UNITED STATES

v.

JULIAN PAUL ASSANGE

Report of Jameel Jaffer

1. I am the Executive Director of the Knight First Amendment Institute at Columbia University in New York City. I have held this position since September 2016. I previously served on the staff of the American Civil Liberties Union for fourteen years, including as Director of its National Security Project and then as Deputy Legal Director, in which capacity I oversaw the organization's work relating to free speech, privacy, technology, national security, and international human rights. I have litigated and argued cases at all levels of the U.S. judicial system, including in the U.S. Supreme Court; testified before Congress and other government bodies; and written scholarly and popular articles, as well as two books, on topics relating to national security and civil liberties. I am a graduate of Williams College, Cambridge University, and Harvard Law School. Early in my legal career, I served as a law clerk to Hon. Amalya L. Kearse of the U.S. Court of Appeals for the Second Circuit, and then to Rt. Hon. Beverley McLachlin, Chief Justice of Canada. I currently serve on the board of the Pierre Elliot Trudeau Foundation, on the advisory board of First Look Media's Press Freedom Litigation Fund, and on the advisory board for the Center for Democracy and Technology. Since 2016, I have also been a Distinguished Fellow at the University of Toronto's Munk School of Global Affairs and Public Policy.

2. At the request of attorneys for Julian Paul Assange, I am providing this report about the implications for press freedom of the U.S. government's indictment of Mr. Assange under the 1917 Espionage Act.[1]

3. The indictment of Mr. Assange poses a grave threat to press freedom in the United States. This case is the first in which the U.S. government has relied on the 1917 Espionage Act as the basis for the prosecution of a publisher. The indictment focuses almost entirely on the kinds of activities that national security journalists engage in routinely and as a necessary part of their work—cultivating sources, communicating with them confidentially, soliciting information from them, protecting their identities from disclosure, and publishing classified information.

[1] I understand that my obligation as an expert witness is to provide objective analysis on matters within my expertise. I met with Mr. Assange once, approximately six years ago at the Embassy of Ecuador in London, to discuss U.S. civil society groups' concerns about his situation. I have never represented Mr. Assange or WikiLeaks. For the purposes of this report, and except where otherwise indicated, I have assumed as true the facts alleged by the U.S. government in the Superseding Indictment filed in open court on May 23, 2019. I understand that Mr. Assange is contesting many of these allegations.

The indictment's implicit but unmistakable claim is that national security journalism is unprotected by the U.S. Constitution as well as criminal.

4. Moreover, the U.S. government advances this claim at a moment when press freedom is already under extraordinary pressure in the United States. President Donald J. Trump is engaged in an ongoing effort to incite public hostility toward the media. He habitually attaches the label "fake news" to journalism he perceives to be critical of him, and the label "enemy of the people" to journalists who do not reliably parrot government talking points. His Justice Department has investigated leaks aggressively and sought to impose harsh penalties on government insiders who share classified information with the press; it is on track to indict more leakers under the Espionage Act than even the previous administration, which itself set a record. After the Saudi regime orchestrated the killing of *Washington Post* journalist Jamal Khashoggi, President Trump endeavored to obscure the Saudi regime's responsibility for the killing and even echoed the Saudi regime's description of the journalist as an "enemy of the state." President Trump has displayed his hostility to the press in many other ways as well, some of which I identify below. Against this background, the message sent by the administration's indictment of a publisher under the Espionage Act is profoundly chilling. In my view, the indictment of Mr. Assange under the Act was intended to deter journalism that is vital to American democracy, and the successful prosecution of Mr. Assange on the basis of the activities described in the indictment would have precisely that effect.

By Its Terms, the Espionage Act Criminalizes Activity Integral to Press Freedom

5. Congress passed the Espionage Act in 1917 as a successor to the Defense Secrets Act of 1911.[2] During and immediately after the First World War, President Woodrow Wilson's administration relied on the Espionage Act to prosecute more than two thousand dissenters for speech the U.S. courts would recognize today as fully protected by the Constitution. One of them was Eugene Debs, who was convicted and sentenced to ten years imprisonment under the Espionage Act for an anti-war speech that allegedly obstructed military recruitment and enlistment.[3]

6. Congress made significant changes to the Espionage Act through the McCarran Act in 1950.[4] It split the principal provision governing "leaks" into two, with one of the new provisions addressing leaks by those "lawfully having possession" of the relevant information and the other addressing leaks by those "having unauthorized possession." It also distinguished leaks of tangible materials from leaks of (intangible) information. In its current form, the Act is notoriously

[2] David Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 Harv. L. Rev. 512, 522 n.34 (2013).

[3] Geoffrey R. Stone, Perilous Times (2004) at 170, 197.

[4] Harold Edgar & Benno C. Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929 (1973).

convoluted.[5] In essence, however, and as relevant here:

- Section 793(b) makes it a crime for anyone who, "for the purpose of obtaining information respecting the national defense with 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," copies or obtains any document, writing, or note of "anything connected to the national defense."[6]

- Section 793(c) makes it a crime for anyone who, "for the purpose of obtaining information respecting the national defense," receives or obtains any document, writing, or note of anything relating to the national defense, knowing or having reason to believe that the materials have been obtained in violation of provisions of the Espionage Act.

