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Identifying Imperial Venality: Day One of Julian Assange's High Court Appeal

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On February 20, it was clear that things were not going to be made easy for Julian Assange, the WikiLeaks founder who infuriated the US imperium, the national security establishment, and a stable of journalists upset that he had cut their ill-tended lawns. He was too ill to attend what may well be the final appeal against his extradition from the United Kingdom to the United States. Were he to be sent to the US, he faces a possible sentence amounting to 175 years arising from 18 venally cobbled charges, 17 spliced from that archaic horror, the Espionage Act of 1917.

The appeal to the High Court, comprising Justice Jeremy Johnson and Dame Victoria Sharp, challenges the extradition order by the Home Secretary and the conclusions of District Judge Vanessa Baraitser who, despite ordering his release on risks posed to him on mental health grounds, fundamentally agreed with the prosecution. He was, Varaitser scorned, not a true journalist. (Absurdly, it would seem for the judge, journalists never publish leaked information.) He had exposed the identities of informants. He had engaged in attempts to hack computer systems. In June 2023, High Court justice, Jonathan Swift, thought it inappropriate to rehear the substantive arguments of the trial case made by defence.

Assange's attorneys had informed the court that he simply could not attend in person, though it would hardly have mattered. His absence from the courtroom was decorous in its own way; he could avoid being displayed like a caged specimen reviled for his publishing feats. The proceedings would be conducted in the manner of appropriate panto, with dress and procedure to boot.

Unfortunately, as things chugged along, the two judges were seemingly ill versed in the field they were adjudicating. Their ignorance was telling on, for instance, the views of Mike Pompeo, whose bilious reaction to WikiLeaks when director of the Central Intelligence Agency involved rejecting the protections of the First Amendment of the US Constitution to

non-US citizens. (That view is also held by the US prosecutors.) Such a perspective, argued Assange's legal team, was a clear violation of Article 10 of the European Convention of Human Rights.

They were also surprised to be informed that further charges could be added to the indictment on his arrival to the United States, including those carrying the death penalty. To this could be added other enlightening surprises for the judicial bench: the fact that rules of admissibility might be altered to consider material illegally obtained, for instance, through surveillance; that Assange might also be sentenced for an offence he was never actually tried for.

Examples of espionage case law were submitted as precedents to buttress the defence, with Edward Fitzgerald KC calling espionage a "pure political offence" which barred extradition in treaties Britain had signed with 158 nation states.

The case of David Shayler, who had been in the employ of the British domestic intelligence service MI5, saw the former employee prosecuted for passing classified documents to *The Mail on Sunday* in 1997 under the Official Secrets Act. These included the names of various agents, that the agency kept dossiers on various UK politicians, including Labour ministers, and that the British foreign intelligence service, MI6, had conceived of a plan to assassinate Libya's Colonel Muammar Gaddafi. When the UK made its extradition request to the French authorities, they received a clear answer from the Cour d'Appel: the offence charged was found to be political in nature.

Mark Summers KC also emphasised the point that the "prosecution was motivated to punish and inhibit the exposure of American state-level crimes", ample evidence of which was adduced during the extradition trial, yet ignored by both Baraitser and Swift. Baraitser brazenly ignored evidence of discussions by US intelligence officials about a plot to kill or abduct Assange.

For Summers, chronology was telling: the initial absence of any prosecution effort by the Obama administration, despite empanelling a grand jury to investigate WikiLeaks; the announcement by the International Criminal Court that it would be investigating potential crimes committed by US combatants in Afghanistan in 2016, thereby lending gravity to Assange's disclosures; and the desire to kill or seek the publisher's extradition after the release of the Vault 7 files detailing various espionage tools of the CIA.

With Pompeo's apoplectic declaration that WikiLeaks was a hostile, non-state intelligence service, the avenue was open for a covert targeting of Assange in the Ecuadorian embassy in London. The duly hatched rendition plan led to the prosecution, which proved "selective" in avoiding, for instance, the targeting of newspaper outlets such as *Freitag*, or the website Cryptome. In Summer's view, "This is not a government acting on good faith pursuing a legal path."

When it came to discussing the leaks, the judges revealed a deep-welled obliviousness about what Assange and WikiLeaks had actually done in releasing the US State Department cables. For one thing, the old nonsense that the unredacted, or poorly redacted material had resulted in damage was skirted over, not to mention the fact that Assange had himself insisted on a firm redaction policy. No inquiry has ever shown proof that harm came to any US informant, a central contention of the US Department of Justice. Nor was it evident to

the judges that the publication of the cables had first taken place in Cryptome, once it was discovered that reporters from *The Guardian* had injudiciously revealed the password to the unredacted files in their publication.

Two other points also emerged in the defence submission: the whistleblower angle, and that of foreseeability. Consider, Summers argued hypothetically, the situation where Chelsea Manning, whose invaluable disclosures WikiLeaks published, had been considered by the European Court of Human Rights. The European Union's whistleblower regime, he contended, would have considered the effect of harm done by violating an undertaking of confidentiality with the exposure of abuses of state power. Manning would have likely escaped conviction, while Assange, having not even signed any confidentiality agreements, would have had even better prospects for acquittal.

The issue of foreseeability, outlined in Article 7 of the ECHR, arose because Assange, his team further contends, could not have known that publishing the cables would have triggered a lawsuit under the Espionage Act. That said, a grand jury had refused to indict the *Chicago Times* in 1942 for publishing an article citing US naval knowledge of Japanese plans to attack Midway Island. Then came the Pentagon Papers case in 1971. While Summers correctly notes that, "*The New York Times*was never prosecuted," this was not for want for trying: a grand jury was empanelled with the purpose of indicting the *Times*reporter Neil Sheehan for his role in receiving classified government material. Once revelations of government tapping of whistleblower Daniel Ellsberg was revealed, the case collapsed. All that said, Article 7 could provide a further ground for barring extradition.

February 21 gave lawyers for the US the chance to reiterate the various, deeply flawed assertions about Assange's publication activities connected with Cablegate (the "exposing informants" argument), his supposedly non-journalistic activities and the integrity of diplomatic assurances about his welfare were he to be extradited. The stage for the obscene was duly set.

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