

# The Government's Indictment of Julian Assange Poses a Clear and Present Danger to Journalism, the Freedom of the Press, and Freedom of Speech

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*The [century-old tradition](#) that the Espionage Act not be used against journalistic activities has now been broken. Seventeen new charges were [filed](#) yesterday against Wikileaks founder **Julian Assange**. These new charges make clear that he is being prosecuted for basic journalistic tasks, including being openly available to receive leaked information, expressing interest in publishing information regarding certain otherwise secret operations of government, and then disseminating newsworthy information to the public. The government has now dropped the charade that this prosecution is only about hacking or helping in hacking. Regardless of whether Assange himself is labeled a “journalist,” the indictment targets routine journalistic practices.*

But the indictment is also a challenge to fundamental principles of freedom of speech. As the Supreme Court [has explained](#), every person has the right to disseminate truthful information pertaining to matters of public interest, even if that information was obtained by someone else illegally. The indictment purports to evade this protection by repeatedly alleging that Assange simply “encouraged” his sources to provide information to him. This places a fundamental free speech right on uncertain and ambiguous footing.

## A Threat To The Free Press

Make no mistake, this not just about Assange or Wikileaks—this is a threat to all journalism, and the public interest. The press stands in place of the public in holding the government accountable, and the Assange charges threaten that critical role. The charges threaten reporters who communicate with and knowingly obtain information of public interest from sources and whistleblowers, or publish that information, by sending a clear signal that they can be charged with spying simply for doing their jobs. And they threaten everyone seeking to educate the public about the operation of government and expose government wrongdoing, whether or not they are professional journalists.

**Assistant Attorney General [John Demers](#)**, head of the Department of Justice’s National Security Division, told reporters after the indictment that the department “takes seriously the role of journalists in our democracy and we thank you for it,” and that it’s not the government’s policy to target them for reporting. But it’s difficult to separate the Assange indictment from President Trump’s repeated attacks on the press, including his declarations on Twitter, at White House briefings, and in interviews that the press is “the enemy of the people,” “dishonest,” “out of control,” and “fake news.” Demers’ statement was very narrow—disavowing the “targeting” of journalists, but not the prosecution of them as part of

targeting their sources. And contrary to the DOJ's public statements, the actual text of the Assange Indictment sets a dangerous precedent; by the same reasoning it asserts here, the administration could turn its fervent anti-press sentiments into charges against any other media organization it disfavors for engaging in routine journalistic practices.

Most dangerously, the indictment contends that anyone who "counsels, commands, induces" (under [18 USC §2](#), for aiding and abetting) a source to obtain or attempt to obtain classified information violates the Espionage Act, [18 USC § 793\(b\)](#). Under the language of the statute, this includes literally "anything connected with the national defense," so long as there is an "intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation." The indictment relies heavily and repeatedly on allegations that Assange "encouraged" his sources to leak documents to Wikileaks, even though he knew that the documents contained national security information.

But encouraging sources and knowingly receiving documents containing classified information are standard journalistic practices, especially among national security reporters. Neither law nor custom has ever required a journalist to be a purely passive, unexpected, or unknowing recipient of a leaked document. And the U.S. government has regularly maintained, in EFF's own cases and elsewhere, that virtually any release of classified information injures the United States and advantages foreign nations.

The DOJ indictment thus raises questions about what specific acts of "encouragement" the department believes cross the bright line between First Amendment protected newsgathering and crime. If a journalist, like then-candidate Trump, had said: "Russia, if you're listening, I hope you're able to find the [classified] emails that are missing. I think you will probably be rewarded mightily by our press," would that be a chargeable crime?

### **The DOJ Does Not Decide What Is And Isn't Journalism**

Demers said Assange was "no journalist," perhaps to justify the DOJ's decision to charge Assange and show that it is not targeting the press. But it is not the DOJ's role to determine who is or is not a "journalist," and courts have consistently found that what makes something journalism is the function of the work, not the character of the person. As the Second Circuit once [wrote](#) in a case about the reporters' privilege, the question is whether they intended to "use material—sought, gathered, or received—to disseminate information to the public." No government label or approval is necessary, nor is any job title or formal affiliation. Rather than justifying the indictment, Demers' non-sequitur appears aimed at distracting from the reality of it.

Moreover, Demers' statement is as dangerous as it is irrelevant. None of the elements of the 18 statutory charges (Assange is also [facing](#) a charge under the Computer Fraud and Abuse Act) require a determination that Assange is *not* a journalist. Instead, the charges broadly describe journalism-seeking, gathering and receiving information for dissemination to the public, and then publishing that information—as unlawful espionage when it involves classified information.

*Of course* news organizations routinely publish classified information. This is not considered unusual, nor (previously) illegal. When the government went to the Supreme Court to stop the publication of the classified [Pentagon Papers](#), the Supreme Court refused (though it did

not reach the question of whether the Espionage Act could constitutionally be charged against the publishers). Justice Hugo Black, concurring in the judgment, [explained](#) why:

In the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.

Despite this precedent and American tradition, three of the DOJ charges against Assange specifically focus solely on the purported crime of publication. These three charges are for Wikileaks' publication of the State Department cables and the Significant Activity Reports (war logs) for Iraq and Afghanistan, documents which were also published in [Der Spiegel](#), [The Guardian](#), [The New York Times](#), [Al Jazeera](#), and [Le Monde](#), and republished by many other news media.

For these charges, the government included allegations that Assange failed to properly redact, and thereby endangered sources. This may be another attempt to make a distinction between Wikileaks and other publishers, and perhaps to tarnish Assange along the way. Yet this is not a distinction that makes a difference, as sometimes the media may need to provide unredacted data. For example, in 2017 the *New York Times* [published the name of a CIA official](#) who was behind the CIA program to use drones to kill high-ranking militants, explaining "that the American public has a right to know who is making life-or-death decisions in its name."

While one can certainly criticize the press' publication of sensitive data, including identities of sources or covert officials, especially if that leads to harm, this does not mean the government must have the power to decide what can be published, or to criminalize publication that does not first get the approval of a government censor. The Supreme Court has justly held the government to a very high standard for abridging the ability of the press to publish, [limited to exceptional circumstances](#) like "publication of the sailing dates of transports or the number and location of troops" during wartime.

### **A Threat to Free Speech**

In a broader context, the indictment challenges a fundamental principle of free speech: that a person has a strong First Amendment right to disseminate truthful information pertaining to matters of public interest, including in situations in which the person's source obtained the information illegally. In [Bartnicki v. Vopper](#), the Supreme Court affirmed this, explaining: "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party. ... [A] stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."

While *Bartnicki* involved an unknown source who anonymously left an illegal recording with *Bartnicki*, [later courts](#) have acknowledged that the rule applies, and perhaps even more

strongly, to recipients who knowingly and willfully received material from sources, even when they know the source obtained it illegally. In [one such case](#), the court rejected a claim that the willing acceptance of such material could sustain a charge of conspiracy between the publisher and her source.

Regardless of what one thinks of Assange's personal behavior, the indictment itself will inevitably have a chilling effect on critical national security journalism, and the dissemination in the public interest of available information that the government would prefer to hide. There can be no doubt now that the Assange indictment is an attack on the freedoms of speech and the press, and it must not stand.

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