

VOICES

National Security Whistleblowers: The U.S. Response to Manning and Snowden Examined

June 12, 2013 | by Sandra Coliver | Open Society Justice Initiative | 17 comments

What sorts of penalties do public servants in Europe and elsewhere face for disclosing classified information to the media? How do procedures and penalties elsewhere compare with those in the United States?

These questions are relevant now as Bradley Manning, a U.S. army private, faces the prospect of serving a life sentence for the disclosure of more than 700,000 documents, and Edward Snowden, a government consultant, faces the possibility of prosecution for disclosing the largest secret surveillance operation ever discovered.

What is common to both is that they undeniably disclosed information of high public interest, including information about government wrongdoing. Indeed, some of Manning's disclosures exposed evidence of possible egregious human rights violations—including gun-ship videos showing U.S. soldiers firing on unarmed civilians, and diplomatic cables that led to disciplinary actions for human rights violations committed by British troops.

Some salient differences between the two disclosures concern the degree to which the person disclosing the documents exercised discretion about what he released, the volume of disclosures and the extent of harm that the disclosures may have caused.

A new set of principles drafted by 22 academic and civil society groups around the globe, in consultation with more than 500 experts from 70 countries, provides helpful guidance.

The Global Principles on National Security and the Right to Information (</publications/global-principles-national-security-and-freedom-information-tshwane-principles>)(called the Tshwane Principles, after the municipality in South Africa where they were finalized), assert that laws should protect public servants—including members of the military and contractors working for intelligence agencies—who disclose information to the public so long as four conditions are met: (1) The information concerns wrongdoing by government or government contractors (defined in some detail); (2) The person attempted to report the wrongdoing, unless there was no functioning body that was likely to undertake an effective investigation or if reporting would have posed a significant risk of destruction of evidence or retaliation against the whistleblower or a third party; (3) The disclosure was limited to the amount of information reasonably necessary to bring to light the wrongdoing; and (4) The whistleblower reasonably believed that the public interest in having the information revealed outweighed any harm to the public interest that would result from disclosure.

Even if the disclosure does not meet the above four criteria, the Principles recommend that the whistleblower should not be punished so long as the public interest in disclosure outweighs the public interest in keeping the information secret. To the extent that a country does have laws that criminalize disclosure to the public of classified information, any punishment should be proportionate to the harm actually caused.

These Principles reflect jurisprudence and practice from around the world. Particularly significant are two decisions of the European Court of Human Rights, which interpret the European Convention on Human Rights, a treaty that is binding on the 47 member states of the Council of Europe (the EU countries, plus most of Eastern Europe, Russia and the former Soviet Union).

The first case concerned Iacob Guja, the head of the press department of the prosecutor general's office in Moldova, who sent to a newspaper copies of letters from public officials who were putting pressure on law enforcement bodies to drop criminal proceedings against some police officers. Guja stated that he disclosed the letters to fight against corruption, and aimed to create a "positive image" of the office rather than to do a "disservice" to it.

In 2008, the Grand Chamber of the European Court, comprised of judges from 17 countries, unanimously ruled that the government's dismissal of Guja violated his human right to impart information as it was unnecessary in a democratic society. The Court considered several factors

(<file:///C:/Users/scoliver/Documents/FOI/National%20Sec%20&%20FOI/finalization/final%20docs/PR%20and%20other%20docs/The%20Principles%20in%20Ac> lack of effective, alternative remedies; the public interest in the information; the harm caused; the reasonableness of Guja's belief in the accuracy and importance of the information; and the severity of the penalty.

The court reached a similar result in a recent judgment concerning a case much like that of Edward Snowden's. In 1996, Constantin Bucur, who worked in the telephone communication monitoring department of Romania's military intelligence agency, disclosed that his agency had tapped the telephones of several journalists and politicians without proper authorization. To provide proof, he disclosed some of the audio tapes, which had been classified "top secret." He maintained that the surveillance was not required by national security. He was convicted and sentenced to two years in prison.

The European Court noted that, given that his superiors were implicated in the irregularities, filing an internal complaint would have been unlikely to have led to an effective investigation. Moreover, a parliamentarian whom Bucur contacted, who was a member of the parliamentary oversight commission, advised him that a complaint would serve no useful purpose. The general interest in the disclosure of information revealing illegal surveillance authorized by high ranking officials was so important in a democratic society that it prevailed over the interest in maintaining public confidence in the intelligence agency. For these reasons, the Court ruled (<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115844>) that divulging the information directly to the public had been justifiable, and that the criminal prosecution and penalty violated Bucur's human rights.

