THE DAMAGING PRECEDENT OF THE JULIAN ASSANGE ESPIONAGE GUILTY PLEA

All day yesterday and on this appearance on Brad Blog, I emphasized we won't know how to assess the resolution of the Julian Assange case until we see the Statement of Offense.

At least as incorporated within his plea agreement, that's now released.

As written, it is an especially damaging precedent. Both in yesterday's post and with BradBlog, for example, I noted that the role of the alleged hacking the conspiracy is one key thing that distinguished Assange's actions from what journalists do.

It's not in the Statement of Facts — not even the attempt alleged in the indictment to help Chelsea Manning crack a password. The Statement of Facts only describes the period from 2009 to 2011, so Assange's later alleged inclusion in the Lulzsec hacking conspiracy is also not included.

Rather than focusing on the alleged hacking, which always distinguished Assange from journalists, the Statement of Facts focuses on Assange's disinterest in redacting the names of sources before publishing the documents.

> In an August 2010 panel discussion, the Defendant said it was "regrettable" that individuals exposed through his website as having previously met with the United States government "may face some threat as a result." In the same panel discussion, the Defendant stated that "we [WikiLeaks] are not obligated to protect other people's sources, military sources or spy organization sources, except from unjust retribution," adding

> that, in general, "there are numerous cases where people sell information . . . or frame others or are engaged in genuinely traitorous behavior and actually that is something for the public to know about."

The primary other thing to implicate Assange in a knowing crime is his statement that,

> unless [sources] were "a serving member of the United States military," those providing classified information would have no legal liability for giving such classified information to him because 'TOP SECRET' meant nothing as a matter of law.

Asking sources to violate their non-disclosure agreements, of course, is something national security journalists do all the time.

Compare that to NSD's press release on the plea, which *did* focus on the hacking.

> As set forth in the public charging documents, Assange actively solicited and recruited people who had access, authorized or otherwise, to classified information and were willing to provide that information to him and WikiLeaks—and also solicited hackers who could obtain unauthorized access to classified information through computer network intrusions. Assange publicly encouraged his prospective recruits to obtain the information he desired by any means necessary, including hacking and theft, and to send that information to Assange at WikiLeaks.

This plea could have been written in a way that limited the damage of the precedent. For reasons we have yet to discover (but which may have been dictated by Assange's side, not DOJ's), it was not.

Barry Pollack, Assange's US criminal defense attorney, is a very good attorney, and this agreement protects Assange very broadly — unsurprisingly, it covers far more serious conduct in 2017.

> The United States agrees not to bring any additional charges against the Defendant based upon conduct that occurred prior to the time of this Plea Agreement, unless the Defendant breaches this Plea Agreement.

Mind you, Assange would have been insane to enter into an agreement with anything short of such a provision. But Assange has gotten immunity for years of (more serious) conduct with no admission to it.

There are three concessions to the United States in this plea (aside from resolving a years-long saga without the cost of more appeals and trial). First, Assange had to agree to do what he could to take down the materials in question.

> Before his plea is entered in Court, the Defendant shall take all action within his control to cause the return to the United States or the destruction of any such unpublished information in his possession, custody, or that of WikiLeaks or any affiliate of WikiLeaks.

By context, this refers to *just* materials received from Chelsea Manning. A far more urgent concern for the US would and has been the source code for CIA's hacking tools. While most of WikiLeaks' content has long been removed, the stub for Vault 7 remains up at the WikiLeaks site, as well as links to one of the developer's guides, still showing information treated as classified in the Josh Schulte case.

By entering into this plea, the US government doesn't have to share any classified discovery with Schulte (or any discovery that might make it easier to sue).

> As part of this Plea Agreement, and based upon the concessions of the United States in this Plea Agreement, the Defendant knowingly, willingly, and voluntarily gives up the right to seek any additional discovery. Further, the Defendant knowingly, wittingly, and voluntarily waives all pending requests for discovery.

And finally, he waives any lawsuit *against the US* for actions taken during the criminal investigation of him.

> The Defendant, on behalf of himself and the Releasing Parties, hearby releases and forever discharges all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or any other, and whether in law or equity, that he ever had, may have or hereafter can, shall or may have against the United States arising out of connected with the United States Department of Justice's criminal investigation, extradition, and/or prosecution of the Defendant.

This is not a surprise, but it is of particular concern here. But this langauge *doesn't* exclude lawsuits against the CIA to the extent the CIA's conduct was dissociated from the criminal investigation. Assange is pursuing actions in Spain against the security guy who surveilled Assange while he was at the Ecuadorian Embassy. While WikiLeaks clearly had non-public information to launch that suit, its claims that this was CIA surveillance, rather than FBI surveillance, has never been convincing.

The US has also invoked State Secrets in a lawsuit brought by WikiLeaks associates against the CIA in SDNY, and resolving this case may make those State Secrets claims easier to sustain (though Judge John Koeltl has not yet dismissed the case). But again, the CIA is the

defendant there.

The Breach language, which looks like it was changed after the plea was originally drafted, is quite narrow – it only covers events that lead up to the judge accepting the plea.

It’s over. Both sides lost. Chelsea Manning especially lost, given the additional time she spent in jail resisting a subpoena for testimony that would never be used at trial.

The question remains how much damage this loss for both sides will do in the future.