

As the Obama DOJ Concluded, Prosecution of Julian Assange for Publishing Documents Poses Grave Threats to Press Freedom

By Glenn Greenwald

November 19, 2018 "[Information Clearing House](#)" - *The Trump Justice Department [i nadvertently revealed](#) in a court filing that it has charged Julian Assange in a sealed indictment. The disclosure occurred through a [remarkably amateurish cutting-and-pasting error](#) in which prosecutors unintentionally used secret language from Assange's sealed charges in a document filed in an unrelated case. Although the document does not specify which charges have been filed against Assange, the Wall Street Journal [reported that](#) "they may involve the Espionage Act, which criminalizes the disclosure of national defense-related information."*

Over the last two years, journalists and others have melodramatically claimed that press freedoms were being assaulted by the Trump administration due to trivial acts such as the President spouting adolescent insults on Twitter at Chuck Todd and Wolf Blitzer or banning Jim Acosta from White House press conferences due to his refusal to stop preening for a few minutes so as to allow other journalists to ask questions. Meanwhile, actual and real threats to press freedoms that began with the Obama DOJ and have escalated with the Trump DOJ - such as [aggressive attempts](#) to unearth and [prosecute sources](#) - have gone largely ignored if not applauded.

But prosecuting Assange and/or WikiLeaks for publishing classified documents would be in an entirely different universe of press freedom threats. Reporting on the secret acts of government officials or powerful financial actors - including by publishing documents taken without authorization - is at the core of investigative journalism. From the Pentagon Papers to the Panama Papers to the Snowden disclosures to publication of Trump's tax returns to the Iraq and Afghanistan war logs, some of the most important journalism over the last several decades has occurred because it is legal and constitutional to publish secret documents even if the sources of those documents obtained them through illicit or even illegal means.

*The Obama DOJ - despite [launching notoriously aggressive attacks](#) on press freedoms - recognized this critical principle when it came to WikiLeaks. It spent years exploring whether it could criminally charge Assange and WikiLeaks for publishing classified information. It ultimately decided it would not do so, and could not do so, consistent with the press freedom guarantee of the First Amendment. After all, the Obama DOJ concluded, such a prosecution would pose a severe threat to press freedom because there would be no way to prosecute Assange for publishing classified documents without also prosecuting the New York Times, the Washington Post, the Guardian and others *for doing exactly the same thing.**

As the Washington Post [put it in 2013](#) when it explained the Obama DOJ's decision not to prosecute Assange:

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 prosecute the New York Times and other news organizations and writers who published classified material, including The Washington Post and Britain's Guardian newspaper.

National Security

Julian Assange unlikely to face U.S. charges over published classified documents

The saga of WikiLeaks founder Julian Assange



Julian Assange, responsible for one of the largest leaks of classified U.S. documents, has been holed up in the Ecuadoran Embassy in London since June 2012, when he was granted diplomatic asylum. According to high-ranking U.S. law enforcement sources, there is no sealed indictment or criminal complaint against the WikiLeaks founder, despite rumors that he was under investigation by the Justice Department.

By **Sari Horwitz**

November 25, 2013

The Justice Department has all but concluded it will not bring charges against WikiLeaks founder Julian Assange for publishing classified documents because government lawyers said they could not do so without also prosecuting U.S. news organizations and journalists, according to U.S. officials.

Last year, the Trump DOJ under Jeff Sessions, and the CIA under Mike Pompeo, began [aggressively vowing](#) to do what the Obama DOJ refused to do - namely, prosecute Assange for publishing classified documents. Pompeo, as CIA Director, delivered one of the creepiest and most anti-press-freedom speeches heard in years, vowing that "we have to recognize that we can no longer allow Assange and his colleagues *the latitude to use free speech values against us*," adding that WikiLeaks has "pretended that America's First Amendment freedoms shield them from justice," but: "they may have believed that, but they are wrong."

Remarkably, the speech by Donald Trump's hand-picked CIA chief and long-time right-wing Congressman sounded like (and still sounds like) the standard Democratic view when they urge the Trump administration to prosecute Assange. But at the time of Pompeo's speech, Obama DOJ spokesman Matt Miller insisted to me that such promises to prosecute Assange were "hollow," because the First Amendment would bar such prosecutions:

it's also hollow. DOJ knows it can't win a case against someone just for publishing secrets.

✉ Matthew Miller (@matthewamiller) [April 13, 2017](#)

But the grand irony is that many Democrats will side with the Trump DOJ over the Obama DOJ. Their emotional, personal contempt for Assange - due to their belief that he helped defeat Hillary Clinton: the gravest crime - easily outweighs any concerns about the threats posed to press freedoms by the Trump administration's attempts to criminalize the publication of documents.

This reflects the broader irony of the Trump era for Democrats. While they claim out of one side of their mouth to find the Trump administration's authoritarianism and press freedom attacks so repellent, they use the other side of their mouth to parrot the authoritarian mentality of Jeff Sessions and Mike Pompeo that anyone who published documents harmful to Hillary or which have been deemed "classified" by the U.S. Government ought to go to prison.