Canadian law applies virtually the same standard and Australia and several other countries are considering legislation that would similarly strengthen protections for whistleblowers, including those who disclose classified information.

Any independent fact-finder that applies this standard, set forth in Principles 40 and 43 of the Tshwane Principles, to Edward Snowden, would surely find disclosure of the information to be of high public interest, though not necessarily of wrongdoing as set forth in Principle 37, given that the programs he disclosed were all carried out with judicial approval pursuant to statute.

The information he disclosed is clearly accurate and significant. Indeed, Principle 10E expressly includes, among categories of information of especially high public interest, which should presumptively be disclosed, "the overall legal framework concerning surveillance of all kinds" and "statistics about the use of such surveillance."

The main issue that could deprive Snowden of full protection is whether an effective alternative to public disclosure was available. Snowden, a security sector consultant, probably could have reported his concerns to the Inspector General or a congressional oversight committee. However the oversight committees were informed and, at least two Congress members, Senators Mark Udall and Ron Wyden (both members of the Intelligence Committee), reported that their efforts to prompt an effective investigation fell on deaf ears, suggesting that nothing short of public disclosure would have been effective.

Even if Snowden could not avail himself of the full protection from all penalties afforded by Principles 40 and 43, he should, pursuant to Principle 46, be subject to criminal penalties only if the disclosures pose a real and identifiable risk of causing significant harm. In other words, mere assertions of harm to national security should not suffice. Government authorities, in order to justify any punishment, should undertake an investigation, and should explain publicly, in as complete detail as possible, the actual and specific harm caused.

Furthermore, any penalty should be proportionate to the actual harm caused. As stated by Kate Martin of the Center for National Security Studies [PDF] (<http://www.right2info.org/resources/publications/national-security-expert-papers/MartinPublicInteretSecrecyInformedPublicAp301.pdf>), "what is required is a thorough articulation of the varied specific public interests and then a weighing of whether each interest is advanced by either disclosure or secrecy."

The calculus regarding Bradley Manning might lead to a different result. He too disclosed information of high public interest. However, the extent of his disclosure arguably went significantly beyond what was necessary to disclose the information of high interest and, moreover, would make it difficult for him to establish that he had read all of the documents, let alone had formed a reasonable belief that their disclosure would serve the public interest.

On the other hand, it is not clear that the disclosures caused irreparable or even significant harm. According to the Principles, and the international case law, the public authority bears the burden of establishing that the disclosures caused harm, in part because the public authority is more likely to have access to the information needed to prove harm.

Assuming that all of Manning's disclosures were not reasonably necessary to disclose information of overriding public importance, or that he could have made his disclosures to a member of Congress, the question then would be what penalty would, under international standards, be considered proportionate to the harm caused?

To answer this question, and to uncover best practices, the Justice Initiative together with an academic at the University of Copenhagen recently undertook a survey of the laws and practices of 20 European countries.

All of the surveyed states prescribe criminal penalties for the disclosure of classified national security information. However, where there is no espionage, treason or disclosure to a foreign state, the penalties are far less than in the US: up to two years in Denmark and Great Britain; four years in Spain and Sweden; five years in Belgium, Germany, Poland and Slovenia; and seven years in France.

Moreover, prosecutions are rare. In six countries—Albania, Belgium, Norway, Romania, Spain and Turkey—there has not been a single conviction in the past 10 years. In 11 countries, there have been just a handful of prosecutions, and even fewer convictions. Russia is the only country surveyed in which significant numbers of prosecutions have been conducted. In the past decade, 10 public servants were convicted and sentenced to terms ranging from 4 to 15 years for the public disclosure of information, including of human rights violations and the dumping of nuclear waste by government agents. The cases illustrate the serious consequences for individuals as well as the public's right to know of excessive prosecutions for public disclosure of classified information.

Significantly, 10 states—Albania, Czech Republic, Germany, Italy, Moldova, the Netherlands, Norway, Romania, Spain, and Sweden—require the government to prove either actual or probable harm resulting from the disclosure in order for any penalty to be imposed. An additional three countries—Hungary, Denmark, and France—allow the lack of harm to be raised as a defense or mitigating circumstance.

