



The debate over what Julian Assange's arrest means for freedom of the press, explained

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Is the arrest of WikiLeaks founder Julian Assange justice against a man who broke the law, or is it a warning shot that journalism is under threat in the United States?

It's a difficult question to answer, in part because it brings up a host of other related questions: Do you consider WikiLeaks a journalistic organization or not? Did Assange actively participate in criminal activity to obtain classified intel, as the US government alleges, or did he just disseminate information passed on to him and is therefore protected by the First Amendment? Does it matter that Assange and his organization seem to have developed at the very least an affinity to Russia? And is the single charge he faces in the United States the total of the government's push for justice — or is it just the opening salvo in what will become a larger war to punish Assange (and anyone else who publishes classified information)?

These questions all came to a head on Thursday when, after months of speculation, Assange was arrested in London by British police after being expelled from the Ecuadorian Embassy there. He now faces likely extradition to the US. After his arrest, the Justice Department unsealed an indictment alleging that Assange conspired with former US intelligence analyst Chelsea Manning to crack a password on a Defense Department computer network in order to download classified records and transmit them to WikiLeaks in 2010.

That, however, isn't all the US government is upset about. Starting in 2010, WikiLeaks published a video of an airstrike in Iraq that killed civilians, military documents about the Iraq and Afghanistan wars, and State Department cables in which diplomats gave candid assessments of foreign governments, all provided by Manning. The unprecedented leaks gained enormous attention and made Assange a sort of celebrity — and a target, as top US officials like Attorney General Eric Holder publicly mused about how they could charge him. Perhaps freshest in mind, however, is the "hactivist" organization's decision to publish Hillary Clinton aide John Podesta's emails in the months before the 2016 election.

There has long been a debate about whether what WikiLeaks does counts as journalism. Some view Assange and WikiLeaks as a bastion of transparency and an ultimate example of forcing government accountability. Others see the work as dangerous and treacherous.

With Assange's arrest and the unsealing of the Justice Department's indictment, the dust around WikiLeaks has been kicked up again. Some groups dedicated to free speech and press have decried the incident as a foreshadowing of dark times to come for American journalism, while many observers have celebrated it as justice served.

“This case raises a number of really thorny questions about what it means to be a journalist, and who is entitled to the constitutional protections that do exist to ensure that the public gets the information it needs,” David Schulz, senior counsel at Ballard Spahr LLP and director of the Media Freedom and Information Access Clinic at Yale Law School, told me.

A lot of people are celebrating Assange’s arrest — but not everyone

At WikiLeaks, Assange has made a lot of enemies, and by many accounts, he’s a jerk. He’s also been hiding out in the Ecuadorian Embassy to avoid an investigation into a sexual assault allegation against him in Sweden.

Many in the national security space hold animosity toward him for compromising sensitive confidential information, including about US military activity in Iraq and Afghanistan and communications from State Department officials. Many Democrats also blame him, at least partially, for Hillary Clinton’s loss in the 2016 election after WikiLeaks published Podesta’s emails and hacked information from the Democratic National Committee.

“Julian Assange got what he deserved,” author Michael Weiss wrote in the Atlantic.

“He’s our property, and we can get the facts and truth from him,” Sen. Joe Manchin (D-WV) told CNN.

Groups dedicated to free speech and press have had a different read.

Ben Wizner, director of the American Civil Liberties Union’s speech, privacy, and technology project, said in a statement that any prosecution of Assange for WikiLeaks’ publishing operation would be “unprecedented and unconstitutional, and would open the door to criminal investigations of other news organizations.”

“The potential implications for press freedom of this allegation of conspiracy between publisher and source are deeply troubling,” said Robert Mahoney, deputy director of the Committee to Protect Journalists, in a statement. He added that the US government could “set out broad legal arguments about journalists soliciting information or interacting with sources that could have chilling consequences for investigative reporting and the publication of information of public interest.”

Barry Pollack, an attorney for Assange, echoed the sentiment in an email to Yahoo News. “Journalists around the world should be deeply troubled by these unprecedented criminal charges,” he said.

This is a little like getting Al Capone on tax evasion

When reports surfaced last year that the US government had indicted Assange, there was a lot of speculation about what, specifically, he was being charged with. As Vox’s Andrew Prokop laid out at the time, the US government had already charged people they’d accused of leaking classified information, including Manning, but going after the publisher of that information was highly unusual. It’s one of the reasons President Barack Obama’s Justice Department hadn’t charged Assange years ago.

But after Assange’s arrest on Thursday, the Department of Justice unsealed the indictment, which is dated to March 2018. The charge: “conspiracy to commit computer intrusion,” related to Assange’s alleged attempt in 2010 to help Manning figure out a password she needed to

access more classified documents and information. Per the indictment, it appears the attempt was unsuccessful.

Compared to what some observers thought the indictment might be — including much more serious charges under the Espionage Act — the charge against Assange is, frankly, a pretty small one. If he's convicted, he could face up to five years in prison — less time than he spent hiding out in the Ecuadorian Embassy in the UK.

