

Julian Assange, the Espionage Act of 1917, and Freedom of the Press

The case against Assange represents the first time the 102-year-old act has been used to target a media organization.

BY STEPHEN ROHDE JUNE 19, 2019



FRANK AUGSTEIN/AP PHOTO

WikiLeaks founder Julian Assange greets supporters from a balcony of the Ecuadorian Embassy in London.

On June 11, the U.S. government formally submitted an extradition request to the United Kingdom for WikiLeaks founder Julian Assange. He is facing an 18-

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the U.S. government's attention because much of what he has published has been highly incriminating and embarrassing to the U.S. government, including the controversial "Collateral Murder" video showing a U.S. air crew in Apache helicopters in July 2007 slaughtering a dozen people in Iraq. The dead included two Iraqis working for Reuters news agency, contradicting U.S. claims that all the dead were insurgents.

The history and enforcement of the 102-year-old Espionage Act, which has routinely been used to silence dissent and punish political opponents, heightens concerns among civil liberties and journalism groups that the Assange prosecution is politically motivated. The statute was enacted two months after U.S. entry into World War I, in a climate of fear and antagonism toward German-Americans and other immigrants. President Woodrow Wilson said that any "man who carries a hyphen around with him carries a dagger that he is ready to plunge into the vitals of the republic." He was equally contemptuous of dissenters. Such "creatures of passion, disloyalty, and

anarchy must be crushed out.”

The Justice Department and postmaster general immediately began using the Espionage Act to silent opposition to the war. By 1918, 74 left-wing newspapers were denied mailing privileges. Attorney General Mitchell Palmer established the General Intelligence Division and appointed a young J. Edgar Hoover to gather and coordinate information relating to radical activities. Hoover quickly created an elaborate card system that held the names of more than 200,000 individuals suspected of radical activities, associations, or beliefs. All told, the Department of Justice invoked the Espionage Act and the subsequent Sedition Act of 1918 to prosecute more than 2,000 dissenters for allegedly disloyal, seditious, or incendiary speech.

In the Spring of 1919, three Espionage Act prosecutions reached the Supreme Court. Prominent socialist Eugene Debs had been convicted for giving a fiery anti-war speech in Canton, Ohio. Charles Schenck and Elizabeth Baer, members of the Executive Committee of the Socialist Party in Philadelphia, had been convicted for overseeing the printing and mailing of 15,000 fliers to draft-age men arguing that military conscription constituted involuntary servitude prohibited by the Thirteenth Amendment. And Jacob Frohwerk had been convicted for publishing articles in a Kansas City newspaper denouncing U.S. involvement in World War I.

All of these convictions were upheld in unanimous opinions written by Justice Oliver Wendell Holmes, Jr. But by the fall of 1919, Holmes and his protégé, Justice Louis Brandeis, had come to see that protecting free speech was essential in times of national conflict, and they dissented in another case involving the Espionage Act. Their enlightened view was supported by the visionary First Amendment scholar and Harvard Law School professor Zechariah Chafee, who observed that it is especially “in times of popular panic and

indignation that freedom of speech becomes important as an institution, and it is precisely in those times that the protection of the jury proves illusory.” The views of Holmes and Brandeis would emerge fifty years later as the prevailing law in the United States.

The case against Assange is breaking new legal ground. The notion of charging someone not for actually stealing and leaking government secrets but for receiving and publishing them has never been tested in court, because until now the government has never brought such charges. The closest case came in 2005 when two lobbyists for the pro-Israel group AIPAC were indicted under the Espionage Act for receiving classified information about American policy toward Iran and passing it along to Israel. After the judge issued several pretrial rulings questioning the prosecution, the government dropped the charges.

Prior to Barack Obama taking office, the law was used four times against government officials for providing classified information to the media. The Obama administration filed seven prosecutions against government employees and contractors, including Chelsea Manning and Edward Snowden. In none of these cases did the government charge the media outlets who ultimately published this information.

According to Jameel Jaffer of the Knight First Amendment Institute at Columbia University, the charges against Assange “rely almost entirely on conduct that investigative journalists engage in every day. The indictment should be understood as a frontal attack on press freedom.” Many publications, including *The New York Times* and *The Washington Post*, and investigative reporters, such as Seymour Hersh, routinely seek information that government officials want to keep secret, including classified national security matters. They cooperate with their sources when they obtain that information, they publish that information, and they take steps to protect the

confidentiality of their sources.

Geoffrey R. Stone, in his masterful *Perilous Times: Free Speech in Wartime, From the Sedition Act of 1798 to the War on Terrorism*, offers this challenge that is now apt as we watch the Assange case unfold:

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To strike the right balance, this nation needs political leaders who know right from wrong; federal judges who will stand fast against the furies of their age; members of the bar and the academy who will help Americans see themselves clearly; a thoughtful and responsible press; informed and tolerant citizens who will value not only their own liberties, but the liberties of others; and justices of the Supreme Court with the wisdom to know excess when they see it and the courage to preserve liberty when it is imperiled. And, so, we shall see.

Publishing information that exposes outrageous government conduct is at the heart of the First Amendment. The Assange case tests whether we can remain true to that principle, despite the furies of our