In Britain, the United States' closest military and intelligence ally, the maximum penalty for public disclosure of intelligence or security information is two years. Since Britain's Official Secrets Act (OSA) of 1989 entered into force, 10 public servants with authorized access to confidential information have been prosecuted under the Act. Of those, the longest sentence—one year in prison (http://news.bbc.co.uk/2/hi/uk_news/199796.stm)—was served by Steven Hayden, a Navy petty officer who pled guilty to the selling to a newspaper of security and intelligence information concerning a plot by Saddam Hussein to launch anthrax attacks in the UK. In the United States, that offense would be prosecuted under the Espionage Act, the same law being used to prosecute Bradley Manning.

As stated by Open Society Foundations Senior Advisor Morton Halperin in an essay that examines the Obama Administration's prosecution of whistleblowers (http://www.right2info.org/resources/publications/Halperin_CriminalPenaltiesforDisclosingClassifiedInformationtothePressintheUnitedStates.pdf), "the determined efforts of the Obama Administration to use the Espionage Act to punish activities leading to publication of information creates a serious threat to the public right to know and to the process by which Americans learn about the activities of the U.S. government on national security matters."

His recommended solution, consistent with Tshwane Principle 46(b)(i), is that actions that provide information to the public should be considered criminal only if Congress has enacted a narrow statute covering a specific and well-defined category of information meriting such protection and stating the circumstances under which government officials have committed a crime.

One question the American public should be asking is why have there been so many leaks in recent years? In addition to the relative ease of downloading documents, as opposed to having to copy them page by page as did Daniel Ellsberg, a major contributing factor surely is the huge number of documents that have been classified needlessly. We all would be better protected from actual harms if the government would identify the secrets that truly need to be kept, and focus on protecting those.

17 Comments

Anna V. Carroll
posted on Jun 13, 2013

There was intelligence days before Pearl Harbor that informed Roosevelt of Japan's plans for that area. Those warnings were ignored. The same for JFK going to Dallas. Some of his strongest Democratic friends warned him of the dangers. He went. He died. Days before 9-11 there was buzz about something in the wind concerning planes. These warnings were also ignored. All the 'intelligence' in the world cannot always prevent catastrophies.

The average Jane and Joe America have no idea what goes on in offices, bunkers, chat-rooms, security organizations, on an hourly basis. If we knew of all the plots being organized from all sides we wouldn't get out of bed in the morning. The events of the last weeks show us the govt. is on the ball and working 24/7 on our behalf. Let them do their jobs. That is what we elected them to do.

What bothers me is the endless condemnation of Mr. George Soros by Aaron Klein (WABC radio), Sean Hannity (WABC radio), Rush Limbaugh (WABC radio), Mark Levin (WABC radio) and Michael Savage (WABC radio). He is blamed for every scandal that happens world-wide. I have never heard anyone from OSI go on television or radio and dispute these untruths. Hope that changes in the future. The average American has no idea who Mr. Soros is and what he does to make the world a better place on many levels.

Sam Bhattacharya
posted on Jun 13, 2013

In Baltimore airport (BWI) there is a gift shop that sells a magnetic strip, one can put it on the fridge door. It says, I love my country, its just the government i am so scared off. Funny joke.

kwikiriza aggrey
posted on Jun 14, 2013

Its a shame that governments around the world are increasingly tightening the free flow of information by threatening the whistleblowers. In Uganda forexample Gen. Ssejusa's case has revealed alot of what our government can do in attempt to silence its citizens.

Thinker Bill Hackett
posted on Jun 14, 2013

Compliments on a marvelous posting.

Cordley Coit
posted on Jun 14, 2013

Sounds like better way of dealing with the problem that is always present. The United States behaves like a narco state or a tyranny when dealing with secrets. It is my duty as a journalist to expose the excesses of govermentall operators creating injustice.

Silvia Thomas
posted on Jun 14, 2013

Excellent article and relief that if information revealed is of more importance to public safety than what the withholding thereof would be, may lead to those who govern to have to start ensuring that all they do is in the interest of those who voted for them to govern.

