

1:30

JZ: Today is Tuesday the seventh of December, a day that will live in infamy it seems and my name is Jonathan Zittrain, I teach at Harvard University. I'm here with my colleague and friend Larry Lessig

LL: Hi Jonathan

JZ: With whom I have been doing we've been doing together a series of podcasts on various Internet issues and today we have a rather unusual format. We have crashed the fellows hour of the Berkman Center for Internet and Society so we're in a roomful of approximately twenty five people. That's not a National Park Service estimate so it's probably accurate, who have in an experience like this tried to get together and talk about issues in a way that we're still thinking stuff through, we are sharing both have ideas about ought and is with each other, what ought to be happening, what is happening. And we thought what we would do this week is record our conversations as they've been going on, and share them with you the Internet at large. What could possibly go wrong?

So today's topic this week is Wikileaks. This is a subject for which already among us there's been a lot of admission that pretty much everybody to a tee in this room feels really conflicted and that's a kind of rare circumstance. Often it's everybody feels very strongly one way or people feel strongly in lots of different ways but rare is it that you find such sort of ambivalence within this group and we wanted to try to out that.

First is to get started in a few facts and I welcome a correction or refinement either live from the people in this room or later as we go through, we will have an accompanying Frequently Asked Questions document that we'll keep updated about the situation.

But at least at the bare level the facts are that Wikileaks was founded in 2006. Exactly by whom is not clear. Who was a member who runs it is not entirely clear. There's a guy named Julian Assange variously described as a member of its advisory board, its founder, its benefactor, et cetera, who is sort of at least in the public eye become the face with Wikileaks.

And it originally was a wiki in the sense of running a piece of software that allows people from pretty much anywhere to make edits to the pages that one might see on the Web site containing the software.

Its initial statement of purpose was, "the primary interest is in exposing oppressive regimes in Asia, the former Soviet bloc, sub-Saharan Africa, the Middle East. We also expect to be of assistance to people of all regions who wish to reveal unethical behavior in their governments and corporations."

But even then in 2006 at the time Assange had been writing an essay with the sort of different cast on it. Here's one just brief outtake from it: "an authoritarian conspiracy that cannot think efficiently cannot act to preserve itself against the opponents it induces. When we look at conspiracy as an organic whole we can see a system of interacting organs. A body with arteries and veins whose blood may be thickened and slowed until it falls unable to sufficiently comprehend and control the forces in its environment."

And that said at least in Assange's own words one view may be leaking is not to expose a particular wrong in a particular time though that may also be part of it. But rather the harder you can make it he seems to say for a government or a corporation to keep secrets the more paranoid that the people within that organization become the less they share with one another and the slower their blood runs as an organic creature.

So what's happened most recently to bring things into the news so starkly? Most recently 251,287 classified documents from the United States have been apparently brought into Wikileaks' custody. They in turn is shared those documents with four newspapers: Le Monde, El Pais, The Guardian, and Der Spiegel. The Guardian then in a fit of sharing sent them to the New York Times. Of those documents only a small comparative handful have actually been made available to the public, namely 960 of them. And those in redacted form the redactions seem to vary slightly.

This exposure of documents 250,000 possibly available but not yet available 960 of them available and more we gather to be released over time, either by the foreign media now five media partners who have them or by Wikileaks itself possibly as part of a mysterious insurance file, which may even be larger than just that release. This is a file that's been made widely available but is inscrutable it is highly encrypted. So should a password be released suddenly everybody holding this inscrutable file can find out what's inside. In the meantime those who know what's inside we don't even know who they are and we don't know what's in it.

This release follows on the release of separate tranches of incidents and other government documents from the American Defense Department concerning the Iraq war and the Afghanistan war. The Iraq release was about 391,000 incident reports and about 90,000 records relating to Afghanistan for which again 15,000 are said to have been withheld. So what will happen next? We don't know there appear to be more releases in the offing. That may mean that more of the 250,000 cables that have not yet been released will be released by the newspapers according to their own conscience and schedule. Or by Wikileaks. And there might even be more additional leaks. It's been suggested that that they might be coming.

7:20

That's kind of my quick capitulation of the facts as we know them in early December of 2010. Is there anything anybody wants to add or ask just on the factual level before we try to start thinking through this stuff. Hello Ethan Zuckerman.

EZ: Just a quick question I was wondering if you wanted to talk briefly about some of the closures of accounts of Wikileaks that seem like an important part of the fact pattern before we jump into this reaction to the release-

JZ: Yeah, Ethan do you wanna talk about that or do you want me to do my best?

EZ: Why don't you do your best you have this wonderful radio voice and you seem to have the facts all at hand Jonathan!

JZ: I'm nothing if not stentorian. So OK, what we know is that with Wikileaks.org is a Web site hosted at a particular location in fact I believe there has been evidence of it being a bunkered location kind of looking like Superman's Fortress of Solitude in the northern clime. That has been up from time to time unavailable, in fact it may be unavailable right now. And that's because complications having to do with the domain name system. You type in Wikileaks.org, it has to resolve to a numeric address. For it to resolve to a numeric address there's a record held by the dot org people that points to the computer that knows where that address is. And that computer is supposed to be one that the holder of the domain name in this case Wikileaks.org designates. That computer was a computer run by a service called easydns whose purpose is to get asked about where things like Wikileaks.org are and to give answers. That computer was subject we think to a denial of service attack easyDNS as a result- I'm being told no by Jillian York.

