

**KEYNOTE ADDRESS:
EXAMINING THE ASSANGE INDICTMENT**

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The following is a transcript of the keynote address given by Dean Mary-Rose Papandrea at First Amendment Law Review's 2021 Symposium on National Security, Whistleblowers, and the First Amendment.¹ The virtual event also featured two panels on (1) Classification and Access to National Security Information² and (2) The Press, Whistleblowers, and Government Information Leaks.³

I thought I would set out some of the issues that matter a lot to me. And I thought we shouldn't get going without thinking a little bit about the timing of this symposium. I know for some of you, including some of the panelists, you probably thought, well, these issues aren't really new. Most of us have been working on them getting close on to decades now. Multiple decades. The tension between the need to protect our most sensitive national security secrets while at the same time trying to promote an informed democracy is something we've been struggling with for a very long time. But for me, the attack on the Capitol on January sixth gave rise to a new urgency to consider how our democracy works and what doesn't work. I do not take anything for granted. We have weathered the last four years, a prolonged attack on our institutions, on all three branches of government, on universities and, of course, on the press.

As we go forward, we are going to have to start looking at how we are going to rebuild and heal as a nation. And an essential part of this rebuilding and healing process will involve truth and figuring out what is true and what is not true. An important way of figuring this out is to rely on the press, the respected members of the media, the journalists who have played such an important role in this country in making sure that we

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¹ This transcript has been lightly edited for clarity. The editors have also inserted footnotes throughout the transcript where there are references to specific cases, statutes, works of scholarship, or other sources.

² Mary-Rose Papandrea, Margaret Kwoka, David Pozen & Stephen I. Vladeck, *Panel One: Classification and Access to National Security Information*, 19 FIRST AMEND. L. REV. 222 (2021) [hereinafter *Panel One*].

³ David S. Ardia, Heidi Kitrosser, David McCraw, Mary-Rose Papandrea & David Schulz, *Panel Two: The Press, Whistleblowers, and Government Information Leaks*, 19 FIRST AMEND. L. REV. 253 (2021) [hereinafter *Panel Two*].

know what our leaders are doing in our names. I should also add, truth—this is not just about national security. Of course, racial justice, the history of white supremacy in this country. We have a lot to resolve, and the role of the press is going to be important.

I'm going to use the prosecution of Julian Assange as a lens to view some of the key issues that we as a nation will need to struggle with going forward. And it is this prosecution and not, of course, the attack on the Capitol on January sixth that was the impetus for this symposium. Julian Assange, of course, is the founder of WikiLeaks. He's Australian. WikiLeaks is an online platform that's committed to radical transparency. It was founded in 2006, and it became noticed in the public eye when it published a series of leaks from Chelsea Manning, a U.S. intelligence analyst, around 2009.

Julian Assange is a highly polarizing figure. On the one hand, he has won journalism awards for essentially calling out truth to power. But he's also been attacked by many on both sides of the aisle. President Biden, not since he's been president, but in the past, has referred to him as a high-tech terrorist. It remains to be seen whether Biden's administration will continue this prosecution, but we shall see. I will say that the possibility of prosecuting Julian Assange is something that the Obama administration seriously considered and ultimately decided against, fearing that it wouldn't be possible to distinguish the established press like *The New York Times*. And they also feared a First Amendment defeat. The Trump administration, however, did go forward with prosecuting Assange, and we found out about it in late 2018.

Since then, there have been two superseding indictments. The current operating indictment, the second superseding indictment, has eighteen counts.⁴ Notably, the indictment doesn't focus on some of the really problematic publications of WikiLeaks—for example, the publication of the hacked emails from the DNC during the 2016 election, believed to have been

⁴ Press Release, DOJ, WikiLeaks Founder Charged in Superseding Indictment (June 24, 2020), <https://www.justice.gov/opa/pr/wikileaks-founder-charged-superseding-indictment>; see also Charlie Savage, *Assange Indicted under Espionage Act, Raising First Amendment Issues*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/us/politics/assange-indictment.html>.

orchestrated by the Russians.⁵ Instead, it focuses on thousands of emails that Chelsea Manning gave them in 2009 and 2010 and, in particular, the publication of some sources, including the names of some informants.⁶ The Chelsea Manning trove of information has thousands and thousands and thousands of pages of information, and it covered a number of military operations, including Iraq war logs, Afghan war diaries, and Afghan war logs.⁷ One point that's worth noting is that a number of news outlets also published parts of these leaked materials. So, that's where it does become particularly difficult to make any distinction between the publication by WikiLeaks and the publication from some mainstream media outlets.