- Section 793(d) makes it a crime for anyone "lawfully having possession" of tangible materials relating to the national defense, or information relating to the national defense that the "possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation," to communicate those materials to any person not entitled to receive them or to retain them and fail to deliver them on demand to someone entitled to receive them.

- Section 793(e) makes it a crime for anyone "having unauthorized possession" of tangible materials relating to the national defense, or information relating to the national defense that the "possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation," to communicate those materials to any person not entitled to receive them or to retain them.

- Section 793(g) makes it a crime for two or more people to conspire to violate any other subsection of Section 793.

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[5] Edgar & Schmidt, *supra* note 4; David McCraw & Stephen Gikow, *The End to an Unspoken Bargain?: National Security and Leaks in a Post-Pentagon Papers World*, 48 Harv. C.R.-C.L. L. Rev. 473, 478 (2013) (characterizing the Act as "dense" and "contradictory").

[6] Courts have generally understood the phrase "information respecting the national defense" to require the government to show that the information was "closely held" and that its disclosure could "potentially" damage the United States or be valuable to its enemies. *United States v. Morison*, 844 F. 2d 1057, 1071–72 (4th Cir. 1988). They have viewed classification as "strong evidence" that information was closely held. Stephen P. Mulligan & Jennifer K. Elsea, Criminal Prohibitions on Leaks and Other Disclosures of Classified Defense Information, Cong. Res. Serv. 16 (Mar. 7, 2017).

7. These provisions are extremely broad, as many others have observed,[7] and they criminalize a "wide range of activities that may bear little resemblance to classic espionage."[8] The Act exposes leakers to severe penalties without regard to whether they acted with the intent to harm the security of the United States.[9] As it has been construed by the courts, the Act is indifferent to the defendant's motives,[10] and indifferent to whether the harms caused by disclosure were outweighed by the value of the information to the public.[11]

8. Of particular significance here, the Act also seems to expose those who publish national defense information to the same severe penalties imposed on leakers. As one scholar has put it, "nothing in the statute carves out the press or publications to the public at large."[12] In 1973, legal scholars Harold Edgar and Benno Schmidt, Jr. famously described the statute as a "loaded gun pointed at

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[7] *See, e.g.*, *Morison*, 844 F.2d at 1066; Stephen Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 Harv. L. & Pol'y Rev. 219, 223 (2007).

[8] Pozen, *supra* note 2, at 522.

[9] *See, e.g.*, *Morison*, 844 F.2d at 1063 (rejecting defendant's argument that Section 793 applies only in cases involving traditional espionage involving intent to injure the United States). One district court construed the Act to require the government to establish, as to a defendant who had been accused of disclosing intangible information (rather than tangible materials), that the defendant specifically intended to cause harm. *See United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006); 520 F. Supp. 2d 786 (E.D. Va. 2007) (requiring the government to prove under §§ 793(d) and (e) of the Espionage Act that the information is objectively harmful to the United States and the defendant subjectively intended to cause that harm). The Court of Appeals cast doubt on the correctness of that construction. *United States v. Rosen*, 557 F.3d 192, 199 (4th Cir. 2009); *see also United States v. Kiriakou*, 898 F. Supp. 2d 921, 923–26 (E.D. Va. 2012).

[10] *See, e.g.*, *United States v. Drake*, 818 F. Supp. 2d 909, 920 (D. Md. 2011) ("[T]here [is] no indication that Congress intended to exempt leaks to the press [from Espionage Act liability]").

[11] *See* Pozen, *supra* note 2, at 627 (noting that the Espionage Act "has not been read to permit a defense of . . . compelling public interest[.]"); Br. of Amici Curiae Scholars of Constitutional Law, First Amendment Law, and Media Law, *United States v. Albury*, 782 F.3d 1285 (2015) (No. 18-00067); Br. of Amicus Curiae American Civil Liberties Union in Support of Appellant, *United States v. Manning*, 78 M.J. 501 (Army Ct. Crim. App. 2018), at 2–3, 3 n.1 (noting that the military judge "did not permit [] Manning to assert any defense that would allow the court to evaluate the value to public discourse of any of the information she disclosed").

[12] Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 Ind. L. J. 233, 264, 266 (2008); *see also* Stephen Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 Harv. L. & Pol'y Rev. 219, 223 (2007) (observing that from a press perspective, Section 793(e) "is easily one of the most significant provisions in the debate over governmental secrecy versus freedom of the press").

newspapers and reporters who publish foreign policy and defense secrets."[13]

9. By its terms, the Act also provides for the imposition of these same severe penalties on *subsequent* publishers—*i.e.*, not just on leakers, and not just on the news organizations that first publish the leaks, but on anyone who later shares the leaked information through any channel, formal or informal. As one scholar has put it, the "text of the Act draws no distinction between the leaker, the recipient of the leak, or the 100th person to redistribute, retransmit, or even retain the national defense information that by that point is already in the public domain."[14] "Taken at its word," another prominent commentator recently observed, the Act "makes felons of us all."[15]

