

Unequal Justice: Five Reasons Biden Should Drop the Extradition of Julian Assange

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The British High Court of Justice in London has given WikiLeaks founder Julian Assange a significant reprieve in his fight against extradition to the United States on charges of espionage. In a sixty-six-page judgment issued on March 26, a two-judge panel stopped short of granting Assange outright permission to appeal the extradition order signed in 2022 by the British Home Secretary. But the panel held that permission will be granted unless the U.S. provides assurances that if Assange is sent to the United States, he will be “permitted to rely on the First Amendment, that [he] . . . is not prejudiced at trial (including sentence) by reason of his nationality, that he is afforded the same First Amendment protections as a United States citizen, and that the death penalty is not imposed.”

In the British legal system, such appeals are discretionary, and require the approval of the High Court to move forward. The panel gave the United States until April 16 to lodge its assurances.

Given the U.S. Supreme Court’s First Amendment case law, it is doubtful the Biden Administration’s Department of Justice (DOJ) will be able to meet the panel’s conditions. While the DOJ is not seeking the death penalty (though it is technically available under the Espionage Act of 1917) and can readily claim that Assange will be afforded all the due process trial protections given to American citizens, it will not be able to satisfy the panel’s First Amendment concerns. Under established Supreme Court precedent, the First Amendment does not apply to foreign citizens outside the United States and its territories. The DOJ is bound by that precedent.

This means that Assange’s appeal, which could take a year or more, should move forward, causing the Biden Administration additional embarrassment at a time when its international human rights record has been called into question over its support of the Israeli invasion of Gaza.

The better course of action, both for Biden and Assange, would be to negotiate a mutually acceptable plea bargain to drop the extradition demand. Fortunately, a resolution may indeed be in the offing.

According to The Wall Street Journal, the DOJ is considering a plea deal for Assange. Under the terms of the arrangement, the U.S. would drop the eighteen Espionage Act and conspiracy charges set forth in the second superseding indictment lodged against Assange in June 2020. In return, Assange would plead guilty to the misdemeanor offense of mishandling classified documents related to the Afghanistan and Iraq wars. Assange would be permitted to plead remotely from prison in London. With the plea in hand, the DOJ would withdraw its extradition demand, and Assange would walk free.

Although Assange’s lawyers say they have not yet been approached with a deal, both parties to the longstanding international legal battle would be well advised to negotiate.

Born in Australia and trained as a computer programmer, Assange created the WikiLeaks website in 2006 to expose human rights abuses committed by governments around the world through the publication of official documents obtained from anonymous sources. His efforts made him a hero in some circles of the international left, but he also incurred the wrath of the United States for releasing, in 2010, war logs and other materials on the wars in Afghanistan and Iraq, and later for publishing emails taken from the Democratic National Committee during the 2016 presidential election campaign. The United States initiated formal extradition proceedings against him in 2019. Assange has been resisting extradition to the United States in British courts ever since.

For Assange, the benefits of a plea bargain with the Biden Administration are obvious. After fourteen years of confinement, including seven years as a political asylee at the Ecuadorian embassy in London, he would be able to resume his work. Yes, he would have to admit guilt, but he would likely lose no political or moral standing with his supporters. No one could credibly accuse him of copping out or capitulating.

The Biden Administration also has compelling reasons to put Assange in the rearview mirror. In fact, it has at least five good reasons:

1. Avoiding a First Amendment Catastrophe

Even if the First Amendment does not apply to Assange, the case carries profound First Amendment implications. Last April, seven progressive House Democrats sent a letter to Attorney General Merrick Garland, urging him to drop the charges against Assange and warning:

“The prosecution of Mr. Assange marks the first time in U.S. history that a publisher of truthful information has been indicted under the Espionage Act. The prosecution . . . if successful, not only sets a legal precedent whereby journalists or publishers can be prosecuted, but a political one as well. In the future The New York Times or The Washington Post could be prosecuted when they publish important stories based on classified information. Or, just as dangerous for democracy, they may refrain from publishing such stories for fear of prosecution.”

It isn't just American news outlets and journalists who would be harmed by a successful prosecution of Assange. The American public would also be damaged. As the Supreme Court has long recognized, the First Amendment doesn't just protect the right to speak and publish. It also safeguards the right to receive information and ideas and the right to read. The prosecution of Assange imperils both aspects of our First Amendment freedoms. Seen in this light, the case against Assange portends a First Amendment catastrophe the Biden Administration should want to avoid.

2. The Case is Weak

From a purely evidentiary standpoint, the case against Assange is weak. The superseding indictment alleges that starting in 2009, Assange conspired with Chelsea Manning to hack military computers to facilitate Manning's acquisition and transmission of classified information. However, as The Intercept's Micah Lee has reported, expert testimony at Manning's 2013 court martial trial and Assange's 2020 extradition hearing raised serious doubts about the existence of any conspiracy.

Manning, according to Lee, “had authorized access to, and the ability to exfiltrate, all of the documents that she was accused of leaking—without receiving any technical help from WikiLeaks.” Far from being airtight, Lee argues, “the government's . . . case [against Assange] appears to be rooted entirely in a few offhand remarks in what it says are chat logs between Manning and Assange discussing password cracking—a topic that other soldiers at Forward Operating Base Hammer in Iraq, where Manning was stationed, were also actively interested in.” In Lee's view, Assange was acting as a journalist and publisher, not a hacker or a perpetrator of espionage.

Manning was convicted for her actions and was sentenced to thirty-five years in military prison. In January 2017, President Obama commuted her sentence to seven years retroactive to her arrest in 2010. Nonetheless, she remains a convicted felon. Relying on her as a star witness in the case against Assange would be a risky move. The only thing worse for the Biden Administration than extraditing Assange and triggering a First Amendment crisis would be an embarrassing loss in a high-profile trial.

3. Dropping the Espionage Charges Would be Consistent with Obama-era Policy

Assange was indicted by Donald Trump's DOJ, and they initiated the extradition demand.

The Obama Administration declined to indict Assange because of what was described at the time as the “New York Times problem”—that if Assange were charged, The New York Times, The Washington Post, and The Guardian, among others, would also have to be prosecuted for publishing classified material.

As Obama's Vice President, Biden stood behind that policy. Abandoning the policy now is inexcusable.

4. Assange Deserves Credit for Time Served

Any deal with Assange will subject Biden to criticism from the right for being soft on crime and letting one

of the country's arch-enemies off the hook. In reality, nothing could be further from the truth, and any such allegations can be easily rebutted.

Assange has been held in Belmarsh Prison, a maximum security facility in southeast London, since April 2019. He is confined to his cell with only one hour per day of supervised recreation.

Plainly, Assange has been punished enough. He should be given credit for time served and set free.

5. A Political Boost

As the election nears, the coalition that put Biden in the White House is fraying. Young people, progressives, and Muslim and Arab Americans are deserting him over his unconditional support for Israel's invasion of Gaza. Many have voted "uncommitted" in the primaries in protest. Negotiating a plea with Assange won't bring all of them back, but it could entice just enough to support him in November and perhaps give him a decisive boost. Resolving the case would also enhance the administration's tarnished human rights image.

In the end, whether the decision to negotiate is driven by politics, morality, or law, a deal to release Assange is the right move to make. And now is the right time to make it.

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