

Julian Assange, the co-founder of [WikiLeaks](#), [has been charged by the Justice Department](#) with a slew of Espionage Act violations that could keep him in prison for the rest of his life.

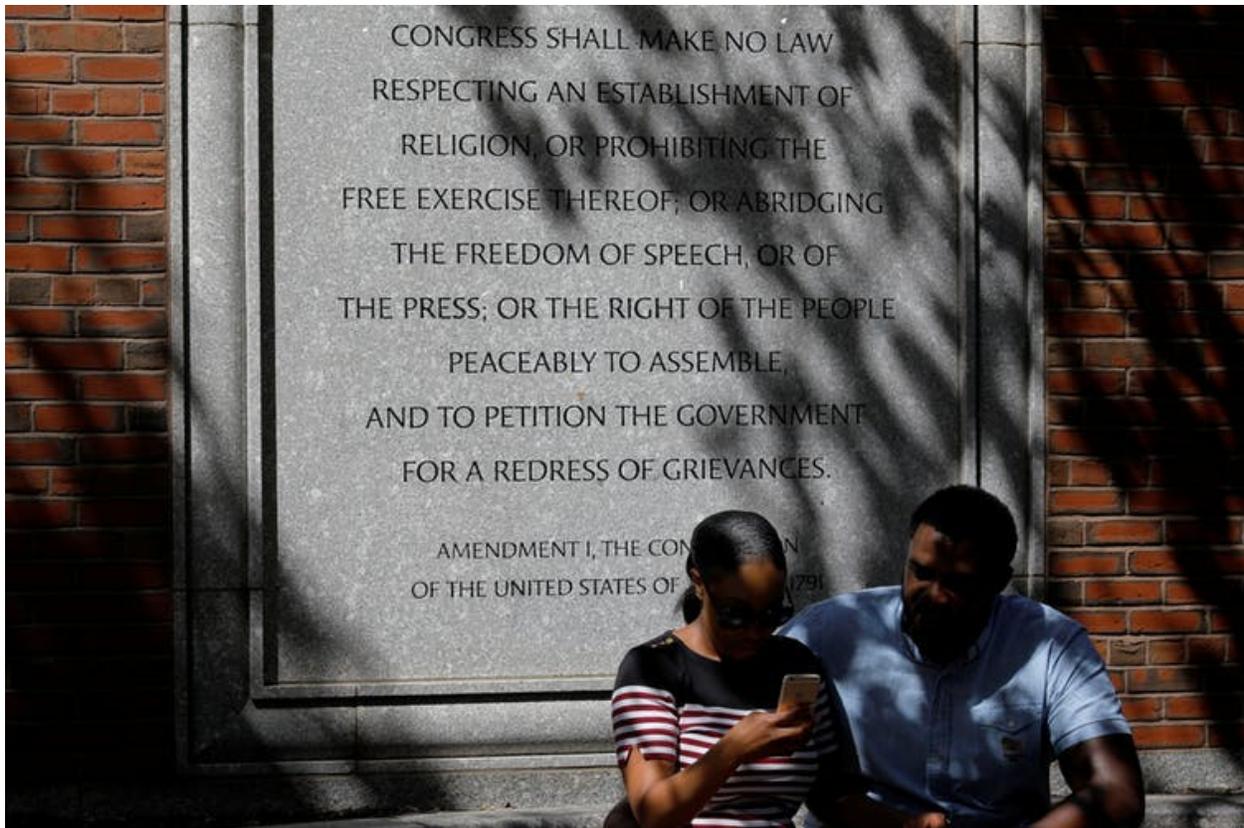
The new indictment expands an earlier one charging Assange with conspiring with Chelsea Manning, the former United States Army soldier convicted of leaking classified documents to Wikileaks, [to hack into a government computer](#).

Assange is responsible for the dissemination of huge troves of classified American documents including [hundreds of thousands of classified military reports](#), [hundreds of thousands of classified diplomatic cables](#), [hundreds of classified reports from the military prison in Guantanamo Bay](#) and [thousands of secret CIA documents](#) revealing the agency's techniques for hacking and surveillance.

The Espionage Act, a sweeping [federal statute originally enacted a century ago](#), imposes heavy criminal penalties for obtaining or disclosing classified information without proper authorization.

Beginning under President Obama, recent years saw a dramatic increase in [prosecutions under the Espionage Act](#). But these prosecutions were directed at leakers of classified information — all government employees and government contractors — not at journalists or publishers.

That makes Assange's indictment a watershed.