The Government Enforces the Espionage Act Highly Selectively

10. In part because of the extraordinary breadth of the Act, the government enforces the Act selectively. The Act is so sweeping, and leaks are so frequent, that it would be impossible for the government to prosecute every violation of the Act, or even to prosecute most of them. In addition, many leaks are useful to the government, and some are officially sanctioned. As two top newspaper editors put it, "Government officials, understandably, want it both ways. They want us [newspapers] to protect their secrets, and they want us to trumpet their successes."[16] In his definitive account of the ecosystem of leaks, Professor David Pozen observes that "key institutional players share overlapping interests in vilifying leakers while maintaining a permissive culture of classified information disclosures."[17] For these reasons, despite the "thousands upon thousands of national security–related leaks to the media," only a relatively small number of leakers have been prosecuted.[18]

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[13] Edgar & Schmidt, *supra* note 4, 936.

[14] Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary, 111th Cong. 67 (2010) (statement of Stephen I. Vladeck, Professor of Law, American University).

[15] Benjamin Wittes, *Problems With the Espionage Act*, Lawfare (Dec. 2, 2010), https://www.lawfareblog.com/problems-espionage-act.

[16] Dean Baquet & Bill Keller, *When Do We Publish a Secret*?, N.Y. Times (July 1, 2006), https://perma.cc/KEU9-N9V8 (stating that former Treasury Secretary John Snow was "scandalized" by the media's exposure of a financial surveillance program but later disclosed sensitive information to reporters himself in the hope of demonstrating "the administration's relentlessness against the terrorist threat").

[17] Pozen, *supra* note 2, at 517.

[18] *Id.* at 534.

11. As a general rule, the government has not used the statute against senior government officials, though most leaks probably originate with them.[19] Even though leaking laws are generally applicable, in practice "senior policymakers are given substantially more leeway to disregard them without risk of formal sanction," creating a "significantly more flexible, and self-serving, regime for regulating leaks."[20]

12. The case of General David Petraeus is illustrative. Five years ago, the government considered filing Espionage Act charges against General Petraeus after concluding that he had shared classified information, including code words for secret intelligence programs and the identities of covert agents, with Paula Broadwell, his biographer and former mistress. Despite the extraordinary sensitivity of the information General Petraeus disclosed, the government ultimately allowed him to plead guilty to a misdemeanor charge of mishandling classified material.[21]

Public Deliberation About War and Security Depends on the Ability of the Press To Publish Classified Information

13. At least in the United States, informed public deliberation about matters relating to war and security would be impossible if the press did not publish classified information. Max Frankel, then the Washington Bureau Chief for the *New York Times*, explained this in an affidavit filed in the *Pentagon Papers* case. If the press did not publish official secrets, he wrote, "there could be no adequate diplomatic, military and political reporting of the kind our people take for granted, either abroad or in Washington and there could be no mature system of communication between the Government and the people."[22]

14. There are structural reasons why unauthorized disclosures of classified information are so vital to the public's ability to understand, evaluate, and influence government policy relating to war and security. Among them:

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[19] Gabe Rottman, *A Typology of Federal News Media Leak Cases*, 93 Tul. L. Rev. 1147, 1176–77 (2019) ("Not only do senior government officials disclose government secrets to the press on a daily basis, they often skate while lower-level employees swing"); Letter from Daniel Patrick Moynihan, U.S. Senator, to President William Clinton (Sept. 29, 1998), https://perma.cc/FNR7-XUMJ (characterizing the government's enforcement of the Espionage Act as "erratic," and questioning the government's "anomal[ous]" application of the law to Samuel Morison, whose rank was "not too high, not too low").

[20] Pozen, *supra* note 2, at 617.

[21] Adam Goldman, *How David Petraeus Avoided Felony Charges and Possible Prison Time*, Wash. Post (Jan. 25, 2016), https://perma.cc/LB9C-NHLT.

[22] Affidavit of Max Frankel ¶ 4, *United States v. N.Y. Times Co.*, 328 F. Supp. 324 (S.D.N.Y. 1971) (No. 71-2662).

a. Executive Order 13526, which establishes the classification system, allows the government to classify information without regard to whether and to what extent disclosure would aid public deliberation. Under that executive order, an "original classifying authority" may classify government information if the information falls within one of a number of specified categories—*e.g.*, "military plans," "intelligence activities," "foreign activities of the United States"—and if disclosure "reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe."[23] If an original classifying authority determines that these criteria are satisfied, information can be classified even if it is plain that the benefits of disclosure would outweigh the harms. In practice, it is common for the government to classify the kinds of documents that could be expected to be especially important to the public's ability to understand, evaluate, and influence national security policy—including documents that describe government policy, documents that explain the government's understanding of its legal authorities or obligations, and documents that describe unlawful conduct. The executive order gives decisive weight to the security interest, and no weight at all to the interest in informed public deliberation.

b. Despite the limiting language in the executive order, the government routinely classifies information whose disclosure could *not* reasonably be expected to cause damage to the national security, as many government studies have found.[24] William Leonard, then director of the Information Security Oversight Office, testified in 2004 that "half of all classified information is overclassified." Former New Jersey Governor and 9/11 Commission Chairman Thomas Kean said a decade later that "three quarters" of the classified material he had reviewed in connection with the 9/11 Commission "should not have been classified in the first place."[25] The executive overclassifies information for many different reasons—among them, that officials are rarely sanctioned for overclassifying information;[26] that classifying information can afford the

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[23] Classified National Security Information (Exec. Order No. 13,526), 75 Fed. Reg. 705, 708 (Dec. 29, 2009), https://perma.cc/E6GC-T8SM.

