THE MISPLACED US DETERMINATION TO INDICT ASSANGE

I have stayed out of the WikiLeaks scrum to date, mainly because the relatively few cables published to date (only 1,269 of the more than 250,000 cables they possess have been released so far) did not provide that much new on the subjects I normally write on as opposed to just confirming or further supporting previous knowledge and/or suppositions. This is certainly not to say they have not been interesting reading or useful to many others, the WikiLeaks material has been all that.

But now comes the bellicose fixation of the United States government on criminally prosecuting WikiLeak's editor-in-chief Julian Assange. What started out as the usual idiotic yammering of Rep. Peter King and Sen. Joe Lieberman has turned into an apparently dedicated and determined effort by the Department of Justice to charge Assange. As the following discussion will demonstrate, it will require dicey and novel extrapolation of legal theories and statutes to even charge Assange, much less actually convict him.

The interesting thing is this type of prosecution flies directly in the face of the written charging guidelines of the DOJ which prescribe a prosecution should be brought only where the admissible facts and evidence are "sufficient to obtain and sustain a conviction". As we have seen in so many instances over the last few years, the DOJ uses this requirement to decline prosecution on a whole host of matters they simply do not want to touch, even where the evidence for conviction of serious crimes is crystal clear and unequivocal. Take for instance the case on the blatant destruction of the abu-Zubaydah and al-Nashiri torture tapes for instance (see here and here), where the DOJ and John Durham used just this basis to decline

prosecution because the DOJ just does not, you know, go out on limbs.

So, why would the Obama Administration be so aggressive against Assange when doing so flies in the face of their written guidelines and standard glib protocol? Is it really all about prosecuting Assange? That would be hard to believe; more likely it is not just to monkeywrench Assange and WikiLeaks, but to send a hard and clear prior restraint message to the American press. This is almost surely confirmed by the rhetoric of Joe Lieberman, who is rarely more than a short ride away from his disciple and friend Barack Obama on such matters, and who is making noises about also prosecuting the New York Times.

Never before has the Espionage Act, nor other provisions of the criminal code, been applied to First Amendment protected American press in the manner being blithely tossed around by US officials in the WikiLeak wake. Avoidance of First Amendment press and publication has been not just the general position of the DOJ historically, it has been borne out by significant caselaw over the years. If you need a primer on the hands off attitude that has been the hallmark of treatment of press entities, you need look no further than *New York Times v. United States,* aka the "Pentagon Papers Case". In *NYT v. US*, the government could not even use the Espionage Act in a *civil* context against the press, much less a *criminal* one as they propose for Assange, without being forcefully shot down. Daniel Ellsberg is right when he says that "Every attack now made on WikiLeaks and Julian Assange was made against me".

The Barack Obama Administration, who rode into office on a platform and promise of less secrecy, more transparency and a respect for Constitutional principles, has proved itself time and again to be anything but what it advertised. And to the uninformed populous as a whole, ill served by the American press that is being pinched in this process, Julian Assange

presents an attractive vehicle for this prior restraint demagoguery by the US government. The public, especially without strong pushback and fight from the press, will surely bite off on this craven scheme.

But the determination to prosecute Julian Assange is not just a destructive and myopic scheme to effect prior restraint in a digital world, it is laughable from the point of legal foundation of criminal prosecution of Assange. That, however, seems to be no deterrent to the US and the Obama/Holder DOJ. ABC News reported last Friday an US indictment against Assange may be imminent and his lawyers were expecting it, and CBS News confirms with more detail today:

> "We have heard from the Swedish authorities there has been a secretly empaneled grand jury in Alexandria…just over the river from Washington DC, next to the Pentagon," Stephens said. "They are currently investigating this, and indeed the Swedes we understand have said that if he comes to Sweden, they will defer their interest in him to the Americans. Now that shows some level of collusion and embarrassment, so it does seem to me what we have here is nothing more than holding charges…so ultimately they can get their mitts on him."
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> Last week, U.S. Attorney General Eric Holder said, "We have a very serious criminal investigation that's underway, and we're looking at all of the things that we can do to try to stem the flow of this information."

Exactly what laws would the DOJ prosecute Assange under? There are two options that appear to have gained traction, the first being the Espionage Act, which is codified in US statutory criminal law in Title 18, Chapter 37, i.e. 18 USC 792 et seq. There are really only two provisions here that could likely be applied to Assange/Wiki, 18 USC 793 "Gathering,

transmitting or losing defense information" and 18 USC 798 "Disclosure of classified information". A review of both statutes yields, at first blush, language that could encompass the conduct of Assange and WikiLeaks.

