

UNITED STATES v. JULIAN PAUL ASSANGE

Declaration of Mark Feldstein

I, Mark Feldstein, hereby declare as follows:

1. Expert witness background and role in this case

I am a journalism historian and professor at the University of Maryland and serve as its Eaton Chair in broadcast journalism. I earned a bachelor's degree from Harvard College in 1979 and a PhD from the University of North Carolina in 2002. In between, I worked for twenty years as an investigative reporter at CNN, NBC News, ABC News and local television stations in the US, broadcasting hundreds of reports that won several dozen journalism awards. I am the author of one book and numerous peer-reviewed journal articles, book chapters, and magazine and newspaper articles that have focused on various aspects of journalism history, investigative reporting, leaking and whistleblowing, freedom of the press, and related issues. I have been quoted hundreds of times as an expert on these and other journalism issues by the news media, including the *Guardian*, *Observer*, *International Herald Tribune*, BBC, Reuters, Agence France-Presse, *New York Times*, *Washington Post*, *Wall Street Journal*, Al Jazeera, and other outlets in the US, Europe, Asia, Africa, Latin America and the Mideast. I have lectured around the world on investigative reporting, censorship, freedom of the press, media history and journalistic ethics, and I have testified about these issues in the US Senate and in American courts in both criminal and civil cases.

I have been asked by attorneys for Julian Assange to render my evaluation for this case from a journalistic perspective, focusing on the history of classified information disclosures to journalists and the US government's response to such leaks; whether Assange is a journalist and entitled to protection of free speech/press under the US Constitution's First Amendment; the journalistic implications of Assange's indictment under the US Espionage Act; and the political dimensions of this case in the context of the Trump administration's battle with the press. It should be noted that this report addresses only WikiLeaks disclosures in 2010-2011, the time period when Assange is accused of violating the Espionage Act; it does not discuss the website's previous or subsequent document releases.

I have read Part 19 of the Criminal Procedure Rules relating to expert evidence and believe that my opinion is compliant with the rules. I understand that my duty as an expert witness is to try to help the court by providing objective analysis on matters within my expertise. I have never met Julian Assange and have no financial or other conflicts-of-interest in this case. This submission is based on my independent study and historical research; its conclusions are my own, its contents true to the best of my knowledge and research.

2. Trump's campaign against the press

Since he took office, President Donald Trump and his administration have waged a relentless campaign against individual journalists and the news media as an institution in a manner that is unprecedented in American history. He has publicly attacked journalists as “enemies of the people” or purveyors of “fake news” more than 600 times and denounced the news media as a whole as “sick,” “dishonest,” “crazed,” “unpatriotic,” “unhinged” and “totally corrupt.”¹ Trump has repeatedly baited and bullied reporters, whipping up crowds in rallies to vilify them. He has threatened to revoke government-issued broadcast licenses of television stations and networks that have criticized him. He praised the physical assault a British reporter,² proposed the establishment of state television to counter mainstream news outlets,³ and pressed his FBI director to stop leaks by “putting reporters in jail.”⁴ In the words of the non-profit organization PEN America, “The President has declared war on all but the most fawning news organizations, exhibiting his antagonism in an almost daily barrage of tweets, press statements, and directives. Threats by the President against newspapers, networks, news sources, and individual journalists have become the norm [as] Trump shows open contempt for freedom of the press.”⁵

The Trump administration's attacks on the press have not been limited to words alone. The White House issued an executive order increasing postal rates to punish the “Fake News Washington Post” for its critical coverage after Trump reportedly said that he wanted to “fuck with” the newspaper's publisher.⁶ His administration allegedly retaliated against another journalistic *bête noire*, CNN, by stopping a potentially lucrative corporate merger of the news network's parent company after the president declared, “I want that deal blocked!”⁷ The White House intervened to revoke the security clearances of ex-government officials working for television networks after they criticized administration policies. The Trump administration has dramatically escalated the number of criminal investigations into journalistic leaks and indicated that reporters themselves may be

¹ “The Growing Threat to Journalism Around the World,” *New York Times* (Sept. 23, 2019); Emily Birnbaum, “Trump Expressed Pride for Popularizing ‘Fake News’ Phrase,” *The Hill* (July 30, 2018); Wajahat Ali, “Trump's media attacks are an abuse of power,” *Guardian* (March 17, 2019);

² Ed Pilkington, “Donald Trump praises Gianforte for assault on Guardian reporter,” *Guardian* (Oct. 19, 2018).

³ Michael Grynbaum, “Trump's Year of Escalating Press Tensions,” *New York Times* (Dec. 27, 2018).

⁴ Jill Abramson, “Comey's wish for a leaker's ‘head on a pike,’” *Guardian* (April 21, 2018).

⁵ *Pen American Center v. Donald J. Trump*, “Amended complaint for declaratory and injunctive relief,” U.S. District Court, Southern District of New York, 18-cv-9443-LGS (Feb. 6, 2019).

⁶ Maya Kosoff, “Determined to Hurt Bezos, Trump Orders Post Office to Crack Down on Amazon,” *Vanity Fair* (April 13, 2018).

⁷ Jane Mayer, “The Making of the Fox News White House,” *New Yorker* (March 4, 2019); Michael J. de la Merced, et al, “At Heart of AT&T Merger, Another Fight Brews: Trump v. CNN,” *New York Times* (Nov. 9, 2017).

prosecuted.⁸ Trump's "use of government power to punish his media critics," PEN America stated, has created "an atmosphere in which all journalists must work under the threat of government retaliation" and is a deliberate attempt to "stifle [the] exercise of the constitutional protections of free speech and a free press."⁹

Seen in this light, the administration's prosecution of Julian Assange is part and parcel of its campaign against the news media as a whole. Indeed, Assange's criminal indictment under the US Espionage Act is arguably its most important action yet against the press, with potentially the most far-reaching consequences.

3. Is Assange a journalist?

When the US Justice Department announced Assange's indictment under the Espionage Act, the chief of its national security division, John Demers, declared that "Julian Assange is no journalist" and thus not protected under the free press clause of the US Constitution's First Amendment.¹⁰

But the First Amendment makes no such definitional demands and in fact the Constitution does not mention journalism at all; at the time it was written, journalism in its contemporary sense did not exist. A "free press" referred to the printing press as technology, the written counterpart to verbal speech; its purpose was "securing the right of every person to use communications technology and not just securing a right belonging exclusively to members of the publishing industry." Courts have upheld this interpretation to the present day while expanding the definition to include modern technologies of communication as well. A free press offers "equal treatment for all speakers...who use mass communications technology, whether or not they are members of the press [as an] industry."¹¹ Assange, in other words, is protected by the First Amendment whether he qualifies as a journalist or not.

Nonetheless, because prosecutorial decision-making in this case seems to have been affected by the issue of whether Assange is a "journalist," and because of the ways in which President Trump has politicized the issue of journalism, such designations are worthy of examination. "There has never been a fixed definition of who is (and is not) a journalist, in part because there has never quite been agreement on what is (and is not) journalism," two media scholars have noted. In the US, "there are no educational prerequisites of its practitioners, no entrance exam, license, or certification

⁸ Joel Simon & Alexandra Ellerbeck, "The President's Phantom Threats," *Columbia Journalism Review* (winter 2018); "Attorney General Jeff Sessions Delivers Remarks at Briefing on Leaks of Classified Materials," Justice.gov (Aug. 4, 2017).

⁹ *PEN American Center v. Donald J. Trump*.

¹⁰ Charlie Savage, "Assange Indicted Under Espionage Act," *New York Times* (May 23, 2019); Jon Allsop, "Espionage charges against Assange are a 'terrifying' threat to press freedom," *Columbia Journalism Review* (May 24, 2019).

¹¹ Eugene Volokh, "Freedom for the Press as an Industry, or for the Press as a Technology?" *University of Pennsylvania Law Review*, vol. 160-459 (2012), 463-5, 538-9.

that deems one a journalist, and no formal credentialing body that would enforce the fidelity of such definitions.”¹²

Some view Assange as a whistleblower or source, not a journalist. Others have said he doesn't practice journalism, he does “data dumps.” Still others have called him an “information broker.” These distinctions are partly a matter of semantics—the lines between them can be blur at the edges—but none of these terms accurately characterize Assange in full. But in the documents he released in this case, Assange was not the whistleblower; that role was played by Chelsea Manning, the intelligence analyst who copied the records from an Army computer and uploaded them to WikiLeaks. Whistleblowers are generally employees, or at least have firsthand knowledge about, the institutions they are blowing the whistle on; that role was not played by Assange, who did not work for the Army. Nor is Assange merely a passive data dumper; he actively engaged in editorial decision-making by choosing what information to solicit and how, working with the whistleblower who had access to it, organizing the material, and then deciding what to make public and how. As for “information broker,” all journalists and news media outlets are information brokers, intermediaries providing information from their sources to the public. “Media,” the plural of the Latin word “medium,” means “middle ground or intermediate.”¹³ The news media is an inter-*media-ry*, “brokering” information from sources to the public.