The First Amendment is carved in granite at the U.S. Federal Courthouse in Boston. REUTERS/Brian Snyder

Scarcity of prosecutions

To be sure, threats of Espionage Act charges against journalists and newspapers were previously made, and in one case charges were even submitted to a grand jury.

In 1942, in the middle of World War II, the Chicago Tribune published a front-page story titled “Navy Had Word of Jap Plan to Strike at Sea.” The story implied that the U.S. military had cracked Japan’s secret naval code – which it had.

An incensed President Franklin Roosevelt demanded that Espionage Act charges be brought against the reporter, the managing editor and the Tribune itself. But unlike Assange’s grand jury, the Tribune’s grand jury refused to issue indictments.

In 1971 President Nixon’s attorney general threatened the New York Times and the Washington Post with such prosecutions when the newspapers published the classified Pentagon Papers

<https://www.nytimes.com/2016/06/30/insider/1971-supreme-court-allows-publication-of-pentagon-papers.html>).

More recently, Alberto Gonzales, attorney general under President George W. Bush, suggested that the New York Times and the Washington Post violated the Espionage Act when disclosing the National Security Agency's secret surveillance program and [the CIA's secret prisons – the so-called “black sites”](#).

But no prosecutions were brought in these matters.

One reason for the scarcity of such prosecutions is their questionable constitutionality. Indeed the language of the Espionage Act is so broad that, undoubtedly, some of its applications run afoul of the [First Amendment to the U.S. Constitution](#).

Yet some Espionage Act charges against journalists and publishers are likely to pass constitutional muster.

Pentagon Papers to rape victims' names

In 1972 the U.S. government tried to stop The New York Times and The Washington Post from publishing the Pentagon Papers, a top-secret Department of Defense study on the Vietnam War.

In its well-known decision, the Supreme Court held that [preventing the publication violated the First Amendment](#). But a majority of the justices also thought that the newspapers could be possibly punished for the publication, even if stopping the publication was unconstitutional.

The Pentagon Papers decision was about the ability of government to stop the publication of information – in other words, its ability to impose a “prior restraint.” It left open the possibility of prosecuting the publishers after the publication.

A number of subsequent Supreme Court decisions did protect publishers who had published truthful information in violation of the law. For example, the court prohibited the punishment of a television station that [broadcast the name of a rape victim](#) in violation of a state law, prohibited the punishment of a newspaper that [published the content of confidential judicial proceedings](#), and prohibited the punishment of a radio station that broke a federal statute by [broadcasting an unlawfully recorded phone conversation](#).

But while these publications were all constitutionally protected by the freedoms of speech and the press, none of them involved national security information. The outcome may be very different when it comes to the disclosure of secret national security materials.



Chicago Tribune of June 7, 1942, featuring story, 'Navy Had Word of Jap Plan to Strike at Sea.' Screenshot, [Chicago Tribune](#)

The constitutionality of prosecutions for the unauthorized possession and publication of national security information is likely to depend on the specific dangers caused by the disclosure.

“No one would question but that a government might prevent ... the publication of the sailing dates of transports or the number and location of troops,” [said the Supreme Court in 1931.](#)

The pivotal question is likely to be [whether lives were endangered](#) by the disclosure, or whether the government was simply trying [to suppress information](#) embarrassing to itself.