JY: It's everyDNS. EasyDNS has unfortunately been caught up in the media storm.

JZ: Let us be clear: easyDNS and everyDNS are completely different! They're just confusingly similar. So for those of you at easyDNS we are sorry! And you offer these services for a fee, so please patronize easyDNS except the fact that people keep confusing it with everyDNS and targeting it with denial of service attacks so maybe they're not the best choice.

But anyway everyDNS is the entity that was hosting the computer that said where Wikileaks.org is. That computer came under repeated denial of service attacks sources unknown, and as a result everyDNS decided to stop answering that question and so far as we know the Wikileaks, whoever runs that, has not gotten in touch with the dot org people to give them a different computer to whom to send the query about where to find Wikileaks.org.

In the meantime Wikileaks.ch and other versions of Wikileaks Web sites remain up and available, perhaps subject denial of service, I don't know, I haven't visited them and there is some sense in which these documents, some of them are available on the websites of the respective newspapers to whom the documents have been released in different forms raw. And there is also some sense in which they may have crept onto the peer to peer torrent file sharing networks normally the province of copyrighted music now there maybe these saying is floating around the networks. Ethan?

EZ: Actually that's been an explicit part of Wikileaks' strategy and the definitive archive of the cables is released as a torrent, that torrent file was updated on a regular basis. To a large extent the Web site is primarily background information on what's going on you can access the cables or in many cases you are able to access the cables through the website. But a complete archive has been available throughout via bittorrent on a continually updated torrent file, which to a certain extent has obviated Wikileaks.org or the other sites being either down because the service provider has stopped providing service or because of distributed denial of services attacks.

Lessig: But to be clear about when you see a complete archive what you mean is a complete archive of the selected chunk of material they've decided to release from the total set that that they have.

JZ: Correct that the 960 not the 251,287. Those may or may not be in the encrypted insurance file.

LL: But there's more to what Ethan was talking about.

JZ: Yes. There's the PayPal angle and the Amazon angle so we might as well talk about them.

LL: And the Mastercard and Visa.

JZ: Correct, so other places where pressure has been applied to try to separate people from these cables and people from Wikileaks or Wikileaks from itself, slowing the body with arteries and veins as they might say, is that it was hosted using Amazon enterprise servers for a while. Amazon doesn't just sell you just books and trinkets. It offers cloud based cash and carry wholesale hosting services to anybody that wants to pay. That anybody for a while included Wikileaks. And then as the story goes in the news we had Senator Lieberman get in touch with Amazon and say are you with us or against us. Amazon which has a terms of service that gives it great discretion in choosing what sites it wishes to host if it were but to think about it thought about it and didn't want to be in the business of hosting Wikileaks, at which point Wikileaks went down off that hosting and it is now posted elsewhere. I think back in Europe appears to be the latest rumor.

The other links that have come under pressure been severed, are for a while Wikileaks was raising money via PayPal and MasterCard and Visa. All three of those intermediaries have on their own initiative or you know with the encouragement of various government bodies decided not to process and in fact may have seized it's not clear monies from people being directed at the Wikileaks organization.

Are there any other intermediaries were talking about right now? Jill?

JY: The other one is Tableau software which was hosting data visualization of Wikileaks. I'm not sure if it was people from Wikileaks or outsiders who put them up. But they have publicly stated that their response was in fact to Senator Lieberman's call.

JZ: And one other example I heard?

Jeffrey Schnapp: When the PayPal--this is Jeffrey Schnapp--when the PayPal conduit was closed down they were relying on I think there were credit donations passing through a Swiss bank account which was also closed down. It was a public post office account.

JZ: And I guess there might even be bank accounts that are being frozen or not as time goes on. So a lot of pressure points we see coming up that come into play with you know unlicensed pharmaceuticals selling Viagra that a given country shouldn't be. Or child abuse images, the usual tools that get deployed against them are in progress in various ways through pressure or suasion more than formal legal process, being deployed against Wikileaks the organization and to some extent the Web sites bracketed by Ethan's observation that it's a lot harder to pull this off with a tormented network. Those who are downloading in the torrent should be aware that the nature of peer to peer tends to mean if you are downloading you are also sharing. That's how it works. So the act of reading the cables is also the act of making them available to others.

OK that's pretty much our articulation of the facts. Now let's turn to the rest of it. And this is the way I think the media tends to move so for better or worse let's start with this question and try to get to it in as subtle way as we can.

People are trying to figure out for whom to cheer here. And the list of characters is a conflicted one. It could include the governments or specific government, it could include Julian Assange, it could include Wikileaks, the press. So I'm curious is there anybody who wants to offer up somebody for whom they are particularly cheering for or against in this tableau as away of figuring out who's right and wrong in all this. Larry should I cold call you

to get started?

LL: You could. Do you want to?

JZ: Yes please.