It is true that Assange is not a traditional journalist who works for a profit-making media corporation. He does not conduct interviews to get “both sides” of a controversy, and he publishes unfiltered documents with minimal contextualizing of information.

Nonetheless, Assange has engaged in the essence of journalism: gathering and publishing newsworthy information and documents for the public.¹⁴ WikiLeaks lists numerous journalism awards on its website; one such prize praised Assange for producing “more scoops than most journalists can imagine...in the oldest and finest tradition of journalism.”¹⁵ Media researchers have variously referred to Wikileaks as an exemplar of “data journalism,” a “news agency” in an expanding “media ecosystem,” a “networked fourth estate,” and the world’s first “stateless newsroom.”¹⁶ By prompting “new alliances between both emerging and legacy media outlets,” one scholar wrote, “WikiLeaks has precipitated a game-changing moment in the history of journalism.”¹⁷

¹² Elizabeth Blanks Hindman & Ryan J. Thomas, “When old and new media collide: the case of WikiLeaks,” *New Media & Society*, vol. 16 (2013), p. 543.

¹³ Macmillan Dictionary: <http://www.macmillandictionaryblog.com/media>

¹⁴ Stephen Rohde, “Julian Assange, the Espionage Act of 1917, and Freedom of the Press,” *American Prospect* (June 19, 2019).

¹⁵ Jason Deans, “Julian Assange wins Martha Gellhorn journalism prize,” *Guardian* (June 2, 2011).

¹⁶ Lynch, p. 317.

¹⁷ Lynch, p. 314; Mira Burri, “Beyond WikiLeaks,” *Journal of Information Policy*, vol. 4 (2014), p. 24.

Assange does not pretend to be objective. He is in part a political provocateur and he espouses an ideology of radical transparency. He believes the US government's "surveillance state" keeps its citizens in the dark through government censorship and a supine mainstream media, and has become one of the world's greatest threats to democracy. The antidote, in his view, are massive, well-publicized leaks to expose the truth.¹⁸

Such political advocacy in journalism has a long and noble tradition in the US, going back to the "patriot" printing presses that urged the overthrow of British colonialism in the 1770s. In the early days of the American republic, newspapers were owned and run by political parties; their primary function was partisan advocacy, not objectivity, often characterized by ardent exhortations to voters for political support—and scurrilous invective against the opposition. Activist publications have been a staple of American journalism ever since, championing radical causes such as the abolition of slavery, women's suffrage, labor unions, pacifism, socialism and other unpopular movements. Like WikiLeaks, America's editorial activists published unfiltered documents with minimal contextualizing and rarely bothered to interview both sides. Then and now, alternative news outlets exposed and opposed government authorities. Then and now, they were scorned and vilified as threats to the established order. But they were often ahead of their time; for just as yesterday's heresy is tomorrow's orthodoxy, yesterday's radical journalist is tomorrow's distinguished publisher.¹⁹

Although some traditional journalists reject the notion that Assange is a publisher or WikiLeaks a news outlet, this cramped view fails to understand historical context: journalism is ultimately dynamic not static and has evolved and expanded over the years in technology, content, format, technique, and style: from newspapers, pamphlets and magazines to radio and television to the Web; from text to audio to video; from handwritten illustrations to photographs to interactive graphics; from discursive partisan polemics to objective news dispatches to in-depth narrative exposés to massive searchable databases.

Each new wave of journalistic innovation and disruption has predictably encountered disparagement from older competitors and resistance from others riled by the new order. WikiLeaks is no exception. It is a digital publication, however unorthodox, and Assange is unmistakably its publisher.²⁰ Indeed, because of the significance of what he revealed—and his pioneering use of the encrypted digital drop box to protect whistleblowers and gather secret

¹⁸ John F. Burns, "Who is Julian Assange?" in Alexander Star, ed., *Open Secrets: WikiLeaks, War, and American Diplomacy* (New York: Grove, 2011), 30-33.

¹⁹ Mitchell Stephens, *A History of News*, 3rd ed. (Oxford: Oxford University Press, 2006); (William David Sloan, *The Media in America: A History*, 10th ed. (Vision Press: Northport, AL, 2017); Gerald Baldasty, *The Commercialization of News in the Nineteenth Century* (Madison, WI: University of Wisconsin press, 1992).

²⁰ Sloan, *Media in America*.

documents all over the world—Julian Assange can accurately be described as one of the most consequential publishers of our time.

4. Importance of Assange's disclosures:

Assange's publishing of classified records—along with his partnership with the world's leading newspapers, such as *The Guardian*, *New York Times*, *Der Spiegel*, *Le Monde*, and others—has exposed on a worldwide scale significant governmental duplicity, corruption, and abuse of power that had previously been hidden from the public. In journalistic terms, these scoops were blockbusters. Among them:

- A disturbing videotape of American soldiers firing on a crowd from a helicopter above Baghdad, killing at least 18 people; the soldiers laughed as they targeted unarmed civilians, including two Reuters journalists.²¹
- US officials gathered detailed and often gruesome evidence that approximately 100,000 civilians were killed after its invasion of Iraq, contrary to the public claims of President George W. Bush's administration, which downplayed the deaths and insisted that such statistics were not maintained. Approximately 15,000 of these civilians killings had never been previously disclosed anywhere.²²
- American forces in Iraq routinely turned a blind eye when the US-backed government there brutalized detainees, subjecting them to beatings, whippings, burnings, electric shock, and sodomy.
- After WikiLeaks published vivid accounts compiled by US diplomats of rampant corruption by Tunisian president Zine el-Abidine Ben Ali and his family, ensuing street protests forced the dictator to flee to Saudi Arabia. When the unrest in Tunisia spread to other Mideast countries, WikiLeaks was widely hailed as a key catalyst for this "Arab Spring."²³
- In Afghanistan, the US deployed a secret "black" unit of special forces to hunt down "high value" Taliban leaders for "kill or capture" without trial.²⁴
- The US government expanded secret intelligence collection by its diplomats at the United Nations and overseas, ordering envoys to gather credit card numbers, work schedules, and

²¹ Keller, 5.

²² Star, 286-8; Greg Miller and Peter Finn, "Secret Iraq war files offer grim new details," *Washington Post* (Oct. 23, 2010).

²³ Star, 93; Peter Walker, "Amnesty International hails WikiLeaks and *Guardian* as Arab spring 'catalysts,'" *Guardian* (May 12, 2011).

²⁴ Nick Davies and David Leigh, "Afghanistan war logs: Massive leak of secret files exposes truth of occupation," *Guardian* (July 25, 2010).

frequent flier numbers of foreign dignitaries—eroding the distinction between foreign service officers and spies.²⁵

- Saudi Arabian King Abdullah secretly implored the US to “cut off the head of the snake” and stop Iran from developing nuclear weapons even as private Saudi donors were the number-one source of funding to Sunni terrorist groups worldwide.²⁶
- Customs officials caught Afghanistan’s vice president carrying \$52 million in unexplained cash during a trip abroad, just one example of the endemic corruption at the highest levels of the Afghan government that the US has helped prop up.²⁷
- The US released “high risk enemy combatants” from its military prison in Guantanamo Bay, Cuba who then later turned up again in Mideast battlefields. At the same time, Guantanamo prisoners who proved harmless—such as an 89-year-old Afghan villager suffering from senile dementia—were held captive for years.²⁸
- US officials listed Pakistan’s intelligence service as a terrorist organization and found that it had plotted with the Taliban to attack American soldiers in Afghanistan—even though Pakistan receives more than \$1 billion annually in US aid. Pakistan’s civilian president, Asif Ali Zardari, confided that he had limited control to stop this and expressed fear that his own military might “take me out.”²⁹

These and other WikiLeaks revelations shocked many American citizens, who learned for the first time what their government was doing in their name with their dollars. According to Edward Wasserman, dean of the graduate school of journalism at the University of California at Berkeley, “WikiLeaks enabled spectacular disclosures of official secrets...that exposed outrageous, even murderous wrongdoing,” including “war crimes, torture and atrocities on civilians.” Assange “was midwife to some of the most sensational and genuinely consequential journalistic disclosures of recent years” and provided “hugely significant information to the public.”³⁰

²⁵ Star, 175.

