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James B. Astrachan

Astrachan Gunst & Thomas, P.C., jastrachan@agtlawyers.com

Eric Easton

University of Baltimore School of Law, eeaston@ubalt.edu

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Astrachan and Easton: Fight WikiLeaks case in court, not cyberspace

By: James B. Astrachan and Eric B. Easton Special to The Daily Record December 26, 2010

If WikiLeaks founder Julian Assange conspired with Bradley Manning to acquire and disseminate classified government documents, the United States should indict, extradite, and prosecute him. But the United States government should not use extralegal means to coerce or bribe American companies into withholding services from WikiLeaks.com as long as that organization's First Amendment right to disseminate information remains an unresolved issue.

To be sure, we don't know whether the government has pressured PayPal, Amazon, DNS.net, and others to sever ties with the rogue website WikiLeaks.com after it began disseminating classified State Department cables. The White House has refused to comment despite reporters' requests to clarify widespread speculation.

We do know that, whatever prompted those Internet service companies to drop the controversial site, the United States government now has egg all over its face. Not only did WikiLeaks activate dozens of mirror sites around the world, but other radical transparency advocates launched denial of service attacks on the American companies that couldn't or wouldn't take the heat. And it didn't take long for the mainstream media to dig up a recent speech by Secretary of State Hillary Clinton praising the Internet's ability to help people discover new facts and make governments more accountable.

But the matter of extralegal coercion goes beyond its ineffectiveness or the government's hypocrisy regarding the Internet. Where First Amendment issues are involved, such conduct by the government is just plain wrong.

At this point, we do not know for sure whether WikiLeaks broke any U.S. laws, at least any that can survive constitutional scrutiny. Attorney General Eric Holder has repeatedly said the Department of Justice had undertaken a major investigation, but no charges have been filed at this writing. Allegations of sexual misconduct in Sweden by Assange and extradition proceedings in London have bought Mr. Holder some time, but sooner or later he will have to come up with specific charges.

The last time the Justice Department tried to use the Espionage Act to prosecute a "middle-man" like Assange — the late AIPAC prosecution — the case blew up in their faces. Receiving "stolen" property has long been held inapplicable to information, where the owner is not deprived of the property. And copyright infringement analogies suggested by some are certainly inapposite where, as here, there is no copyright.

Still, there may be a viable case against Assange. Perhaps there is evidence that he solicited the information or provided the necessary software, or perhaps the laws protecting national security information do constitutionally reach disseminators like Assange.

If the government truly has a valid cause of action against WikiLeaks because it violated the law, or because the nation's security is at stake, it should pursue the case through the courts, not start a surreptitious cyberwar that it should not and probably cannot win. Such tactics may be acceptable to frustrate Iran's nuclear weapons program, but not to chill what must be described as protected speech until found otherwise.

If the government does take WikiLeaks to court, though, it must be mindful of the Pandora's box it may open. For example, some commentators have gone to great lengths to distinguish WikiLeaks from its mainstream outlets: the Guardian, Der Spiegel, and The New York Times. Journalistically, they are very different. These mainstream publications routinely exercise editorial judgment and, presumably, restraint. Well-established communication channels, not duress, can mitigate serious security leaks.

But The New York Times and WikiLeaks.com are exactly the same under First Amendment law as we know it. When Daniel Ellsberg of Pentagon Papers fame was prosecuted under the Espionage Act, the government opted not to pursue The Times and The Washington Post. But it might have, according to some of the separate opinions of Supreme Court justices, who collectively refused to enjoin publication. The Ellsberg prosecution was ultimately scrapped when the White House plumbers were discovered, and the Espionage Act dodged a modern First Amendment analysis.

In any event, the Supreme Court has repeatedly found that the press's right to gather and publish information is the same as yours or mine or Julian Assange's; the state cannot punish us for publishing the information unless we break the law to acquire it. Does national security information stand on different ground? We don't know, but a

successful prosecution of WikiLeaks.com for publishing national security information that it acquired legally could open the door to prosecuting The Times for publishing all the national security leaks it gets on a daily basis. Our concept of a free press would surely be jeopardized.

Freedom of speech is one of our most sacred and important rights, particularly where that speech involves the press's gathering and reporting news about governmental activities. Should the government attempt to take WikiLeaks to court over these embarrassing, and even harmful, publications — at least without evidence of complicity in the leak — that right could be compromised. Still, it is better to raise this issue in open court than to attack freedom of speech by the back door.

James B. Astrachan is the author of The Law of Advertising, published by Matthew Bender-Lexis/Nexis. Eric B. Easton is a professor of law and co-director of the Legal Skills Program at the University of Baltimore School of Law. Both authors are members of The Daily Record's Editorial Advisory Board; however, the opinions expressed in this column are their own.