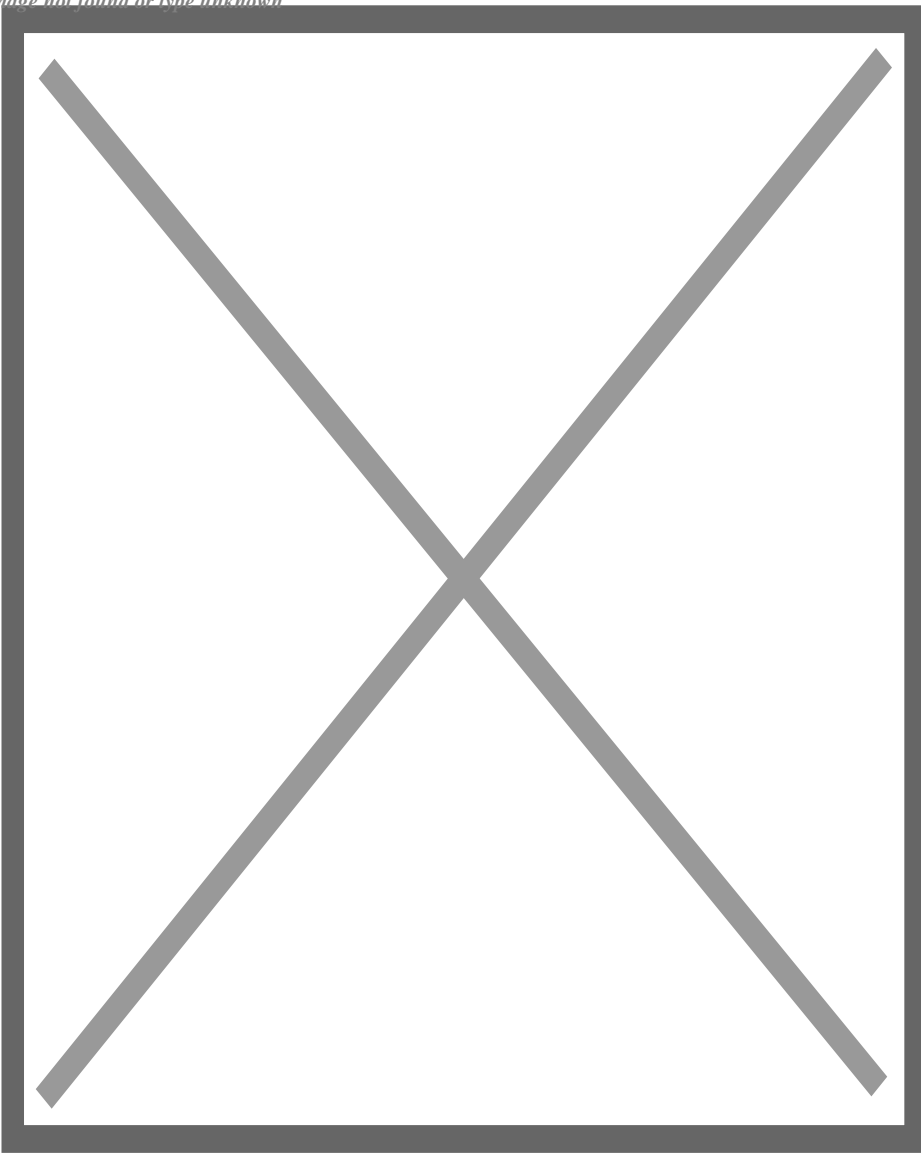


*Julian Assange is finally free –
but should not have been
prosecuted in the first place*

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Kenneth Roth *

The U.S.'s pursuit of Assange under the Espionage Act created a dangerous precedent that threatens journalistic practices

Julian Assange's lengthy detention has finally ended, but the danger that his prosecution poses to the rights of journalists remains. As is widely known, the U.S. government's pursuit of Assange under the Espionage Act threatens to criminalize common journalistic practices. Sadly, Assange's guilty plea and release from custody have done nothing to ease that threat.