²⁶ Star, 62; Thomas L. Friedman, “The Big American Leak,” *New York Times* (Dec. 5, 2010).

²⁷ Star, 54, 101

²⁸ David Leigh, James Ball, Ian Cobain and Jason Burke, “Guantanamo Leaks lift lid on world’s most controversial prison,” *Guardian* (April 24, 2011).

²⁹ Star, 110, 252.

³⁰ Edward Wasserman, “Julian Assange and the Woeful State of Whistle-Blowers,” *New York Times* (April 26, 2019).

5. History & Ubiquity of Publishing classified documents

In the US, newspapers have published excerpts of secret or classified documents ever since the nation's founding. In the 1790s, the newspaper *Aurora* printed verbatim the secret draft of a treaty that the US was negotiating with Britain, along with President George Washington's confidential communications to his Cabinet and private correspondence between US and French diplomats.³¹ These secret government records were the functional equivalent of classified documents (though a formalized classification system did not exist at the time and would only be developed in the middle of the twentieth century).³² In any case, the unauthorized disclosures at the end of the eighteenth century set the standard that has continued ever since. Many exposed governmental deceit, illegality, or abuse of power. Most shed light on governmental decision-making that furthered public knowledge and understanding of governmental policy.

Gaps in the historical record prevent a full accounting of the countless national security secrets published in the press, but the most significant cases have been documented by scholars. Among them:

- In 1844, the *New York Evening Post* published President John Tyler's secret proposal to annex Texas, which was then an independent country.
- In 1846, the *Philadelphia North American* published the full text of a secret treaty proposal between the US and Britain over a border dispute in Oregon.
- In 1848, the *New York Herald* published a secret draft of the Treaty of Guadeloupe-Hidalgo, which ended the Mexican-American War.
- In 1871, the *New York Tribune* published a secret treaty between the US and Britain settling claims arising from the American civil war.
- In 1890, the *Washington Post* and *New York Times* published a secret extradition treaty between the US and Britain.
- In 1892, newspapers published details of secret Senate debates about a proposed US-UK treaty to resolve a dispute in the Bering Sea.³³
- In 1944, the *New York Times* published verbatim the secret texts of American proposals for the international Dumbarton Oaks Conference that would give birth to the United Nations.³⁴

³¹ Margaret Blanchard, "Freedom of Expression in the United States," unpublished manuscript, pp. 51-4, 96-7.

³² Beverly Gage, "The Strange Politics of 'Classified' Information," *New York Times Magazine* (Aug. 22, 2017).

³³ Gabe Rottman, "Federal Cases Involving Unauthorized Disclosure to the News Media, 1778 to the Present," Reporters Committee for Freedom of the Press: www.rcfp.org/wp-content/uploads/2018/12/12-8-2019-Leaks-Chart-1.pdf

³⁴ James C. Goodale, *Fighting for the Press: The Inside Story of the Pentagon Papers and Other Battles* (New York: CUNY Journalism Press, 2013), 39.

- In 1953, the *New York Times* published the entire text—more than 200,000 words—of secret minutes and other records documenting the meeting in Yalta between Winston Churchill, Franklin Roosevelt and Joseph Stalin to divide Europe into spheres of influence after World War II.³⁵
- In 1961, days before US-backed Cuban exiles invaded the Bay of Pigs, the *New York Times* and other American media outlets reported that an invasion to overthrow premier Fidel Castro was imminent; these detailed accounts listed locations of training and staging stations, anticipated troop levels, and other military tactics and strategy.³⁶
- In 1969, the *New York Times* revealed that President Richard Nixon had secretly authorized covert bombing of Cambodia, expanding the US war in Vietnam that he claimed to be winding down.³⁷
- In 1972, the *Washington Post* published information contained in classified FBI files about the involvement of the Nixon White House in the burglary of the Democratic party’s headquarters at the Watergate building in Washington.³⁸
- In 2004, the *New Yorker* magazine published gruesome photos and detailed excerpts of a classified 53-page government report documenting US torture of captives at the Abu Ghraib prison in Iraq.³⁹
- In 2005, the *Washington Post* disclosed that the CIA had been hiding and interrogating important al Qaeda captives at secret “black sites” around the world, effectively hiding torture of prisoners.⁴⁰
- In 2010, the *Baltimore Sun* published a report about alleged government mismanagement involving a classified project code-named Trailblazer, a tool for sifting digital communications.⁴¹
- In 2008 and 2009, the *New York Times* and other news outlets reported classified information about the capture and brutal interrogation of suspected Al Qaeda member Abu Zubaydah.⁴²

³⁵ Ibid.

³⁶ Tad Szulc, “Anti-Castro Units Trained To Fight At Florida Bases,” *New York Times* (April 7, 1961); W. Joseph Campbell, *Getting it Wrong: Ten of the Greatest Misreported Stories in American Journalism* (Berkeley, CA: Univ. of California Press, 2010), chp. 4.

³⁷ William Shawcross, *Sideshow: Kissinger, Nixon, and the Destruction of Cambodia* (New York: Cooper Square Press, 2002).

³⁸ Max Holland, *Leak: Why Mark Felt Became Deep Throat* (Lawrence, KS: University of Kansas Press, 2012).

³⁹ Seymour Hersh, “Torture at Abu Ghraib,” *New Yorker* (April 30, 2004).

⁴⁰ Dana Priest, “CIA Holds Terror Suspects in Secret Prisons,” *Washington Post* (Nov. 2, 2005).

⁴¹ Siobhan Gorman, “System Error,” *Baltimore Sun* (Jan. 29, 2006).

⁴² Charlie Savage, “Ex-CIA Officer Charged in Information Leak,” *New York Times* (Jan. 23, 2012).

- In 2013, the *Washington Post* quoted from classified intelligence documents that revealed a secret US government program code-named PRISM that tracked foreign targets by using “bulk surveillance” to extract photos, emails, and video chats from Facebook, Google, Skype, Apple, Microsoft, YouTube, and other Internet companies.⁴³
- In 2014, the McClatchy news service reported that the CIA was spying on a Senate committee that was compiling a critical report on CIA torture.⁴⁴
- In 2015, the online news outlet The Intercept posted classified documents about the US military’s use of drones to assassinate foreign targets.⁴⁵
- In 2017, The Intercept published excerpts of a top-secret report about Russian attempts to hack US elections software.⁴⁶
- In 2018, The Intercept uploaded a cache of classified documents about how the US was recruiting informants in foreign countries.⁴⁷
- In 2018, CNBC television cited classified intelligence reports that Russia successfully tested a hypersonic weapon that the US is unable to defend against.⁴⁸

The frequency and volume of such classified leaks is impossible to know. A study by the Senate intelligence committee in 1986 counted 147 leaks of classified information to the nation’s eight leading newspapers in just six months—an average of more than five a week. In 2005, a study by a presidential commission identified “hundreds of serious press leaks” containing classified information during the previous decade. In 2012, a Harvard University law professor tallied “hundreds of stories” that appeared in the *New York Times* and *Washington Post* that contained “self-reported disclosure of classified information,” plus many more “classified tidbits” that weren’t advertised as such [emphasis added]. According to still another governmental study, classified leaks to the press are a “daily occurrence.” In 2013, a detailed study by a Columbia University law

⁴³ Barton Gellman and Laura Poitras, “US, British intelligence mining data from nine US Internet companies in broad secret program,” *Washington Post* (June 7, 2013).

⁴⁴ Michael Grynbaum, Scott Shane and Emily Flitter, “How an Affair Between a Reporter and a Security Aide Has Rattled Washington Media,” *New York Times* (June 24, 2018).

⁴⁵ Jeremy Scahill, “The Assassination Complex,” *The Intercept* (Oct. 15, 2015); “Operation Haymaker,” *The Intercept* (Oct. 15, 2015); Rachel Weiner, “Former intelligence analyst charged with leaking drone details to news outlet” (May 9, 2019).

⁴⁶ Dave Philipps, “Reality Winter, Former NSA Translator, Gets More Than 5 Years in Leak of Russian Hacking Report,” *New York Times* (Aug. 23, 2018).

⁴⁷ Rachel Weiner and Ellen Nakashima, “Former FBI agent gets four years in prison for leaking classified documents,” *Washington Post* (Oct. 18, 2018).

