

TIME MACHINE: 2011 TO 2012 WIKILEAKS IS NOT 2018 WIKILEAKS

Since DOJ confirmed last week that it does have at least one sealed criminal complaint against Julian Assange, WikiLeaks has adopted a notable defense strategy. In most of their responses, WikiLeaks has claimed a continuity between what it has done in the last two years and what it was doing in 2010, when the US government first took aggressive action against WikiLeaks.

For example, this timeline claims vindication of persistent claims among WikiLeaks supporters that Assange had already been indicted, even while linking to reports that make it clear DOJ has changed its approach recently (and ignoring, entirely, the NYT report that says the charge dates to this summer and which WikiLeaks' Twitter feed attacks elsewhere).

November: US prosecutors inadvertently reveal that Julian has been charged under seal (i.e., confidentially) in the US – something which WikiLeaks and others have long said but which has been denied by some US officials. The document making the admission was written by Assistant US Attorney Kellen S Dwyer. The Wall Street Journal reports that “over the past year, US prosecutors have discussed several types of charges they could potentially bring against Mr. Assange”. It notes that charges against Julian could include violating the US Espionage Act, which criminalises releasing information regarding US national defence.

Assange's UK lawyer, Jennifer Robinson, did the same in an appearance with MSNBC. She claimed that the charge came out of the investigation

started in 2010 in response to WikiLeaks' publication of US Diplomatic cables, the Iraq war logs, the Afghan war logs, which she argues (correctly, I'd agree) was demonstrated to be in the public interest and had been published by other media outlets, including the NYT. She says this criminal charge proves it was correct for Assange to have sought asylum from Ecuador. And she emphasized that Assange would be extradited "for publishing truthful information." She repeated "public interest" over and over.

Another Tweet RTed by WikiLeaks claims that Assange had been indicted as early as 2011 and the Australian government knew about it.

Finally, another Tweet purports to lay out the possible charges against Assange, which it describes as:

- Espionage: 18 U.S.C. § 793(d) – imprisonment up to 10 years
- Conspiracy to commit espionage: 18 U.S.C. § 793(g) – imprisonment up to 10 years
- The theft or conversion of property belonging to the United States government: 18 U.S.C. § 641 – imprisonment up to 10 years
- Violation of the Computer Fraud and Abuse Act: 18 U.S.C. § 1030 – imprisonment up to 10 years
- (general) Conspiracy: 18 U.S.C. § 371 – imprisonment up to 5 years

It bases that claim on this post from early 2015 describing the late 2014 notice to WikiLeaks of warrants served on Google two and a half years

earlier (so around June 2012, which is when Assange first took refuge in the Ecuadorian embassy).

In other words, WikiLeaks is working public opinion by pretending it is being prosecuted for the stuff it did in 2011, even to the point of claiming that news of a recent complaint proves that Assange has been indicted all this time. It is true that the prosecutor who made the cut-and-paste error that revealed the existence of a complaint, Kellen Dwyer, has reportedly been on the WikiLeaks investigative team for years. But that doesn't mean, at all, that the US prosecution is in any way related to those earlier actions.

The reports of both the WSJ and NYT seem to prove the opposite. Whether because the Trump Administration that WikiLeaks worked so hard to elect turned out to be far less respectful of freedom of the press than the Obama Administration, or because the US started collecting more aggressively on WikiLeaks and therefore learned more about its operations, or because the nature of Assange's more recent actions are fundamentally different from what he did in 2011, DOJ came to charging Assange this summer when Eric Holder refused to do so. Indeed, while no one has confirmed this one way or another, the assumption has been that Assange's charges relate either to his involvement in the 2016 Russian hack-and-leak (though that would presumably be charged in DC) or his involvement in the 2017 Vault 7 and Vault 8 files as well as his exploitation of them.

The possible crimes may have expanded, too. Espionage is definitely still a possibility, particularly given how DOJ charged accused Vault 7 leaker Joshua Schulte, including possibly suggesting his leaks were designed to help another nation (presumably Russia). If Assange had advance knowledge of any of the Russian hacks (or the Peter Smith negotiated efforts to obtain Hillary's server emails), he might be exposed to CFAA as well. And if he is charged by

Mueller, he will surely be charged with at least one conspiracy charge as well; WikiLeaks was already described as an unindicted co-conspirator in the GRU indictment.

But there may well be other charges, starting with extortion or something akin to it for the way Assange tried to use the threat of the release of the Vault 7 documents to obtain a pardon. Some of his actions might also amount to obstruction. Yochai Benkler's latest post also imagines Assange may have coordinated more closely with Russian intelligence, which might lead to different charges.

WikiLeaks' attempts to rest on its earlier laurels is telling, for several reasons. It suggests they and their supporters don't seem to want to defend Assange's more recent actions. I find it remarkable, for example, that Robinson didn't mention how many stories the NYT and WaPo wrote based on the 2016 files, which would support her argument that the files were newsworthy.

The attempt to pretend Assange is being prosecuted for his earlier actions seems to serve another purpose – to defend his years of asylum claims, which are also the basis for his claims to be a victim of US political targeting (and the premise for his demands for immunity on threat of releasing the Vault 7 files). Don't get me wrong. I think some of the things DOJ is known or suspected to have done in 2010 and 2011 are problematic. But those did not directly merit an asylum claim (and in fact they preceded Assange's asylum claim by over a year).

That may, in turn, serve to obscure what Assange wanted immunity for in coercive negotiations that started in 2017: Was it 2011, his role in publishing the State cables? Or was it 2016, as his offers to explain what (he claims) really happened in 2016 would suggest?

Whichever it is, WikiLeaks seems to have a lot staked on making a defense of Assange's 2011 activities. Which suggests they're a lot less

confident they can defend his 2016 and 2017 activities.