, as currently practiced by our government, is precisely about wielding power attained partly through the clearance system. Yet, that system of power relies on the asymmetrical prosecution of leaks, such that authorized leaks to Woodward help catapult hagiography onto the best-seller lists, but unsanctioned leaks can lead to jail time.

Asymmetrical treatment of leaking is a cornerstone of the assault by the Executive on rule of law.

And yet, that's how our government has increasingly functioned of late.

Abbe Lowell may be mapping this out solely to develop a growing practice in leak defense. But it's an important argument about our government more generally.

On a related note, I will be hosting a Book Salon with Greg Mitchell at **3:30** [corrected time] PM ET to discuss his book, *The Age of WikiLeaks*.