⁴⁸ Eric Wemple, “Reporters at CNBC and NBC News become tangled in leak investigation,” *Washington Post* (Oct. 9, 2019).

professor found that “thousands upon thousands of national security-related leaks to the media” have occurred.⁴⁹

In short, leaks of classified information to the press have become routinized in Washington. One veteran journalist from the *New York Times*, Max Frankel, famously explained how the system works:

The reporter and the official trespass regularly, customarily, easily, and unselfconsciously (even unconsciously) through what they both know to be official “secrets.”

Presidents make “secret” decisions only to reveal them for the purposes of frightening an adversary nation, wooing a friendly electorate, protecting their reputation. The military services conduct “secret” research in weaponry only to reveal it for the purpose of enhancing their budgets...The Navy uses secret information to run down the weaponry of the Air Force. The Army passes on secret information to prove its superiority to the Marine Corps. High officials of the Government reveal secrets in the search for support of their policies, or to help sabotage the plans and policies of rival departments. Middle-rank officials of government reveal secrets so as to attract the attention of their superiors or to lobby against the orders of those superiors....

For the vast majority of “secrets,” there has developed...a rather simple rule of thumb: The Government hides what it can, pleading necessity as long as it can, and the press pries out what it can, pleading a need and a right to know. Each side in this ‘game’ regularly ‘wins’ and ‘loses’ a round or two. Each fights with the weapons at its command. When the Government loses a secret or two, it simply adjusts to a new reality. When the press loses a quest or two, it simply reports (or misreports) as best it can.”⁵⁰

6. Government exaggerates harm from publishing national security information

US prosecutors allege in their indictment that Assange endangered confidential government informants and jeopardized America’s national security. But as one legal scholar has observed, “[c]laims of dire consequences from the disclosure of classified information are easily made, but difficult to prove—or for that matter, to disprove because the details themselves are frequently shrouded in secrecy.”⁵¹

Official assertions about the sensitivity of national security information cannot be taken at face value because of the government’s long history of exaggeration. In particular, over-classification of

⁴⁹ David E. Pozen, “The Leak Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information,” *Harvard Law Review*, vol. 127, 512 (2013), 528-9, 534.

⁵⁰ Affidavit, Max Frankel, *US v. New York Times*, 43 US 713 (June 17, 1971).

⁵¹ Jane Kirtley, “A ‘Clear and present Danger’: The Indictment of Julian Assange and the First Amendment,” *Journalism & Communication Monographs*, vol. 2: 3 (2019), 273.

government records is widely acknowledged as rampant to the point of absurdity. “[E]very government study of the issue over the last six decades has found widespread classification of information that the government had no basis to conceal,” several scholars wrote. Estimates of the extent of over classification vary. “Three quarters of what I read that was classified should not have been,” the head of presidential commission investigating the 9/11 attacks said. A White House national security aide testified that the figure was closer to 90%, acknowledging that only a fraction of classified information was for “legitimate protection of secrets.” As Supreme Court justice Potter Stewart observed, “when everything is classified, then nothing is classified, and the system becomes one to be....manipulated by those intent on self-protection or self-promotion.”⁵²

According to Jack Goldsmith, assistant attorney general in the Bush administration, “the principal concern of the classifiers is not with national security, but rather governmental embarrassment of one sort or another.”⁵³

Indeed, the government has frequently exaggerated the harm caused by publishing classified information as a way to hide incompetence, misconduct, or even political vendettas.

For example, in 1942, the *Chicago Tribune* reported that the US Navy had advance warning of Japanese tactics before a key battle during World War II, suggesting that Americans had cracked enemy codes. President Franklin Roosevelt, who had a long-running feud with the newspaper’s publisher, wanted to send troops to occupy the Tribune Tower and charge him with treason. But the Japanese continued using the same codes anyway; there is no evidence that the leak harmed the US—or even that the Japanese knew about it.⁵⁴

A similar case of “crying wolf” occurred in 1971, when syndicated columnist Jack Anderson published excerpts of top-secret government documents revealing that the Nixon administration had secretly armed Pakistan in its war with India, even though Nixon publicly proclaimed American neutrality in the war. White House national security advisor Henry Kissinger branded the leak “a serious security risk to our government.” President Nixon asserted that “from the point of view of national security, it was intolerable.” But top Pentagon officials admitted that it

⁵² Heidi Kitrosser, Patrick Kabat, Jane Kirtley, Jonathan Manes, David Schulz, “Brief of Amici Curiae Scholars of Constitutional Law, in Support of the Defendant in *United States v. Terry J. Albury*,” (Oct. 4, 2018): <https://www.rcfp.org/wp-content/uploads/imported/RCFP-Albury-Amicus-Brief.pdf>; Tom Blanton, testimony to House Committee on Oversight and Reform, “Examining the Costs of Over-classification on Transparency and Security” (Dec. 7, 2016): <https://docs.house.gov/meetings/GO/GO00/20161207/105452/HHRG-114-GO00-Wstate-BlantonT-20161207.pdf>; *US v. New York Times*, 43 US 713 (1971).

⁵³ Erwin N. Griswold, “Secrets Not Worth Keeping,” *Washington Post* (Feb.15, 1989).

⁵⁴ Norton Smith, 432-42; John Prados, “Secrecy and Leaks: When the US Government Prosecuted the *Chicago Tribune*” (Oct. 25, 2017): <https://nsarchive.gwu.edu/briefing-book/intelligence/2017-10-25/secracy-leaks-when-us-government-prosecuted-chicago-tribune>.; Michael Sweeney and Patrick Washburn, “Ain’t Justice Wonderful: “The *Chicago Tribune*’s Battle of Midway Story and the Government’s Attempt at an Espionage Act Indictment in 1942,” *Journalism and Communication Monographs* 16:1 (Spring 2014): 7-97.

“primarily affected diplomatic sensitivity [not] military security” and no evidence ever emerged of any genuine damage—except to the administration’s credibility.⁵⁵

In 2005, the *New York Times* published details of a classified government program revealing that President George W. Bush had illegally authorized the US National Security Agency to monitor phone calls and emails in the US and abroad. Bush denounced the leak as “disgraceful” and said it could alert potential terrorists that they were under scrutiny. If there was another terrorist attack on American soil, the president told *Times* executives, “You’ll have blood on your hands.” No evidence has emerged that the story led to bloodshed, but revelation of the government spying did lead to public outrage, lawsuits, congressional hearings, and a judicial ruling that the surveillance was unconstitutional.⁵⁶

According to one scholar who has studied the history of journalistic leaking, “there is scant evidence that national security has been harmed in any significant way by the disclosure of government secrets.”⁵⁷

The most famous example of the government invoking national security to cover up its mistakes involves the Pentagon Papers, a classified 7000-page study of the origins of the Vietnam War that revealed how the government had systematically lied to Congress and the public about the failing American intervention in the war. In 1971, the *New York Times* began publishing the first of several articles containing extensive excerpts of the top-secret documents. President Nixon was enraged and dispatched federal prosecutors to warn the newspaper that continuing to publish more top-secret documents would violate the US Espionage Act and “will cause irreparable to the defense interests of the United States.”⁵⁸ The ominous but vague accusation was almost impossible to refute. “Nixon’s lawyers knew assertions of damage to national security could not be challenged effectively, or at all,” *Times* lawyer James Goodale said. “The government could assert whatever it wanted, and there was no way to disprove it.”⁵⁹ In court, the administration claimed that further publication could expose US military plans, identify CIA agents and activities, and even prolong the Vietnam War.⁶⁰ The head of the NSA, Admiral Noel Gayner, testified that publication could reveal secret American eavesdropping and cited as proof a US radio intercept of a North Vietnamese

⁵⁵ Mark Feldstein, *Poisoning the Press: Richard Nixon, Jack Anderson, and the Rise of Washington’s Scandal Culture* (New York: Farrar, Straus & Giroux, 2010), 163.

⁵⁶ James Risen and Eric Lichtblau, “Bush Lets U.S. Spy on Callers Without Courts,” *New York Times* (Dec. 16, 2005); Joe Hagan, “The United States of America vs. Bill Keller,” *New York* (Sept. 8, 2006); Goodale, 200-01.

⁵⁷ William H. Freivogel, “Publishing National Security Secrets: The Case for ‘Benign Indeterminacy,’” *Journal of National Security Law & Policy*, vol. 3:95 (2009), 98.

⁵⁸ Hedrick Smith, “Mitchell Seeks to Halt Series on Vietnam,” *New York Times* (June 15, 1971).

⁵⁹ Goodale, 220, 74.