[24] Brief of Amici Curiae Scholars of Constitutional Law, First Amendment Law, and Media Law, *United States v. Albury*, 782 F.3d 1285 (2015) (No. 18-00067), https://perma.cc/5DP2-8YHC (sources compiled at n.9).

[25] Ron Wyden, *Statement on the Intelligence Declassification Provision in the Intelligence Reform Bill* (Dec. 8, 2004), https://perma.cc/S73M-LFUN.

[26] Executive Order 13,526 contemplates the possibility of sanctions, Section 5.5, but in practice sanctions are almost never imposed, Classified National Security Information, 75 Fed. Reg. at 726; J. William Leonard, *When Secrecy Gets Out of Hand*, L.A. Times (Aug. 10, 2011), https://perma.cc/72EB-PJDE.

classifier bureaucratic advantage;[27] and that classifying information can shield controversial decisions from scrutiny from both inside and outside the government.[28] For these reasons and others, "we overclassify very badly,"[29] and the mere fact of classification is not a reliable indicator that disclosure could reasonably expected to cause harm.[30]

c. Congress has not afforded the public or the press a meaningful statutory right of access to information relating to national security. While the U.S. Freedom of Information Act allows ordinary individuals to request records from the government on any topic, it does not permit courts to order the disclosure of information that is properly classified, and the courts almost always defer to the government's assertion that the information is properly classified. (Indeed, the number of cases in which courts have overturned the executive's classification decisions can be counted on one hand.) Because FOIA does not include a public interest "override," courts affirm the government's withholding of classified information under the Act without reference to whether the benefits of disclosure are likely to outweigh the harms. Indeed, courts affirm the government's withholding of classified records even when they believe that the records describe or authorize government conduct that is unlawful.[31]

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[27] Daniel P. Moynihan, *The Culture of Secrecy*, National Affairs, 67 (1997).

[28] Erwin N. Griswold, *Secrets Not Worth Keeping*, Wash. Post (Feb 15, 1989), https://perma.cc/DLZ8-X7W4 ("It quickly becomes apparent to any person who has considerable experience with classified material . . . that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another.").

[29] National Commission on Terrorist Attacks Upon the United States, Federation of American Scientists (May 22, 2003), https://perma.cc/7YB5-MNT8 (quoting former CIA Director Porter Goss).

[30] President Obama acknowledged this himself when he was asked about Secretary of State Hilary Clinton's use of a private email server to store emails that may have contained classified information. *See Obama On Clinton's Emails: 'There's Classified, And Then There's Classified'*, CBSN (Apr. 10, 2016), https://perma.cc/D9AK-QSXS ("What I also know, because I handle a lot of classified information, is that there are — there's classified, and then there's classified," Obama told Fox News. "There's stuff that is really top-secret, top-secret, and there's stuff that is being presented to the president or the secretary of state, that you might not want on the transom, or going out over the wire, but is basically stuff that you could get in open-source."); *see also* Geoffrey Stone, Top Secret, 197 (2007) (noting that classification is a "highly imperfect guide to the need for confidentiality").

[31] *N.Y. Times v. DOJ*, 756 F.3d 100 (2014), https://perma.cc/7ADY-MU2F. Executive Order 13,526 bars the government from classifying information "*in order to* . . . conceal violations of law," but this narrow prohibition turns on the reasons why the records are being withheld, not on the content of the records, and the courts almost never question the

d. The courts have interpreted FOIA in a way that accommodates selective disclosure. Congress enacted FOIA in large part out of concern that the government had distorted debate about the war in Southeast Asia by cherry-picking the information it shared with the public.[32] The way the courts have implemented FOIA, however, facilitates the practice that the statute was meant to address. As interpreted by the courts, FOIA allows the government to disclose classified information unofficially—through unattributed leaks to the media—without waiving its right to withhold that same information in response to FOIA requests. As it has been interpreted by the courts, FOIA also permits the government to disclose classified information selectively without waiving its right to withhold closely related information.[33]

e. Beyond FOIA, the courts have rejected the proposition that the First Amendment guarantees the public or even the press any general right of access to information in the hands of government. Acknowledging the "structural" role that the First Amendment plays in "securing and fostering our republican system of government," the Supreme Court has held that the First Amendment protects the public's right of access to criminal proceedings and certain documents filed in connection with them,[34] and lower courts have held that this right extends to civil proceedings. The courts have declined, however, to recognize a more general right of access to government information.[35] Moreover, even in the narrow circumstances in which a right of access has been recognized, some courts have held that the mere fact of classification is sufficient to overcome the constitutional right.[36]

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government's proffered reasons. Classified National Security Information, 75 Fed. Reg. at 710 (emphasis added).

[32] Jameel Jaffer, *Selective Disclosure About Targeted Killing*, Just Security (Oct. 7, 2013), https://perma.cc/9MF2-SAL9.

