UNITED STATES v. JULIAN PAUL ASSANGE

Supplemental Declaration of Mark Feldstein

I, Mark Feldstein, hereby declare as follows:

1. Expert witness background and role in this case

I am a journalism historian and professor at the University of Maryland and serve as its Eaton Chair in journalism. I have authored a book, peer-reviewed journal articles, book chapters, and magazine and newspaper articles focusing on journalism history, freedom of the press, investigative reporting, and leaking/whistleblowing. I have been quoted hundreds of times as an expert on these issues by news outlets around the world. I have lectured about these topics on six continents and testified as an expert witness in the US Senate and in criminal and civil cases in court.

I was asked by attorneys for Julian Assange to render my evaluation for this case from a journalistic perspective, including whether Assange is a journalist and entitled to protection under the US Constitution's First Amendment; the history of classified information disclosures to journalists; the journalistic implications of Assange's indictment under the Espionage Act; and the political dimensions of this case in the context of the Trump administration's battle with the press.

I concluded that no matter how unorthodox, Assange is a publisher and protected by the free speech and free press clauses of the Constitution. He has published truthful and important information that exposed illegal and unethical actions by the US government. Such disclosure of secret documents has a long history in the US, going back to George Washington's presidency; government officials routinely leak classified information when it is in their interest, even as they exaggerate the harm from leaks that are not in their interest. Yet no administration has ever before indicted a publisher for publishing classified information. The decision to disregard this longstanding precedent and indict Assange under the Espionage Act was ultimately a political one: The Obama administration intensively investigated Assange and concluded that the First Amendment protected his disclosure of national defense information. The Trump Justice Department has no new evidence, just a political agenda radically different from its predecessors. Its prosecution of Assange for the act of publishing is perhaps this administration's most menacing move yet in its battle with journalistic "enemies of the people."

2. Assange is being prosecuted for newsgathering

The government asserts that Assange is not being charged for "passively obtaining or receiving" national defense information but for his "complicity" in acquiring that information, "his knowing and intentional receipt" of it from a government employee.[1] In other words, Assange would not have been indicted if he had only "passively" received the information—if, for example, he got it anonymously in the mail out of the blue.

The government's attempt to draw a distinction between passive and active newsgathering—sanctioning the former and punishing the latter—suggests a profound misunderstanding of how journalism works. Good reporters don't sit around waiting for someone to leak information, they actively solicit it; they push, prod, cajole, counsel, entice, induce, inveigle, wheedle, sweet-talk, badger, and nag sources for information—the more secret, significant, and sensitive, the better. Vigorous newsgathering has been a staple of American journalism for nearly two centuries—taught in journalism schools, routinized by the assignment of reporters to news "beats," promoted at annual conferences where journalists share tips and tricks about how to acquire secret records and information.

When I was a reporter, I personally solicited and received confidential or classified information, hundreds of times. Like Assange, I was actively "complicit" in gathering secret records from government employees. Like Assange, my receipt of this information was "knowing and intentional." The same is true of every good journalist, especially investigative reporters who cover national security.

If the law prohibited active newsgathering, little unauthorized information would become public—or jail cells would overflow with journalists who refused to abide by such suppression. The effect would be to criminalize newsgathering, which would be tantamount to criminalizing journalism itself.

3. Political Motivations and Secrecy of Assange Prosecution

The government insists that the Trump administration's prosecution of Assange is not politically motivated. It dismisses my contrary conclusion—and that of other expert witnesses—by saying that we "primarily rely on a select number of news articles…and the hearsay within them."

Indeed, my declaration relied on news accounts that the Obama administration decided not to prosecute Assange because of concerns that doing so would violate the First Amendment.[2] In

[1] Gordon D. Kromberg, "Declaration in Support of Assange Extradition," *US v. Assange* (Jan. 17, 2020), ¶18-19, pp. 8-9.

[2] Mark Feldstein, "Declaration," *US v. Assange*, p. 18.

particular, I cited comments that Matthew Miller, the former spokesman for the Obama Justice Department, made in an interview with the *Washington Post*: "The problem the department has always had in investigating Julian Assange is there is no way to prosecute him for publishing information without the same theory being applied to journalists. And if you're not going to prosecute journalists for publishing classified information, which the department is not, then there is no way to prosecute Assange." The *Post* reported that prosecutors called this the "*New York Times* problem"—that if they indicted Assange for publishing the documents leaked by Chelsea Manning, then they would also have to also indict the *New York Times* for doing the same.[3]

I also noted that the Trump administration decide to reject this interpretation and cited a *New York Times* report that its new appointees running the Justice Department began "pressuring" prosecutors to indict Assange, although two career prosecutors argued against doing so on First Amendment grounds. I also cited the article's finding that "the Justice Department did not have significant evidence or facts beyond what the Obama-era officials had when they reviewed the case"[4] and concluded that the decision to indict Assange was not an evidentiary decision but a political one.[5]

As the government knows, internal prosecutorial deliberations are not a matter of public record. White House and Justice Department documents that would shed further light on the political dimensions of the case—emails, internal memos, grand jury transcripts, and other records—are kept secret by the government. Thus, the reporting I cited by the *New York Times* and *Washington Post* is to date the only public source of information about the behind-the-scenes maneuvering to prosecute Assange.

Like so much other questionable conduct by the Trump administration, revelations about the unorthodox nature of this prosecution came to light only because of the vigilance of a free and vigorous press.

Dated the 5th day of July, 2020.

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[3] Sari Horowitz, "Julian Assange unlikely to face US charges over publishing classified documents," *Washington Post* (Nov. 25, 2013)

[4] Devlin Barrett, Matt Zapotosky and Rachel Weiner, "Some federal prosecutors disagreed with decision to charge Assange under Espionage Act," *Washington Post* (May 24, 2019).

[5] Feldstein, *op. cit*., p. 25.

Signed