

DOJ INVOKED AARON SWARTZ' MANIFESTO TO JUSTIFY INVESTIGATIVE METHODS

In the original July 14, 2011 indictment of Aaron Swartz, DOJ described him this way.

Aaron Swartz lived in the District of Massachusetts and was a fellow at Harvard University's Center for Ethics. Although Harvard provided Swartz access to JSTOR's services and archive as needed for his research, Swartz used MIT's computer networks to steal well over 4,000,000 articles from JSTOR. Swartz was not affiliated with MIT as a student, faculty member, or employee or in any other manner other than his and MIT's common location in Cambridge. Nor was Swartz affiliated in any way with JSTOR.

In their September 12, 2012 superseding indictment, DOJ described him this way.

Aaron Swartz lived in the District of Massachusetts and was a fellow at Harvard University's Safra Center for Ethics. Swartz was no affiliated with MIT as a student, faculty member, or employee or in any other manner. Although Harvard provided Swartz access to JSTOR's services and archive as needed for his research, Swartz used MIT's computer networks to steal millions of articles from JSTOR.

On November 16, 2012, they wrote this motion to rebut Swartz' claims that a number of the searches MIT and the Secret Service conducted in their investigation were improper and should be suppressed.

During the period alleged in the Superseding Indictment, Aaron Swartz was a fellow at Harvard University's Safra Center for Ethics, on whose website he was described as a "writer, hacker and activist." Harvard provided Swartz with access to JSTOR's services and archives as needed for his research there. Swartz was not a student, faculty member, or employee of MIT. In the Guerilla Open Access Manifesto, which Swartz actively participated in drafting and had posted on one of his websites, Swartz advocated "tak[ing] information, wherever it is stored, mak[ing] our copies and shar[ing] them with the world."

In other words, precisely at the moment the government defended all the searches it did of Swartz, it (for the first time, I believe) introduced a new descriptor (in addition to the adjectives "writer, hacker, and activist"): Swartz wrote the Guerilla Open Access Manifesto.

The reference is particularly odd, being introduced (though not elaborated on) in this brief defending the investigative approach used by MIT and then the government. It effectively invokes First Amendment protected speech to justify investigative tactics.

The timeline laid out in the rest of the brief claims (not entirely credibly) they had no idea who was downloading from JSTOR until they arrested him in January 2011 (note, too, it is predictably vague about when the Secret Service got involved). So what Swartz wrote two years before the JSTOR downloads started is (or should be) utterly irrelevant to the legitimacy of investigative tactics, because according to the government they didn't know about that until a good bit later.

Unless of course Secret Service was involved earlier, in which case under DOJ's current Domestic Investigation and Operations Guide, they could use First Amendment activity as part

of the predicate for an investigation.

But that's not the narrative they lay out in this brief.

And look at the passage from the Manifesto they quote in the brief, which appears in this larger passage.

There is no justice in following unjust laws. It's time to come into the light and, in the grand tradition of civil disobedience, declare our opposition to this private theft of public culture.

We need to take information, wherever it is stored, make our copies and share them with the world. We need to take stuff that's out of copyright and add it to the archive. We need to buy secret databases and put them on the Web. We need to download scientific journals and upload them to file sharing networks.
[my emphasis]

In context, much of the manifesto advocates for things that are perfectly legal: sharing documents under Fair Use. Taking information that is out of copyright and making it accessible. Purchasing databases and putting them on the web.

Aside from sharing passwords, about the only thing that might be illegal here (depending on copyright!) is downloading scientific journals and uploading them to file sharing networks.

Precisely what the government accused Swartz of.

But they don't cite that passage. Rather, they cite the "making copies" passage—something not inherently illegal. As if that justified the investigative tactics they used.

Used as it is in this page-limited brief arguing why their tactics were legal, the citation is really bizarre. But it does seem to admit that the government considers Swartz' role in the Open Access movement to be as much proof he was

a criminal as that he chose to download the documents at MIT and not Harvard.