15:53

LL: Well I'd kind of like to reframe it in a way that makes him Wikileaks case strongest. Because I think the general understanding of what exactly has happened and who did what obscures this. So let's say Wikileaks had announced its policy as the following. We've got a whole bunch of documents that are secret and classified that were given to us by some person who probably shouldn't have but he did-

JZ: And that person by the way appears in part but it's also unclear to be Bradley Manning a US soldier who had access to a lot of the stuff but it has been unclear whether he's been the sole source of that has been released. Manning has been caught and is in jail and from what we can tell does not have an Internet connection.

LL: Manning if you're there call in? OK so let's say that we get this information and what we do is we turn over to a bunch of respectable newspapers from around the world you know and we could have arguments about what respectable is. But the four that that they picked might not be liked by FOX News but they're not crazies. And those respectable newspapers start writing about the stuff we've given them and then what we do as Wikileaks is we make accessible to the public the stuff that they're talking about when they write about us.

Now if that's all that's happened here one thing that I find extraordinary is the unthinking kind of Lieberman-esque reaction to this that says that what we ought to be doing is bringing the full moral suasion of the government and more against any entity trying to enable this thing to happen. Because in fact in that description of the case the newspapers are in some sense taking the lead and discussing and deciding what issues are of public import to be considered and discussed and all that they're doing is providing a public backup source to that sort of information.

So if it's framed like that what's the argument against Wikileaks?

JZ: Well, I suppose one argument is because this isn't being released in the context of say the Pentagon Papers which might really in retrospect especially be one of most sympathetic examples of a leak where in retrospect the Republic still stood there was no great harm to national security it helped with internal truth telling the United States to have the Pentagon Papers available

and from what we can tell it did not reveal crucial sources and methods or put people in danger, maybe mentioned in the paper. So that's kind of like the gold standard-

LL: But that's why I framed it like this. Because it seems to plug right into the Pentagon Papers standard. Because I thought the point of the Pentagon Papers was that we have a tradition of protecting the journalists' decisions to publish or not to publish certain information. That doesn't mean people who illegally release the information won't be prosecuted. They will be. But if the facts are as I've described and all Wikileaks is doing is providing the backup to effectively with the equivalent of the New York Times or the Washington Post-

JZ: It's like a caching server of all this stuff-

LL: For the newspapers, it's like the modern day version of what the Pentagon papers- you wouldn't have gone out and bought those books. I still remember going out and buying those books when it first came out, you just be getting off the Internet! What could the complaint be against, what's the complaint against it, and more pointedly, isn't it outrageous that we're motivating this political action against effectively newspapers deciding what information they ought to be publishing about matters they consider to be of public import on the basis of information they've gotten not themselves through any criminal activity?

JZ: Well and one prosaic concern that we've heard expressed by the US government and by others has been: to the extent that you actually see stuff worth redacting because it really could put people in danger you're not just holding this in Ben Bradley's desk at The Washington Post with a lock on it and and we presume decent security at The Washington Post building. You're strewn it all over the place, it's on servers the kind of sophisticated parties who are the worst entities into whose hands these documents could fall just know that they hack Wikileaks they've got the whole trove.

And that might be the worst of both worlds then because-

LL: By hacking Wikileaks now what you're describing is getting more of the cables than the things that the newspaper released?

JZ: Correct. That there's stuff that the public doesn't see being held in this pen for sifting. And it's not even like- it is a classic fishing expedition, it's not as if specific things were leaked because there was an overriding corruption or issue to be broached and then we further redact them to try to even better balance the pluses and minuses of making this stuff public. But rather we take just a huge scoop into the stream of stuff that is classified information, pour it into this unsecured location and then hope that they kind

of more or less redact it well. That feels a lot different from the Pentagon Papers doesn't it?

21:00

LL: That does but again I would isolate that for a second, and make sure I understand the outrage or the anger against what in fact happens here. If in fact what happens here is nothing more than providing the backup for the material which journalists believe it's important and relevant to be discussing out in the public.

Because just some back story to our conversation here, in the beginning part of our conversation not recorded, and not even available on Wikileaks yet—Ethan Zuckerman give us a nice framing of what you might think of as the stages of Wikileaks life. I'm going to ask you to reframe it for this conversation. But the thing we were struggling with in the conversation is how do we understand what all called stage three and the appropriate response to stage three disclosure. And I guess what I'm wondering is: have I described to the appropriate thing in stage three disclosures. Meaning in stage three disclosure which you'll understand in the second, newspapers get to go through a exercise in journalistic judgment, decide which things are appropriate to be published, publish them, and then Wikileaks is completely fine, has a safe harbor if all they're doing is reflecting what the newspapers say ought be published.

EZ: This is Ethan Zuckerman. Just to refer back to this taxonomy that I propose that was suggesting that early on Wikileaks we could think of Wikileaks as essentially providing protection services or brokering services for individual whistleblowers. So we saw documents released having to do with an assassination plot in Somalia, having to do without corruption in the Moi regime in Kenya, having to do with commercial dealings and the Turks in Caicos. And essentially what Wikileaks was doing was taking information from individuals were leaking it, releasing it to the general public.

In a second phase we saw Wikileaks take on what you might think of as—

JZ: So they weren't filtering at all is what you're saying. They're basically taking it and pushing it out.

EZ: Well it's unclear. It's unclear in Stage one whether if I had come up with your personal health records Jonathan and submitted it Wikileaks if they would have refused it at that point. But what they were trying to do was make it possible for an individual leaker to protect her/his identity.