Gar Smith
posted on Jun 14, 2013

I will be posting this on the Website of Environmentalists Against War (www.envirosagainstar.org (<http://www.envirosagainstar.org>)).

Jyotiswaroop Pandey
posted on Jun 14, 2013

This exemplifies the wider phenomenon of criminalisation of non violent activities and incarceration as the primary punishment;both have proved dysfunctional and yet we continue to have them knowing the immense miscarriages of justice that are a consequence.

Jonathan Pool
posted on Jun 14, 2013

Thank you for this informative and thoughtful essay.

I am surprised to see improper concealment missing from the exculpatory and protective criteria. The principles mainly define limits on governments' right to keep information secret. So it would be reasonable to make these limits self-enforcing, by entitling any possessor of improperly concealed information to disclose it, regardless of whether it shows wrongdoing.

Conversely, I don't see the principles stating that "any punishment should be proportionate to the harm actually caused". I see them considering both the extent of harm and the risk of harm, and thus permitting punishment even where no actual harm has occurred.

M.K.Cham, The Gambia
posted on Jun 14, 2013

Many years ago, many of us in Africa tend to look up to Europe and USA as the hope for human right protection in the world. For USA, those hopes have since been destroyed with the Bush and now Obama`s Administrations. The Obama`s Administration is no better than that of Mugabi of Zimbabwe. Practising rule by law and rule of law.The World looks up to Europe to protect the Tshwane Principles

maarit puska
posted on Jun 14, 2013

There should be enacted laws in every countries' parliament/Congress establishing that a comprehensive inquiry takes place (sworn to duties of elected officials) to pursue wrongdoing by g'ment agencies/outside contractors as a remedy to uphold laws. If no demonstrable action is taken- then for public interest (of wrongdoing-illegality)alone whistleblowers' protection is fundamental. Spying on average Joe Doe's e-mails/phone conversations/medical records/ by

a g'ment contractor all over the world should be a real no-no (Booz,Allen & Hamilton come to mind since their offices are scattered all over the world- Finland,Sweden,Russia,Kazakhstan,Georgia,Azerbaijan,UAE,Qatar - their former director James Clapper now the Big Enchilada in US national security being said firm's director in charge of US g'ment programs before going to work for B,A,H's client. Spying on private citizens' e-mails should have equivalent penal codes to those of mail- access to rebut any charges due to phone taps to a court of law- medical records are supposed to have one's written consent (there are penalties for accessing patients' records unlawfully too). The monies spent on these goose are astronomical- the Boston Marathon bombing suspects from Chechnya -according to Russian news sources (itar-tass) US was notified of their previous terrorism- the same Black Widows/terrorists who killed Russians in Moscow airport and the train. One has to read news sources in different countries to get an understanding what truly is going on in the world- and putting wrongdoers under the lens' lights (or letting sunshine in) is a remedy- not a placebo. .Keep up the excellent work.

Of course WEAKYLEAK gave us a lot of food for thought...in fact if we knew of all the infernal plots being put secretly in place.....by those same people who pretend to protect us....we would be discouraged to try so hard , in opposition to try to apply the rule of law..

Smart President of Guinea Alpha Condé defends the idea of EXTRACTIVE INDUSTRIES TRANSPARANCY INITIATIVE....i have respect for his vision he says:

"we do not want to live dependend on the generosity of others when our resources can make us prosperous healthy and strong...those who play by the rules to prosper with us.....and we shall lock out those who do not"bravo to President of Guinea.

Albert Einstein tells us:

"the world is dangerous not because of those who do harm...but because of those who watch and do nothing"

Interesting enough while in power Sarkozy called all the world states to unite to create:

"THE NEW WORLD ORDER OF THE XX1ST CENTURY"

on the idea that the common goods of humanity should be placed under the responsibility of the people of the whole humanity;defending the idea to assure to all men access to vital resources...water...energy..food..medecines..knowledgecalling the UNITED NATIONS to take the responsibility of a juste distribution of profits of the income of all commodities and technologies....

so as to put more the accent on development rather than on SPECULATION and also go further in the struggle against corruption....at this time its the struggle of united Europe..Asia..and Africa against the power of the United States

maybe we need to come back to a new intelligence the one of the elite of the first century with..Pythagora.. Plato..Aristotle..Thomas d'Aquin..Copernic..Descartes.. Leibniez..Swedwnborg..Balzac...Jesus..Lao-Tsé or Moise and Mahomet...create a new conscience...

