US government pursues bogus criminal prosecution of WikiLeaks and Julian Assange

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The US attorney in the federal court in the Eastern District of Virginia on December 14 obtained a subpoena directed to the social network site Twitter. It seeks the mailing addresses and billing information, connection records and session times, IP addresses used to access Twitter, email accounts, as well bank account and credit card numbers for WikiLeaks founder Julian Assange and imprisoned US Army private Bradley Manning. Also named are WikiLeaks supporters Birgitta Jonsdottir, who is a member of the Icelandic parliament, Dutch citizen Rop Gonggrijp and US programmer Jacob Appelbaum.

The subpoena amounts to confirmation that prosecutors have convened a grand jury in an effort to indict Assange and perhaps other WikiLeaks personnel on charges of conspiring to steal documents with Manning, a US Army intelligence analyst.

Manning himself faces a court martial and up to 52 years in prison for allegedly sending WikiLeaks the diplomatic cables, as well as military logs about incidents in Afghanistan and Iraq and a classified military video showing US soldiers indiscriminately shooting Iraqi civilians. The US Department of Justice has been trying to coerce Manning to testify that Assange conspired with him to release these materials.

The subpoena as issued ordered Twitter not disclose that it had been served with the subpoena, or the existence of the investigation. Twitter's lawyers asked the district court to remove those secrecy provisions, which it did on January 5. Twitter then advised the subjects that if they did not challenge the subpoenas in court within 10 days it would turn over the requested material.

Assange condemned the court order in a statement on Saturday. WikiLeaks also suggested that Google and Facebook might also have been issued similar subpoenas. According to the *New York Times*, Facebook declined to comment, and Google did not respond to an inquiry.

Along with Assange and Gonggrijp, Ms. Jonsdottir produced the Wikileaks video showing a US Apache helicopter shooting civilians in Iraq in 2007, which first brought Wikileaks to public attention. She was the chief sponsor of the Icelandic Modern Media Initiative law, which made Iceland an international haven for investigative journalism and free speech. Jonsdottir said she would challenge the subpoena and that the Icelandic foreign minister has asked the American ambassador to meet to discuss the matter, including whether it involves a grand jury proceeding.

US Attorney General Eric Holder last month confirmed there was "a very serious, active ongoing investigation that is criminal in nature" in relation to WikiLeaks' disclosure of classified State Department cables.

First Holder said the Justice Department was looking to prosecute Assange under the Espionage Act. Section (c) of the Espionage Act (18 U.S.C. § 793) makes it a felony when a person "receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document ... respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation."

Those found guilty of conspiring to engage in any action found to violate the Act can also be convicted. Thus, the government will also likely try to show that Assange induced someone in the government to provide him with secret information.

Later Holder said that while that Act might prove one basis for prosecution, his office was looking at "other statutes, other tools." One such suggestion apparently is that Assange be charged with "trafficking in stolen government property"—an absurd accusation given that the published cables are reproductions of files, not physical documents. This shows the lengths the government may go to concoct a case.

The reason is that prosecution under the Espionage Act presents daunting stumbling blocks to the government.

First, as to the intent requirement, the statute was well described by former Supreme Court Justice John Marshall Harlan as "singularly oblique." It implicates political views—one man's intention to injure the US is another man's intent to help it. Thus it is very difficult to prove that Assange and WikiLeaks received material with intent or reason to believe that the information would injure the United States. Quite to the contrary, WikiLeaks correctly asserts that it obtained information in order to shine light on the sordid operations of US imperialism, to the benefit of the American people.

Second, an espionage prosecution against WikiLeaks would be a drastic assault on the First Amendment to the US Constitution and freedom of the press. By logical extension, it would outlaw any news organization that is not a state propaganda outlet.

The Espionage Act, passed in 1917, has a long and reactionary history. It was used to quell speech and association of government political opponents such as the legendary workers' leader Eugene V. Debs in 1918, along with thousands of members of the Industrial Workers of the World and other working class militants.

The Act was passed before the Supreme Court had ever declared an act of Congress unconstitutional under the First Amendment. Doubts have repeatedly been raised as to its constitutionality. The 1919 landmark Supreme Court case of *Schenk v. U.S.* was an Espionage Act case where the so-called "clear and present danger" test was articulated as a

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constitutional check on the law. That test was modified some 50 years later in *Brandenburg v. Ohio* (1969) to an "imminent lawless action" test.

Other cases such as *New York Times Co. v. United States*, the case involving the precedent of the publication in the *New York Times* and *Washington Post* of the Pentagon Papers, and the refusal of the US Supreme Court to grant the government's request for an injunction barring the papers from printing the material, raised doubt about the constitutionality of the Act, but did not decide it. But by rejecting the government's position the high court implicitly made it clear that prosecution of a journalist or news outlet under the Act could not pass constitutional muster.

Recently, the Electronic Frontier Foundation (EFF) stated they "agree with other legal commentators who have warned that a prosecution of Assange, much less of other readers or publishers of the cables, would face serious First Amendment hurdles, and would be 'extremely dangerous' to free speech rights."