JZ: They saw themselves as basically doing pass through.



EZ: That's my belief, and I think early on there's also the assumption that for information that was difficult the source like the Somali information there might be an online function where people could come and discuss the authenticity of documents.

In what I'm characterizing as a second phase we saw what I'm thinking of as an advocacy journalism phase and I would put up the collateral murder video in that camp. A specific leak of a video from the US government. But edited and contextualized with a release title that had a very strong point of view as well as edited with a narrative associated with it to make a particular set of political points that seem like Wikileaks was no longer simply acting as the broker for a whistleblower, but was putting forth a specific agenda.

In Phase three as Larry just referred to we're now talking about leaking of the large collection of data, and this is a phase that is probably made possible by Bradley Manning, that's who's currently being accused of it. Or someone else with access to a large number of US government documents and in Phase three there seems to be a recognition that Wikileaks as an organization can't sort through the data and therefore either needs to partner with a journalistic organization to sort through and make sense of that.

But there's this other challenge which is that in releasing the data to the Web there is a need to scrub the data some how to deal with some of these concerns raised by human rights organizations like Human Rights Watch about potential collateral damage. I would also just raise in the conversation we had leading up to this there is sort of- the phase that hasn't happened and it's worth noting that it hasn't happened which would be Wikileaks essentially releasing all of these documents without scrubbing them or releasing them all at once.

JZ: Which may represent the insurance file.

EZ: Which might represent the insurance file. Or might represent a nihilistic competition of the project. But it's worth noting that it hasn't happened suggesting that there's a deeper logic.

JZ: And I guess as a matter of fact again on the third phase we understand that Wikileaks reached out to the US State Department said would you like to work with us on redacting this stuff. You can imagine that this puts the State Department into a dilemma. It legitimates them to say yes let's do this and if they don't do it it runs the risk that they won't be properly redacted. To our knowledge the State Department did not agree to sit down with Wikileaks and do this. There may be connections or communications between the State Department and the New York Times or possibly the State Department and the non US publications to work on the redactions I don't think we know that.

OK so back to you Larry? Your part of the phase three was what? If that's what they're doing that's something that we should not be so much against-

LL: I guess I'd restate it like this: we're into this stage of journalism where stage three dumps are going to happen all the time whether Wikileaks survives or not there are going to be people who come collecting a whole ton of data. Let's say Bank of America data that is also a threatened or possibly Bank of America to be released or whatever. People who believe that there's a reason to be releasing a ton of data come to some entity and want to release the data. And the question is what's the appropriate way to handle this? One to handle it, one way that I would think is completely irresponsible would be to say OK just publish it all! Put it all out there! I don't care what the consequences are, just put it out there. I think that's extraordinarily juvenile but again as is Ethan has said notice that's not Wikileaks did. Wikileaks has done something much less than that. The other extreme might be for them, the entity, let's call Wikileaks version two, to basically say OK we've got this data, now we're basically going to turn over the judgment to a trusted third party: New York Times or the Guardian. And in the context it would be hard to see- if the Guardian had taken it on themselves, if the New York Times-

JZ: It would be hard to imagine the Guardian Web site coming under attack, or calls for the assassination of the editor of The Guardian.

LL: Exactly right. So we're now talking about some space between these two extremes and the question is What are the appropriate set of rules that should govern in that space?

JZ: Judith Donath.

JD: One question also is that even if Wikileaks ceases to be the entity that's doing this type of thing it seems unlikely that there won't be sort of a permanent set of entities of this type. Some perhaps more mischievous than Wikileaks. Sort of the 4chan Wikileaks version. And I think one of the questions is what is the difference as the secrets moved from being government secrets to corporate secrets to personal secrets. When you asked earlier if there's someone you feel you're for or against, my immediate response is the person I'd be against is Joe Lieberman, who I think has behaved quite irresponsibly. But I think it's a response born of fear, looking into this abyss of a world war on secrecy. So what does that look like? If you assume that this is a permanent condition of their being perhaps less responsible entities than Wikileaks being open for inescapable publishing-

JZ: And if you buy Ethan's three phases of Wikileaks' own existence that's showing some movement in the direction of trying to be more responsible and more news organization-like it's almost to use the analogy to the music and

copyright industries, it's like if you kill Napster you might well be creating Gnutella and ultimately more distributed versions of things for which it's harder to tell the entire BitTorrent network to shape up. "C'mon be more responsible Torrent network!" Where you could have done that possibly with Napster. It just seemed like you were trading with the devil to just sit down in the room with Napster and try to negotiate. So the same dilemma might be here. You can imagine for those with secrets to protect legitimately or not, dealing with Wikileaks and actually helping their brand but also temporising them might in retrospect be better than allowing to the 4chans to take over.

Susan Landau is wanting to get in.

30:00

SL: So I had two things I wanted to say. The first is that the Times, in my memory, The Times has twice not published stories that in retrospect it was sorry not to have published at least at the time. One was when it became aware that the US was planning to invade Cuba in 1962 it got asked by the White House not to publish. They think that if they had done so maybe Bay of Pigs wouldn't have happened.

JZ: So their regret is not necessarily ethical. It's just a regret that the Bay of pigs thing wasn't called off.

SL: They think they did not act responsibly. The second time was on the warrantless wiretapping that they reported on in 2005, they sat on the story for a year. Again asked by the White House to do so.

The second point- and just to show that the newspapers have a full panoply of actions - the second point is that one of the likely reasons for Manning to have access to all the cables, if in fact the diplomatic cables were leaked by Manning is the effort by the government post-September 11th to do much more information sharing. But when you get that type of information sharing you also have to think very very carefully about what things you keep secret and what things you don't. And you want to limit the number of things that are secret because otherwise you end up in a situation where lower level people have access to many many secrets.

LL: Yeah, but I think that if we think about this as an inevitable progression - and I like the idea of saying you know if this is now an event, big data dumps, Wikileaks as the recipient, the next stage will be any number of entities is the recipient. It's almost as if we're brought to the world that David Brin was writing about in his book "Transparent Society" but thinking now not so much about, I mean, the focus in that book was all of these issues, but privacy was the one that got people going. But now we're thinking about from the other side, the government-

JZ: And his book basically, it's hard to boil down a book, but his prescription was: as long as the watchers are going to be watching us we won't have much privacy against our own governments, at least we hope we can watch the governments. So with somebody watching the watchers maybe it all comes out in the wash.

LL: Right so the first important part of that boiled down version though is to insist that the technology is driving us to a place where there's no ability to imagine keeping secrets anymore. Either side: the government or individuals. So we need to evolve a set of responses for getting what we need out of privacy without imagining that we're going to be controlling access to information. And it had a kind of in my view panglossian view about the way everybody would kind of work it all out, and which seems even harder to believe now in the context of what we've seen in this very limited instance of it with this Wikileaks release.

JZ: And in fact you've written in The New Republic recently "Against Transparency" which at least by the title appears to clash with Brin's theory.

LL: Yeah, right. It's even harder to summarize my articles in a short form-

JZ: You flatter yourself!

[LAUGHTER]

LL: I was criticizing myself because so many people have argued including at this table that there's something confused about the argument. But my point, I bought an evocative title to almost demonstrate the point of the article. So one part of the article was arguing that you know we have to acknowledge such a thing as an attention span problem in the world, an attention span problem is: imagine any time you've got a bit of information that it takes thirty seconds to understand but a rational reasonable person would only spend ten seconds listening it. Much like this commentary I'm making right now!

JZ: I was already thinking about something else actually! "Bring home milk!"

[LAUGHTER]

LL: In that kind of context the information will be systematically misunderstood because people will not pay enough attention to understand it and so you'll have an impression of it that is completely not the impression you're supposed to have. So that was a six thousand word article in The New Republic. I wanted to demonstrate the attention span problem by calling it "Against Transparency." People wrote the furious-

JZ: Hoping that people would misunderstand it thereby showing your point, your a brilliant one Professor Lessig!!

[LAUGHTER]

LL: Right! The first stage happened, people misunderstood it, there are a few who then tried to put it in context which was the thing I was hoping for which was to demonstrate that you know it's going to take more to understand these points. And the Wikileaks example is bringing this out in spades because there's all sorts of things which as it gets snipped by The Guardian whomever, we get to see the thing that's being referred to it's out of context it has no real meaning it creates all sorts of anger and frustration and which is not producing understanding or knowledge out there. And that's a particular version of the problem that this-

JZ: So is what you're saying that it is basically tragic to see these releases happening, of the fishing expedition variety. Here's a bunch of stuff that will then be grazed over for kind of little stories or context-less bad things. Or misunderstood things. It is both tragic but you also see it is inevitable?

LL: Yes. I think it's inevitable. And so the question is what's the proper appropriate response-

JZ: Which by the way also maps very much to your view on copyright it sounds like. You think it's actually a bad thing to see wholesale bit for bit piracy or copying of copyrighted materials going on through the very networks that are now carrying this stuff but you also think it's inevitable that people should deal-

LL: Yeah, deal with it in a way that addresses the objective of copyright by compensating artists. So right I think to think you have to accept the consequences of the new technological infrastructure and figure out what the best way to respond to it is. And so again going back to the question I framed: imagine Wikileaks on day one it says "here's what we've got, here is how we're going to behave. We are only going to release the stuff that responsible journalists believe needs to be referenced and we'll give you what we've got if they talk about it, but it's their judgment to talk about it." If they had done that what would the debate have been? Would the world view them as responsible for anything?

JZ: If they had basically been a mere data warehouse-

LL: Yeah, we are the warehouse we're the cache-

JZ: And we will accept help from governments who want to make our warehouses

secure as possible so that the redacted stuff can't be leaky.

LL: Yeah, but it's El Pais who is making the decision about what information needs to be published.

JZ: Harry Lewis, former dean of Harvard College and professor of computer science.

36.23

HL: But if taking Susan's point, if it's inevitable that this is going to happen more and more after all you know maybe they'll be able to arrest and throw of Mr Assange in jail for long enough that not a single other person who has the technological capability would ever dare try doing such a thing again, but doesn't seem likely. So if it's going to keep happening isn't the effect of this in fact going to be to change the secret secrecy management protocols.

LL: It certainly will. But I was-

HL: And would that be a good thing or a bad thing?

JZ: By the way, by change them you think they'll make, as Assange predicted or wanted in his 2006 essay, you think it will make for much less information sharing internal to a government so there are fewer points of leakage.

