

THROWING OUR PATRIOT AT ASSANGE

Last week, U.S. Attorney General Eric Holder admitted what bmaz laid out yesterday – the problems with prosecuting WikiLeaks' Julian Assange under the Espionage Act. But at the same time, he said, the Espionage Act may play a role in a possible Assange indictment.

"I don't want to get into specifics here, but people would have a misimpression if the only statute you think that we are looking at is the Espionage Act," Mr. Holder said Monday at a news conference. "That is certainly something that might play a role, but there are other statutes, other tools that we have at our disposal."

So even with all the problems in applying the Espionage Act to Assange, Holder is still invoking the provision in his discussion of the "tools that we have at our disposal" to combat Assange.

Legally, the stance could have import beyond the question of whether or not they can indict him.

Consider, for example, this language on the National Security Letter provision of the PATRIOT Act, which allows the FBI, with no court oversight, to require financial service and telecommunications providers to turn over data pertaining to any investigation the Department of Justice asserts is an espionage investigation:

A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection

(b) of this section.

The Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, may—

request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the name, address, length of service, and toll billing records sought **are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities**, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States; [my emphasis]

Or this language from Section 215 of the PATRIOT Act, which allows the FBI, with FISA Court approval, to require private businesses to secretly turn over a broad range of business records or tangible items pertaining to any investigation DOJ asserts is an espionage investigation.

The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order **requiring the production of any tangible things (including books, records, papers, documents, and other items)** for an investigation to protect against international terrorism **or clandestine**

intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution. [my emphasis]

Between these two provisions, the government can collect a wide range of information on US persons – things like donations via credit card and server data – simply by claiming the investigation involves spying. They don't have to even claim there's a connection between those US persons making those donations or accessing the particular server and the alleged spy. They don't have to **prove** that the case involves spying or that they have the ability to indict under the Espionage Act. They only have to claim they are pursuing an authorized – ultimately, the AG does the authorizing – investigation to protect against spying.

Which is what the Attorney General is suggesting here, that they are investigating Assange and the Espionage Act might play a role.

Mind you, they'd also have to claim (to themselves, in the case of the NSL, to FISC in the case of Section 215) that they were collecting data on a US person for reasons above and beyond that person's First Amendment right to read stuff on the InterToobz or donate to people the government is loosely alleging may be sort of like a spy. Mind you, if the government did collect – say – the names of Americans donating to WikiLeaks via MasterCard or Visa or Paypal, or the names of Americans accessing the WikiLeaks site for the day Amazon hosted it, those people might have a great lawsuit claiming they had been targeted for First Amendment protected activities.

If they ever found out they were targeted.

But of course, we don't have any way of knowing whether the government decided to use the PATRIOT Act provisions allowing them to collect

data on Americans so long as they assert a connection to an Espionage investigation. Because that all remains secret.

Now, I have no idea whether the government is doing this (though I could imagine that if financial service providers like MasterCard and Visa got a really onerous request from DOJ, they might choose to end their relationship with Assange rather than provide ongoing compliance with the DOJ request).

But it seems these PATRIOT provisions are just the tip of the iceberg of potential investigative techniques they could have access to (FISA wiretaps are another) based on the stance that DOJ is investigating Assange for spying, whether or not they ever intend to charge him with spying.