That Assange was indicted under the Espionage Act, a U.S. law designed to punish spies and traitors, should not be considered the normal course of business. Barack Obama's justice department never charged Assange because it couldn't distinguish what he had done from ordinary journalism. The espionage charges were filed by the justice department of Donald Trump. Joe Biden could have reverted to the Obama position and withdrawn the charges but never did.

The 18-count indictment filed under Trump accused Assange of having solicited secret US government information and encouraged Chelsea Manning to provide it. Manning committed a crime when she delivered that information because she was a government employee who had pledged to safeguard confidential information on pain of punishment. But Assange's alleged solicitation of that information, and the steps he was said to have taken to ensure that it could be transferred anonymously, are common procedure for many journalists who report on national security issues. If these practices were to be criminalized, our ability to monitor government conduct would be seriously compromised.

To make matters worse, someone accused under the Espionage Act is not allowed to argue to a jury that disclosures were made in the public interest. The unauthorized disclosure of secret information deemed prejudicial to national security is sufficient for conviction regardless of motive.

To justify Espionage Act charges, the Trump-era prosecutors stressed that Assange was accused of not only soliciting and receiving secret government information but also agreeing to help crack a password that would provide access to US government files. That is not ordinary journalistic behavior. An Espionage Act prosecution for computer hacking is very different from a prosecution for merely soliciting and receiving secret information.

Even if it would not withdraw the Trump-era charges, Biden's justice department could have limited the harm to journalistic freedom by ensuring that the alleged computer hacking was at the center of Assange's guilty plea. In fact, it was nowhere to be found.

The terms for the proceeding were outlined in a 23-page "plea agreement" filed with the US District Court for the Northern Mariana Islands, where Assange appeared by consent. Assange agreed to plead guilty to a single charge of violating the Espionage Act, but under U.S. law, it is not enough to plead in the abstract. A suspect must concede facts that would constitute an offense.

What were those facts? The agreement describes how Assange solicited secret documents from Manning for publication on WikiLeaks, and that Manning downloaded and handed over hundreds of thousands of US government documents, using a secure cloud drop box that Wikileaks had established. None of that necessarily deviates from accepted journalistic practice. But there is nothing in the agreement about Assange having helped Manning crack a government password – nothing about the key facts that Trump administration prosecutors had highlighted to distinguish Assange from ordinary journalists.

One effect of the guilty plea is that there will be no legal challenge to the prosecution, and hence no judicial decision on whether this use of the Espionage Act violates the freedom of the media as protected by the first amendment of the U.S. constitution. That means that just as prosecutors overreached in the

case of Assange, they could do so again. The failure of Biden administration prosecutors to narrow the charges by creating a record in court of facts that distinguish his behavior from that of journalists effectively greenlights further abuse of the Espionage Act.

Of course, maybe there were no such facts. As far as we know from the plea agreement, the story of Assange having conspired to hack a password was no more than a Trump administration concoction designed to justify charges that should never have been brought.

Some suggest that the damage to journalistic freedom isn't so bad because Assange wasn't really a journalist. They note that he often posted documents on Wikileaks with little or no editorial curation. His releases contained some useful nuggets, such as the 2007 video showing a U.S. Apache helicopter attack in Baghdad that killed 11 people including two Reuters journalists. But many of them were simply data dumps.

Indeed, some of Assange's releases arguably did harm, such as his unredacted publication of the names of Afghans and Iraqis who provided information to the US government – a possible death sentence. His wholesale distribution of internal state department memoranda, most quite reasonable and informative, had the effect of discouraging the use of such memoranda and thus reducing the number of participants in state department decisions. That de-democratizes foreign policy.

But media protections are not limited to journalists who are deemed responsible. Nor do we want governments to make judgments about which journalists deserve First Amendment safeguards. That would quickly compromise media freedom for all journalists. Imperfect journalist that he was, Assange should never have been prosecuted under the Espionage Act. It is unfortunate that the Biden administration didn't take available steps to mitigate that harm.

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