



Written by [Joe Wolverton, II, J.D.](#) on May 30, 2019

## Does Justice Department's Indictment of Assange Infringe on Free Press?

"All ministers, therefore, who were oppressors, or intended to be oppressors, have been loud in their complaints against freedom of speech, and the licence [sic] of the press; and always restrained, or endeavoured [sic] to restrain, both. In consequence of this, they have brow-beaten writers, punished them violently, and against law, and burnt their works. By all which they shewed how much truth alarmed them, and how much they were at enmity with truth."

*Cato's Letters*, No. 15 (February 4, 1721)



On May 23, the U.S. Department of Justice announced that a grand jury had handed down an indictment of WikiLeaks frontman Julian Assange, adding 17 felony counts to the charge that he violated the Espionage Act.

The criminal case is related to his activities in late July 2010 when WikiLeaks released the so-called *Afghan War Diary*. These documents are a collection of internal U.S. military logs of the war in Afghanistan that were obtained by Bradley [now calling himself Chelsea] Manning and surreptitiously sent to Assange's organization.

On April 11, Assange was physically dragged from the Ecuadorian embassy in London by British police after officials of the Ecuadorian government withdrew their political protection of the WikiLeaks founder.

A day earlier, April 10, the president of Ecuador, Lenin Moreno, tweeted the reason for the country's end of asylum for Assange: "Ours is a government respectful of the principles of international law, and of the institution of the right of asylum. Granting or withdrawing asylum is a sovereign right of the Ecuadorian state, according to international law," Moreno said in the prerecorded message.

Now that Assange is no longer safely sequestered inside a foreign embassy, officials of the United States are attempting to extradite him in order to try him for a variety of crimes he's alleged to have committed in connection with the Afghan papers incident.

For those who voted for Donald Trump in 2016, it is likely an unexpected development in the nearly decade-long persecution of Assange.

Just weeks after being elected president, Donald Trump tweeted that, while he wasn't "in agreement with Julian Assange," he (the then-president elect) added that when it comes to charges of collusion with Russia, "I simply state what he [Assange] states."

In fairness, that isn't exactly an exchange from a buddy movie. It is an admission by the president that



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he believes Assange is not a dupe of Vladimir Putin.

The oblique recognition that Assange is not a tool of the Kremlin aside, President Trump's administration has set about securing an expansive indictment of Assange, who is currently in the U.K. challenging extradition to the United States.

As outlined above, the Justice Department's indictment of Assange has nothing to do with Russia, and it is unlikely that President Trump's agreement with Assange on the issue of the president's collusion with Moscow to fix the 2016 election will have any sort of substantial influence on the famous whistleblower's legal turmoil.

One thing that is certain about this story is that when it comes to using the Espionage Act as a tool for taking down whistleblowers, President Trump is following the lead of his predecessor.

With the Assange indictment, though, the Trump administration is going farther down the road of restricting the flow of information, as it's not just whistleblowers that should keep their heads on a swivel, but journalists should be on alert, too.

Here's a history of the Espionage Act published by the Electronic Frontier Foundation that should provide a sufficient context for the current criminal case the U.S. government is building against Assange:

Signed into law on June 15, 1917, the Espionage Act 18 U.S.C. § 792 et seq., was Congress's response to a fear that public criticism of U.S. participation in World War I would impede the conscript of soldiers to support the war effort and concerns about U.S. citizens undermining the war effort by spying for foreign governments. Although some parts of the law were repealed, many remain in effect 100 years later.

Most pertinent today, the law criminalizes both the disclosure and receipt of certain national security information. As a result, the Espionage Act remains the most common grounds upon which leakers of U.S. governmental information are prosecuted. Indeed, the recent charges against the alleged source of the NSA Russian Election Systems Phishing documents are based on the Espionage Act.

To date, however, the United States has never sought to prosecute a journalistic entity under the Espionage Act for either receiving secret government documents from a source or further disseminating the documents themselves or information from them in the course of reporting. There is nothing in the language of the law that prevents its use against a news organization, but it has been unofficially accepted that it should not apply to the press.

Any American who identifies himself as a friend to freedom and to the Constitution that protects it should agree with the position that the press should never be stifled by the government.

After the indictment against Julian Assange was made public, Assistant Attorney General John Demers, of the Department of Justice's National Security Division, assured the members of the press gathered to cover the story that the Trump administration "takes seriously the role of journalists in our democracy and we thank you for it."

"It is not and has never been the Department's policy to target them for their reporting," Demers added.

That may be true, but there are rational reasons for worrying about the future of the free press.



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As I reported for *The New American* last August, research conducted by Ipsos revealed that 43 percent of self-identified Republicans believe that “the president should have the authority to close news outlets engaged in bad behavior.” A shocking 26 percent of respondents overall agree with that statement, as well.

The notable French philosopher Benjamin Constant put an even finer point on the issue of government censorship of the press, warning of what happens when a people place such immense power in the hands of one man:

By authorizing the government to deal ruthlessly with whatever opinions there may be, you are giving it the right to interpret thought, to make inductions, in a nutshell to reason and to put its reasoning in the place of the facts which ought to be the sole basis for government counteraction.

This is to establish despotism with a free hand. Which opinion cannot draw down a punishment on its author? You give the government a free hand for evildoing, provided that it is careful to engage in evil thinking. You will never escape from this circle.

The men to whom you entrust the right to judge opinions are quite as susceptible as others to being misled or corrupted, and the arbitrary power which you will have invested in them can be used against the most necessary truths as well as the most fatal errors.

To his credit, President Trump has never hinted that he believes that he should be able to shutter any of the organizations he considers to be purveyors of “fake news.”

Then again, the Justice Department’s statement announcing its indictment of Assange preemptively sidesteps the question of the infringement on the freedom of the press, proclaiming, “Julian Assange is no journalist.”

However, the press release does admit that Assange is a publisher, explaining, “The United States has only charged Assange for publishing a narrow set of classified documents.”

As the charges against Julian Assange continue along the path toward prosecution, there is one question that the Justice Department has not addressed, and I believe it is a constitutionally critical one.

Does the First Amendment protect the freedom of journalists? No! The First Amendment protects the “freedom of the press,” which, while admittedly similar, is not the same.

Constitutionalists, above all others, must be constitutionally consistent and the power to define “the press” is not within the federal government’s enumerated powers.

Although it is certainly not within the enumerated power of the U.S. Supreme Court to define key constitutional terms, a quote from the 1972 case of *Branzburg v. Hayes* is remarkably relevant: “We hold that the individual claiming the privilege must demonstrate, through competent evidence, the intent to use material sought, gathered or received to disseminate information to the public and that such intent existed at the inception of the newsgathering [sic] process.”

Assange’s alleged receipt and publication of the *Afghan War Diaries* seems to pass that legal test.

Finally, Jennifer Robinson, Assange’s attorney, told NBC News she’s preparing for “a big extradition fight,” insisting that the process will decide the future of the First Amendment.

“We are concerned about the free speech implications,” she said. “This precedent will be used against other media organizations.”



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