

THE INEVITABLE COLLAPSE OF LEGITIMACY UNDER SECRET LAW: WIKILEAKS HACKS

DOJ indicted 16 alleged hackers today, 14 of whom were purportedly involved in hacking PayPal after it refused to accept payments for WikiLeaks.

According to the San Jose indictment, in late November 2010, WikiLeaks released a large amount of classified U.S. State Department cables on its website. Citing violations of the PayPal terms of service, and in response to WikiLeaks' release of the classified cables, PayPal suspended WikiLeaks' accounts so that WikiLeaks could no longer receive donations via PayPal. WikiLeaks' website declared that PayPal's action "tried to economically strangle WikiLeaks."

The San Jose indictment alleges that in retribution for PayPal's termination of WikiLeaks' donation account, a group calling itself Anonymous coordinated and executed distributed denial of service (DDoS) attacks against PayPal's computer servers using an open source computer program the group makes available for free download on the Internet. DDoS attacks are attempts to render computers unavailable to users through a variety of means, including saturating the target computers or networks with external communications requests, thereby denying service to legitimate users. According to the indictment, Anonymous referred to the DDoS attacks on PayPal as "Operation Avenge Assange."

Now, I'm not surprised DOJ indicted these folks. I'm not arguing that, if they did what DOJ alleged they did, they didn't commit a crime.

But I can't help but notice that DOJ has not yet indicted anyone for the DDoS attacks—the very same crime—committed against WikiLeaks 8 days earlier than the crime alleged in this indictment.

I'm guessing DOJ has a very good idea who committed that crime. But for some reason (heh), they haven't indicted those perpetrators.

In fact, I'll bet you that DOJ also has a better explanation for why PayPal started refusing WikiLeaks donations on December 4, 2010—two days before this alleged crime—than they describe here.

But we mere citizens are privy to none of that. As far as we know—because of choices about secrecy the government has made—a crime was committed against a media outlet on November 28, 2010. That crime remains unsolved. Indeed, DOJ has never made a peep about solving that crime. Meanwhile, today, 14 people were indicted for allegedly committing the very same crime the government—inexplicably, at least according to its public statements—has not pursued.

According to the public story, at least, the rule of law died with this indictment today. The government has put itself—the hackers it likes, if not employs—above the law, while indicting 14 people for the very same crime committed just weeks before those 14 people allegedly committed their crime.

Of course, that's probably not how the government views it. I presume they went to some judge—probably a FISA judge—in the days leading up to November 28 and told that judge they were pursuing a case of Espionage and couldn't that judge please give the government permission to commit a crime against a media outlet.

Mind you, I'm not aware of the part of the PATRIOT Act (or other US Code) that permits the

government to commit crimes against media outlets it claims are engaged in Espionage. But then I'm not aware of the part of the PATRIOT Act that permits the government to track geolocation of all of us in the name of hunting terrorists.

And we know they do that.

That's one of the problems with secret law, you know. It's never clear what basis the government has given a judge, in secret, for breaking the law.

Less perplexing than how the government explains why its hack of WikiLeaks is not a crime but the alleged hacking committed by these 14 people is a crime, is why PayPal and Visa and MasterCard all of a sudden, within days, decided to stop taking donations to WikiLeaks. Withdrawing funding for alleged terrorists and spies with no due process, at least, is at least provided for under the law.

Though, from the perspective of seeing that our government used it to persecute a media outlet, it doesn't necessarily make it right.

The other interesting thing about how this secret law thing works is that around about the same time this uninvestigated hack against WikiLeaks occurred and around about the same time these alleged hackers hacked PayPal, the government anonymously leaked information about problems with the claim that WikiLeaks was, in fact, engaged in Espionage. Even at that point, the government admitted it didn't have much of an Espionage case.

The Justice Department, in considering whether and how it might indict Julian Assange, is looking beyond the Espionage Act of 1917 to other possible offenses, including conspiracy or trafficking in stolen property, according to officials familiar with the investigation.

Attorney General Eric H. Holder Jr. acknowledged this week that there were

problems with the Espionage Act, a World War I-era law that says the unauthorized possession and dissemination of information related to national defense is illegal. But he also hinted that prosecutors were looking at other statutes with regard to Mr. Assange, the founder of WikiLeaks.

[snip]

A government official familiar with the investigation said that treating WikiLeaks different from newspapers might be facilitated if investigators found any evidence that Mr. Assange aided the leaker, who is believed to be a low-level Army intelligence analyst – for example, by directing him to look for certain things and providing technological assistance.

If Mr. Assange did collaborate in the original disclosure, then prosecutors could charge him with conspiracy in the underlying leak, skirting the question of whether the subsequent publication of the documents constituted a separate criminal offense. But while investigators have looked for such evidence, there is no public sign suggesting that they have found any.

Did they tell a judge WikiLeaks was engaged in Espionage even while they were telling Charlie Savage it wasn't?

Particularly from the perspective of today—as it has become clear that Rupert Murdoch has been trafficking in stolen property without his media properties mysteriously getting hacked by people we believe to be aligned with the government—the 7 month period in which DOJ has failed to find any grounds to indict WikiLeaks itself really raises questions about the justification DOJ presumably gave to a judge all those months ago to engage in illegal prior restraint.

I assume DOJ claimed WikiLeaks engaged in Espionage. I assume the government used that claim to hack WikiLeaks and engage in prior restraint. I assume the government used the same claim to cut off US-based donations to WikiLeaks. And if the government admitted that publicly, likely just a few crazy civil libertarians like me would object to the government's violation of the First Amendment.

We're so quaint, those of us who believe in rule of law!

DOJ could fix the crisis in legitimacy this indictment will bring about by simply explaining some detail about why they're not pursuing the hackers that brought down a media outlet last year, but they have pursued hackers that brought down an online payment service (never mind questions about why they're not pursuing bankers). They could simply explain what law they used—or abused—to be able to incapacitate a media outlet without violating the First Amendment.

That might give their actions today—and back in November—the patina of legitimacy.

But instead, they have apparently chosen to persist in applying their secret laws, such that they can violate the First Amendment of the Constitution, even while prosecuting others for crimes the government has presumably committed itself.

And that, my friends, is how secret law kills democracy and the rule of law.