

THE INTERCEPT'S SILENCE ABOUT EDWARD SNOWDEN'S INCLUSION IN JULIAN ASSANGE'S CHARGES

Back in October, I beat up The Intercept's Micah Lee for writing a post that purported to cover the "crumbling" hacking case against Julian Assange by working from an outdated indictment rather than the superseding one that added 50-some paragraphs to the overt acts alleged in the single count for conspiracy to hack. Micah made a half-assed and still factually inaccurate "correction" (without crediting me for pointing out the embarrassing error) that utterly misunderstands US conspiracy law, and claimed events since 2011 had tolled whereas the original password hacking attempt had not.

In the 2020 indictment, attempting to portray Assange as a hacker rather than a journalist, the government listed other instances of Assange allegedly directing hacking activity by people other than Manning – but did not add to the charges against him, prompting a discussion of whether the statute of limitations on the alleged new crimes had expired. Assange's lawyers called the newest evidence “‘make weight’ allegations designed to bring all of this back within the limitation period.” It remains to be seen if the U.S. government will pursue this reaching strategy. At the moment it seems that these supplemental allegations are peripheral to the first, and only clearly chargeable, instance described by the government that could be conceived as a conspiracy to commit a computer crime – providing marginal support for a case which is, at its

core, already weak.

In short, having been alerted to the superseding indictment, The Intercept's resident expert on hacking utterly dodged the allegations made in that expanded charge, not so much as mentioning what they were.

At the time, I promised to return to Micah's embarrassing piece after I finished some more pressing issues.

It turns out, the problem at The Intercept is broader than just Micah's piece.

A recent post from Charles Glass suggests that if President Biden were to "remove the Espionage Act charges against Assange," it would amount to the withdrawal of his extradition application entirely.

WHEN JOE BIDEN becomes president of the United States on January 20, a historic opportunity awaits him to demonstrate America's commitment to the First Amendment. He can, in a stroke, reverse four years of White House persecution of journalism by withdrawing the application to extradite Julian Assange from Britain to the U.S.

[snip]

By removing the 1917 Espionage Act charges against Assange, Biden would be adhering to the precedent established by the administration in which he served for eight years as vice president. President Barack Obama's Department of Justice investigated Assange and WikiLeaks for three years until 2013 before deciding, in the words of University of Maryland journalism professor Mark Feldstein, "to follow established precedent and not bring charges against Assange or any of the newspapers that published the documents." Equal application of the law

would have required the DOJ to prosecute media outlets, including the New York Times, that had as large a hand in publicizing war crimes as did Assange himself. If prosecutors put all the editors, publishers, and scholars who disseminated WikiLeaks materials in the dock, there would not be a courtroom anywhere in America big enough to hold the trial. Obama decided against it, knowing it would represent an unprecedented assault on freedoms Americans hold dear.

Glass went on to repeat the grossly erroneous claims about the history of Assange's prosecution made at the extradition hearing by journalism history professor Mark Feldstein, who literally submitted a filing to the hearing admitting he wasn't familiar with what the public record actually says about it.

That Glass ignored the hacking charge against Assange is remarkable given that, along with the erroneous piece from Micah, an earlier post from him is one of the few that addressed the (now superseded) CFAA count.

In addition, The Intercept did a Deconstructed show on the hearing in October. It, too, adopted the erroneous fairy tale about why the Trump Administration charged Assange when the Obama Administration did not. And while it introduced the allegation that Assange is a hacker, it then reverted to the so-called *New York Times* test, suggesting that if the publishing activities of Assange cannot be distinguished from the NYT's, then it means Assange cannot and should not be prosecuted.

RG: Supporters of the prosecution of Assange make a number of arguments: That Assange is not a "real" journalist. He's a hacker. He's a traitor. He recklessly endangered lives and so he deserves no protection as a journalist. All of this is wrong.

The First Amendment isn't worth the parchment it's written on if it's not respected, and defended, in the broader culture of the United States. People have to support it. Once that support erodes, it tends not to come back. That's why authoritarians, when they want to curtail a particular freedom, usually find the most unsympathetic target they can, hoping nobody will come to his defense. Then once a new precedent is established, all bets are off. With Assange, Trump and Barr think they've found just such a man. It's up to us not to take the bait.

[snip]

Kevin Gosztola: I think the key thing about Trevor Tim[m]'s testimony is destigmatizing the work of WikiLeaks, or even demystifying it. Because what you have through the U.S. government's targeting of Wikileaks over the past decade is a concerted effort to make it seem like what WikiLeaks does is not journalism. And so the counter to that through the defense's case is to make it abundantly clear that this is not reasonable; that in fact, everything that WikiLeaks does, from when it accepts the documents, when it tries to authenticate them, to when it makes media partnerships, to also make sure that names are redacted, to make sure that sensitive details are understood fully before the documents are published. And I think you see that this is the way to keep investigative journalism robust in the 21st century.

