

# PROSECUTORIAL DISCRETION, EXTRADITION, AND NATIONAL SECURITY: READING BETWEEN THE LINES OF THE ASSANGE INDICTMENT

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## INTRODUCTION

Julian Assange: the name rings bells worldwide. Some see him as a crusader for truth and government transparency<sup>1</sup>; others see him as a serious national security risk.<sup>2</sup> The stance of the United States government has historically been the latter.<sup>3</sup>

Federal prosecutors recently requested Assange's extradition from the United Kingdom in connection with a 2018 indictment.<sup>4</sup> However, their case has very little to do with the full range of national security concerns that the government has attributed to Assange over the years. Prosecutors have curiously filed a single-count indictment that charges Assange with conspiracy to hack a Department of Defense password.<sup>5</sup> This lean indictment causes pause. Its narrow focus can only be described as dissonant when measured against Assange's adversarial history with the government and the purported threats to national security he poses.

In this piece, I posit that prosecutorial discretion has produced that "dissonant" indictment purposefully. Assange's indictment has been crafted for the purpose of ensuring his successful extradition. That effort has translated into prosecutorial restraint. Once and if he reaches

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<sup>1</sup> See, e.g., Talia Kaplan, *Judge Andrew Napolitano: 'Julian Assange is a hero'*, FOX NEWS (Apr. 11, 2019), <https://www.foxnews.com/world/judge-andrew-napolitano-julian-assange-hero>.

<sup>2</sup> See, e.g., Joe Sterling, *Will the U.S. prosecute Julian Assange?*, CNN (Dec. 1, 2010, 3:25 P.M.), <http://www.cnn.com/2010/WORLD/europe/12/01/sweden.interpol.assange/index.html>; *US says Wikileaks could 'threaten national security'*, BBC NEWS (July 26, 2010), <https://www.bbc.com/news/world-us-canada-10758578>.

<sup>3</sup> See, e.g., Julian E. Barnes et al., *How the Trump Administration Stepped Up Pursuit of WikiLeaks's Assange*, N.Y. TIMES (Nov. 16, 2018) ("National security officials have long viewed Mr. Assange with hostility and considered him a threat."); *CIA director calls WikiLeaks a threat to US national security*, CNBC (Apr. 14, 2017), <https://www.cnbc.com/2017/04/14/cia-director-takes-negative-tone-on-group-trump-has-praised.html>; Sterling *supra* note 2 ("Secretary of State Hillary Clinton has called WikiLeaks' disclosure of the documents an attack on America's foreign policy and an attack on the international community.").

<sup>4</sup> See Indictment, United States v. Assange, No. 1:18CR00111 (E.D. Va. Mar. 6, 2018), ECF No. 8 [hereinafter *Assange Indictment*].

<sup>5</sup> See *id.*

American soil, prosecutors may have the option of abandoning that strategic restraint and presenting additional charges that reflect the true weight of the national security threat he allegedly poses.

## I. THE MATTERS OF NATIONAL SECURITY AT PLAY IN THE ASSANGE CASE

Assange is the director of WikiLeaks, an entity described as “a whistleblowing platform...established to obtain and disseminate classified documents and data sets from anonymous sources and leakers.”<sup>6</sup> At its genesis, WikiLeaks touted itself as “an intelligence agency for the people.”<sup>7</sup> Since its creation, the entity has been at the center of a number of political scandals; it has released hundreds of thousands of classified records, including military documents and diplomatic cables.<sup>8</sup>

For example, Assange’s “intelligence agency for the people” made its first mark in December 2007 when it published the U.S. Army manual governing prisoner treatment in Guantanamo Bay.<sup>9</sup> In 2010, WikiLeaks released a military video showing U.S. armed forces firing at and killing civilians in Iraq, which led to the infamous Chelsea Manning scandal.<sup>10</sup> Assange’s connection with Manning is what prosecutors have chosen to focus on in their current case against him. On March 6, 2018 the U.S. government entered a sealed indictment against Assange for conspiring with Manning to hack a Department of Defense computer password in March 2010.<sup>11</sup>

That indictment, though, did not immediately lead to his arrest. Up until recently, Assange had been living as a political asylee in the Ecuador’s embassy in London on account of his possible prosecution in the United States.<sup>12</sup> Assange’s political asylee status effectively shielded him from the consequences of U.S. criminal charges while WikiLeaks continued to publish state documents without authorization.<sup>13</sup>

However, Assange’s circumstances changed on April 11, 2019 when the Ecuadorian ambassador to the United Kingdom advised him that his asylee status had been revoked. British law enforcement officers arrested

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<sup>6</sup> Francis Whittaker, *What is WikiLeaks? Everything you need to know*, NBC NEWS (Apr. 30, 2018), <https://www.nbcnews.com/storyline/smart-facts/what-wikileaks-everything-you-need-know-n869556>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *WikiLeaks Fast Facts*, CNN (last updated Apr. 11, 2019, 5:17 P.M.), <https://www.cnn.com/2013/06/03/world/wikileaks-fast-facts/index.html> [hereinafter *WikiLeaks Fast Facts*].

