DOJ Leak Investigations Raise First Amendment

Digital Media and Data Privacy Law Blog

on 06.06.2013
Posted in Newsroom Subpoenas

Many journalists, constitutional lawyers, and plain old average Americans have expressed alarm at recent revelations about the Obama Administration's "unprecedented number of leak investigations." Perhaps most notably, James Goodale, who represented the New York Times in the *Pentagon Papers* case, has argued that the President is on his way to surpassing Richard Nixon as "the worst president ever on issues of national security and press freedom."

Of primary concern appears to be the Justice Department's investigation of Fox News reporter James Rosen. As is well-known by now, the DOJ applied for and received a warrant to search Rosen's personal emails in connection with a 2009 story about North Korea's nuclear plans, describing Rosen in its search warrant application as "an aider and abettor and/or co-conspirator" who, along with former State Department arms expert Stephen Kim, allegedly violated the Espionage Act of 1917.

In labeling Rosen a "co-conspirator," the DOJ has advanced what some have called a "newfound" legal theory, which appears to be that a reporter who solicits and then publishes classified information can be the subject of a criminal prosecution. In other words, investigative journalism into areas implicating national security might be unlawful.

The DOJ hooks its legal argument on Section 793(d) of the Espionage Act of 1917, which states in part: "Whoever, lawfully having possession of . . . information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States . . . willfully communicates, delivers [or] transmits . . . the same" shall be fined or imprisoned.

Section 793(g) of that Act makes a conspiracy to violate Section 793(d) a violation as well. The Administration's theory in securing a warrant was that Rosen, in effectively working his source to obtain and then publish classified information, may have broken the law. In other words, Section 793 applies to the press, notwithstanding the First Amendment.

It's a legal theory that has received widespread criticism. In the 1971 *Pentagon Papers* case, two members of the Supreme Court, Justices William O. Douglas and Hugo L. Black, appeared to reject the argument that the Espionage Act applies to the press in their concurring opinion. More recently, James Goodale has expressed his concern that the government "wants to criminalize the reporting of national security information. This will stop reporters from asking for information that

might be classified. Leaks will stop and so will the free flow of information to the public." Numerous journalists and First Amendment watchdogs have decried the chilling effect the DOJ approach might have on national security reporters.

By contrast, however, noted First Amendment scholar Eugene Volokh sees a distinction between actively soliciting, obtaining and then revealing classified information, and the mere publishing of classified information by an "unconnected downstream recipient." Writes Volokh:

If there's a First Amendment right to solicit, aid, and conspire in leaks of classified defense information, then there'd be such a right to solicit, aid, and conspire in leaks of tax return information, leaks of attorney-client confidences, leaks of psychotherapist-patient confidences, illegal interception of cell phone conversation, illegal break-ins into people's computers, illegal rifling through people's desks, and so on.

In the end, the Washington Post may have captured it best, in reporting on another recent leak investigation by the DOJ that involved searching the telephone records of the Associated Press— "the real scandal is what's legal."