The Assange Extradition Decision: No Time To Celebrate

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On January 4, Westminster Magistrates' District Court Judge Vanessa Baraitser finally handed down her long-awaited decision regarding the American government's extradition request on radical transparency activist Julian Assange. In short, she denied the U.S. government's extradition request—not because she bought Assange's arguments that he's the victim of a political prosecution, but because she doesn't believe Assange would survive long in an American prison. There's a lot to digest in the 132-page decision, but for now I'm going to focus on what I believe are the key takeaways.

One of the key pillars of Assange's defense was the assertion that his actions and those of Wikileaks constituted the practice of journalism and publishing, and that any extradition or related prosecution for publishing leaked or electronically purloined data would constitute prosecution for "political offenses" under Article 10 of the European Convention on Human Rights (EHCR), which protects freedom of expression. Judge Baraitser rejected that argument, noting that extradition treaties are "an agreement between governments which reflects their relationship for the purposes of extradition. It is made between sovereign states on the proviso that it is not governed by the domestic law of either state." (p. 21) Baraitser then went on to note that since the U.K. parliament removed the "political offense" exception language from the 2003 Extradition Act indicated "…a deliberate intention by Parliament to remove this protection" (p. 22) and that "In light of this, there is no need for me to determine whether the allegations in this request amount to political offences.'" (p. 24)

Judge Baraitser also gave credence to U.S. government claims vis a vis the Computer Fraud and Abuse Act (CFAA) that Wikileaks (and specifically Assange's) computer hacking assistance to then-U.S. Army soldier Chelsea Manning went well beyond any established journalistic standard, and certainly beyond established EU and UK case law.

In her ruling, Baraitser specifically cited the European Court of Human Rights (ECHR) 2016 decision in *Brambilla and others v. Italy* "…in which three journalists were convicted of offences after intercepting carabinieri radio communications in order to obtain information on crime scenes for the purposes of reporting." (p. 41) Baraitser further noted that "Had Mr.

Assange decided not to assist Ms. Manning to take the information in the various ways described above, and merely received it from her, then the Article 10 considerations would be different." (p. 42)

In other words, if Assange/Wikileaks had simply taken data given to them, and not (as alleged) provided direct technical hacking assistance, the U.S. government request might well have been dismissed outright.

What Baraitser failed to address was a core allegation that Assange, Manning and others (including this author) have made that national governments routinely and deliberately misuse the classification system to conceal their own crimes. In the case of Manning and Wikileaks, it was exposing potential U.S. Army war crimes in Iraq.

I discussed this hypocritical legal and moral double standard in 2019 in a previous piece, from which I'll quote again:

> *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.*

To be clear, I've never approved of Wikileaks' release of the names of individuals who've provided information to the U.S. government under an expectation of confidentiality, particularly those who've provided information on known or suspected terrorists or foreign spies trying to steal legitimate U.S. government secrets. But right now, about the only way the public can reliably, if infrequently, learn about secret wrongdoing by their own governments is through whistleblowers exfiltrating incriminating data out of government systems and into the hands of journalists. Baraitser completely elided that issue in her ruling, much to the satisfaction of U.S. government officials I'm sure.

Assange's only reprieve came through Baraitser's conclusion, based on expert witness testimony in the case, that were he extradited to the U.S. Assange might well face conditions that would drive him to kill himself. "I am satisfied that, if he is subjected to the extreme conditions of SAMs, Mr. Assange's mental health will deteriorate to the point where he will commit suicide with the 'single minded determination' described by Dr. Deeley," Baraister wrote. (p. 116).

The acronym in question stands for "special administrative measures"—a Department of Justice euphemism for solitary confinement and other measures designed to maximize the isolation of an inmate or someone awaiting trial. It's normally reserved for only the most violent of offenders, although Baraitser noted that "It is an agreed fact that there are currently nine inmates subject to a SAMs for espionage…" (p. 96) and that the U.S. government had given no guarantee that Assange would not be subjected to SAMs.

American authorities are expected to appeal Baraister's decision, and although Assange has a bail hearing on Wednesday it's unlikely he'll be freed at this point. If U.S. government authorities pledge not to subject Assange to solitary confinement or other isolating measures in their appeal, it's possible Assange could still be extradited to the United States to face trial.

What I fear here is that the CFAA argument being put forward by DoJ lawyers is a legal Trojan Horse. The password cracking and other hacking techniques they cite as violations of law are not the only kinds of technology they want to connect to the crime.

Count 18 of the DoJ indictment against Assange focuses on alleged CFAA violations by Assange (via Manning) 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."

Also getting three mentions in the indictment is Assange and Manning using "a cloud drop box" for the exchange of the exfiltrated documents. Thus, DoJ lawyers are claiming that the employment of a "cloud storage" capability was a key feature of the crime, *rendering the entire chain of digital traffic between Wikileaks and Manning illegal*.

The Freedom of the Press Foundation's encrypted SecureDrop system for receiving documents from sources is used by dozens, if not hundreds, of media outlets globally. It's a portal for whistleblowers seeking to out illegal or questionable government conduct to get relevant material into the hands of journalists. A DoJ court victory on Count 18 of the Assange indictment would put every news organization in the world utilizing SecureDrop or a similar system at risk of a future CFAA prosecution, something that would effectively nullify the Supreme Court decision in the *Pentagon Papers* case—all while deliberately ignoring an actual crime in this case: the deliberate misuse of the U.S. government classification system to conceal war crimes. You don't have to be an Assange groupie (which I'm definitely not) to understand the absolutely huge First Amendment threat this prosecution represents.

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