EFF linked to a report by the Congressional Research Service (CRS), the nonpartisan research arm of the US Congress, spelling out the unprecedented character of seeking to prosecute Assange and WikiLeaks for making classified information public. US criminal statutes covering such information, the report notes, "have been used almost exclusively to prosecute individuals with access to classified information (and a corresponding obligation to protect it) who make it available to foreign agents, or to foreign agents who obtain classified information unlawfully while present in the United States."

Only government employees have been successfully prosecuted under the Espionage Act for receiving and passing on secret documents. In fact, the Bush administration's attempt to apply the Espionage Act to two employees of the pro-Zionist lobby AIPAC, who obtained material from a US intelligence analyst and then passed it on to Israel, ended in failure, as courts acquitted the two employees despite the evidence provided by the analyst, who was the source of the leak.

The CRS report goes on to point out, "Leaks of classified information to the press have only rarely been punished as crimes, and we are aware of no case in which a publisher of information obtained through unauthorized disclosure by a government employee has been prosecuted for publishing it."

Citing the Pentagon Papers case, the CRS report warns that an attempt to stage a prosecution for the WikiLeaks disclosures would raise questions over "government censorship" and US attempts to exercise "extraterritorial jurisdiction."

If the law were properly applied, a prosecution of WikiLeaks and Assange would not even be brought. However, given the sharp shift to the right by the US high court, along with the rest of the political establishment, there is every reason to believe that a government attempt to railroad Assange on espionage charges will proceed in earnest.

Political figures on the Republican right have called for Assange to be labeled an "enemy combatant" or "terrorist," and to be taken out or assassinated. Moreover, they argue, WikiLeaks should be designated a "terrorist organization."

Democrats have also joined in the campaign. US Vice President Joe Biden denounced Assange as a "high-tech terrorist." In a column in the *Wall Street Journal*, California's Democratic senator, Dianne Feinstein, called for the prosecution of Assange under the Espionage Act.

Feinstein attempted to provide a basis for denying Assange First Amendment protection, writing,

"Mr. Assange claims to be a journalist and would no doubt rely on the First Amendment to defend his actions. But he is no journalist: He is an agitator intent on damaging our government, whose policies he happens to disagree with, regardless of who gets hurt." Feinstein continued, "Just as the First Amendment is not a license to yell 'Fire!' in a crowded theater, it is also not a license to jeopardize national security."

In other words, a person who exposes the crimes of a government engaged in armed aggression and torture is a criminal. Free speech should be suspended by the mere invocation of "national security."

The Supreme Court itself is now all too willing to junk its prior precedents and the Constitution in order to back the nefarious operations of the US government overseas. In June of last year the court ruled that a law which prohibits providing "material support" to foreign organizations designated as terrorist was constitutional, even where the "support" was peace training, and involved political advocacy at the UN supporting negotiation of military conflict. The court ruled that "even well-intentioned aid to terrorist organizations is likely to backfire." Contrary to a longstanding bedrock principle of Anglo-American criminal law, intent did not matter in the context of criminal prosecution for such activity.

The fact that the grand jury proceedings against WikiLeaks have been convened in the Eastern District of Virginia itself is a calculated attempt to pack the potential jury pool with persons sympathetic to prosecution. It would almost certainly include people employed by or with family connections to the US national security apparatus, since the Pentagon, CIA and the Department of Homeland Security are headquartered in the area.

This combination of a lynch mob atmosphere pushed by American politicians, the rightward shift of the US courts and the location of the prosecution alone casts into severe doubt Assange's ability to get a fair trial.

In a direct attempt to eliminate the hurdles to prosecuting WikiLeaks and Assange, Senator Joseph Lieberman and two other senators, along with the incoming chairman of the House Homeland Security Committee, Republican Peter King of Long Island, have introduced legislation that would make it a federal crime to publish the names of those who supply information to the US military or intelligence agencies, regardless of the intent of the publishing party.

The so-called SHIELD Act (Securing Human Intelligence and Enforcing Lawful Dissemination) would amend the Espionage Act to make it a crime to publish information "concerning the identity of a classified source or informant of an element of the intelligence community of the United States," or "concerning the human intelligence activities of the United States or any foreign government" if such publication is prejudicial to US interests. Nothing more would be required for conviction.

Presumably the new law could not be applied to past conduct by WikiLeaks. It would be barred under the Constitution as "ex post facto"—a law passed after the commission of an act which retrospectively changes the legal consequences of such act.

The legislation takes square aim at WikiLeaks and other publishers. But

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its constitutionality would be even more dubious than the old Espionage Act provisions, especially in the context of journalism and news media.

In the final analysis, the US campaign to prosecute WikiLeaks and Assange is designed to shield the very politicians and US government officials who authorize and pursue criminal activities around the world and against its peoples. The exposure of those crimes is principled and heroic, but the criminals control the criminal prosecution agencies.

Were the prosecution of WikiLeaks successful it would set the stage for an even more far-ranging drive to suppress freedom of the Internet as a whole, to shut down other web sites that oppose the policies of the US government, and to impose an even tighter veil of secrecy over the operations of the CIA, the Pentagon and the White House.

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