The infirmity of both provisions becomes apparent upon closer inspection. 18 USC contains several stated active prohibitions, however "publication" is certainly not one of them. There is solid historical authority that such omission of "publication" as a prohibited act was intentional (one would assume in light of the First Amendment). As Jennifer Elsea states in a wonderful discussion in a recent official Congressional Research Service Report:

> Moreover, the statutes described in the previous section have been used almost exclusively to prosecute individuals with access to classified information (and a corresponding obligation to protect it) who make it available to foreign agents, or to foreign agents who obtain classified information unlawfully while present in the United States. Leaks of classified information to the press have only rarely been punished as crimes, and we are aware of no case in which a publisher of information obtained through unauthorized disclosure by a government employee has been prosecuted for publishing it. There may be First Amendment implications that would make such a prosecution difficult, not to mention political ramifications based on concerns about government censorship. To the extent that the investigation implicates any foreign nationals whose conduct occurred entirely overseas, any resulting prosecution may carry foreign policy implications related to the exercise of extraterritorial jurisdiction.

Exactly. And the last bit on "extraterritorial jurisdiction" is not to be overlooked in the

discussion either (although it mostly has been to date). Neither Assange nor WikiLeaks committed any overt act on US soil, within its territorial bulge, nor in or on a US controlled facility overseas. Assange is neither an US citizen or permissive resident, nor does his conduct seem to fall within the parameters of the within the Special Maritime and Territorial Jurisdiction of the United States. In short, Assange is neither a US subject of any kind, nor does he appear to have physically committed any overt act within the jurisdiction, even extended, of the United States.

To conclude the Espionage Act discussion, I harken back to *New York Times v. United States*, where Mr. Justice William O. Douglas wrote,

> It is apparent that Congress was capable of, and did, distinguish between publishing and communication in the various sections of the Espionage Act.

The various concurring majority opinions in *New York Times v. United States* are a treasure trove of law directly against the attempt by the Obama DOJ to prosecute Julian Assange under the Espionage Act, and they are a roadmap for Assange's defense if they do. If the DOJ undertakes such charges, it is a crystal clear signal their own written prosecutorial standards, as discussed above, are worthless and not worth the paper they are printed on.

The second charging modality against Assange that has been identified by the government relates to receiving and/or retaining stolen property. Receiving and trafficking in stolen property is by definition almost always a state law based offense; however, there is a Federal statute that has occasionally been used in situations having at least some analogy to Assange. The statute is 18 USC 641 and it was used to prosecute Samuel Morison and Jonathan Randal. The difference, of course, is that both Morison and Randal were government employees working in intel (Morison) and for the DEA

(Randal).

In short, both gentlemen – Morison and Randal – were Bradley Manning, not Julian Assange; and in both cases the press was not pursued. Because the press is simply in a different posture in light of the First Amendment and the plethora of crystal clear caselaw. Secondly, 18 USC 641 facially contemplates a "thing" or "property" and the argument could certainly be made that no such tangible object was ever removed from the government's possession, nor were they deprived of the use or possession thereof.

Frankly, while this is an argument I would certainly throw out were I defending Assange, I would not want to hang my hat on it. It is not so hard to see a court finding a digital copy of the cable files to be within the ambit of the statute; especially after the warning Harold Koh gave clearly setting up this application of section 641. The problem is, the DOJ still runs headfirst into the brick wall that is the First Amendment separation of press and publication under the seminal *New York Times v. United States* case. Again, it is impossible to read the majority opinions in *New York Times* and find the headroom for the US DOJ to prosecute Julian Assange short of engaging in the production of contorted and scurrilous horse manure.

Oh, and one other thing, about the thought that if Assange is prosecuted, the New York Times could be too; no less an authority than former Bush Attorney General Michael Mukasey suggests, while such may place the NYT squarely within the prosecutorial ambit, that the DOJ simply engage in straight up selective prosecution and go only after Assange. Nice. Remember when all those high minded bloggers were saying how principled Mukasey was and what a refreshing choice he would be to replace Alberto Gonzales? I do; that didn't work out so well.

Eric Holder and the DOJ cannot possibly find jurisdiction to charge American contractors who torture and murder people in the course and scope of their employment by the US Government

abroad, and cannot charge CIA supervisors and OLC lawyers who patently admit to destruction of evidence and conspiracy to commit war crimes; however, the same DOJ is now suddenly able to be so legally creative as to find a path to charging a person under the Espionage Act who is not a US citizen, owed the US no duty under citizenship and treason provisions, committed no act within the jurisdiction of the US and who is a member within the general definition of "press" and who only published purported whistleblower leaks given to him. It is amazing how the DOJ is willing to go out on that "limb" when it wants to, but can never so travel when the interests of justice really demand it to.

In conclusion, and to bring this post full circle, there is no established viable basis for prosecuting Julian Assange, in fact all precedent is to the contrary. To do so flies directly in the face of the once vaunted DOJ guidelines for criminal prosecution. For these reasons, there is no reason to consider the attempts by the US government to prosecute Assange as anything but a craven facial assault on the First Amendment and freedom of the press. After seeing the disdain, contempt and avarice the Obama Administration has displayed toward the Fourth Amendment and Fifth Amendment, I guess no one should be shocked.