Now, in the second superseding indictment, there are eighteen counts, and a lot of people who dismiss this prosecution as not posing a big threat to journalists focus on the parts of the indictment that alleged that there was a conspiracy to commit computer intrusion—that Julian Assange helped Chelsea Manning try to crack a password hash stored on the U.S. Department of Defense computers. And, rightfully, people point out it is not normal journalistic practice to help sources crack passwords *per se*. This was unsuccessful, the attempt to crack. But what I want to mention and highlight for everyone here is that the indictment goes much, much further than just talking about the involvement with hackers and being intimately involved with getting that information. There are seventeen other counts.⁸ And most of these counts are under the Espionage Act for conspiring to obtain national security information or even just for simply publishing this national security information, regardless of how it was obtained.⁹ These counts surely do implicate the First Amendment rights of the press.

At present, there are many unresolved First Amendment issues. First, on the obtaining of the national security information, national security reporters work very closely with their sources. Although, as I said, they don't routinely try to help their sources crack passwords, they certainly will work with sources and may even encourage them to obtain material when

⁵ See Second Superseding Indictment, *U.S. v. Assange*, No. 1:18-cr-111 (CMH) (E.D. Va. June 24, 2020), <https://www.justice.gov/opa/press-release/file/1289641/download>.

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

⁹ See *id.*

possible. There is a case called *Bartnicki*, where the Supreme Court held that the First Amendment protected the publication of sensitive information as long as there were clean hands.¹⁰ In that particular case, a radio station received a tape anonymously, basically dropped in their mailbox, and they went ahead and published it.¹¹ The tape was of an intercepted phone call, an admittedly illegally intercepted phone call.¹² The problem with the *Bartnicki* case is threefold. Number one, in most situations you will not have a clean hands defense. Most journalists have ongoing relationships with their sources, and it's unclear what would be sufficient to lose that *Bartnicki* protection. So, in *Bartnicki*, there was no involvement whatsoever in the obtaining of that information from the source.¹³ But what if, for example, the reporter said, "here's my email address, send me whatever you have." It may take very little to lose that protection.

Secondly, the *Bartnicki* case is not a national security case. And I think for any of you who've studied constitutional law, you know that all bets are off as soon as national security is involved. This could not be more true than in the First Amendment context. I'll just cite the *Holder v. Humanitarian Law Project*¹⁴ case as an example of where the Court did not follow its usual rules and doctrine in the First Amendment context.

Thirdly, it's, of course, very clear that the indictment's counts that allege that Assange published national security secrets would raise the specter that the media, the more mainstream media, could also be prosecuted for the same thing. We have lived in a state of what some scholars have called a "benign indeterminacy."¹⁵

So, then in the Pentagon Papers case, the Supreme Court held that the government could not get a prior restraint on the publication of very sensitive material, historical materials about the U.S. involvement in the Vietnam War.¹⁶ But if you read that opinion closely, it's not hard to find a majority of the justices, if

¹⁰ *Bartnicki v. Vopper*, 532 U.S. 514, 528–35 (2001).

¹¹ *Id.* at 517–19.

¹² *Id.* at 517.

¹³ *Id.*

¹⁴ 561 U.S. 1 (2010).

¹⁵ See Harold Edgar & Benno C. Schmitt, *The Espionage Statutes and Publication of Defense Information*, 73 *COLUM. L. REV.* 929, 936 (1973) ("We have lived since World War I in a state of benign indeterminacy about the rules of law governing defense secrets.").

¹⁶ *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

you add up the votes, left open the possibility that subsequent criminal prosecution would be permissible. So, since that time, we haven't had efforts to prosecute the press. The closest we had was the prosecution of two lobbyists from the American Israel Public Affairs Committee (AIPAC) in the Eastern District of Virginia.¹⁷ And this prosecution ended up getting dropped after some unfavorable opinions for the government.¹⁸ Those lobbyists had received information from a Department of Defense source,¹⁹ and, although they were lobbyists and not the press, they were similar to the press in that they were third parties. In other words, they were not people who had obtained the information through their jobs or through contracts and then revealed it directly—they had obtained it from someone else.