⁶⁰ David Rudenstine, *The Day the Presses Stopped: A History of the Pentagon Papers Case* (Berkeley: University of CA Press, 1996), 9.

transistor—even though the intercept turned out to have already been made public in a Senate report more than three years earlier.⁶¹ Still, Nixon’s solicitor general, Erwin Griswold, asked the Supreme Court to stop the press from further publication, saying it could cause “immediate and irreparable harm to the security of the United States.”⁶²

This was at best a gross exaggeration and arguably a deliberate falsehood that attempted to exploit judicial and public fear ignorance and fear.⁶³ Eighteen years later, Griswold admitted that, contrary to his assertions in court about the documents, he had “never seen any trace of a threat to the national security from the publication. Indeed, I have never seen it even suggested that there was such an actual threat.”⁶⁴

Nearly 50 years after the Pentagon Papers were published, the Defense Department official in charge of the project confessed that military stiff had thought it “too much work” to go through the study “page by page” to see what should be classified so instead stamped everything in the files top-secret,” including newspaper articles, as a kind of joke.⁶⁵ There has not been “a scintilla of proof that any of the 7,000 pages damaged national security,” attorney Goodale wrote in 2013. “It’s time to admit that the claims of breach of national security made in this case turned out to be hot air.”⁶⁶

Only after Nixon left office did the full truth emerge about the case, thanks to the fluke that his staff had secretly recorded audiotapes capturing the president’s hidden motive: to punish the *New York Times* for its critical coverage of him. “This is a bunch of goddamn left-wingers trying to destroy” his administration, Nixon fumed on tape. He ordered his staff to do “everything we can do destroy the *Times*” because “they’re our enemies.” Nixon instructed his attorney general to “Use some really high-flown adjectives” with “strong language, like ‘a massive breach of security’ to describe the dangers of unleashing the classified documents. The “main thing to do is to cast it in terms of [the *New York Times*] doing something disloyal to the country” that “risks our men” and gives “aid and comfort to the enemy.”⁶⁷

⁶¹ Sanford J. Ungar, *The Papers & The Papers: An Account of the legal and Political Battle over The Pentagon Papers* (New York: Columbia University Press, 1989), 204; John Sims, “Triangulating the Boundaries of the Pentagon Papers,” *William & Mary Bill of Rights Journal*, vol. 2:2, 367, 436.

⁶² Rudenstine, 9.

⁶³ To dramatize the sensitivity of the radio intercept, intelligence officials sheathed the document in three envelopes of increasing size sealed with a large red wax seal with dangling ribbons, encased in a double-locked briefcase. “The government made a big production...in order to scare the judge,” Goodale said. Goodale, 145

⁶⁴ Erwin N. Griswold, “Secrets Not Worth Keeping,” *Washington Post* (Feb.15, 1989).

⁶⁵ Goodale, 219.

⁶⁶ *Ibid.*, 218.

⁶⁷ Feldstein, 150-1; James Rosen, *The Strong Man: John Mitchell and the Secrets of Watergate* (New York: Doubleday, 2008), 162.

7. Leaking double standard

Although government officials denounce national security leaks that they find embarrassing, they leak classified information with abandon when it serves their needs.

For example, while President Bush warned the *New York Times* that it might have “blood on its hands” for revealing his illegal NSA spying program, his advisors leaked similarly classified information to advance its political agenda. In 2003, the *New York Times* published a series of articles based on classified information leaked by administration officials that asserted (erroneously) that Saddam Hussein’s regime had acquired weapons of mass destruction. Instead of condemning the articles as a breach of security, the White House trumpeted them publicly because they buttressed its case for war with Iraq. When a former ambassador publicly questioned the evidence, officials retaliated by once again leaking classified information to the press: the fact that the ambassador’s wife worked for the CIA, a deliberate outing of an intelligence officer’s identity that was said to put her and others at great risk.⁶⁸ These leaks elicited no denunciations from the White House.

A double standard about leaking was not limited to the Bush administration. President Barack Obama said that “anyone who leaks classified information is committing espionage.”⁶⁹ But in 2011, in the aftermath of a US counterterrorism operation that killed Osama bin Laden, the *New Yorker* magazine published a wealth of classified secrets based on interviews with military and intelligence officials about the successful raid: how national security advisors considered tunneling into bin Laden compound but couldn’t because the soil was too wet; how the US dumped his body at sea after Saudi Arabia declined to take the corpse; how the key to success was an ingenious fake vaccination drive that the CIA set up to get DNA from the bin Laden family.⁷⁰ One US senator criticized the administration’s “flurry of anonymous boasting” but no such criticism came from the White House.⁷¹ Similarly, in 2012, the *New York Times* published an article based on classified information that seemed designed to help Obama’s re-election campaign; the article reported that the White House maintained a “kill list” of potential terrorist targets and detailed at length how Obama himself painstakingly but resolutely signed off on all major drone strikes.⁷² Six weeks later,

⁶⁸ Michael Isikoff and David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* (New York: Crown, 2006), 34-7, 48-9, 55-62; Glenn Kessler, “Valerie Plame’s claim that Scooter Libby leaked her identity,” *Washington Post* (Sept. 10, 2019); Joseph C. Wilson, “What I Didn’t Find in Africa,” *New York Times* (July 6, 2003); Michael Massing, “Now They Tell Us,” *New York Review of Books* (Feb. 26, 2004).

⁶⁹ Goodale, 207.

⁷⁰ Nicholas Schmidle, “Getting Bin Laden: What happened that night in Abbottabad,” *New Yorker* (Aug. 1, 2011).

⁷¹ Uri Friedman, “Good Leak, Bad Leak: A look at the Obama administration’s hot-and-cold approach to secrets,” *Foreign Policy* (June 8, 2012).

⁷² Jo Becker and Scott Shane, “Secret ‘Kill List’ proves a Test of Obama’s Principles and Will,” *New York Times* (May 29, 2012).

the *Times* revealed a classified US government project code-named Operation Olympic Games that unleashed a computer virus nicknamed Stuxnet in a damaging cyberattack against Iran that disabled 1,000 centrifuges at its Natanz nuclear facility.⁷³ “They’re intentionally leaking information to enhance President Obama’s image as a tough guy for the [upcoming] elections,” one senior senator observed.⁷⁴

Reporter Bob Woodward has long been Washington’s champion recipient of national security leaks. His books, based on government insiders, have revealed highly classified CIA and NSA programs, including code names, the existence of clandestine paramilitary army in Afghanistan run by the CIA, and details of China’s secret cyber-penetration of computers used by US presidential candidates. Woodward’s books “are filled with classified information that he could only have received from the top of the government,” observed Jack Goldsmith, a Harvard law professor who served in the Bush Justice Department. This “puts in a bad light the secrecy system that presidents can turn on or off at will, not always obviously in the national interest.”⁷⁵

8. Failed efforts to prosecute publishers of national security information

Since World War I, the US government has convicted a number of government employees who leaked national security information but never any of the media outlets that published them. This distinction between leaker and leakee—the “source/distributor divide,” as one scholar has termed it—has been consistently upheld over the years, primarily because the government feared running afoul of the free press clause of the First Amendment.⁷⁶

In a handful of highly politicized cases, presidents have exerted heavy pressure on their Justice Department appointees to file criminal charges against journalists, though none were ultimately successful.

For example, during World War II, President Franklin D. Roosevelt pressured his attorney general, Francis Biddle, to indict Robert McCormick, the *Chicago Tribune* publisher and longtime FDR critic whose newspaper effectively revealed that the US had broken Japanese military codes. The president and his advisors had no evidence that the newspaper story had harmed national security. Biddle tried to dissuade FDR from his vendetta but he wouldn’t take no for answer. The

⁷³ David E. Sanger, “Obama Order Sped Up Wave of Cyberattacks Against Iran,” *New York Times* (June 1, 2012); Ellen Nakashima and Joby Warrick, “Stuxnet was work of US and Israeli experts, officials say,” *Washington Post* (June 2, 2012); Friedman, “Good Leak, Bad Leak.”

⁷⁴ Friedman, “Good Leak, Bad Leak.”

⁷⁵ Jane Mayer, “Thomas Drake vs. the NSA,” *New Yorker* (May 23, 2011); Jack Goldsmith, “Classified information in Woodward’s ‘Obama Wars,’” *Lawfare* (Sept. 29, 2010). There’s “clearly an element of hypocrisy involved,” said Steven Aftergood, publisher of the newsletter *Secrecy News*. “Some leaks are fine and dandy and others are outrageous and get prosecuted—depending on who is doing the leaking.” Michael Isikoff, “‘Double Standard’ in White House leak inquiries?” *NBCNews.com* (Oct. 18, 2010).