If Hitler was successfull as a monster dictator....

OBAMA could be the contrary....we need a leader who has "GUTS"Obama is already a world leader just with his"YES WE CAN CHANGE" but he will have to face this infernal movement of The New World Order.

This gigantic American monument of the high finance which detains more than 50% of the world's wealth.

i wish a lot of determination for those who try to apply the rule of any law to this control power,this is one more reason to never give up the mission of Monsieur Soros to apply the rule of law which should govern the conduct of the nations....its the only way to put order in this grab jungle.

we have to face the reality that most international or national organizations serve those interesstes in one way or another....European Union..Otan..G7..G 8...G 20

the quartet FMI...World Bank..and of course the United Nations....are all tools...vehicles of the "UNIFORMISATION" with a central power;who takes decisions for the whole surface of the globe...with no possible recourse.. (CLOSED DOORS)

the 5% of people detaining 95% of the resources have political and economical controlwell different from the 95% of the people detaining the last 5% of resources...with maybe a helpless awarness...

My soul oblige me to denounce and encourage all those brave enough to face this power,within the Open Society Foundations..with new ideas...and an ability of objective thinking to create clear strategies against this infernal propaganda machine that unfortunately works so well for those giants of this high finance elite.

I say OBAMA HAS TO WAKE UP NOW...THE PEOPLE HAVE FAITH IN HIM NOW...THEY TRUST HIS INTEGRETY AND HIS GENEROSITY...HE HAS A SINCERE DESIRE TO CHANGE THE WORLD...

I SAY YES HE CAN NOW IF HE DECIDES HE

WANTS TO here it is not a question of money its a question of courage... Claire Costom.

Nino Gobronidze
posted on Jun 15, 2013

Excellent blog!

Anna V. Carroll
posted on Jun 15, 2013

I have just learned of the passing of Paul Soros. His Obituary in The New York Times is heartbreaking to read. So little was known of the older brother in his lifetime. I was not aware of the great personal tragedies he & his wife suffered nor the physical pain he had been in for some time. The legacy of the Soros family is staggering in its humanity. Their father, Tivadar, set the bar very high with respect to giving all one can for his fellow man. Unselfish, sacrificing, an inspiration for all who read his profoundly moving book, Masquerade. My sincere sympathy and prayers are sent out to the entire Soros family. So very few of us will leave the kind of legacy this family has. By their example they have helped me grow in so many ways. I am forever grateful.

Joanne Bauer
posted on Jun 18, 2013

Thanks, Sandy. This is incredibly helpful and clarifying.

Bea Edwards
posted on Jun 19, 2013

Just a note to add that Snowden should be protected under the Tshwane Principles because he undoubtedly knew that no effective alternative to public disclosure was available to him. There was significant risk of retaliation if he used internal reporting channels. GAP clients Tom Drake, Bill Binney and Kirk Wiebe, all NSA whistleblowers, tried to report extensive domestic surveillance and gross waste up the chain of command at NSA and through the Inspector General. When no remedial action was taken, they went to a staff member of the House Permanent Select Committee on Intelligence for help. She and they were all investigated and raided by the FBI. The IG exposed them to retaliation. Drake was prosecuted as an enemy of the state under the Espionage Act.

To receive his disclosures, Snowden chose Laura Poitras (as well as Glenn Greenwald). Poitras released a video of Binney and his disclosures about a year ago, and it cannot be coincidence that Snowden went to her.

In short, Snowden was well-informed about the retaliation directed at other NSA whistleblowers and had good reason to think that what happened to them would happen to him.

Linda Merrion
posted on Aug 1, 2013

The recent Ed Snowden case is really intriguing. It plainly highlights the astounding problems the US has with privacy. However it is not simply our president. Even ordinary people are now snooping on one another. Without knowing anything at all about you; non-techies, Marsha, the Plumber, Joey can use internet tools like IntelliGator (<http://tinyurl.com/kgIh6hf>) and learn your criminal records, address, employment history...etc. And just like the NSA - it's totally legal. Immoral but nonetheless legal.

Content Use Policy

Unless otherwise noted, you may republish our content for free with some restrictions. 

© 2013 Open Society Foundations, some rights reserved.