HL: Well I don't know-

LL: Actually there's a lot- I think Susan's model had a lot of moving parts in it. You can see it as deciding we're not going to make secret a whole bunch of things because it's creating all sorts of problems. On the other side as Daniel Patrick Moynihan had argued and others, the whole problem with secrecy is it's a currency inside the government and so you have a natural tendency to more of it and a very strong resistance from releasing any of it. So those are two things pushing in opposite directions, and I don't have a sense of which is going to win.

But I certainly think this is going to lead them to rethink how they actually make data available, maybe making data less available.

But I guess I'm embracing the Brin assumption that whatever they do, if the data is out there in some tangible form, it's been recorded some place, there are going to be people who figure out how to grab it and release it. And the question we need to figure out is what we do, how do we live in such a world to get us what we need.

JZ: And there you could at least see a government wanting to signal, this is purely just it was symbolic but not just symbolic, an important symbolic thing

- the government might say we don't want this to become so legitimated that it's just up there at a Web site hosted Amazon, no Cash and carry access. Fine if you want it you're going to have to go to the Torrent zone and get it and realize this is gray market stuff if it's not necessarily illegal. Something we haven't talked about yet, how illegal each stage of this might or might not be. But you can see a government wanting to do that even though they know the entities that most want it will still get to it including other governments that will be very eager to see if this stuff. Does that make sense to you? As a government that they would want at least not to legitimate it so much that it's just one click away for anyone?

LL: So let's be precise of the "it" The "it" is the stuff that's been talked about by the press or the "it" is the full archive?

JZ: The full archive.

LL: Of course they shouldn't want- I think they have proper reason to try to block one click access to the full archive. We haven't gotten you know even to the stage of defending the idea of releasing the full archive. But again I'm thinking about before that. What would the criticism have been? What's our argument against it?

JZ: I guess the criticism against it would be: there are people who think it is the job of the press to keep the government honest, but you judge how illegal, how worth chasing after the press or any intermediary is, on the basis of looking at the substance of what they are releasing. If they redact a cable so that obvious sources are not compromised but they're otherwise given access to private government communications that would not be "FOIA-able" or otherwise accessible for years to come, and there's no particular great revelation that comes with it, you still might think: that is not Pentagon papers. That is not good stuff. And the government would be entitled to try to prevent that and in fact in the Pentagon Papers case as I understand it the reason the New York Times was able to win that case was because the balance of benefit and public insight provided by the Pentagon Papers versus the harm of releasing them in the form released was so clearly in favor of public disclosure.

40:40

LL: I would give a different reading. My reading would be the judgment was the decision about publishing and what ought to be published was the decision we vest in the press. That's what the free speech clause and free press clause mean. And the government's ability to step in and block it was I think presumptively suspect.

JZ: Presumptively suspect but you could rebut that. If the New York Times in

its bizarre wisdom chose to start releasing people's credit card numbers or who knows what you could see the government going for a so called prior restraint- I want it stopped now- and of course if you don't get the prior restraint what they were really saying was: Look let the Times do its thing, we don't think that the evil of this release is so much that it requires the very strong medicine of a prior restraint. But then go sue them in court later for what you're going to sue them for.

LL: In that framing, if Wikileaks gives all of these cables to the Guardian, and the Guardian goes through it and says here are the things that we think are interesting and ought to be talked about, even if you and I and the United States government of which you apparently are part and would say this is ridiculous! This is outrageous! This should not be discussed! The point is the whole meaning of the case is to say that's Guardian's judgment. And they might be subject to all sorts of liability ex-post but it's very hard to get over the burden-

JZ: Very hard but not impossible.

LL: Yeah.

JZ: Joseph Reagle wants to weigh in.

JR: So I've just been wondering about people's opinions on the media's judgment particularly with respect to the cable releases and whether they reflected an element of Wikiality. In that a lot of the things I've seen are little more than State Department gossip.

JZ: Tell us what Wikiality is.

JR: So Wikiality is the concept coined in the context of Wikipedia by Steven Colbert to say there's this funny phenomenon that Wikipedia is understood to reflect the things that are important in the world. And interestingly enough if you can do something trivial, get it noticed at Wikipedia, which then people will say this is trivia, we're going to delete it, but the fact that it was on Wikipedia is then reported upon which becomes a sort of self-sustaining phenomenon. And Wikipedia is now able to sort of change the world that seeks to document. And so relying upon the press to be this arbiter, my sense with respect to the latest leaks is "why am I reading this? Who cares?" So I'm just wondering if that's even a good decision really?

JZ: This stuff don't meet the notability standard.

JR: In a way, yeah, in Wikipedia speak.

LL: I think it's a great point but that's why I think this framing helps us



see that point because we were attacking Wikileaks. Maybe we should be attacking the press right? The people who have actually decided to report on the stuff that Wikileaks is releasing. Or at least releasing to the rest of us.

JR: But Wikileaks itself is the story. And so they have to substantiate it with this trivia and gossip.

LL: Right.