[33] Jameel Jaffer, *Known Unknowns*, 48 Harv. C.R.-C.L. L. Rev. 457 (2013).

[34] *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1 , 13 (1986) (recognizing First Amendment right of access to preliminary hearings); *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501 (1984) (recognizing First Amendment right of access to voir dire); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1982) (recognizing First Amendment right of access to criminal trials); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980) (recognizing First Amendment right of access to criminal trials).

[35] *Houchins v. KQED*, 438 U.S. 1, 9 (1978) ("This court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.").

[36] *Center for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918 (D.C. Cir. 2003) (stating that the Constitution "is not a Freedom of Information Act" and observing that, in our system, "disclosure of government information is generally left to the political forces"); *United States v. Hasbajrami*, Nos. 15 Civ. 2684, 17 Civ. 2669, 2019 WL 6888567 (2d Cir. Dec. 18, 2019);

15. For these reasons and others, the ability of the press to publish classified information is vital to the public's ability to understand, evaluate, and influence government policy.[37] If the press did not publish classified information without authorization, public debate about war and security would take place in an information environment controlled almost entirely by executive branch officials.

16. Recent experience has only underscored the extent to which public deliberation about war and security depends on the freedom of the press to publish classified information without authorization. Much of the initial reporting about the Bush administration's torture policies relied on anonymous sources who disclosed classified information.[38] Reporting about unlawful surveillance by the National Security Agency was similarly based on classified information supplied to the media without authorization.[39] The same was true of some of the reporting about the Obama administration's policies relating to the use of armed drones to carry out extrajudicial killings.[40] If the American press had not published classified information without authorization, informed public deliberation about these and other momentous questions relating to the "war on terror" would have been impossible.

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but see In re Washington Post Co., 807 F.2d 383, 390 (4th Cir. 1986); *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005), *appeal dismissed as moot*, 449 F.3d 415 (2d. Cir. 2006).

[37] Mary-Rose Papandrea, *National Security Information Disclosures and the Role of Intent*, 56 Wm. & Mary L. Rev. 1381, 1435 (2015) ("[D]isclosure of some national security secrets is not only inevitable but also essential for the proper functioning of our government").

[38] *See, e.g.*, Seymour Hersh, *Torture at Abu Ghraib*, New Yorker (Apr. 30, 2004), https://perma.cc/D38F-6TNR; Mark Mazzetti, *C.I.A. Destroyed 2 Tapes Showing Interrogations*, N.Y. Times (Dec. 7, 2007), https://perma.cc/43GP-4DD7; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Wash. Post (Nov. 2, 2005), https://perma.cc/42VT-UBYV

[39] *See, e.g.*, Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data From Nine U.S. Companies in Broad Secret Program*, Wash. Post (June 7, 2013), https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html; Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, Guardian (June 6, 2013), https://perma.cc/T3C2-WPTQ; *see also* Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 Harv. L. & Pol'y Rev. 281, 281 (2014) ("By leaking a large cache of classified documents to these reporters, Edward Snowden launched the most extensive public reassessment of surveillance practices by the American security establishment since the mid-1970s.").

[40] Jeremy Scahill, *The Assassination Complex*, Intercept (Oct. 15, 2015); *see also* Jameel Jaffer, *The Espionage Act and a Growing Threat to Press Freedom*, New Yorker (June 25, 2019), https://perma.cc/FRE5-HMQM.

The U.S. Government Is Using the Espionage Act Increasingly Aggressively Against Insiders Who Supply Information to the Press

17. While the Espionage Act has always cast a shadow over the activities of the American media and over the American public's "right to know," it was only relatively recently that the government began using the Act aggressively against government insiders who supplied classified information to the press.

18. During the twentieth century, only one person was convicted under the Espionage Act for having provided classified information to the press. Samuel Loring Morison, a Navy intelligence analyst, was charged in 1984 with providing classified photographs to the publication Jane's Defence Weekly.[41] The photos showed a next-generation Soviet aircraft carrier being assembled at a construction yard. Morison was convicted, but President Bill Clinton pardoned him in 2001.[42] Senator Daniel Patrick Moynihan, who wrote powerfully of the corrosive effect of official secrecy, was among many who advocated for Morison's pardon. He argued that Morison had been convicted for "an activity which has become a routine aspect of government life: leaking information to the press in order to bring pressure to bear on a policy question."[43]

19. Since 9/11, the government has increasingly used the Espionage Act against sources. The Obama administration indicted nine government insiders under the Espionage Act for providing classified information to the press. Among the individuals it indicted under the Act were Jeffrey Sterling, a former C.I.A. officer who was sentenced to three and a half years in prison for supplying The New York Times with classified information about U.S. efforts to disrupt Iran's nuclear program; and Donald Sachtleben, a former F.B.I. agent who was sentenced to three and a half years in prison for providing the Associated Press with information about a foiled terrorist plot in Yemen. The Obama administration also indicted Chelsea Manning under the Act for having provided thousands of pages of classified documents to Mr. Assange's organization, WikiLeaks.[44] President Obama commuted Manning's

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[41] *See* Stephen Engelberg, *Spy Photos' Sale Leads to Arrest*, N.Y. Times (Oct. 3, 1984), https://perma.cc/YRW8-TSLA.

