



Beyond espionage: Four ways the United States can still prosecute WikiLeaks's Julian Assange

By HARVEY SILVERGLATE AND KYLE SMEALLIE | January 5, 2011

Not long after WikiLeaks entered the international lexicon, the question became not *whether* the United States government would prosecute founder Julian Assange, but *how*.

The 39-year-old Australian is deemed the chief architect behind the release of troves of government secrets worldwide, including nearly 750,000 classified Pentagon and State Department documents to date. To some, he's a journalist; to others, an anarchist; to still others, a terrorist. While Assange faces legal trouble across the Atlantic — two Swedish women have accused him of sexual misconduct, and he's now under house arrest in England awaiting extradition proceedings — US prosecutors are reportedly combing the statute books, looking for a way to give Assange yet another label: federal prisoner.

Speculation concerning a criminal inquiry has focused on the Espionage Act, a 1917 statute enacted to blunt criticism of US entry into World War I, but later adapted to protect against dissemination of state secrets. It's not a slam-dunk case against Assange, most agree, in part because of arguable First Amendment protections accorded journalists. But through a combination of breadth and vagueness, federal laws provide an arsenal for prosecutors to pursue Assange — and almost any other muckraker using pen or pixel.

PRESS AND PRECEDENTS

It's impossible to deny the impact of Wikileaks's now-ubiquitous whistle-blowing platform. Consider the groundbreaking reports and documents released by WikiLeaks in just the past 10 months: in April, a video depicting US military forces killing two Reuters journalists and nine Iraqis in 2007; in October, Pentagon files detailing abuse of Iraqi prisoners by US and Iraqi forces, as well as 15,000 previously unreported civilian deaths; and since November, a steady

stream of US diplomatic cables, dealing with subjects like Iran's nuclear program and alleged CIA torture.

Naturally, this watershed year for government transparency hasn't sat well with those at the top. US Attorney General Eric Holder, announcing the criminal investigation November 29, promised that this was no mere Department of Justice "saber-rattling."

Though hardly the only option, the Espionage Act is perhaps the most obvious for prosecutors. It prohibits anyone from gathering, transmitting, or receiving defense information, if they have reason to believe that the information could be used against the United States, or to the benefit of a foreign country.

Reporters and lawyers commonly assume that media reporting truthful information are immune to Espionage Act prosecutions. Yet that principle has not been tested in court. Every time it looked as though it might be, the media has narrowly missed prosecution.

The early days of World War II for example, held a close call for media prosecutions. Shortly after the American victory in the Battle of Midway, the *Chicago Tribune* — an isolationist newspaper opposed to President Franklin D. Roosevelt's successful effort to enter the war — reported that information about the Japanese naval forces had been "well known in American naval circles several days before the battle began." Roosevelt, realizing that this was a tip-off that the Americans had broken Japanese naval codes, was ready to indict the paper for espionage. The administration reversed course only after realizing that the Japanese high command apparently missed reading the *Trib* that day. Rather than risk a public prosecution that might tip them off, the DOJ spared the press a potentially devastating legal precedent.

The next close call came decades later, in the 1971 "Pentagon Papers" case, when the Supreme Court rebuffed the Nixon administration's attempt to restrain publication by the *New York Times* of a leaked Defense Department study of errors made fighting in Vietnam.

But while the court made it clear that the government could not stifle reporters for publishing the truth, it left open the possibility of punishing them for it. Five of the nine justices said they would have been open to criminal prosecution *after* the stories had run. (After Watergate, however, the government lacked the will to do so, and no such prosecution ever took place.)

OTHER TOOLS

Thus, Assange can take only cold comfort from Espionage Act precedents. But sticky issues still remain: getting Assange inside American borders will require at least some cooperation from

authorities abroad, and, even if the government secures an indictment, convincing 12 out of 12 jurors that WikiLeaks harmed the US is no sure bet. Rather than injuring the nation, Assange's lawyer could argue, the disclosure might have served Americans by providing a clearer picture of what's being done in their name and with their tax money.

But the Espionage Act is not the only avenue available to prosecutors. US law lists approximately 4500 distinct federal crimes — up from 3000 in 1980 — many of which are derived from vaguely-worded statutes whose language allows for a wide variety of applications.

And unearthing those applications is something of a prosecutorial sport. Over beer and pretzels, federal prosecutors in Manhattan would play a parlor game fit for a Dickens novel, as Columbia Law School Professor Tim Wu recounted in a 2007 Slate series. Random celebrities would be named — say, Mother Teresa or John Lennon — and prosecutors would search for plausible statutes to pin on the hapless headline-makers. The more obscure the law, the better.

So it's no mere posturing when Holder says, with regard to the Espionage Act, that "there are other statutes, other tools that we have at our disposal."

Consider the following prosecutorial options:

CONSPIRACY Prosecutors are reportedly looking into whether Assange collaborated with the alleged source of the military leaks, Army Private Bradley Manning, to obtain information. If so, this could potentially make Assange a co-conspirator alongside Manning, who is currently being held in solitary confinement at a military prison in Quantico, Virginia, and is expected to face a military trial this spring. Assange vehemently denies any connection with Manning, pointing out that WikiLeaks's anonymous electronic "drop box" platform is designed to protect a leaker's identity. If in fact such a connection exists, however, the government still faces difficult questions with a conspiracy prosecution. To what extent, it will be asked, do traditional media reporters engage in similar "conspiracies" in attempting to elicit scoops from government sources?

THEFT OF GOVERNMENT PROPERTY According to the relevant portions of this statute, "Whoever . . . knowingly converts to his use, or without authority . . . conveys . . . any record . . . or thing of value of the United States," can be imprisoned for up to 10 years. Without any established link between Assange and Manning, a prosecution under this statute would be difficult, due to that pesky word "knowingly." The government would have to show that Assange knew the documents were stolen from the government, and that he was acting in violation of this law. On the other hand, it may or may not be difficult, given the nature of the

documents, for jurors to conclude that it was obvious the documents were the product of a theft.

TRAFFICKING IN STOLEN PROPERTY While this law has traditionally been applied to the theft of tangible goods, the language of the statute leaves room for interpretation: "Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities, or money, of the value of \$5000 or more, knowing the same to have been stolen, converted, or taken by fraud," faces up to 10 years. When a former Goldman Sachs trader recently was accused of stealing an algorithm designed for high-frequency trading, he argued that this statute should apply "only to tangible items." But the federal courts insisted that the terms "good, wares, or merchandise" be interpreted "broadly" and found that the statute does not distinguish between tangible and intangible property. This potentially opens the door for prosecutors to argue that WikiLeaks trafficked in intangible, valuable "goods" that it knew were "stolen."

WIRE FRAUD This is a classic fall-back for prosecutors because it says more about the means of the crime than its actual substance. A vast array of conduct has been found to be within this statute's ambit, including, more recently, crimes committed via computer. According to the statute's text, transmitting, "by means of wire," material meant to further "any scheme or artifice to defraud," constitutes wire fraud. This leaves room for prosecutors to argue that Assange's actions defrauded the American government.

If in fact the government chooses to indict Assange, it has more than the complicated and controversial Espionage Act at its disposal. A vast and malleable cache of laws is available to the US to pursue its perceived political opponents — a fact that should give all citizens pause. If nothing else, it gives a dark twist to WikiLeaks supporters' rallying cry: "We are all Julian Assange." If US law can be stretched to get Assange, there's not much stopping us all from being potential targets.

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