⁷⁶ Pozen, 518.

attorney general reluctantly appointed a special prosecutor but the grand jury voted against bringing any charges against the *Tribune* publisher or his staff. The Japanese continued using the same military codes and there is no evidence that the leak harmed the US or even that the Japanese knew about it.

Similarly, President Nixon wanted to prosecute his longtime journalistic bête noire, columnist Jack Anderson, after he published classified documents revealing the government's secret arming of Pakistan. "Goddamnit," Nixon told his attorney general John Mitchell, "we've got to do something with this son of a bitch." Mitchell agreed that we should "get ahold of this Anderson and hang him," but explained that publishing classified documents wasn't illegal. Prosecutors never filed criminal charges against Anderson.⁷⁷

In the Pentagon Papers case, too, Nixon wanted to prosecute the press for publishing classified documents, especially the reporter who first obtained them, Neal Sheehan of the *New York Times*, whom Nixon privately called a "cocksucker" and "left-wing Communist son of a bitch."⁷⁸ FBI agents conducted an extensive investigation of Sheehan and of reporters for the *Washington Post* and *Boston Globe*; agents used false identities to question their friends and neighbors, issued subpoenas, and poured through their bank statements, credit cards purchases, phone calls, and travel receipts. In Boston, federal prosecutors convened a grand jury, a fact that the government quickly leaked to the press. "Jury Weighs Indictment of the *New York Times*," one headline read. Another stated: "US Said to Be Planning to Seek Indictment of a *Times* Reporter."⁷⁹

But it was unclear what crime the newspapers had committed. "There had never been a court decision concerning the publication of classified information," *Times* lawyer Goodale realized.⁸⁰ "However, just because there were no laws that were directly applicable did not mean that in its war against the press, the Nixon administration couldn't stretch existing laws to fill the void." Federal prosecutors tried to prove that the press took part in a conspiracy to violate the Espionage Act but Goodale was skeptical of this theory: "The *Times* did not intend to commit the crime of espionage. It was trying to inform the public. Espionage required delivery of secret information to an enemy with the intent to harm the United States...[B]ecause the law was written to apply to espionage and not publishing, it seemed too vague to fit our situation." In particular,

⁷⁷ Mitchell suggested that Anderson was "guilty of possession of these documents" and could be prosecuted "not for the publication but for the possession" of classified records, probably under laws against theft of government property. Feldstein, 191-3.

⁷⁸ Ibid, 150.

⁷⁹ Goodale, 174; Seth Rosenfeld, "The FBI's secret investigation of Ben Bagdikian and the Pentagon Papers," *Columbia Journalism Review* (Aug. 29, 2018).

⁸⁰ Federal prosecutors also explored prosecuting the newspapers for theft of government property under 18 USC 641 but according to Goodale, that law "criminalized people who stole jeeps and other tangible government property. It did not apply to Xeroxing of the Pentagon Papers. If the government was really serious about getting Sheehan for trading in stolen property, it would have to find language in 641 that was not there." Goodale, 175; 18 USC 641.

Goodale wrote, section 793 of the Espionage Act outlawed *communicating* national security information not *publishing* it: “Congress was quite careful not to use the ‘publish’ in the Espionage Act. It chose communication not publication to cover espionage....If lawmakers wanted to control publication they had to say so specifically.” According to Goodale, this is an important distinction: “Communication has a much larger meaning than publication. It includes conversations, broadcasting and the like....For example, every publication in New York State is required to publish a list of its officers and directors. The law says that, particularly. It does not say every publication in New York must communicate to the public who its officers and directors are.”⁸¹

Federal prosecutors dismissed the Boston grand jury without bringing charges. They decided to focus on prosecuting the whistleblower who leaked the classified documents, Daniel Ellsberg, not the newspapers that published them. Once again, the “source/distributor divide” was upheld.

9. The Assange prosecution

Forty years later, in the summer of 2010, the Obama administration began an aggressive criminal investigation of both Julian Assange and Chelsea Manning, who leaked the classified documents to WikiLeaks. FBI and CIA officials argued that Assange was an “information broker” not a journalist and should be indicted, but senior Justice Department officials reportedly “expressed reluctance” to do so on First Amendment grounds. The FBI and CIA officials pressed for a meeting with the president to make their case that Assange was not a journalist therefore was subject to prosecution; but the meeting with Obama never took place. By 2013, after a three-year probe and months of internal debate, the Justice Department had decided to follow established precedent and not bring charges against Assange or any of the newspapers that published the documents. “The problem the department has always had in investigating Julian Assange is there is no way to prosecute him for publishing information without the same theory being applied to journalists,” said Matthew Miller, former spokesman for the Obama Justice Department. “And if you’re not going to prosecute journalists for publishing classified information, which the department is not, then there is no way to prosecute Assange.” Prosecutors called it the “*New York Times* problem”—that if it indicted Assange for publishing the documents Manning leaked, it would also have to also indict the *New York Times* for doing the same.⁸²

⁸¹ Section 798 of the Espionage Act uses the word “publish” as well as “communicate,” as Goodale pointed out, but only in reference to codes, which wasn’t relevant in either the Pentagon Papers or Assange cases. Goodale, 41-3, 175; 18 USC 798.

⁸² Sari Horowitz, “Julian Assange unlikely to face US charges over publishing classified documents,” *Washington Post* (Nov. 25, 2013); Julian Barnes, Adam Goldman, Charlie Savage, “How the Trump Administration Stepped Up Pursuit of WikiLeaks’s Assange,” *New York Times* (Nov. 16, 2018).

In all of these politically charged cases, the government's desire to prosecute the journalists who published classified records foundered on First Amendment grounds and the longstanding precedent that publishing secret records is not a crime.

But Donald Trump's election changed the calculus. The month after his inauguration, the president met with FBI director James Comey and brought up the issue of plugging leaks. Comey suggested "putting a head on a pike as a message" and Trump recommended "putting reporters in jail."⁸³ Three days later, he instructed his attorney general to investigate "criminal leaks" of "fake" news reports that had embarrassed the White House.⁸⁴ According to press accounts, the new administration soon "unleashed an aggressive campaign" against Assange. CIA director Mike Pompeo publicly attacked WikiLeaks as a "hostile intelligence service" that uses the First Amendment to "shield" himself from "justice." In private, he briefed members of Congress on a bold counterintelligence operation the agency was conducting that included the possible use of informants, penetrating overseas computers, and even trying to directly "disrupt" WikiLeaks, a move that made some lawmakers uncomfortable.⁸⁵ A week later, Attorney General Jeff Sessions said at a news conference that journalists "cannot place lives at risk with impunity," that prosecuting Assange was a "priority" for the new administration, and that if "a case can be made, we will seek to put some people in jail."⁸⁶ The new leaders at the Justice Department dismissed their predecessors' interpretation that Assange was legally indistinguishable from a journalist and reportedly began "pressuring" their prosecutors to outline an array of potential criminal charges against him, including espionage. Once again, career professionals were said to be "skeptical" because of the First Amendment issues involved and a "vigorous debate" ensued.⁸⁷ Two prosecutors involved in the case, James Trump and Daniel Grooms, reportedly argued against charging Assange.⁸⁸ But in April of 2019, Assange was arrested in London—even though "the Justice Department did not have significant evidence or facts beyond what the Obama-era officials had when they reviewed the case."⁸⁹

⁸³ Abramson, "Comey's wish for a leaker's 'head on a pike.'"

⁸⁴ "Remarks by President Trump in Press Conference," WH.gov (Feb. 16, 2017); Charlie Savage and Eric Lichtblau, "Trump Directs Justice Department to Investigate 'Criminal Leaks,'" *New York Times* (Feb. 16, 2017); Barnes, *et al*, "How the Trump Administration Stepped up Pursuit of WikiLeaks' Assange."

⁸⁵ CIA, "Director Pompeo Delivers Remarks at CSIS" (April 13, 2017): www.cia.gov/news-information/speeches-testimony/2017-speeches-testimony/pompeo-delivers-remarks-at-csis.html.

⁸⁶ "Sessions Delivers Remarks," Justice.gov.

⁸⁷ Matt Zapposky and Ellen Nakashima, "Justice Department debating charges against WikiLeaks members," *Washington Post* (April 20, 2017); Adam Goldman, "Justice Department Weighs Charges Against Julian Assange," *New York Times* (April 20, 2017).

⁸⁸ Devlin Barrett, Matt Zapposky and Rachel Weiner, "Some federal prosecutors disagreed with decision to charge Assange under Espionage Act," *Washington Post* (May 24, 2019).