BA: Brad Abruzzi, Berkman fellow. I wonder if you are concerned about- we could accept that the data is going to be available, maybe the data doesn't get generated to begin with and there's value to having it. What I've drawn from The Times' publication is that they are releasing things that are gossipy to us and yet I think the substance of those cables is probably useful from a diplomatic perspective. That is it's just it for us to know how we assess the character of President Sarkozy for example. But that information may actually be useful in our dealings with him. To the extent that there's anything useful to be gleaned from-

JZ: And when you say us, who do you mean?

BA: When did I say us?

JZ: They might be useful to us in dealing with President Sarkozy-

BA: They might be useful to the government, I'm sorry. So one of the things that we always bandy about in the law is confidentiality. Assurances of confidentiality are important because they induce candor. Are we going to be less candid generally with one another on the idea that everything that we communicate via the internet could subsequently be delivered to people that we don't want to see it.

JZ: Or we just might see that goods going to media that are more ephemeral. That I put something in a cable but disregard that, give me a call and I'll tell you what's really going on. Which would be detrimental both in the short term, it's harder to share among the people who want to know it. And in the long term because it means the historical record will no longer be any different from a public press release.

LL: The e-mails in the White House is a perfect example of this. That's an extraordinary technology that you would hope that the top of our government was able to use but they can't because it produces records which they're not able to do anything useful with.

45:22

JZ: Urs Gasser, the executive director of the Berkman Center.

UG: Thanks, I have a question for you. I'm intrigued by this analogy to copyright and copyright war. Looking at the copyright story of course there was not only the fight against legitimate sources, the peer to peer networks, but there was also the emergence of legitimate sources of online music distribution. iTunes is an example. Taking this analogy not too far of course, but what can that possibly teach us when we look for appropriate responses in a kind of Wikileaks 2.0 environment. Would it be possible in your view that actually society would respond by, and governments would start thinking about, legitimate ways of whistle blowing of government secrets for instance.

Obviously we're concerned and supportive of the release of certain information that has value, we mentioned a few examples where we are less in favor of the release of packages of information where we do not even know what the point is of releasing those documents. Now in the corporate sector obviously we have seen whistleblower legislation where we tried to channel some of the energy and create some incentives. What kind of information actually should be released where we then also offer in return certain protections to the whistleblower. Is a regime like that totally fantasy, out of space? Or is that something you would see as a possibility for a more mature response of a learning system?

LL: Well I certainly obviously agree with the idea. here let's figure out how to accept the technology and live with it. And I think that the copyright analogy is useful. But I think there's a very important distinction here to keep clear. One of the reasons why I think the world can survive pretty well with leaky control of the distribution of copyrighted material is that you know once a particular song gets out there it doesn't destroy the market that might exist for that song. I mean you know there's a huge market for itunes music even though there's also a huge market if quote free music that's available illegally using Bit Torrent.

JZ: Which is to say a little bit of shoplifting is not fatal to Wal-Mart.

LL: It's different but-

JZ: You can have a little around the edges-

LL: I mean let's not get-

JZ: You hate tangible theft metaphors.

LL: Yeah absolutely-

JZ: Even though they're so clarifying.

[LAUGHTER]

LL: Yeah or confusing that's the problem. But the point is you can have a little bit of leak here without destroying your objective. But in the context of a secret you know the leak is it.

JZ: To leak once is bad.

LL: So if you do something like march tanks into Tienanmen Square on your own citizens and somebody snaps a picture of this and releases it, it's not like you know you can tolerate the fact that the secret has now gotten out, if the whole objective is to block the secret from getting out, and that's why I'm less confident that we're going to have something like the negotiated deal with state departments where, OK we've got the stuff you sit down and say OK you got us now let's just talk about how you're going to release the stuff that you've gotten in a way that doesn't do too much harm to us. I just think it's-

JZ: That seems right. Just one commensurate advantage that the government's might have that isn't quite reflected in the Tianenman hypothetical is-

LL: Which government do you work for?

[LAUGHTER]

JZ: We're all friends here! Is the idea that many of the secrets originate in government and in fact what makes them so sensitive is just the fact that someone in government thinks that. It's like you know I believe X about this country, it's sensitive that a US government official believes that, rather than I just got this amazing insight about this country. And those secrets maybe easier to keep because in the music industry the name of the game is to get the music OUT to the public that paid for it while somehow keeping away the public that didn't. And here you're not trying to get it out to the public. You are trying to keep it secure and it's probably worth noting that the stuff in question so far as we can tell has been rated, there's a spectrum of secrecy and it hasn't been at the highest levels of secrecy, and as you go farther along that spectrum, the systems allowed to contain the secret, the people who are entitled to be exposed to them, those actually change dramatically. So it may just mean top secret means top secret and that we may still be able to think we can keep that secret pretty well. We shouldn't give up on it and ratify those who would leak, but then there's this intermediate range called secret that maybe isn't such a big deal if it should leak. And of course a lot of reaction to the cables has been, gee I guess the government is pretty good at what it does. It's actually pretty canny about evaluating things even though it's a little sensitive to see that wasn't all smiles and

handshakes at a given meeting about which a report was written.

I wanted to ask you quickly Larry: in the midst of this as the government has been trying to deal with the US government with a rather new situation, there's word that filtered out for example at Columbia Graduate School there said that they had heard from someone at the State Department who just wanted to pass the advice along to Columbia students that they shouldn't be in the business of downloading and rebroadcasting if it's Torrenting, or otherwise supporting the distribution of the secret materials because that would call into question their respect for and ability to handle classified information in the future. Does this seem silly, appropriate, both? How do you evaluate that and what would you tell a student that might want to work in government?