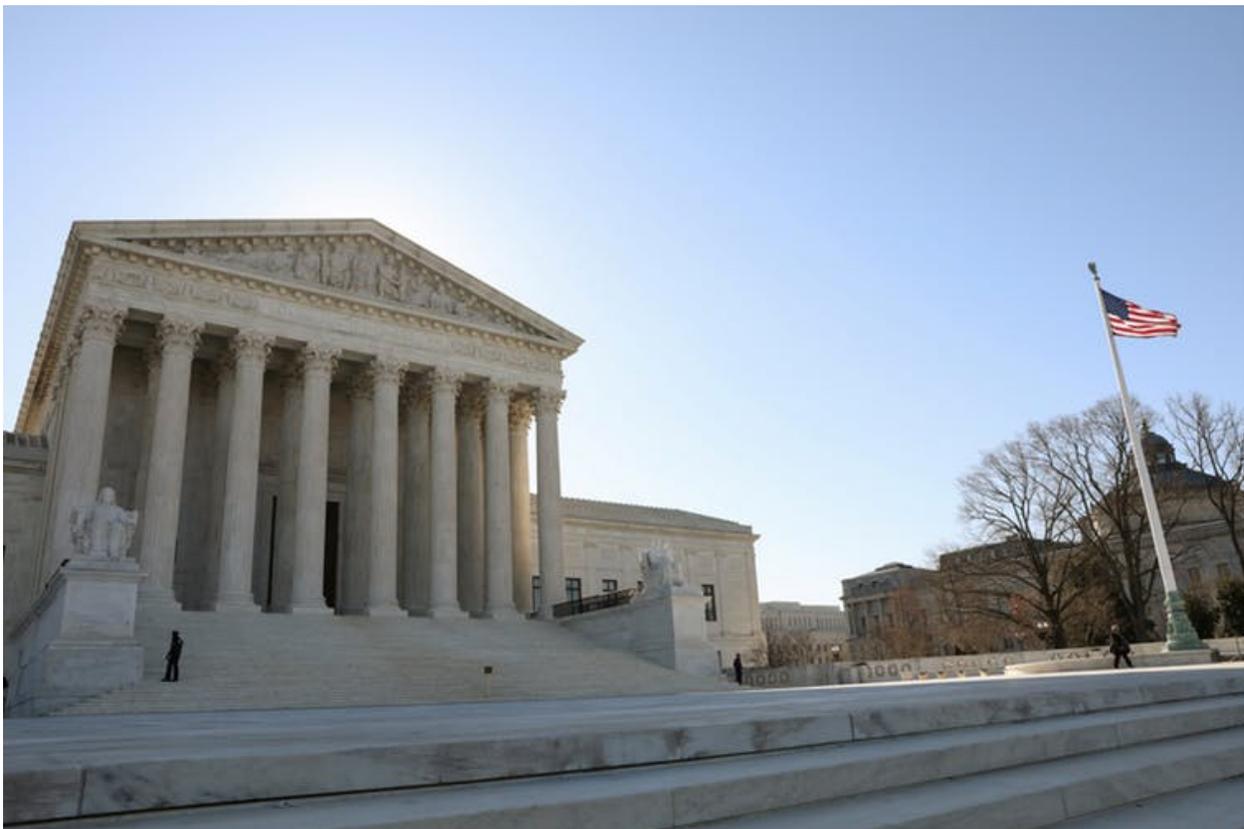
At the same time, some judges are likely to defer to the government’s own assessment of the materials, and refuse to conduct an independent evaluation of the risks they posed.

“In my judgment the judiciary may not ... redetermine for itself the probable impact of disclosure on the national security,” [wrote Justice John Marshall Harlan](#) for himself and two other justices in the Pentagon Papers decision.

Some of today's Supreme Court justices – Justice Clarence Thomas, for example – are likely to agree with the sentiment.

The Assange indictment includes specific allegations of publication of life-threatening information. The indictment accuses Assange of publishing the names of American intelligence sources, knowing full well that the publication would endanger their lives.

These charges might be found constitutional. Judges may be understandably reluctant to prohibit the government from punishing the publication of such sensitive life-threatening information.



The Supreme Court ruled in the Pentagon Papers case that prior restraint of publication is unconstitutional. REUTERS/Brendan McDermid

Dubious charges

On the other hand, Assange's indictment also involves a number of charges that are less likely to withstand constitutional scrutiny.

Assange is charged with "obtaining" information—including detainees' assessment briefs from Guantanamo, and Iraq rules-of-engagement files.

The danger posed by the disclosure of such information is far more questionable (and indeed much of that information was also obtained and published by respectable media outlets).

Moreover, some of the charges against Assange are based on the theory that Assange aided and abetted [Chelsea Manning](#) to leak classified information to Assange himself.

Given that aiding and abetting can take the form of cajoling and encouraging, many national security journalists could become instant felons under this theory.

In fact, this is not the first time that the federal government advances such a constitutionally questionable claim in regard to a mainstream journalist.

In 2009 Fox News reporter James Rosen wrote an article that contained leaked classified information about North Korea. In 2010 the Obama administration [filed a search warrant application](#) where it argued that Rosen was a criminal aider and abettor of his State Department source in the criminal disclosure of classified information.

The warrant was granted, although Rosen was never indicted for the alleged crime. Indeed when the matter became known and an outcry ensued, the Department of Justice explicitly repudiated the theory as a basis for prosecuting journalists.

Nominally, that repudiation still stands today. Defending against the charge that the new indictment endangers the freedom of American journalism, the [Department of Justice issued a statement declaring that “Julian Assange is no journalist.”](#)

But that assertion lacks constitutional significance: First Amendment protections do not depend on one’s status as a journalist. First Amendment doctrine does not extend any special protections to the press.

What goes for Assange also goes for any person who obtains or discloses classified information.

That includes any journalist, including those at the New York Times – which in fact published much of the information mentioned in Assange’s indictment, albeit after careful reductions of potentially dangerous materials.

This is an updated version of [an article](#) originally published on May 1, 2019.