⁸⁹ Barrett, *et al*, "Prosecutors Disagreed."

Assange’s indictment triggered an outcry not only from human rights and civil liberties organizations but most of all from journalists—not because of affection for Assange but because, as one wrote, “it characterizes everyday journalistic practices as part of a criminal conspiracy.”⁹⁰ Indeed, Trump administration has charged Assange with 17 counts of violating the Espionage Act not for spying or conducting espionage on behalf of a foreign power but for soliciting receiving, and publishing national defense information. Specifically, Assange faces three counts of “unauthorized Obtaining” this information; four counts of “unauthorized Obtaining and Receiving” it; nine counts of “unauthorized disclosure” of it; and one count of “Conspiracy to Obtain, Receive and Disclose” it.⁹¹

From a journalistic standpoint, these activities boil down to newsgathering (soliciting and receiving documents), publishing them, and protecting the source who provided them. Specifically:

a) Soliciting documents:

According to the indictment, Assange “*encourage[d]* those with access to protected information, including classified information, to provide it to WikiLeaks for public disclosure” and “*explicitly solicited...restricted material of political, diplomatic or ethical significance ...precisely because of the value of that information.*” He further “posted a detailed list” of his ‘Most Wanted Leaks’ in order to receive these documents through the WikiLeaks drop box and “*encouraged...aided, abetted, counseled, induced*” and “*conspired with*” Manning in texts, offering direction, encouraging her to “continue” digging, and complimenting her efforts: “ok great!”⁹²

These actions—encouraging sources to focus on valued information of political, diplomatic or ethical significance in order to disclose it to the public—are not only consistent with standard journalistic practice, they are its lifeblood, especially for investigative or national security reporters. When I was a journalist, I personally solicited sources for confidential or restricted information, on more occasions than I can count. So has every investigative reporter in the US. I teach journalism students how to cultivate sources to provide information, including about sensitive or secret topics. So does every journalism school worthy of the name. I have both solicited and received information from restricted and classified documents, sometimes directly, sometimes with a nod and a wink. So have countless other journalists. (And yes, I complimented and flattered sources to elicit information, too.)

Like Assange, all reporters prize information with the highest “value.” Learning to distinguish between what is newsworthy and what is not is a standard part of the journalism school

⁹⁰ Ben Wizner, “ACLU Comment on Julian Assange Arrest” (April 11, 2019): <https://www.aclu.org/press-releases/aclu-comment-julian-assange-arrest>

⁹¹ Superseding indictment, *US v. Julian Assange* 1:18-cr-111 (May 23, 1971).

⁹² Emphasis added here and in subsequent quotations from indictment. *US v. Julian Assange* (May 23, 2019), 2-3.

curriculum. When I was a reporter, I let sources know what kind of information or documentation I was looking for and would often (politely) direct them to go back and get more. Innumerable other journalists do this, too.

In this sense, I and other investigative reporters have counseled, induced, conspired with, and aided and abetted whistleblowing sources. So have the world's greatest journalists. After all, good investigative reporters are not mere stenographers who passively accept whatever information falls in their lap. The reporter-source relationship is a constant back-and-forth between parties, even a kind of dance—sometimes led by one party, sometimes the other; but it always takes two to tango.⁹³

As for drop boxes, they are routinely used by leading news outlets in the US to solicit anonymous leaks of sensitive records, classified or not. They are just the latest technological innovation of the digital age used to dig up and document evidence of governmental wrongdoing, an extension of the traditional news tip hotline that has been commonplace in newsrooms for decades. These drop boxes are now a journalistic staple, employed by leading outlets around the world, including the *New York Times*, *Guardian*, *Washington Post*, *Wall Street Journal* and others.⁹⁴

Similarly, Assange's publicly posted "Most Wanted" list of documents may be a bolder and more imaginative form of newsgathering, but it differs only in degree from the kind of solicitations for information that journalists routinely post on social media sites.

b) Receiving documents

According to the indictment, not only did Assange solicit restricted documents, he was also successful in "obtaining" it, the basis for three of the Espionage Acts against him. As the indictment put it, "Assange was *knowingly receiving* such classified records from Manning for the purpose of publicly disclosing them on the WikiLeaks website."⁹⁵

"Obtaining" or "receiving" information is the whole point. Soliciting isn't enough, you have to actually get the information before you can publish it. Again, this is what news outlets have been doing for more than two centuries.

c) Publishing documents

Nine of the counts against Assange—more than half of the indictment—are purely for the act of publishing, or as the indictment calls it "disclosure." According to the indictment, Assange's "objective" was to "publicly disseminate" these records and he "conspired" to "obtain documents,

⁹³ Jack Huber and Dean Diggins, *Interviewing America's Top Interviewers: Nineteen Top Interviewers Tell All About What They Do* (New York: Birch Lane Press, 1991), 180.

⁹⁴ "Digital Security," Global Investigative Journalism Network: <https://gijn.org/digital-security/>

⁹⁵ Superseding indictment, *US v. Julian Assange*, 7.

writing and notes,” to “willfully communicate” and “disclose that information to the public and inspire others with access to do the same.”⁹⁶

What the indictment calls disclosure and public dissemination is what reporters call publishing. It is the fundamental purpose of journalism, the means by which reporters and editors inform the public; it is, as it were, the whole enchilada. It is also explicitly protected by the free press clause of the First Amendment.

As for trying to inspire other sources who have access to secrets to leak them, that’s what I and other journalists always hope will happen. That’s why a television station I worked for created a graphic that ran on the air with my contact information right after my stories were broadcast. Sometimes it worked.

d) Protecting confidential sources

The indictment states that Assange took “measures to prevent the discovery of Manning as [his] source, such as clearing logs and use of a cryptophone; and a code phrase to use if something went wrong.”⁹⁷

This kind of protection of confidential sources is not only standard practice but a crucial professional and moral responsibility for reporters, instilled in journalism schools and celebrated in books, movies, and other avenues of popular culture. It is as sacred to journalists as the doctor-patient relationship is to physicians or the attorney-client privilege is to lawyers. Whistleblowers often take enormous personal risks to supply sensitive information to the public, and reporters have gone to jail rather than betray a source to whom confidentiality has been promised. Indeed, whistleblowers are the lynchpin of investigative reporting; without them, the press would be crippled in its ability to serve as an effective check on governmental or corporate wrongdoing.

Journalists protect confidential sources in a variety of ways: granting anonymity; using code words; encrypting electronic communication; removing digital fingerprints or identifying details from documents; misdirecting suspicion away from sensitive sources to other people; coaching them in how to safely answer suspicious questions; and yes, providing technical advice on how to navigate dropboxes and transmit information without detection. Journalistic organizations and workshops train reporters in these techniques. As a journalist, I used most of these tactics myself. So have countless journalists.

The Justice Department portrays standard journalistic tradecraft as nefarious, akin to espionage. In fact, the crimes for which Assange is charged are legally indistinguishable from what news outlets do everyday. “We all think there’s a difference between the *New York Times* and Assange

⁹⁶ Ibid., 17-18, 10.

⁹⁷ Ibid., 9-10.

from a practical point of view, but from a constitutional point of view, it's hard to find that difference," said Alan Dershowitz, professor emeritus at Harvard law school and a defender of President Trump. "They're both publishing classified, stolen material."⁹⁸ The old "*New York Times* problem" that blocked the Obama administration from bringing charges against Assange—and that has kept presidents from prosecuting the press for the past century—is now being overturned by the Trump administration. According to Gabe Rottman, attorney for the Reporter's Committee for Freedom of the Press, the Justice Department is now propounding "a profoundly troubling legal theory, one rarely contemplated and never successfully deployed...to punish the pure act of publication of newsworthy government secrets under the nation's spying laws." Furthermore, he says the indictment is so broadly crafted that it "would permit prosecution even if Assange had received the material anonymously in the mail" without any solicitation whatsoever.⁹⁹

Prosecuting Assange purely for publishing has ramifications beyond the US. According to the director of the Committee to Protect Journalists, "the United States is asserting extraterritorial jurisdiction in a publishing case, a practice usually reserved for terrorism or piracy. Under this rubric, anyone anywhere in the world who published information that the US government deems to be classified could be prosecuted for espionage."¹⁰⁰

10. Political dimensions of case

Why did the Trump administration decide to bring these recent charges against Assange for what he published nine years earlier? No new "significant evidence" in the case has emerged since the Obama administration rejected such prosecution.¹⁰¹ The indictment breaks all legal precedents. No publisher has ever been prosecuted for disclosing national secrets since the founding of the nation more than two centuries ago—despite the "thousands upon thousands" of national security leaks to press.¹⁰² The only previous attempts to do so were highly politicized efforts by presidents seeking to punish their enemies, and in the end the First Amendment forced them to back down, too.

