

Prosecution or Persecution:

THE CASE OF AARON SWARTZ

“Prosecuting attorneys enjoy broader discretion in making decisions that influence criminal case outcomes than any other actors in the American justice system. They make pivotal decisions throughout the life of a case — from determining whether to file charges, to crafting plea offers and recommending sentences. That they do so with little public or judicial scrutiny generates questions about the justice and fairness of the process.”¹

Questions about the prosecution of Aaron Swartz arise at every stage of the process. Examine the documents collected here and discuss the questions raised for consideration.



1. INVESTIGATION

The Massachusetts U.S. Attorney's Office (USAO) opened its criminal investigation of the case only a day after Swartz's laptop was discovered in a wiring closet at MIT — that is, before Swartz had been identified as the owner of the laptop. Was this an appropriate reaction to what MIT authorities had regarded as little more than an unusually troublesome network security problem for the prior three months?

Key Documents:

- **The Internet's Own Boy**, Clip 1 at ymiclassroom.com/iob, presents this initial stage in the prosecution.
- **Summary of Events** at <http://docs.jstor.org/summary.html>: provides JSTOR's perspective on these events. Here JSTOR states, “We do not know how law enforcement became involved” in its months-long joint effort with MIT to block the downloader.
- **Report to the President: MIT and the Prosecution of Aaron Swartz** at <http://swartz-report.mit.edu>: provides a detailed account of events leading to Swartz's arrest (pages 16-27) and an overview of the federal prosecution (pages 36-43). The report indicates that federal authorities became involved in the case primarily because a Secret Service special agent happened to accompany the Cambridge police detective who was called in when MIT discovered the laptop. Both the agent and the detective were members of the New England Electronic Crimes Task Force, a Secret Service coalition of federal, state, and local computer crime

specialists (see www.secretservice.gov/ectf_newengland.shtml). The USAO opened its investigation following an inquiry by the Secret Service agent about statutes that might be used to prosecute the owner of the laptop.

- **Life Inside the Aaron Swartz Investigation** by Quinn Norton, *The Atlantic* (March 3, 2013) at <http://www.theatlantic.com/technology/archive/2013/03/life-inside-the-aaron-swartz-investigation/273654/>: an account by Swartz's girlfriend at the time of her experience with the USAO and its efforts to obtain evidence against Swartz. Also see **The Internet's Own Boy**, Clip 2 at ymiclassroom.com/iob, for Norton's description of this period.
- The American Bar Association **Standards on Prosecutorial Investigations** at www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pinvestigate.html: sets guidelines for all phases of a criminal investigation.

Consider:

- Based on the facts available at the time, was it appropriate for the USAO to regard the laptop discovered at MIT as evidence of a federal crime?
- In your opinion, was the presence of a federal computer crimes specialist beneficial or prejudicial to the prosecutor's assessment of the facts?

¹ Bruce Frederick and Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making — Summary Report* (December 2012), p. 2



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- What is your reaction to Quinn Norton's account of the Swartz investigation and her treatment by the USAO prosecutors? Did the USAO meet ABA standards in its use of a proffer (2.5), subpoenas (2.7), and the grand jury (2.9)? How would you respond to Norton's statement in *The Atlantic* that "the prosecutors manipulated me...This is their normal... We should understand that any alleged crime can become life-ruining if it catches their eyes.... This is the system that we, as citizens, have agreed to."
- Your Questions:



- Rather than accept responsibility for his actions, Swartz and his defense team were attempting to re-victimize the victim by dragging MIT through a long legal process, which the prosecutor compared to re-victimizing a rape victim by accusing her of promiscuity.
- Swartz's efforts to rally support for his cause through an online petition had moved the case "from a human one-on-one level to an institutional level," which required an institutional response.

(Documentation for these accounts of private conversations is available at <http://swartz-documents.mit.edu>.)

