

Assange indictment bigger threat than the secrets he leaked

The indictment of Julian Assange for leaking national security secrets poses a serious challenge to the First Amendment's protection of the right of the press to publish stories on the most important of news events.

Assange is the first self-styled journalist to be charged with violating the century-old Espionage Act, an overbroad law passed in the midst of World War I hysteria. The law makes it a crime to disclose any secret that might help an enemy – even if that secret is as benign as how much corn is being raised in Iowa.

The [indictment](#) breaks the important norm under which leakers of government secrets are prosecuted for espionage, but the journalists who receive those secrets and publish them are not prosecuted.

So, for example, [Daniel Ellsberg](#) was prosecuted for espionage for leaking the secret history of the Vietnam War, but Neil Sheehan, Arthur Ochs Sulzberger and the *New York Times* were not. Edward Snowden [would be prosecuted](#) for espionage if he came back to the United States to take responsibility for his conduct. But Glenn Greenwald and the *Guardian* were not prosecuted for printing his leaks about the NSA's vast collection of Americans' telephone data.

Last week's indictment was much more alarming than the initial indictment against Assange [charging him](#) with helping Chelsea Manning hack the WikiLeaks secrets.

There is not much question but that journalists can be charged for hacking or helping to hack computers – just as they can be

charged with any other crime they engage in to get a story – stealing, trespassing, wiretapping.

As free speech expert Eugene Volokh [put it](#): “Journalists and other speakers don’t have the right to help others break into offices, safes, or computers, even when the break-in would help reveal important information. And as a practical matter, I suspect that very few reporters actively help their sources crack passwords...just as very few reporters provide sources with lock picks or instructions on breaking into safes.”

But the superseding indictment against Assange last week went much further charging Assange with espionage for doing things some of America’s best reporters have done for decades – receiving national security secrets and publishing important ones that don’t pose imminent damage to national security or individual intelligence agents.

Counts 15-17 of the indictment state:

“From in or about July 2010 ..., [Assange], having unauthorized possession of, access to, and control over documents relating to the national defense [such as leaked Afghanistan and Iraq war activity reports and State Department cables], willfully and unlawfully caused and attempted to cause such materials to be communicated, delivered, and transmitted to persons not entitled to receive them.”

“Persons not entitled to receive them” – that’s the American people. Essentially the Trump administration is saying the American people didn’t have the right to know that three American presidents lied to them about Vietnam or that the NSA was collecting vast amounts of data about Americans’ calls.

Reporters often publish information they know was illegally leaked to them. The Supreme Court has even upheld this activity in a case that didn’t involve national security.

In [Bartnicki v. Vopper](#), an unknown person wiretapped a

teachers union president in Pennsylvania saying that if the school board didn't agree to higher wages the union would have to "Blow off their front porches." The wiretapped conversation was provided to talk show host Frederick Vopper, who broadcast it on his radio show. The Supreme Court ruled that as long as Vopper and the radio station were not involved in the illegal wiretap, the First Amendment protected their right to broadcast.

The Trump administration argues *Bartnicki* doesn't apply to national security secrets. It has a decent argument. There is even language in the generally pro-press [Pentagon Papers](#) decision where two justices said that even though the government couldn't stop the publication of the secrets that did "not mean that it could not successfully proceed in another way" – in other words under the Espionage Act.

Assange himself is the worst possible test case for the press.

For one thing, many journalists and legal experts say he is not really a journalist or publisher. Journalists on the *New York Times* or *Washington Post* vet the national security secrets they report and check with the government on possible harm to national security and intelligence methods. Assange generally does not.

Two notable free press lawyers who represented the *New York Times* in the *Pentagon Papers* case – James Goodale and Floyd Abrams – disagree about whether Assange is a journalist. Goodale says Assange stands in the shoes of publishers like Sulzberger. But Abrams says he doesn't because he does no real reporting, is careless in his disclosure of secrets and has an avowed goal of harming the United States.

While most leakers and news organizations print national security secrets to give readers the knowledge to make good decisions as citizens, Assange has made no secret that he

hates the United States. His involvement in hacking [Hillary Clinton and DNC](#) emails was a key part of a Russian disinformation campaign to disrupt the 2016 presidential election. It's no coincidence Assange has never been able to find anything negative to report about Vladimir Putin.

Assange's antipathy toward the United States has legal significance. Because the Espionage Act is written so broadly, courts have said that criminal convictions must include proof of "specific intent" to harm the United States. That did not exist in prior cases, but Assange's statements and activities may provide the proof necessary to convict him.

Before the Assange indictment, a [century of prosecutorial practice](#) had protected journalists from criminal prosecution under the Espionage Act. Some scholars called it an era of "benign indeterminacy" where the journalists could claim that 102 years of uncertainty was a good reason not to charge a journalist with espionage.

Julian Assange's excesses together with the Trump administration's hostility to the press have brought an abrupt end to that remarkable era during which the disclosure of national security secrets altered Americans' views of the Vietnam War and led to reforms in the way Americans' private data were collected.

No other nation provides as much constitutional protection for the press to publish information the government tries to keep from the people. It is important that reporters continue to have the First Amendment protection to inform the public on important matters of national security.

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