LL: Well I think it hangs a lot on who you're talking to and what you're advising them. So if you're trying for a job as a spook with the government, it's pretty good advice not to be spreading secrets about the government and as part of your CV. Like I ran a Bit torrent server that made available all the Cablegate press. On the other hand I think it's very important to be clear

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JZ: I should just say I've been handed an anonymous yellow pad so it must be from a lawyer, that says of Columbia thing was rescinded. Columbia seems to have had second thoughts on that so anyway

LL: Good it was rescinded because the law is very unclear, as Floyd Abrams who in a wonderful NPR interview made his point very strongly. Floyd Abrams is of course a first amendment lawyer who also was the lawyer for the New York Times in the Pentagon Papers case. But Abrams point was the law as it relates to having these documents and making them available, is hopelessly over broad in the way that it's written. It makes it sound like no matter what purpose you have in making available you've committed a violation of the 1912 Espionage Act. But Abrams point was actually the way the law would be interpreted is you make it available for the purpose of doing harm to the United States. So if you make it available for the purpose of commenting about the bad policy that we need to rile up the people to change the government to overturn, that's perfectly legitimate. But if you release it for the purpose of bringing down the American government that would be illegitimate. It's at least better advice to say that you shouldn't be violating the law in at least that narrow sense.

JZ: And in fact just looking at the Columbia walkback, that's basically the line they're taking. That in reporting the original advice was extremely broad. It's like you shouldn't be discussing Wikileaks. And now it's well maybe you shouldn't be downloading specifically these documents. And for its part the State Department has said we're not giving anybody else advice, we're just telling our own employees not to access stuff that remains classified.

But your point about intent then also might explain for those curious why it's so murky what is the state of the law is here and who's breaking it, and for instance what Julian Assange could be arrested for. And as a practical matter it could typically be a very difficult case to bring certainly against the New York Times for its role here because it's intention is not to harm the security of the United States but instead to be a newspaper. Assange may be a different story because his declared intentions may have put him within the I'm trying to bring down the government category.

LL: Yeah, and again to bring out some very important fact Wikileaks, Wikileaks is not Assange, Wikileaks is a whole bunch of people who have been working on this project for a number of years a lot of them have motives that are very different from Assange's. Worse in some cases, and much better in other cases. So even if you- it'd be kind of odd to pick this guy out in his writings out to show that his objective is to bring down the United States government and somehow tie this back to the whole entity Wikileaks.

JZ: So last question to wrap us up. Classic media question hopefully asked with the right level of subtlety. How much is this an inflection point? How much is this kind of as good a marker as any as you were hinting before about we're in a new zone here, you just can't keep secrets that well. There's going to be thumb drives full bulk information that one way or another is going to get out. Or is it: Nah, there's been this eruption, we'll get over it, and this isn't necessarily some earth shattering indicator.

LL: So I don't think we're going to know enough or be able to see the extent to which it is an inflection point because I think the relevant point of inflection is going to be inside the government as the government thinks again about how in fact it keeps secrets but also deals with leaks. Because it's- remember the last critical inflection point of 9/11, brought about pretty substantial changes in a whole bunch of issues around civil rights and about surveillance and to deal with was perceived inaccurately in many case to be a great degree the gravest threat the United States. Here too the claim will be: this is a huge threat, and we need to devote an extraordinary amount of government resources to figure out how to deal with this threat. And the way to deal with this threat is not in the American tradition going to be we need to pass laws to make it possible for us to shut down servers by filing lawsuits against them. It might be we need to better develop our cyber warfare technologies to make it effectively impossible for this to really work. So you know there's a lot of ambiguity about exactly how governments around the world respond to these sorts of things-

JZ: And the extent to which they can see denial of service attacks, or other tools designed to bring down servers as part of a legitimate toolset to stop the spread of...

LL: They will certainly think of it within a toolset and my question is to what extent does legitimacy get into that conversation, that's the critical, critical question.

JZ: And I guess we close too again with the observation: is it different when its government secrets at work? One difference that may point a way forward without too much collateral damage is that for the government generating its own secrets it may be able to develop IT systems so that every time you look at a document as an authorized user within the government it is subtly and untraceably watermarked with your identity so should it leak they'll know where to find you, short of finding the New York Times and Julian Assange or something. And that could be a real deterrent to leaking except for those who really think it's important or even beyond their own direct self interest to leak stuff because for some reason it's so important that the public know.

For the other secrets that become available in bulk there may not be as simple a means of accountability. Larry you're going to get the last word.

LL: Any solution that hangs upon the government being sophisticated and developing technologies to deal with problems in a smart way is not a solution.

[LAUGHTER]

JZ: And depending on your point of view as the listener then that is either an incredibly depressing and pessimistic way to shut down this podcast, or it's an incredibly enlivening one. As John Perry Barlow says "you cannot separate the air that chokes from the air upon which wings beat."

[LAUGHTER]

JZ: I don't know if that's true, but it sounded profound to me.

From all of us here at the Berkman Center for Internet and Society, good luck, watch where you click.

[APPLAUSE]