[42] Valerie Strauss, *Navy Analyst Morison Receives a Pardon*, Wash. Post (Jan. 21, 2001), https://perma.cc/RGQ9-UKWZ.

[43] Letter from Daniel Patrick Moynihan, *supra* note 19.

[44] In addition to Sterling, Sachtleben, and Manning, the Obama administration charged Shamai Leibowitz, who was indicted in 2009 for disclosing FBI documents to a blogger; Thomas Drake, who was indicted in 2010 for disclosing documents revealing NSA abuses to *The Baltimore Sun*; Stephen Kim, who was indicted in 2010 for disclosing an intelligence report about North Korean nuclear tests to a *Fox News* reporter; John Kiriakou, who was indicted in 2012 for disclosing the identity and involvement of CIA officers in the U.S. torture program to journalists; James Hitselberger, who was indicted in 2012 for retaining documents and releasing four classified documents to a Stanford University

sentence in 2017, but only after she had served about seven years in prison.[45]

20. Even as the U.S. government has begun to use the Espionage Act aggressively against journalists' sources, sentences imposed on those convicted under the Act have become more severe, as the Reporters Committee for Freedom of the Press, a prominent U.S.-based advocacy organization, has documented.[46] Reality Winner, an Air Force linguist who was convicted under the Act in 2018 for having disclosed a classified document relating to Russian cyberattacks, was sentenced to a term of more than five years in prison. Terry Albury, an FBI agent who was convicted under the Act in 2018 for having disclosed classified documents relating to FBI surveillance practices, was sentenced to a term of four years in prison. Before President Obama commuted her sentence in 2017, Manning was sentenced to a term of 35 years in prison. The sentences imposed on Winner, Albury, and Manning are the heaviest ever imposed under the Act on individuals accused of supplying information to the press.[47]

The Prosecution of Mr. Assange Under the Espionage Act Raises Serious Press Freedom Concerns

21. The government's use of the Espionage Act against government insiders who supply classified information to the press poses a serious threat to the ability of the press to inform the public about matters relating to war and security. The government's indictment of a publisher under the Act, however, crosses a new legal frontier. According to news reports, the Obama administration considered indicting Mr. Assange but abandoned the idea after concluding that it would be difficult to pursue Mr. Assange without calling into question the legitimacy of national security journalism.[48] The indictment of Mr. Assange suggests that the Obama

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archive; and Edward Snowden, who was indicted in 2013 for disclosing documents regarding U.S. surveillance activities to multiple news outlets. *See* Rottman, *supra* note 19, at 1182–1185.

The Bush administration indicted three people under the Espionage Act. They were Lawrence Franklin, who was indicted in 2005 for passing classified documents regarding U.S.-Iran policy to two AIPAC employees, Steven Rosen and Keith Weissman; and Rosen and Weissman, who were also indicted in 2005 for having participated in a conspiracy to communicate classified information. *See* Rottman, *supra* note 19, at 1182.

[45] Charlie Savage, *Chelsea Manning To Be Released Early As Obama Commutes Sentence*, N.Y. Times (Jan. 17, 2017), https://perma.cc/U5ZE-X7GY.

[46] Rottman, *supra* note 19, at 1176–78.

[47] *Id.* at 1177.

[48] Sari Horwitz, *Julian Assange Unlikely To Face U.S. Charges Over Classified Documents*, Wash. Post (Nov. 25, 2013), https://perma.cc/T6S7-RYLW ("Justice officials said they looked hard at Assange but realized that they have what they described as a 'New York Times problem.' If the Justice Department indicted Assange, it would also have to

administration's analysis was correct.[49]

22. The conviction of Mr. Assange under the Act for the activities described in the indictment would have a significant chilling effect on journalism that is vital to the proper functioning of American democracy. I reach this conclusion for three reasons.

23. First, American courts have not fully resolved the scope of the protection that the First Amendment provides to those who publish classified information without government authorization. The U.S. Supreme Court addressed the right of news organizations to publish classified information in the *Pentagon Papers* case. That case involved the government's effort to prevent the *New York Times* and *Washington Post* from publishing a top-secret study about the Vietnam War, which military analyst Daniel Ellsberg had copied and supplied to the newspapers without government authorization. The government asserted that the publication of the report would cause grave harm to national security, but the Supreme Court nonetheless held that the government could not constitutionally enjoin the newspapers from publishing it.[50] The *Pentagon Papers* case is widely and appropriately considered a pillar of American press freedom, but it involved a prior restraint, not the imposition of criminal penalties.

24. In subsequent cases, the Supreme Court has repeatedly emphasized that "state action to punish the publication of truthful information seldom can satisfy constitutional standards . . . absent a need to further a state interest of the highest order."[51] It has also read the *Pentagon Papers* case broadly as having "upheld the right of the press to publish information of great public concern obtained from documents stolen by a third party."[52] It expressly reaffirmed this right in *Bartnicki v.*

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prosecute the *New York Times* and other news organizations and writers who published classified material, including *The Washington Post* and Britain's *Guardian* newspaper, according to the officials, who spoke on the condition of anonymity to discuss internal deliberations.").