It's a bit like gangster Al Capone being arrested on tax evasion charges: It's probably not what the US government wanted to get him on, but it's the way they could do it.

“This is not the thing they care about,” Julian Sanchez, a senior fellow at the Cato Institute, told me. “It's the thing that they can win a court case over.”

For those who view Assange as a criminal as contemptible as Capone, that's a win — take what you can get. But for civil liberties defenders, it's a reprehensible overreach.

That the US government would go to such extreme lengths to go after Assange has caused some alarm, especially in light of how small the charge is against him, at least for now. “It would be pretty unusual for the government to go to this amount of effort to extradite someone if that was the only issue,” Sanchez said. “If their only contribution to the crime has been that they ran some software against a password hash and then failed to actually help, then that probably wouldn't result in someone's extradition.”

Journalists aren't given a free pass to commit crimes in the pursuit of a story — but they also haven't been punished for publishing info that came from one

That's not to say that what the indictment alleges Assange did, if convicted, isn't a crime.

And reporters don't get to just commit any crime they want in the name of journalism. If I punch someone to get them to talk to me for a story or break into their house to steal documents, I can still be charged with assault or robbery.

“Journalists are not scot-free to do whatever they think they need to do in order to pursue an act of journalism,” said Columbia University professor Todd Gitlin.

Whether Assange committed a crime in his work with Manning is something that will ultimately be decided if he is indeed extradited and brought to trial. That's when courts will determine whether he knowingly violated the law to gain access to information. What it could all hinge on: Did he just advise Manning on how to avoid detection, or was he conspiring with her to get information in an illegal way?

There are some prior cases that illustrate how this could play out, and where the line is. In 2001, the Supreme Court ruled on a case called *Bartnicki v. Vopper*. In that case, a person intercepted and recorded a phone call between a union negotiator and union president and sent it to a radio station, which played a tape of the conversation. The court ruled that the First Amendment protected the broadcaster because it hadn't participated in the illegal interception.

Other cases, however, have gone the other way. A Texas television station was implicated when a man made recordings of his neighbor's cordless phone conversations discussing plans to interfere in the local school district's insurance contract. (The station ultimately settled the

related lawsuit.) A journalist was arrested for allegations that he aided and abetted a TWA pilot who stole evidence from the TWA Flight 800 crash in the 1990s.

“There is established in the law a pretty bright line,” Schulz said. “You cross it when you become a participant in illegal activity.”

This is a lot bigger than a password

The debate about Assange and WikiLeaks stretches far beyond helping Manning crack a password. It has reopened the ongoing discussion about whether what WikiLeaks does counts as journalism. It has also raised questions about the government’s intentions and whether this opens the door to prosecuting more journalists or not.

On the former point, people have different opinions of whether what WikiLeaks does — dumping troves of data indiscriminately — is really journalism.

“Is a data dump journalism? That’s an interesting question,” Gitlin said. “In the case of war crimes footage, I feel comfortable saying that by working with Manning on that, Assange was performing an act of journalism. But when you release terabytes of data indiscriminately, I don’t know what to call that, but it’s not self-evidently journalism.”

Indiscriminate data dumps such as those WikiLeaks engages in can have dangerous consequences. For example, human rights advocates have complained that WikiLeaks’ activities have endangered activists in China, and the platform has released information on government sources that the US has gone to great lengths to protect.

Making the matter even more complicated is the evolution of WikiLeaks itself. Back in 2010, it gave the New York Times, Der Spiegel, and the Guardian troves of information. In 2016, it was clearly rooting for Trump and trying to undermine Clinton. And as Foreign Policy points out, Assange was at the same time declining to publish damaging information on the Russian government. Members of Trump’s administration have even gone so far as to denounce WikiLeaks as a “hostile intelligence service.” (To be sure, a lot of journalism is far from unbiased.)

More specifically to Assange and the charge against him right now, there are concerns that there could be more charges brought against him in the future. That’s one of the concerns Wizner, from the ACLU, raised in his statement. “We have no assurance that these are the only charges the government plans to bring against Mr. Assange,” he said.

The New York Times noted that if the Justice Department does intend to charge Assange with additional offenses, it would likely need to do it before the UK decides whether to send him to the US. The extradition process could take months or even years, so there’s a non-zero chance more charges could be added — and press advocates worry that any broader charges related to WikiLeaks’ work could have a chilling effect on more traditional media outlets that are considering publishing leaked information.

“Never in the history of this country has a publisher been prosecuted for presenting truthful information to the public,” Wizner told CNN in 2017. “Any prosecution of WikiLeaks for publishing government secrets would set a dangerous precedent that the Trump administration would surely use to target other news organizations.”

Adding another layer of anxiety is the Trump administration and its contentious relationship with the press. The president has openly discussed an interest in loosening up libel laws and frequently derides the media.

The controversy over WikiLeaks' place in the journalistic sphere and what Assange's arrest means for reporting isn't going anywhere anytime soon. It may very well be that Assange did commit a crime — but his arrest might not be something we should cheer, at least not without some reflection.