So, I said that I wanted to use this prosecution to think about a lot of issues, and I do regard these issues as fundamental to the successful operation of our democracy. Number One, this prosecution and the facts underlying it reveal the unbelievable state of our classification system. Overclassification is rampant. The sheer volume of secrets that the United States keeps is mind boggling. And now, we have a volume of leaks that are possible with technology, flash drives, and so on that were not possibly contemplated before. We also have the ease of leaks that we never had before.

On the one hand, the security of our republic could be threatened. And I do want to give credence to the national security concerns that this prosecution reveals. You know, the idea that people should have carte blanche freedom to leak and publish national security secrets does raise some serious national security concerns. I think everyone agrees that there are some national security secrets that must remain secret. Some of the focus of the indictment is the identity of informants in Iraq and Afghanistan, and protecting their security is a really big deal. There are, of course, movements of ships and troops, secret communication methods, that sort of thing, codes. We know that there is clearly protected information that we need to keep secret. So, the ease of leaks and the volume of leaks is disconcerting. But, at the same time, it can't be that everything that is classified

¹⁷ Neil A. Lewis & David Johnston, *U.S. to Drop Spy Case Against Pro-Israel Lobbyists*, N.Y. TIMES (May 1, 2009), <https://www.nytimes.com/2009/05/02/us/politics/02aipac.html>.

¹⁸ *See id.*

¹⁹ *See id.*

needs to be classified. There is grave concern—and history bears this out—that the government has used and misused the classification system to hide government wrongdoing. So, it's hard to know what our leadership is doing in our names if we don't have access to this information.

The other point is that the indictment rests in large part, as I said, on the various counts in the Espionage Act.²⁰ The Espionage Act itself is written in broad, capacious terms. I know some of our panelists have testified before Congress, particularly Steve Vladeck, and in those hearings, when asked, the government officials typically will say, “you know, we're good. We like the Espionage Act the way it is,” because the Espionage Act and a number of other laws that are on the books basically allow the government real authority to prosecute anyone they would want if they want to go after someone. These problems with the Espionage Act are really well known. As Steve Vladeck said in a recent podcast, “let me get out my dead horse and beat it,” when talking about how the Espionage Act needs to be rewritten.²¹ But this prosecution, if it goes forward, is going to highlight more of these problems.

Another point this prosecution highlights is the need for us to come to grips with the importance of transparency. I want to mention specifically the work of David Pozen, who's on the first panel and who has been writing a lot about transparency and how we should think about the importance of transparency.²² As he's rightly mentioned, transparency for transparency's sake

²⁰ See Second Superseding Indictment, *supra* note 5.

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²² David Pozen is the Vice Dean for Intellectual Life and Charles Keller Beekman Professor of Law at Columbia Law School and a nationally recognized expert on constitutional law and information law. *David Pozen*, COLUM. L. SCH., <https://www.law.columbia.edu/faculty/david-pozen> (last visited Apr. 21, 2021). Professor Pozen has written extensively on government secrets and access to information. *Id.* Professor Pozen was a panelist at *First Amendment Law Review's* 2021 Symposium on National Security, Whistleblowers, and the First Amendment. *Panel One, supra* note 2.

cannot be our goal. We have to think more purposefully about why we want transparency. What is the underlying purpose? What do we hope to achieve? As I mentioned, there could be some real harms with complete transparency. How much should we know? How much do we need to know? And it may be that just having everything laid bare is not actually going to help our democracy. In fact, one of the biggest problems with the volume of secrets these days is that it's very hard to process if you have these thousands and thousands of pages. The average person doesn't have time to go through that, and trying to figure out what is important and what's not important can really get lost in the shuffle. So, we need to be thinking clearly about what we would need to know and what, maybe, we can continue to keep secret.

One of the problems we see with all these leak prosecutions and the Assange prosecution is that, because our classification system is so broken, we have come to rely on leakers and the publication of leaked information by the press in order to reform our democracy. And I think most people have said it's a terrible system, but it's the best that we've got. Nevertheless, it illustrates that we need to continue the battle to reform the system. The systems we have set up in place are not working particularly well. In the last four years, we have seen some of the problems with our inspectors general and how they've been attacked, particularly by President Trump, and the failure, the utter failure, of Congress to be a meaningful check on the executive branch. I'll just nod to Heidi Kitrosser's amazing work in this area, separation of powers, to illustrate some of the issues that we have there.²³

Most importantly, the Assange prosecution highlights my concerns about the press. When announcing the Assange indictment, DOJ National Security Division Team Chief John Demers said Assange is “no journalist.”²⁴ Well, what did that mean? I'm sure he was trying to assure everyone they're not