During the Obama years, the notion that Assange could be prosecuted for publishing documents was regarded as so extreme and dangerous that even centrist media outlets that despised him sounded the alarm for how dangerous such a prosecution would be. The pro-national-security-state Washington Post editorial page in 2010, writing under the headline "Don't Charge WikiLeaks," [warned](#):

Such prosecutions are a bad idea. The government has no business indicting someone who is not a spy and who is not legally bound to keep its secrets. Doing so would criminalize the exchange of information and put at risk responsible media organizations that vet and verify material and take seriously the protection of sources and methods when lives or national security are endangered.

In contrast to Democrats, Republicans have been quite consistent about their desire to see WikiLeaks prosecuted. As Newsweek [noted in 2011](#): "Sarah Palin [urged](#) that Assange be ~~a~~ pursued with the same urgency we pursue Al Qaeda and Taliban leaders,' and The Weekly Standard's William Kristol [wants](#) the U.S. to ~~a~~ use our various assets to harass, snatch or neutralize Julian Assange and his collaborators.'" Some [Democratic hawks](#), such as Joe Lieberman and Dianne Feinstein, joined the likes of Palin and Kristol in urging WikiLeaks prosecution, but the broad consensus in Democratic and liberal circles was that doing so was far too dangerous for press freedoms.

In the wake of the 2010 disclosures of the Iraq and Afghanistan war logs, Donald Trump himself told Fox and Friends' Brian Kilmeade that he believed Assange deserved "the death penalty" for having published those documents (a punishment Trump [also advocated for Edward Snowden in 2013](#)):

What has changed since that Obama-era consensus? Only one thing: in 2016, WikiLeaks published documents that reflected poorly on Democrats and the Clinton campaign rather than the Bush-era wars, rendering Democrats perfectly willing, indeed eager, to prioritize their personal contempt for Assange over any precepts of basic press freedoms, civil liberties, or Constitutional principles. It's really just as simple - and as ignoble - as that.

It is this utterly craven and authoritarian mentality that is about to put Democrats of all sorts in bed with the most extremist and dangerous of the Trump faction as they unite to create precedents under which the publication of information - long held sacrosanct by anyone caring about press freedoms - can now be legally punished.

Recall that [the DNC itself is currently suing WikiLeaks and Assange](#) for publishing the DNC and Podesta emails they received: emails deemed newsworthy by literally every major media outlet, which relentlessly reported on them. Until this current Trump DOJ criminal prosecution of Assange, that DNC lawsuit had been the greatest Trump-era threat to press freedoms - because it seeks to make the publication of documents, which is the core of journalism, legally punishable. The Trump DOJ's attempts to criminalize those actions is merely the next logical step in this descent into a full-scale attack on basic press rights.

The arguments justifying the Trump administration's prosecution of Assange are grounded in a combination of legal ignorance, factual falsehoods, and dangerous authoritarianism.

The most common misconception is that unlike the New York Times and the Washington Post, WikiLeaks can be legitimately prosecuted for publishing classified information because it's not a "legitimate news outlet." Democrats who make this argument don't seem to care that this is exactly the view rejected as untenable by the Obama DOJ.

To begin with, the press freedom guarantee of the First Amendment isn't confined to "legitimate news outlets" - whatever that might mean. The First Amendment isn't available only to a certain class of people licensed as "journalists." It protects not a privileged group of people called "professional journalists" but rather an activity: namely, using the press (which at the time of the First Amendment's enactment meant the literal printing press) to inform the public about what the government was doing. Everyone is entitled to that constitutional protection equally: there is no cogent way to justify why the Guardian, ex-DOJ-officials-turned-bloggers, or Marcy Wheeler are free to publish classified information but Julian Assange and WikiLeaks are not.

Beyond that, WikiLeaks has long been recognized around the world as a critical journalistic outlet. They have won prestigious journalism awards including the [Martha Gellhorn Prize for excellence in journalism](#) as well as [Australia's top journalism award](#). Beyond that, it has [partnered with](#) the planet's leading newspapers, including the New York Times, the Guardian, El Pais and others, to publish some of the most consequential stories of the last several decades. One does not need to be a "legitimate journalism outlet" to enjoy the press freedom protections of the First Amendment, but even if that were the case, WikiLeaks has long possessed all indicia of a news outlet. Then there's the claim that WikiLeaks does more than publish documents: it helps its sources steal them. This was the claim made last night by former CIA agent John Sipher when trying to justify the Trump DOJ's actions in response to concerns from a journalist about the threats to press freedom this would pose:

No. Assange's crime is aiding and abetting. He encouraged Manning to steal classified documents (similarly to how he encouraged Trump Jr. to claim the election was rigged). He was not a place to publish whistle blowers. He was a thief and assistant to Putin.

🗨️ John Sipher (@john_sipher) [November 16, 2018](#)

What Sipher said there is a complete fabrication. When the Obama DOJ explored the possibility of prosecuting Assange, that [was the theory it tested](#): that perhaps it could prove that WikiLeaks did not merely passively receive the documents from Chelsea Manning but collaborated with her on how to steal them.

