

Associated Press

In this image made from video released by WikiLeaks on Friday, Oct. 11, 2013, former National Security Agency systems analyst Edward Snowden speaks during a presentation ceremony for the Sam Adams Award in Moscow, Russia. (AP Photo)

**Snowden could use a trial to showcase spy claims**

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WASHINGTON – Should Edward Snowden ever return to the U.S., he would face criminal charges for leaking information about National Security Agency surveillance programs. But legal experts say a trial could expose more classified information as his lawyers try to build a case in an open court that the operations he exposed were illegal.

A jury trial could be awkward for the Obama administration if the jurors believe Snowden is a whistle-blower who exposed government overreach. Snowden surely would try to turn the tables on the government, arguing that its right to keep information secret does not outweigh his constitutional right to speak out.

"He would no doubt bring First Amendment defenses to what he did, emphasizing the public interest in his disclosures and the democratic values that he served," said David Pozen, a Columbia Law School professor and a former legal adviser at the State Department. "There's been no case quite like it."

Administration officials say the possibility of a public spectacle wherein Snowden tries to reveal even more classified information to make his case has not lessened the Justice Department's intent to prosecute him, and Attorney General Eric Holder has not warmed to calls for clemency for the former NSA systems analyst.

Department spokesman Andrew Ames last week indicated there was no change in the department's intent to prosecute, and that point was reinforced by National Security Council spokeswoman Caitlin Hayden.

"There's been no change in our position: Mr. Snowden is accused of leaking classified information and faces felony charges here in the United States," Hayden said. "He should be returned to the U.S. as soon as possible, where he will be accorded full due process and protections."

A former NSA general counsel, Stewart Baker, drawing from conversations with his former associates after New York Times and Guardian editorials called for clemency, said the issue "has been more of a media idea than something that is being seriously debated inside the government."

Both newspapers, along with The Washington Post, have received and reported on some of the documents Snowden took.

"I haven't talked to anyone in government who considers this a possibility," Baker said.

Officials have called Snowden's leaks the single largest theft of secrets in U.S. history.

The Justice Department breaks those alleged misdeeds into three charges filed in federal court in Virginia: theft of government property; under the Espionage Act, the unauthorized communication of national defense information; and willful communication of classified communications intelligence information to an unauthorized person.

A November Washington Post/ABC News poll found 52 percent of Americans supported charging Snowden with a crime, while 38 percent opposed it.

Escaping conviction would be difficult.

Snowden has admitted taking and distributing the documents, explained Jason Weinstein, a former deputy assistant attorney general. The documents were first published in the Guardian and the Post in June, based on some of the thousands of documents Snowden handed over to Barton Gellman of the Post, Brazil-based American journalist Glenn Greenwald and Laura Poitras, a U.S. filmmaker.

It would be tough, too, to make a legal argument that Snowden was acting as a whistle-blower, exposing criminal wrongdoing by the government.

"To the legal argument that the programs were illegal, the government's answer would be that the programs were legally authorized," Weinstein said.

"Your personal judgment as to whether the government is doing something illegal is not an element of the crime. You disclosed something you did not have permission to disclose."

No court has allowed a leaker of classified information to escape punishment on those grounds, Pozen wrote in a Lawfare blog post on the subject.

The first person convicted of espionage for furnishing classified data to a journalist was Samuel Loring Morison, who was employed at the Naval Intelligence Support Center in Suitland, Md., from 1974 to 1984. He was convicted of spying for leaking intelligence photographs in 1984 to Jane's Defence Weekly, a British military magazine. Morison was sentenced to two years in jail, and later was pardoned by President Bill Clinton.

The Obama administration has pursued leakers aggressively, and Snowden's breach was far more sweeping than Morison's.

Snowden's defense strategy could rest on "graymail," said national security lawyer Mark Zaid, in which the defense threatens to reveal classified information in the trial if the prosecution insists on pursuing the case.

Zaid, who has defended clients in similar cases, said that could force government lawyers to argue to close much of the hearings, only feeding Snowden's argument that the government is trying to hide misdeeds from the public behind a cloak of secrecy.

Snowden's legal representative, Ben Wizner at the American Civil Liberties Union, said the government likely would not ever let the jury hear his client's arguments for releasing the information on moral grounds.

"The Justice Department has successfully barred defendants in leaks prosecutions from mounting any kind of public interest defense by using the Espionage Act," Wizner said. He said all the government would have to prove is that Snowden took national defense information and gave it to someone who wasn't allowed to receive it.

"The government doesn't have to prove that the disclosures were harmful to the country. The defendant can't defend himself on basis that documents shouldn't have been classified ... and lower courts have upheld that," Wizner said. "That's why Edward Snowden is not taking his chances in a federal court. He wouldn't be able to explain himself."

Snowden is living under temporary asylum in Russia, which has no extradition treaty with the United States. If he decided to stay there or move to another country also without an extradition treaty with the U.S., he conceivably could live out his life without prosecution.

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