- **Statement by U.S. Attorney Carmen Ortiz Regarding the Death of Aaron Swartz** (January 16, 2013) at www.justice.gov/usao/ma/news/2013/January/StatementreSwartz.html: the head of the Massachusetts USAO states that in its plea bargaining "this office sought an appropriate sentence that matched the alleged conduct — a sentence that we would recommend to the judge of six months in a low security setting. ...At no time did this office ever seek — or ever tell Mr. Swartz's attorneys that it intended to seek — maximum penalties under the law."
- **Letter to the U.S. Department of Justice Office of Professional Responsibility** (January 23, 2013) at <http://big.assets.huffingtonpost.com/HeymannOPRletter.pdf>: Swartz's attorneys charge the USAO lead prosecutor with professional misconduct primarily for his handling of evidence but also for "attempts to coerce Mr. Swartz into waiving his right to trial" through improper plea bargaining (page 6). This account of the USAO's bargaining position contradicts the assertions of U.S. Attorney Carmen Ortiz.
- **Testimony by U.S. Attorney General Eric Holder** (March 6, 2013) at www.youtube.com/watch?v=CAdCU7u0kUI: Holder states that Swartz was offered plea bargains ranging from 3 to 6 months in prison over the course of the prosecution and was never told that the USAO would seek a maximum penalty at sentencing following a trial. Holder describes this as "a good use of prosecutorial discretion," basing that judgment on what was offered rather than what was charged in the case.

2. PLEA BARGAINING

The government's lead prosecutor, Assistant U.S. Attorney Stephen Heymann, began plea bargaining with Swartz and his defense team months before issuing an indictment and continued bargaining as the case approached trial. Were the terms offered by the prosecution appropriate to the circumstances?

Key Documents:

- **The Internet's Own Boy**, Clip 3 at ymiclassroom.com/iob, one of Swartz's attorneys describes the USAO's plea bargaining position; his family and supporters react to the prosecution's demand that he plead guilty to a felony.
- **Report to the President: MIT and the Prosecution of Aaron Swartz** at <http://swartz-report.mit.edu>: provides details on the plea bargains offered by the USAO from January 2011 through December 2012 (pages 38-40). At every stage, Swartz was given a choice between serving months in prison if he would plead guilty to a felony and potentially serving years in prison if the case went to trial. The report also provides information about the lead prosecutor's rationale for taking this position (pages 67-69) :
 - The case involved not only unauthorized access to a computer network but also unauthorized downloading of intellectual property.



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- **United States Attorney's Manual, Principles of Federal Prosecution (9-27.000)** at www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm: sets guidelines for all phases of prosecution, including all types of plea agreements (9-27.330-640).

Consider:

- Was it reasonable to require Swartz to plead guilty to a felony and serve time in jail for his conduct?
- Is it troubling that the USAO lead prosecutor allegedly weighed the manner in which Swartz conducted his defense in formulating his plea bargaining position?
- Is it troubling that the USAO lead prosecutor evidently did not weigh the wishes of the victims, JSTOR and MIT, in formulating his plea bargaining position? (JSTOR stated, "we preferred that no charges be brought;" MIT told the prosecutor that they did not want a jail sentence for Swartz.)²
- Was the choice allegedly offered to Swartz between months and years in jail coercive?
- Is the Attorney General's distinction between what was offered by the prosecution and what was charged in the indictment meaningful for judging prosecutorial conduct? Is it a meaningful distinction from a defendant's point of view?
- Your Questions:

3. INDICTMENT

In July 2011, Swartz was charged with one violation of the Wire Fraud Act (18 U.S.C. § 1343) for devising a scheme to obtain property from JSTOR by false pretenses and three violations of the Computer Fraud and Abuse Act (CFAA, 18 U.S.C. § 1343) for unauthorized access to a "protected computer," obtaining information whose value exceeded \$5,000, and causing damage amounting to at least \$5,000 in value. More than a year later, in September 2012, a superseding indictment was filed charging Swartz with two violations of the Wire Fraud Act and eleven violations of the CFAA. Were these charges appropriate to Swartz's alleged conduct and was it appropriate to increase the charges against him — and the potential penalty — in this way?