But the Obama DOJ concluded that this theory would not justify prosecution because - contrary to the lie told by Sipher - there was absolutely no evidence that Assange worked with Manning to steal the documents. As the Post put it: "officials said that although Assange published classified documents, he did not leak them, something they said significantly affects their legal analysis."

The same is true of WikiLeaks' publication of the DNC and Podesta emails. Nobody has ever presented evidence of any kind that WikiLeaks worked on the hacking of those emails. There is no evidence that WikiLeaks ever did anything other than passively receive pilfered documents from a source and then publish them - exactly as the New York Times did when it received the stolen Pentagon Papers, and exactly as the Guardian and the Washington Post did when it received the Snowden documents.

Moreover, journalists often do more than passively receive information, but instead frequently work with sources before publication of articles: encouraging, cajoling, and persuading them to provide more information. Accepting the theory that a journalist can be prosecuted for doing more than merely passively receiving information - something that nobody has even proved Assange did - would itself gravely threaten to criminalize core aspects of journalism.

Then there's the claim that WikiLeaks somehow stopped being a real journalism outlet because it acted to help one of the presidential campaigns at the expense of the other. This is just another version of the false argument that only "Real Journalists" - whatever that might mean, whoever gets to decide that - enjoy the right to use a free press to disseminate information. That claim is pure legal ignorance.

But let's assume for the sake of argument that it's true that WikiLeaks acted to help the Trump campaign and therefore should be disqualified from the protections of the First Amendment. To see how pernicious this argument is, look at how it was [recently expressed](#) by former Pentagon official Ryan Goodman and Obama WH Counsel Bob Bauer in justifying the prosecution of WikiLeaks:

It is clear from [disclosures](#) by an internal WikiLeaks critic and [other materials](#) that Julian Assange targeted Hillary Clinton and sought to work with the Trump campaign and the Russians to secure her defeat. This is not a "legitimate press function." And the conflation of Wikileaks' plan of campaign attack with standard journalistic activity undermines important distinctions critical to the protection of the free press.

Just ponder the implications of this incredibly restrictive definition of journalism. It would mean that any outlets that favor one candidate over another, or one political party over another, are not engaged in "legitimate press functions" and therefore have no entitlement to First Amendment protections.

Does anyone on the planet doubt that outlets such as MSNBC and Vox favor the Democratic Party over the Republican Party, and the people they employ as journalists spent the last year doing everything they can to help the Democrats win and the Republicans lose? Does anyone doubt that MSNBC and Vox journalists spent 2016 doing everything in their power to help Hillary Clinton win and Donald Trump lose? No person with even the most minimal amount of intellectual honesty could deny that they did so.

Does this mean that Rachel Maddow and Ezra Klein - by virtue of favoring one political party over the other - are not real journalists, that they are not engaged in "legitimate press functions," and thus do not enjoy the protections of the First Amendment, meaning they can be prosecuted by the Trump DOJ without the ability to claim the rights of a free press? To state that proposition is to illustrate the tyrannical impulses underlying it. As Marcy Wheeler, otherwise sympathetic to the arguments made by the Goodman/Bauer article, [put it](#):

I agree with much of this analysis abt limits on 1A protection for Trump's conspiring w/Russians. But this claim would threaten a lot of journalistic activity and is fundamentally at odds with the early history of journalism in this country. pic.twitter.com/nBHkU69THI

emptywheel (@emptywheel) [November 2, 2018](#)

As Dan Froomkin [wrote in response](#) to that article, he finds some of Assange's actions "despicable" and "abhorred the heedless, unedited publication of the non-newsworthy and personally hurtful" emails that were released (I have [expressed similar highly critical views about WikiLeaks' publication decisions](#)). But Froomkin nonetheless recognizes that "Assange remains a journalist" and that "In the Trump era, when the president of the United States is using his office to attack journalists and journalism itself, the First Amendment is a key bulwark of liberty." That's how people who actually care about press freedom - rather than pretend to care about it when doing so suits their political interests of the moment - will reason.

But that's exactly the point. Neither the most authoritarian factions of the Trump administration behind this prosecution, nor their bizarre and equally tyrannical allies in the Democratic Party, care the slightest about press freedoms. They only care about one thing: putting Julian Assange behind bars, because (in the case of Trump officials) he revealed U.S. war crimes and because (in the case of Democrats) he revealed corruption at the highest levels of the DNC that forced the resignation of the top 5 officials of the Democratic Party and harmed the Democrats' political reputation.

They're willing to create a precedent that will criminalize the core function of investigative journalism because - even as they spent two years shrilly denouncing that most trivial "attacks on press freedom" - they don't actually care about that value at all. They want to protect only the journalism that advances their political interests, while putting people behind bars who publish information that undermines their political interests. It is this authoritarian, noxious mentality that has united the worst elements of the Trump administration and the Democratic Party that pretends to find tyrannical actions objectionable but is often the leaders in defending them.

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