[49] Jack Goldsmith, *The U.S. Media Is in the Crosshairs of the New Assange Indictment*, Lawfare (May 24, 2019), https://perma.cc/Z7JF-U7RK.

[50] *See N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

[51] *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 102–103 (1979); *see also Florida Star v. B.J.F.*, 491 U.S. 524, 527 (1989) (holding that the First Amendment protected a newspaper's publication of a rape victim's name, which a sheriff's department had posted publicly, despite a statute prohibiting the disclosure of the names of rape victims); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 831 (1978) (holding that the First Amendment protected the publication of the name of a state judge undergoing a disciplinary investigation, despite a statute criminalizing the disclosure).

[52] *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001).

Vopper.[53] In that case, it upheld the right of a radio station to broadcast the recording of a conversation "of public importance" that had been provided to it by an unknown person who had intercepted the conversation unlawfully. The Court wrote: "A stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."[54] Important to the Court's reasoning in the case, however, was its conclusion that the broadcaster had not been "involved in the initial illegality"—that is, that the broadcaster had not participated in the illegal interception of the conversation. The Court did not have occasion to address at any length what kind of "involvement" would deprive a journalist or publisher of the First Amendment's protection.[55]

25. Second, many of the activities described in the indictment are integral to national security journalism. For example, the indictment gives significance to the fact that Mr. Assange "sought, obtained, and disseminated" classified information (para. 2); that he solicited information from Ms. Manning (paras. 4-5); that he "knowingly received" classified information (para. 20); that he accepted files from Ms. Manning through a "cloud drop box" (para. 22, 27); and that he discussed with Ms. Manning "measures to prevent the discovery of Ms. Manning as [his] source" (para. 28). The indictment also lists as part of the "manners and means of the conspiracy" that Mr. Assange and Ms. Manning used an encrypted chat service to communicate with one another (manners and means, para. 1); that Mr. Assange "took measures to conceal Ms. Manning as the source of the disclosure" (manners and means, para. 2); that Mr. Assange encouraged Ms. Manning to provide him with classified information (manners and means, para. 3); and that Mr. Assange and Ms. Manning "used a special folder on a cloud drop box" to transmit classified information (manners and means, para. 4).

26. These kinds of activities—asking sources for information, communicating with them on secure channels, taking measures to protect their identities—are activities that national security journalists engage in routinely. As one prominent scholar has written, "This is exactly what national security reporters and their news publications often ask government officials or contractors to do. Anytime a reporter asks to receive information knowing it is classified, that person encourages sources to circumvent legal safeguards on information. The news organizations' encouragement is underscored by the mechanisms they provide for sources to convey information securely and anonymously."[56]

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[53] *Id.* at 535.

[54] *Id*. at 535. *See also Landmark Commc'ns, Inc.*, 435 U.S. at 831.

[55] The Court did make clear in *Bartnicki* that the broadcaster did not lose its constitutional privilege merely because it knew, or had reason to know, that the communication had been intercepted unlawfully. *See id.* at 517–18.

[56] Goldsmith, *supra* note 49; *see also* Stephen Hiltner, *How to Tell a Secret in the Digital Age*, N.Y. Times (Mar. 2, 2017), https://perma.cc/Z5YC-LNDS; Charles Berret, *Guide*

27. Some government officials have argued that the indictment should not be understood as a threat to press freedom because Mr. Assange is not a journalist, or because WikiLeaks is not a member of the press. This argument misses the point. The indictment is mainly a description of Mr. Assange engaging in core journalistic activities. These are the activities that the government's apparent theory of liability would criminalize. It is also misguided, in my view, to conclude that the indictment does not implicate the press because Mr. Assange is alleged to have offered to help Ms. Manning "crack a password hash" stored on government computers (indictment, para 15; manners and means, para. 1). This allegation seems relevant to only two of the indictment's 18 counts (counts 1 and 18), and even as to these two counts, it is not clear how the alleged effort to crack the password hash is relevant to the government's theory of liability. Finally, the government alleges that Mr. Assange published documents "without redacting the names of human sources who were vulnerable to retribution" (paras. 39–40). Journalists and human rights organizations have also criticized Mr. Assange for his failure to redact certain names. However, if a publisher's exposure to liability under the Espionage Act, and its entitlement to First Amendment protection, turned on whether the government believed the publisher had exercised its editorial discretion appropriately, the First Amendment's protection would be unavailable much of the time.[57]

28. Third, this case arises at a moment when press freedom is already under extraordinary pressure in the United States.[58] As numerous press freedom groups have noted, President Donald Trump's "continual vilification of the press"[59] and

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to SecureDrop, Tow Reports (May 12, 2016) ("Source protection is a basic and essentially undisputed journalistic value"), https://perma.cc/97ZS-RBHH.