<sup>10</sup> See Laurie Ure, *Soldier accused of leaking classified info*, CNN (June 7, 2010), <http://www.cnn.com/2010/US/06/07/soldier.leak.accusation/index.html>.

<sup>11</sup> See *Assange Indictment*, *supra* note 3, at ¶ 15(B).

<sup>12</sup> See *WikiLeaks Fast Facts*, *supra* note 8.

<sup>13</sup> See *id.*

Assange at the Ecuadorian Embassy in London that same day. At the same time, the U.S. government made Assange's 2018 indictment public.<sup>14</sup>

## II. THE INDICTMENT AT FIRST GLANCE

Assange's indictment causes pause – not because of what it charges, but because of what it leaves out. Prosecutors chose to indict Assange on a sole count of conspiracy to access a protected computer<sup>15</sup> despite Assange's years of accessing and releasing government documents without authorization. Some in the media interpreted the sole count of conspiracy to be a strategic choice by prosecutors to avoid a free speech battle in connection with Assange's case.<sup>16</sup> Although that may be true, there are certainly more legal complexities at play.

Assange's indictment was carefully crafted to account for the legal and political complexities that it necessarily implicates. To hold Assange accountable for his acts, the prosecutors in his case must first successfully extradite him from the United Kingdom. By consequence, the treaty governing the U.S.–U.K. extradition process likely played a large role in how Assange's prosecutors chose to proceed against him.

For example: consider the offense prosecutors charged. Unlike other extradition treaties,<sup>17</sup> the U.S.–U.K. extradition treaty<sup>18</sup> does not establish a list of covered offensive conduct. Instead, Article Two of that instrument generously provides for extradition whenever the criminal conduct charged is: prosecutable in both jurisdictions, and punishable by at least one year of imprisonment. Thus, at the very minimum, prosecutors likely had to find parallels of the Computer Fraud and Abuse Act, which Assange is accused of conspiring to violate,<sup>19</sup> in U.K. law.

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<sup>14</sup> See Jeanette Torres, *Feds unseal charges against WikiLeaks founder Julian Assange hours after arrest in London*, ABC NEWS RADIO (Apr. 11, 2019, 11:15 A.M.), <http://abcnewsradioonline.com/world-news/feds-unseal-charges-against-wikileaks-founder-julian-assange.html>.

<sup>15</sup> Assange Indictment, *supra* note 3, at ¶ 16 (“The primary purpose of the conspiracy was to facilitate Manning’s acquisition and transmission of classified information related to the national defense of the United States so that WikiLeaks could publicly disseminate the information on its website.”).

<sup>16</sup> See, e.g., Steve Chapman, *Why the Julian Assange indictment is a victory for press freedom*, CHICAGO TRIBUNE (Apr. 11, 2019, 4:05 P.M.), <https://www.chicagotribune.com/news/opinion/chapman/ct-perspec-chapman-assange-wikileaks-indicted-20190411-story.html>.

<sup>17</sup> Cf. Treaty on extradition between the United States and Canada, Apr. 12, 1971, 1051 U.N.T.S. 57 (including a schedule of extraditable offenses).

<sup>18</sup> Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America, Mar. 3, 2003, 2490 U.N.T.S. 249 [hereinafter U.S.–U.K. extradition treaty].

<sup>19</sup> See Assange Indictment, *supra* note 3, at ¶ 15(B) (charging violations of 18 U.S.C. §§ 1030(a)(1),(a)(2),(c)(2)(B)(ii)).

### III. PROSECUTORIAL DISCRETION AT WORK

Additionally, prosecutors knew that they would likely have to defend that any charges against Assange were not “political offenses.” The extradition treaty prohibits extradition for “political offenses” without defining what that term entails. The treaty also separately prohibits politically-motivated extradition requests.<sup>20</sup>

These points further help explain the tenuous relationship between the indicted charge and the national security concern Assange allegedly poses. Assange’s prosecutors seem to have placed their bets on arguing that conspiring to hack a government computer is not a “political offense” and that their extradition request is not “politically motivated.” Admittedly, that endeavor seems challenging given Assange’s history with the American government.

However, the very fact that there is only one count of conspiracy may favor the government. In fact, the lean indictment could be used to indicate that the government is not seeking total retribution for all of the ways in which it believes Assange has affronted it. Rather, the government could argue, it is veritably seeking to hold Assange accountable for a particular wrongdoing.

Nevertheless, prosecutors have already indicated their intention of adding charges to the indictment.<sup>21</sup> They have not indicated their timing for doing so.<sup>22</sup> If the prosecutors intend on waiting until Assange is on American soil to add new charges, their success will again partly depend on their discretion – this time, in selecting a venue.

In foreign relations law, the rule of specialty establishes that a requesting state may not try an extraditee “for an offense other than one for which he was extradited.”<sup>23</sup> The U.S.–U.K. treaty directly incorporates that rule,<sup>24</sup> and in fact, U.K. law requires the Secretary of State to prevent an extradition to certain countries where no “specialty

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<sup>20</sup> See U.S.–U.K. extradition treaty, *supra* note 16, at arts. 4(1),(3) (prohibiting extradition for “political offenses” and “politically motivated” extradition requests). