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Assange espionage indictment: classified hypocrisy and a prosecutorial Trojan horse

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The May 23 Espionage Act indictment of Wikileaks founder Julian Assange evoked justified outrage and condemnation from media organizations and free speech advocates. Federal prosecutors claim in the indictment that Assange illegally received classified U.S. government information on United States military operations in Iraq and Afghanistan, State Department cables involving U.S. foreign relations and the identities of human sources helping American forces in Iraq and Afghanistan.

Carrie DeCell of the Knight Institute at Columbia University observed on Twitter that the "government argues that Assange violated the Espionage Act by soliciting, obtaining, and then publishing classified information. That's exactly what good national security and investigative journalists do every day."

Masha Gessen at The New Yorker addressed an equally weighty issue when she observed, "The last thing we want the U.S. government, or any government, to do is to start deciding who is and who is not a journalist."

I'm going to take that analogy one step further: the last thing we want is executive branch departments and agencies unilaterally and selectively asserting what should or should not be considered legitimately classified information.

The very law being used to charge Assange was passed over 100 years ago at the beginning of America's entry into World War I. The Espionage Act of 1917 was used by the Justice Department and Postal Service to cow, investigate, shut down and even prosecute news outlets that challenged the Wilson administration's wartime policies.

One of the most prominent targets was former Rep. Victor Berger of Wisconsin and his newspaper, the Milwaukee Leader. For publishing editorials critical of the war, Berger was charged and convicted under the Espionage Act in 1919. Though the conviction was overturned two years later, in the interim, Berger won reelection to the House twice but his colleagues refused to seat him.

In Assange's case, he and Wikileaks did exactly what newspapers have done for decades — seek information about U.S. government policies and actions that were either questionable or outright illegal and publish information accordingly.

In 1971 for the New York Times it was the Pentagon Papers — the classified history of the Vietnam War leaked by then-RAND Corporation analyst and former Marine Corps infantry captain Daniel Ellsberg.

For the Washington Post, it was Watergate, including then-Attorney General John Mitchell's illegal, secret surveillance slush fund used to target Democratic politicians. For Assange and his then-U.S. Army intelligence analyst accomplice, Chelsea Manning, it was about exposing U.S. war crimes in Afghanistan and Iraq.

In the Assange Espionage Act indictment, federal prosecutors specifically invoke Manning's sharing and Assange's receipt of classified information as also involving violations of Executive Order 13526, National Security Information, which states (Sec. 1.4(a)) that "military plans, weapons systems, or operations" are considered classified under the executive order.

But the Army officials who classified the 2007 Apache helicopter video released by Assange showing the killing of Iraqi civilians misused the classification system to conceal criminal conduct — something expressly forbidden by Sec. 1.7(a) of the very same Executive Order federal prosecutors cited in the Assange indictment.

So where are the indictments against Pentagon or CIA officials who knowingly and deliberately misused the classification system to conceal acts of torture or other war crimes in Iraq, Afghanistan or elsewhere? The hypocrisy and selective application of federal laws, regulations and executive orders in matters of national security is on full display in the Assange indictment. And there is another deeply troubling thing about the latest Assange indictment: the Justice Department's attempt to criminalize the digital transfer of government information to third parties.

The 18th count against Assange focuses on alleged violations of the Computer Fraud and Abuse Act (CFAA), namely that Assange (via Manning) sought to "knowingly access a computer … to obtain information that has been determined by the United States Government … to require protection against unauthorized disclosure" and to "willfully communicate, deliver, transmit, and cause to be communicated, delivered, or transmitted the same, to any person not entitled to receive it."

The indictment also mentions three times Assange and Manning using "a cloud drop box" for the exchange of the purloined documents. In effect, prosecutors are arguing that the entire chain of digital exchanges between Wikileaks and Manning were illegal, and that the use of a "cloud storage" mechanism was a key feature of the crime.

Multiple news organizations utilize the Freedom of the Press Foundation's encrypted SecureDrop system for receiving sensitive, including classified, documents from sources seeking to expose illegal or questionable government activities. If federal prosecutors prevail on Count 18 of the Assange indictment, it would open up every news organization in the world utilizing SecureDrop or a similar system to a CFAA prosecution — whether a whistleblower was digitally passing along Immigration and Customs Enforcement (ICE) reports of immigrant abuse, Pentagon documents showing contracting irregularities, etc.

Prosecutors are attempting to overturn the Supreme Court decision in the Pentagon Papers case through a statutory Trojan Horse (the CFAA) all while deliberately ignoring the real crime in this episode — the deliberate misuse of federal classified information statutes and executive orders to conceal American government war crimes.

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