[57] Sheryl Gay Stolberg, *Bush Says Report on Bank Data Was Disgraceful*, N.Y. Times (June 27, 2006) (quoting President George W. Bush after *The New York Times* and other media organizations disclosed financial surveillance program: "We're at war with a bunch of people who want to hurt the United States of America, and for people to leak that program, and for a newspaper to publish it, does great harm to the United States of America"), https://perma.cc/UB6G-WT64; *Yemen Leak: Former FBI Man Admits Passing Information to Associated Press*, Guardian (Sept. 23, 2013), https://perma.cc/9A4U-BHZS (quoting CIA director John Brennan stating that AP's publication of story about CIA operation in Yemen was "irresponsible and reckless"); Callum Borchers, *The White House Says the Media Put National Security at Risk by Publishing Leaks. Is that True?*, Wash. Post (Feb. 12, 2018), https://perma.cc/6U3U-G5RU (quoting White House Press Secretary Sarah Sanders faulting media for publishing sensitive information: "You guys are the ones that publish classified information and put national security at risk,").

[58] Sarah Repucci, *Freedom and the Media 2019: A Downward Spiral*, Freedom House 4 (June 2019), https://perma.cc/GY3C-R2CH; *see also* Michael M. Grynbaum, *After Another Year of Trump Attacks, 'Ominous Signs' for the American Press*, N.Y. Times (Dec. 30, 2019), https://perma.cc/9WTS-MD5S.

[59] Repucci, *supra* note 58, at 3.

"notorious anti-press rhetoric"[60] have been a hallmark of his presidency: He has repeatedly referred to the press as the "opposition party" and the "enemy of the people,"[61] threatened to revise U.S. libel laws to make it easier to sue journalists and news organizations,[62] and urged the revocation of networks' broadcasting licenses.[63] He successfully pressed former Attorney General Jeff Sessions to "launch a major crackdown on leakers of classified information" and to "review policies on subpoenaing news organizations."[64] He has also expressed indifference toward crimes against journalists beyond U.S. borders. After *Washington Post* journalist Jamal Khashoggi was assassinated in 2018, Trump ignored the Central Intelligence Agency's assessment that Saudi Arabia's Crown Prince Mohammed bin Salman ordered the killing and instead "heap[ed] praise on the Saudi ruler."[65] As Freedom House observed, although the United States constitution maintains robust protections for the media, "President Trump's public stance on press freedom has had a tangible impact on the global landscape. Journalists around the world now have less reason to believe that Washington will come to their aid if their basic

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[60] *RSF Index 2019: Institutional Attacks on the Press in the US and Canada*, Reporters Without Borders (2019), https://perma.cc/8TEW-9D74 ("Marred by the effects of President Donald Trump's second year in office, the United States has dropped three places to 48th out of 180 countries in the latest World Press Freedom index, moving into the ranks of 'orange color' countries with a noticeably problematic press freedom environment just a few months after it was classified as one of the five deadliest countries in the world for journalists.").

[61] John Cassidy, *Trump's Attacks on the News Media Are Getting Even More Dangerous*, New Yorker (Aug. 31, 2018), https://perma.cc/5XE3-4MN9; Michael M. Grynbaum, *Trump Calls the News Media the 'Enemy of the American People,'* N.Y. Times (Feb. 17, 2017), https://perma.cc/8PVV-SP2Z; *see also* Michael M. Grynbaum & Eileen Sullivan, *Trump Attacks* The Times*, in a Week of Unease for the American Press*, N.Y. Times (Feb. 20, 2019), https://perma.cc/85F8-LZGH; Ezra Klein, *"Enemy of the People": How Trump Makes the Media into the Opposition*, Vox (Oct. 30, 2018), https://perma.cc/FEZ5-K7JW; David Smith, *'Enemy of the People:' Trump's War on the Media is a Page from Nixon's Playbook*, Guardian (Sept. 7, 2019), https://perma.cc/9F2A-CKCY.

[62] Michael M. Grynbaum, *Trump Renews Pledge to 'Take a Strong Look' at Libel Laws*, N.Y. Times (Jan. 10, 2018), https://perma.cc/6YN3-VRPR.

[63] Makini Brice & David Shepardson, *Trump Hits CNN and NBC, Urges 'Look at their License': Tweet*, Reuters (Sept. 4, 2018), https://perma.cc/GPZ2-M49R; Luis Nelson & Margaret Harding McGill, *Trump Suggests Challenging NBC's Broadcast License*, Politico (Oct. 11, 2017), https://perma.cc/QNZ8-SG7S.

[64] Del Quentin Wilber, *Sessions Vows Crackdown on Leaks*, Wall Street J. (Aug. 4, 2017), https://perma.cc/6D9M-JHFU.

[65] Shane Harris, Greg Miller & Josh Dawsey, *CIA Concludes Saudi Crown Prince Ordered Jamal Khashoggi's Assassination*, Wash. Post (Nov. 16, 2018), https://perma.cc/6UMS-DDLC; David Herszenhorn, *Trump Praises Saudi Crown Prince, Ignores Questions on Khashoggi Killing*, Politico (June 29, 2019), https://perma.cc/GSF9-3JDZ.

rights are violated."[66]

29. Against this background, I believe that the indictment of Mr. Assange must be understood as a deliberate effort on the part of the Trump administration to deter journalism that is vital to American democracy. The government's successful prosecution of him would certainly have this effect.

[66] Repucci, *supra* note 58, at 4.