RG: I thought Trevor's point was interesting that The New York Times does not get a press badge from the U.S. government. You know, it isn't, and it shouldn't be, up to the U.S. government to decide who is and who is not a

journalist.

And the idea of who is or is not a responsible journalist is different from what is illegal or legal conduct, which I also thought was important because the prosecution wants to say: Well, he's an irresponsible person, so therefore, he doesn't have these protections. And the counter is no, it's not up to the government to say what's responsible or irresponsible journalism. You know, the government creates laws, and if the laws are violated, then you can start your prosecution. But if not, you can't. And it's never been against the law to publish classified information. It's against the law to leak it, if you have access to it. But it's not against the law to publish it.

As I have said over and over, I agree that the Espionage Act charges against Assange, as charged, pose a real threat to journalism (though so do the Trump DOJ's other prosecutions of Espionage as a conspiracy, including the Henry Kyle Frese case where DOJ used a Title III wiretap to obtain evidence, and the Natalie Sours Edwards case where the Treasury Department attempted to achieve prior restraint on Jason Leopold, prosecutions that have gotten far less attention).

But I also think the sheer amount of shitty propaganda and outright lies people are telling in service of Julian Assange do their own damage to journalism. It is possible to discuss the risk that Assange's prosecution *on the Espionage charges* poses without ignoring large swaths of the public record or even, as The Intercept has done in these three pieces and much of their earlier coverage, the actual charges.

The Intercept's silence on the superseding indictment is all the more notable because of the way its founding act plays a part.

As I laid out here and here, the superseding charge incorporates a number of other overt acts in the CFAA conspiracy, going through 2015 (and seemingly setting up another superseding indictment that covers publications from 2015 through 2017). The new overt acts include a number of things that absolutely distinguish Assange and WikiLeaks from journalists and publishers. Of particular note, they allege that Julian Assange:

- Entered into an agreement with individuals involved in Gnosis and Lulzsec before those individuals carried out the hack of Stratfor and remained in the agreement during and after the hack. This is a case where five of the people Assange allegedly entered into a conspiracy with have already pled guilty, in both the UK and US (as well as Ireland), making the primary proof required at trial that Assange did enter into agreement with the other co-conspirators, not that the hack occurred.
- Directed Siggi to hack a WikiLeaks dissident to destroy incriminating evidence implicating Assange. While I'm less certain whether Siggi took steps to advance this conspiracy (and Siggi has credibility problems as a

witness), I know of multiple different allegations that dissidents, sources, and competing outlets were similarly targeted for surveillance, with one WikiLeaks dissident claiming to have been hacked and threatened after a political split with the group.

- Helped Edward Snowden flee, both by sending Sarah Harrison to facilitate his flight and creating distractions, and then using WikiLeaks' assistance as a means to recruit further hackers and leakers.

The last one seems particularly irresponsible for The Intercept to suppress as they have, particularly given four other details:

- Snowden's description of setting up Tor bridges for Iranians with other Tor volunteers in the extended Arab Spring, making it highly likely he had a relationship with Jake Appelbaum *before* he took his NSA job in Hawaii.
- Bart Gellman's description of how Snowden worked to "optimize" his own outcome to encourage others to leak, mirroring Harrison's stated motive for helping him flee.

- The government's suggestion that Daniel Everette Hale – Jeremy Scahill's alleged source for his drone reporting – was inspired to leak by Snowden.
- Snowden's own (recent) treatment of three Intercept sources – along with Hale, Reality Winner and Terry Albury – as a group meriting a Trump pardon, something that will likely make Hale's defense at trial next year more difficult.

The government's theory about Snowden as a recruitment tool is really problematic (though I suspect the government plans to make it a lot more specific after inauguration, even before Hale's trial next year). But it is also the case that publishers don't usually help their sources flee as a way to ensure they'll recruit future leakers and hackers (indeed, in his book, Gellman talked at length about how careful he was to avoid crossing that line when Snowden tried to trick him into it).

One can argue that WikiLeaks was heroic for doing so. One can argue that the US empire has what's coming to it and so WikiLeaks was right to help Snowden flee. But one can't argue that the overt acts alleged in the CFAA count of the superseding indictment are things that journalists routinely do. And, if proven, that gets the government well beyond the *New York Times* test.

Importantly, if you're engaging in a debate about Assange's fate but ignoring credible allegations that Assange did a bunch of things that journalists do not do, you should not, at the same time, claim you're serving journalism.

You're serving propaganda (particularly if you're also telling a fairy tale about what changed in 2016 and 2017).

All the more so if you're The Intercept. The government has alleged that one thing that distinguishes Julian Assange from journalists – and they're right – is that he sent someone halfway around the world to save the guy who created the opportunity to create The Intercept in the first place. Unless Assange is pardoned before Trump leaves (and maybe even then, since many of the acts Assange is charged with are more obviously illegal in the UK), this allegation is going to remain out there.

The founding possibility for The Intercept has now been included as an overt act in a hacking indictment. One way or another, it seems The Intercept needs to address that.