

THE SIX WEEK DELAY IN THE SWARTZ INVESTIGATION

I want to explain something about this post.

As I noted, the same day that Aaron Swartz resubmitted his FOIA on Bradley Manning's treatment, the Secret Service got a warrant to search most of the hardware captured on the day he was arrested (a USB on his person and a laptop and hard drive found elsewhere on MIT's campus), as well as his home (and they subsequently got a warrant to search his office at Harvard).

Some people were either confused or skeptical there was a connection.

But whether or not there's a connection, there's something funky about the Swartz investigation in the first half of 2011.

He was arrested very quietly on January 6; I suspect the reason few people knew about it was because no one expected it to amount to anything.

And for a while, it didn't.

The Secret Service officer on the case, Michael Pickett, raised the issue of warrants on January 7—the day after Swartz was arrested. But the government didn't get around to actually getting warrants to search this hardware until February 9, over a month later.

Here's the warrant and supporting affidavit ultimately used for the hardware (except his phone, which was also seized).

But as this defense motion makes clear, there was a further delay after that first February 9 warrant. The Secret Service let the February 9 warrants **for the hardware** expire, and had to get new warrants on February 24.

Here, there was a 34-day delay in obtaining the February 9, 2011, warrant, which remained unexecuted, and a total of a 49-day delay until the obtaining of the February 24, 2011, warrant pursuant to which the items were ultimately searched.

[snip]

On the other side of the balance, defendant knows of no conceivable reason which could justify a delay of this magnitude.

And while it's not central to this post, in the motion Swartz' lawyer cited a slew of Circuit Court opinions (though none from the First Circuit) throwing out searches on computers after this kind of delay.

In other words, after getting control of this investigation, Secret Service largely let it slide, potentially fatally so for any prosecution.

Which is why it's interesting that, when the Secret Service finally summoned the energy (or got the okay from AUSA Stephen Heymann) to start this investigation, it was more interested in investigating **Swartz' home** than in investigating his hardware—the stuff that directly tied to the crime purportedly in question.

This motion describes what happened with the investigation of Swartz' home and then—after they didn't find what they were looking for there—his Harvard office. Secret Service got the warrant to search Swartz' house, which they executed on February 11.

On February 9, 2011, Secret Service S/A Michael Pickett submitted an affidavit in support of an application for a warrant to search Swartz's home at 950 Massachusetts Avenue, Apt. 320, Cambridge, Massachusetts. Exhibit 34. A warrant authorizing the search was

issued the same day. Exhibit 35. The search warrant was executed on February 11, 2011.

The affidavit was based on somewhat flimsy stuff—including a tweet Swartz had sent 30 days before the warrant application from a Mac, which apparently supported the Secret Service's suspicion that Swartz had a Mac at his home.

The affidavit also mentioned that neither the "ghost macbook" associated with the JSTOR downloading or the external hard drive which had been observed attached to the ACER laptop on January 4, 2011, had yet been recovered. Id. The affidavit further stated that on January 10, 2011, Swartz "broadcast a message via Twitter for Mac."

After searching Swartz' house, they decided they needed to search his office.

On February 11, 2011, Secret Service S/A Brett Seidel submitted an affidavit in support of an application for a warrant to search Swartz's office at 124 Mount Auburn Street, Office 504, Cambridge, Massachusetts, the case-specific averments of which were virtually entirely derived from observations made by law enforcement officers during the search of Swartz's home and statements made by Swartz which were a direct product of that search. Exhibit 36. The warrant was issued and executed the same day. Exhibit 37.

And while I actually think the warrants for the home search would not have been thrown out (because after all, the Magistrate had approved them), I do think the motion makes a decent case that Secret Service provided no particularly compelling reason to tie Swartz' apartment—and from there his office—to the crime they were purportedly investigating him for, downloading a

bunch of JSTOR documents onto a computer they had in their possession but were letting sit.

Thus, there are two things that make the timing of the February 9 warrant to search Swartz' hardware and house interesting. First, the delay, in an investigation that would much later merit ratcheting up the charges rather dramatically, as if there were some urgency about the prosecution. And also, the fact that Secret Service chose not to investigate the most central evidence in the case—the laptop onto which Swartz had downloaded the JSTOR articles—until almost two weeks after searching Swartz' home, which was much less directly tied to the crime they were purportedly investigating (it might have been important had they immediately searched it, to find the missing hard drives—which were eventually recovered—and Mac—which AFAIK was not, but not so much after the delay).

That's why the coincidence between Swartz' persistence in FOIAing Manning's treatment and the decision to renew the investigation on him is so interesting.

It's not the only potential explanation for the delay. Perhaps there are bureaucratic reasons to explain the delay.

Or perhaps it's that—as WSJ reported that same day, February 9—DOJ had hit a wall in its preferred theory for prosecuting Julian Assange. (h/t JL)

U.S. investigators have been unable to uncover evidence that WikiLeaks founder Julian Assange induced an Army private to leak government documents to his website, according to officials familiar with the matter.

New findings suggest Pfc. Bradley Manning, the intelligence analyst accused of handing over the data to the WikiLeaks website, initiated the theft himself, officials said.

[snip]

Further denting the push by some government officials to prosecute Mr. Assange, the probes have found little to link the two men, though others affiliated with WikiLeaks have been tied to Pfc. Manning, officials said.

[snip]

Federal Bureau of Investigation agents and Justice Department lawyers continue to gather evidence for a possible conspiracy charge against Mr. Assange, but that's a harder case to make, government officials said. Such a charge would be based on contacts, which are more evident, between Pfc. Manning and lower-level WikiLeaks activists, and on Mr. Assange's leadership of the group, these officials said.

I don't know what the reason for the delay is. But the delay—along with indications they were conducting fishing expeditions into others aspects of Swartz' life—do raise questions. Swartz' efforts to FOIA tapes of Manning explaining his treatment might be one explanation to answer those questions.