

DOJ USED THE OPEN ACCESS GUERILLA MANIFESTO TO DO MORE THAN JUSTIFY PROSECUTION, THEY JUSTIFIED A SEARCH OF AARON SWARTZ' HOME

Yesterday, the HuffPo caught up to reporting I did in January, reporting that DOJ used Aaron Swartz' 2008 Guerilla Open Access Manifesto to justify their investigation of him.

A Justice Department representative told congressional staffers during a recent briefing on the computer fraud prosecution of Internet activist Aaron Swartz that Swartz's "Guerilla Open Access Manifesto" played a role in the prosecution, sources told The Huffington Post.

[snip]

The "Manifesto," Justice Department representatives told congressional staffers, demonstrated Swartz's malicious intent in downloading documents on a massive scale.

[snip]

Reich told congressional staffers that the Justice Department believed federal prosecutors acted in a reasonable manner, according to the sources. He also made clear that prosecutors were in part influenced by wanting to deter others from committing similar offenses.

When considering punishment, courts are supposed to impose an "adequate deterrence to criminal conduct" under

federal statute. Swartz's "Manifesto," prosecutors said they believed, made clear that he intended to share the academic articles widely.

But there's something the HuffPo is still missing.

Not only does the Guerilla Manifesto advocate doing a lot of things that may well be legal – the biggest exception is the one most applicable, downloading scientific journals and upload them to file sharing networks...

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.

But it's the way the government used Swartz' manifesto legally. They used it, as far as I've found, primarily to justify HOW they investigated Swartz.

They used it in a brief rebutting his effort to suppress a number of searches they had done in the investigation.

And that's significant because of an oddity in the investigation. The government, at first, wasn't all that quick to investigate Swartz. They let the actual evidence of the alleged crime just sit for weeks and weeks. And when they finally got around to looking into that stuff, they started with Swartz' house, not with the hardware that offered the best evidence of a crime.

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.

What the government effectively did with Swartz' Guerilla Manifesto, at least in that brief, was use it to justify the way they had investigated him, including this bizarre 6 week delay, prioritizing investigating his house before actually investigating the hardware that served as best evidence of any crime.

While they didn't say so in as many words, the brief the government submitted – arguing that this delay shouldn't result in suppression of the evidence collected in this odd investigation – basically says the Manifesto makes the delay okay.

That is, an investigative approach that might otherwise result in the best evidence be thrown out was okay, the government argued, because Swartz wrote a document advocating for the largely legal but nevertheless incriminating, it claimed, sharing of information.

Threat Level reveals the government went so far as subpoenaing various versions of the manifesto

from Internet Archive.

His attorney, Elliot Peters, said prosecutors were “very focused” on the manifesto Swartz penned from Italy.

“They were very focused on it, and appeared to be planning to use it as evidence of Aaron’s intent to take the JSTOR material and somehow post it online to make it available for all,” Peters told Wired on Friday. “They had spent a lot of energy investigating that document – who wrote it, whether it conveyed Aaron’s point of view, etc.”

The government, Peters said, “had also subpoenaed various versions of the document from the Internet Archive,” Peters said.

This was part of the fishing expeditions Swartz’ lawyer was trying to win discovery on back in 2012.

DOJ told Congress it believed the Manifesto would prove motive – that Swartz planned to share the journals widely. But that only underscores that had he used them for his own purposes – to collect data on who funded what studies and what kind of results they produced, as he had in the past – they would have had a hard time claiming this was a crime at all.

It appears that, only by researching the Manifesto, a First Amendment protected publication that largely espoused legal information sharing, did the government even get around to treating this as a crime.