The political dimensions of this case are inescapable. The "indictment seems to have been tailored in a way that will do a lot of collateral damage, if not the maximum possible amount," wrote Gabriel Schoenfeld, a conservative scholar. "The Espionage Act has always been...a loaded

⁹⁸ Michael Grynbaum, Marc Tracy, "'Frightening': Charges Against Julian Assange Alarm Press Advocates," *New York Times* (May 23, 2019).

⁹⁹ Gabe Rottman, "The Assange Indictment Seeks to Punish Pure Publication," *Lawfare* (May 24, 2019).

¹⁰⁰ Joel Simon, "The Assange prosecution is a threat to journalists around the world," *Washington Post* (May 24, 2019).

¹⁰¹ Barrett, et al, "Prosecutors Disagreed."

¹⁰² Freivogel, 96.

gun pointed at the press. That gun is now in the process of being fired.”¹⁰³ The Justice Department could have tailored its indictment more narrowly to minimize the First Amendment concerns but it didn’t. The charges against him were “obviously framed to mirror what journalists do,” wrote Jack Goldsmith, an assistant attorney general in the Bush administration who handled national security matters. “I do not think this is an accident.”¹⁰⁴

Julian Assange is the perfect defendant for a prosecutor because he is so widely reviled. He has faced “a relentless and unrestrained campaign of public mobbing, intimidation and defamation,” the UN special rapporteur on torture said.¹⁰⁵ Prominent US politicians have urged that Assange be “hunted down” and “assassinated.”¹⁰⁶ Secretary of State Mike Pompeo, the ex-CIA director, has publicly attacked Assange as “a fraud” and “a coward hiding behind a screen” who¹⁰⁷ Even journalists who oppose his prosecution have called him “odious,” “reprehensible,” and “a narcissist.”¹⁰⁸ “Picking unsympathetic defendants to establish bad precedents is a time-worn legal strategy,” one journalist has pointed out, and convicting Assange for publishing national security documents is far more likely to be successful than convicting the publisher of the *New York Times*—even as it opens the door to doing just that.¹⁰⁹

The government casts Assange as a criminal and a threat to the state but his real offense is political. In the words of one student of national security law: “Espionage is generally considered a political offense and the [US-UK] treaty forbids extraditing someone charged with political offenses. Those very clear legal propositions raise the questions of why the Justice Department” brought the charges at all. His indictment may be “more symbolic statement” than “genuine charging document” designed “to deter future WikiLeaks-like activities or to intimidate traditional journalists.”¹¹⁰ Such an explanation is fully plausible in the context of the Trump administration’s attacks on journalistic “enemies of the people.”

¹⁰³ Gabriel Schoenfeld, “Indictment of Assange for Espionage Directly Threatens Press Freedoms,” *JustSecurity.org* (May 23, 2019).

¹⁰⁴ Jack Goldsmith, “The US Media is in the Crosshairs of the New Assange Indictment,” *Lawfare.com* (May 24, 2019).

¹⁰⁵ Alan Jones, “Julian Assange will not get fair trial in US after years of torture, warns UN official,” *Irish Independent* (May 31, 2019).

¹⁰⁶ Ewen MacAskill, “Julian Assange like a hi-tech terrorist,” *Guardian* (Dec. 19, 2010); Natalie Musumeci, “John McCain says Julian Assange ‘puts lives in danger,’” *New York Post* (Jan. 5, 2017); Haroon Siddique and Matthew Weaver, “US embassy cables culprit should be executed, says Mike Huckabee,” *Guardian* (Dec. 1, 2013).

¹⁰⁷ CIA, “Director Pompeo Delivers Remarks.”

¹⁰⁸ Michelle Goldberg, “Is Assange’s Arrest a Threat to the Free Press?” *New York Times* (April 11, 2019); Matthew Ingram, “The Case against Julian Assange is a clear threat to journalism,” *Columbia Journalism Review* (April 18, 2019); Fred Kaplan, “Risk: Laura Poitras’ WikiLeaks documentary,” *Slate* (May 23, 2017).

¹⁰⁹ Adam Serwer, “The ‘Enemy of the People’ Is the Real Target of the Assange prosecution,” *Atlantic* (May 24, 2019).

¹¹⁰ John T. Nelson, “L’Affaire d’Assange: Why His Extradition May Be Blocked,” John T. Nelson, *JusticeSecurity.org* (June 7, 2019).

11. Conclusion

Assange's deep unpopularity is all the more reason why he needs to be defended. The true test of a society's commitment to freedom of speech and press is not publishing facts or opinions that are widely accepted but publishing those that are not.

No matter how unorthodox, Assange is a publisher and is protected by the free speech and free press clauses of the American constitution. He has published truthful information in the public interest that exposed illegal and unethical actions by the US government. Disclosures of classified secrets have a long history in the US, going back to George Washington's presidency. Government officials routinely leak national security information when it is in their interest, even as they exaggerate the harm from leaks that are not in their interest. Yet no administration has never before indicted a journalist for publishing national security secrets.

The belated decision to disregard this 230-year-old precedent and charge Assange criminally for espionage was not an evidentiary decision but a political one. The Obama administration had already thoroughly investigated bringing such charges and concluded—like all previous presidents—that the First Amendment protected public disclosure of government secrets. Trump's Justice Department had no new information, just a political agenda radically different from its predecessors. Prosecuting Assange for the act of publishing is perhaps the administration's most menacing move yet in its battle with the press, with potentially the most far-reaching consequences of all.

The administration has already won a partial victory. Even if the espionage charges against Assange are ultimately dismissed, this politicized prosecution will still produce dividends whenever reporters hesitate for fear of getting into hot water, whenever publishers pull their punches to avoid angering authorities, whenever Americans start viewing journalists as criminals and spies who belong in prison—as “enemies of the people.”

Julian Assange faces lifetime imprisonment for publishing truthful information about governmental criminality and abuse of power, precisely what the First Amendment was written to protect. In the end, however, this case about more than Assange or journalism. It is about the right of citizens to have the information they need to participate in a democracy. A free society depends on democratic decision-making by an informed public. And an informed public depends on a free and independent press that can serve as a check on governmental abuse of power—the kinds of abuses that WikiLeaks made public. “In a free society, we are supposed to know the truth,” a US congressman said when WikiLeaks first began publishing this batch of documents. “In a society where truth becomes treason, we are in trouble.”¹¹¹

¹¹¹ Andy Barr, “Ron Paul stands up for Assange,” *POLITICO* (Dec. 3, 2010).

Dated the 12th day of January, 2020.

Signed 

Attachments:

1. Mark Feldstein CV
2. Mark Feldstein, "The Jailing of a Journalist: Prosecuting the Press for Receiving Stolen Documents," *Communication Law and Policy*, vol. 10: 2 (2005), 133-77.
3. Mark Feldstein, "A Muckraking Model: Investigative Reporting Cycles in American History," *Harvard International Journal of Press and Politics* (spring 2006): 105-20.
4. Mark Feldstein, "Media Coverage and a Federal Grand Jury: Publication of the Secret Watergate Transcripts," *American Journalism* (spring 2007): 7-33.
5. Mark Feldstein, "Dummies and Ventriloquists: Models of How Sources Set the Investigative Agenda," *Journalism: Theory, Practice and Criticism* (fall 2007): 543-53.
6. Mark Feldstein, "Wallowing in Watergate: Historiography, Methodology, and Mythology in Journalism's Celebrated Moment," *American Journalism*, fall 2014: 550-570.
7. Mark Feldstein, "Muckraking Goes Global," *American Journalism Review* (Spring 2002), 40-5.
8. Mark Feldstein, "The Implications of WikiLeaks," *American Journalism Review* (Dec./Jan. 2011): <https://merrill.umd.edu/wp-content/uploads/2015/05/The-Implications-of-Wikileaks.pdf>
9. Mark Feldstein, "Spreading Leaks Before WikiLeaks," *American Journalism Review* (Sept. 2010): <https://merrill.umd.edu/wp-content/uploads/2015/05/Spreading-Leaks-Before-WikiLeaks.pdf>
10. Mark Feldstein, "Why you should support press freedom," *Chicago Tribune* (April 23, 2006): <https://www.chicagotribune.com/news/ct-xpm-2006-04-23-0604220281-story.html>