

IN SUBPOENAING CHELSEA MANNING, THE GOVERNMENT PICKS A LIKELY NEEDLESS FIGHT WITH THE TRANSPARENCY COMMUNITY AGAIN

I'm bumping this post from earlier in the week. After refusing to answer questions before the grand jury under a grant of immunity, the Judge in this matter, Claude Hilton, held Chelsea Manning in contempt. She has been booked into the Alexandria jail until she either answers the questions or the grand jury expires.

Here's an interview Manning did just before going in for her contempt hearing.

As NYT first reported, a grand jury in EDVA has subpoenaed Chelsea Manning to testify. She has said she'll fight the subpoena.

Ms. Manning, who provided a copy of the subpoena to The New York Times, said that her legal team would file a motion on Friday to quash it, arguing that it would violate her constitutional rights to force her to appear. She declined to say whether she would cooperate if that failed.

"Given what is going on, I am opposing this," she said. "I want to be very forthright I have been subpoenaed. I don't know the parameters of the subpoena apart from that I am expected to appear. I don't know what I'm going to be asked."

The WaPo adds details about a grand jury appearance last year by David House. Notably, he

appears to have been asked about the Iraq and Afghan war logs, not the State department cables that have been more central to public reporting based off WikiLeaks releases.

Last July, computer expert David House, who befriended Manning in 2010 at a hacker space in Boston he founded, testified for 90 minutes before the grand jury. In an interview, House said he met the WikiLeaks founder in January 2011 while Assange was under house arrest at Ellingham Hall, a manor house 120 miles northeast of London. Assange was fighting an extradition request by Sweden, where he faced an inquiry into allegations of sexual assault.

Assange asked House to help run political operations for WikiLeaks in the United States. "Specifically, he wanted me to help achieve favorable press for Chelsea Manning," he said.

House, who testified in exchange for immunity, said the grand jury was interested in his relationship with Assange. "They wanted full insight into WikiLeaks, what its goals were and why I was associated with it," he said. "They wanted explanations of why certain things occurred and how they occurred. . . . It was all related to disclosures around the war logs."

The WaPo also argues that Manning will have a tough time fighting this subpoena, which is probably right, though I'm not sure how her legal exposure works given the commutation. She may have a real basis to challenge the subpoena (or at least invoke the Fifth) based off a double jeopardy claim.

Setting aside the legal questions though, I think this subpoena raises real tactical ones. Unless the government believes they need to show a newly-understood pattern of behavior on the

part of WikiLeaks dating to before the time Julian Assange took refuge in Ecuador's embassy as part of a bid to boot him, I think this move is likely to backfire, even from the most hawkish government perspective.

Subpoenaing people for stuff that happened nine years ago, when WikiLeaks' actions are more immediately suspect in the context of the Vault 7 releases, only makes sense if prosecutors are pursuing some new theory of criminal activity. Contra what Steve Vladeck says to the WaPo (that Assange's charges last year may be about a 10 year statute of limitations tied to the Espionage Act), prosecutors may be pursuing a conspiracy charge that has continued to more recent years, of which the 2009 actions were the first overt acts (which would also toll the statutes of limitation).

But it's not just the US government that appears to have a new understanding of WikiLeaks' actions. So do people who have been involved with the organization over the years, particularly in the wake of WikiLeaks' 2016 efforts to help Russia elect Donald Trump. The public reversals on supporting Assange from Xenia Jardin, Barrett Brown, and Emma Best have been accompanied by a whole lot of reporting (some of it obviously based on leaks of communications from other former insiders) that lay out activities that go beyond the passive receipt of public interest documents and subsequent publication of them. More will surely be coming.

What journalists and activists are presenting about WikiLeaks doesn't necessarily get the government beyond a First Amendment defense – certainly not one that might put a lot of respectable investigative reporting at risk. But it does undermine Assange's claims to be a mere publisher.

And unless there's a really good legal reason for the government to pursue its own of evolving theory of WikiLeaks' activities, it doesn't make sense to rush where former WikiLeaks supporters are headed on their own. In virtually all

venues, activists' reversed understanding of WikiLeaks is bound to have more credibility (and almost certainly more nuanced understanding) than anything the government can offer. Indeed, that would likely be especially true, internationally, in discussions of Assange's asylum claim.

A charge against Assange in conjunction with Vault 7 or the 2016 election operation might accelerate that process, without foreclosing the government's opportunity to present any evolved understanding of WikiLeaks' role in the future (especially if tied to conspiracy charges including the 2016 and 2017 activities).

But getting into a subpoena fight with Chelsea Manning is likely to have the opposite effect.

That's true, in part, because post-commutation a lot of people worry about the impact renewed pressure from the government against Manning will have, regardless of the legal soundness of it. The government wanted Aaron Swartz to become an informant when they ratcheted up the pressure on him between 2011 and 2013. They didn't get that information. And his suicide has become a key symbol of the reasons to distrust law enforcement and its ham-handed legal tactics.

There's even good reason to believe history will likely eventually show that FBI's use of Sabu as an informant likely didn't get them what they thought they got. And it's not just Sabu. It is my strong suspicion that we'll eventually learn that at key moments, the known instincts and habits of the FBI were exploited just as badly as the good faith efforts of transparency activists, even before the Bureau's bumbling efforts played the perhaps decisive role in the 2016 election.

We're at a moment when, amid rising tribalism, both federal law enforcement and the transparency community are actually reassessing. That reassessment is key to being less susceptible to exploitation, on both sides.

But ratcheting up the stakes, as a subpoena of

Manning at this moment amounts to, will reverse that trend.

As I disclosed last July, I provided information to the FBI on issues related to the Mueller investigation, so I'm going to include disclosure statements on Mueller investigation posts from here on out. I will include the disclosure whether or not the stuff I shared with the FBI pertains to the subject of the post.