²³ Heidi Kitrosser is the Robins Kaplan Professor of Law at the University of Minnesota Law School and the Newton N. Minow Visiting Professor of Law at the Northwestern Pritzker School of Law. *Heidi Kitrosser*, NW. PRITZKER SCH. OF LAW, <https://www.law.northwestern.edu/faculty/profiles/HeidiKitrosser/> (last visited Apr. 21, 2021). Professor Kitrosser is a leading expert on federal government secrecy, and her scholarship focuses on leak prosecutions, government whistleblowers, government secrecy, and separation of powers. *Id.* Professor Kitrosser was a panelist at *First Amendment Law Review's* 2021 Symposium on National Security, Whistleblowers, and the First Amendment. *Panel Two*, *supra* note 3.

²⁴ Savage, *supra* note 4.

going after the press. But that's a meaningless assurance. In this country, we don't credential our journalists and, perhaps more importantly, our First Amendment protections do not belong exclusively to journalists. And they have no special protections under the First Amendment. Depending on, or relying on, prosecutors and then, ultimately, members of the jury to determine who is a journalist is no way to protect our democracy. We have seen that the norms that govern our society and our democracy are under attack. And one of the things that we have depended on for the last two centuries is that the press is given this protection, but it's not by law. It's a norm.

It's this benign indeterminacy, in part, but it's also a much bigger norm that the press plays an important role in our society. And I'll point to something that's related, which is the rules that govern the reporter's privilege. So, there is no federal reporter's privilege, and, instead, the attorney general's office has guidelines that restrict subpoenas to the press to reveal their sources or to require them to turn over work product.²⁵ I do think one miracle of the Trump administration is that we didn't see more subpoenas to the press, given that it is only norms and not law that protect the press from having to turn over their source identity and their work product. But I fear for the future. I'm hopeful, under President Biden, that the protection of the press will continue. But I think we all know Biden is in office four years, and what happens after that?

We need to be thinking in the long term, and relying on the norms is particularly problematic when the public at large doesn't like the press. So, it's not just that we have to rely on the prosecutors, but we have a much bigger societal problem where the press is now not sympathetic. I feel like the Assange prosecution is part and parcel of this attack on the press. Assange is not a sympathetic character to most Americans. You will find people who trumpet him as a brave journalist exposing wrongdoing, but, for the most part, I think most Americans are not superfans of him. He's also not an American, so that doesn't help his cause. And I fear that this kind of case could make some bad law for the press in general. So, what I would say going

²⁵ Linda Moon, Bruce D. Brown & Gabe Rottman, *New DOJ reports provide detail on use of law enforcement tools against the news media*, REPS. COMM. FOR FREEDOM OF THE PRESS (Nov. 9, 2018), <https://www.rcfp.org/new-doj-reports-provide-detail-use-law-enforcement-tools-against-new/>.

forward is that we should see this as a call to action. We need to rehabilitate the press in the public's eye.

I always ask my students, where do you get your news and what do you think about the news media? And, of course, none of them read papers anymore. They get a lot of their news through social media. But, most disturbingly, last year I think it was the first time my students, most of the class, said they didn't know what was true or false anymore. They didn't know who to trust. My heart broke right there on the spot. So, we need to commit ourselves to finding out what the truth is and establishing the public's trust in our institutions. So, in other words, although the Biden administration may decide to drop the Assange prosecution, this prosecution itself illustrates the urgency of rehabilitating the press.

The role of the press in this country is essential. It's known as the Fourth Estate for a reason. It provides an essential check on our government. Is it perfect? No. But the role of the press is essential. Rehabilitating the press will not be easy, but this is important work that needs to be done. Along the way, all of us here—and I'm pointing to you students too, not just the esteemed scholars—we need to continue the good fight against excessive government secrecy, work to protect the reporter's privilege, and work to reform and revise the laws that govern the publication of national security information. We need to fight for the protection of leakers who reveal information that's important for the public's interest. And, so, this is my call to action.

We have so many things we need to do in this country. Again, I think the January sixth attacks really brought to light for all of us the need to engage in so many ways. But I urge you all, no matter what your cause is—if it's not national security, perhaps it's racial justice, it could be any number of topics—to think about the role of the press in allowing us to come to a national consensus on what is truth. Because some things are true, and some things aren't true. And getting that information is essential for a democracy to work effectively.