Key Documents:

- **The Internet's Own Boy**, Clip 4 at ymiclassroom.com/iob: reaction by Swartz's family and supporters to the first indictment.
- **Indictment of Aaron Swartz** (July 14, 2011) at s3.documentcloud.org/documents/555334/1-11-cr-10260-nmg.pdf (pages 18-32).
- **Alleged Hacker Charged with Stealing Over Four Million Documents from MIT Network** (July 19, 2011) at www.justice.gov/usao/ma/news/2011/July/SwartzAaronPR.html: a USAO press release announcing Swartz's indictment, which states that, if convicted on all charges, he faces up to 35 years in prison, to be followed by three years of supervised release, restitution, forfeiture and a fine of up to \$1 million." U.S. Attorney Carmen Ortiz comments on the case: "Stealing is stealing whether you use a computer command or a crowbar, and whether you take documents, data or dollars. It is equally harmful to the victim whether you sell what you have stolen or give it away."
- **Superseding Indictment of Aaron Swartz** (September 12, 2012) at s3.documentcloud.org/documents/555334/1-11-cr-10260-nmg.pdf (pages 240-255).
- **The Internet's Own Boy**, Clip 5 at ymiclassroom.com/iob: reaction to the second indictment and commentary on deficiencies in the Computer Fraud and Abuse Act.
- **Computer Fraud and Abuse Act** (18 U.S.C. § 1343) at www.law.cornell.edu/uscode/text/18/1030.
- **United States Attorney's Manual, Principles of Federal Prosecution** (9-27.000) at www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm: see guidelines for selecting and adding charges (9-27.300-320).
 - "[A] Federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct." (9-27.300B)
 - "It is important to the fair and efficient administration of justice in the Federal system that the government bring as few charges as are necessary to ensure that justice is done....To ensure appropriately limited exercises of the charging power, USAM 9-27.320 outlines three general situations in which additional charges may be brought: (1) when necessary adequately to reflect the nature and extent of the criminal conduct involved; (2) when necessary to provide the basis for an appropriate sentence under all the circumstances of the case; and (3) when an additional charge or charges would significantly strengthen the case against the defendant or a codefendant. (9-27.320B)

²JSTOR, *Summary of Events* at <http://docs.jstor.org/summary.html>; *Report to the President: MIT and the Prosecution of Aaron Swartz* at <http://swartz-report.mit.edu>, p. 68.

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Relevant Documents:

- **The Internet's Own Boy**, Clip 6 at ymiclassroom.com/iob: In 2008 Swartz participates in an effort to make public court records freely available by downloading an estimated 2.7 million documents from the Public Access to Court Electronic Records (PACER) subscription database; the FBI investigates but does not pursue the case.
- **The Internet's Own Boy**, Clip 7 at ymiclassroom.com/iob: Swartz's supporters and his defense attorney speculate on his motives.
- **Guerilla Open Access Manifesto** at https://archive.org/stream/GuerillaOpenAccessManifesto/Goamjuly2008_djvu.txt: This July 2008 web posting attributed to Swartz declares, "We need to take information, wherever it is stored, make our copies and share them with the world...We need to download scientific journals and upload them to file sharing networks. We need to fight for Guerilla Open Access."
- **The Internet's Own Boy**, Clip 8 at ymiclassroom.com/iob: From late 2011 through January 2012, Swartz plays a leadership role in the successful grassroots effort to prevent passage of the Stop Online Piracy Act (SOPA) during the period between his first and second indictment.

Consider:

- The allegations against Swartz are virtually identical in both indictments. Based on the *Principles of Federal Prosecution*, was it appropriate to increase the number of charges against him?
- In both indictments, the government asserts that "Swartz intended to distribute" the articles he downloaded from JSTOR "through one or more file-sharing sites." What is the evidence for this charge? How would you weigh the evidence of Swartz's motives? Consider his 2005 downloading of the Westlaw database for a research project while at Stanford, his 2008 downloading and distribution of documents from the PACER database, and the 2008 "Guerilla Open Access Manifesto." Was the USAO justified in determining that Swartz acted with criminal intent?



- In your opinion, did Swartz's involvement in the campaign to prevent passage of SOPA have any impact on his prosecution? Would it be appropriate to weigh those actions in formulating the case against him if one purpose of the prosecution was to make an example of Swartz as a deterrent to others?
- In **The Internet's Own Boy**, one commentator says that Swartz was

being prosecuted "for taking too many books out of the library." Compare this view of his actions with the comments by U.S. Attorney Carmen Ortiz on the government's first indictment. Formulate what you regard as an appropriate characterization of Swartz's downloading from JSTOR.

- Your Questions:

Research:

There are hundreds of articles criticizing the prosecution of Aaron Swartz as an abuse of prosecutorial discretion, many of which accuse the USAO lead prosecutor of unethical overreach. Use Google to review a selection of these articles. Based on your study of the case, how would you respond to the prosecution's critics?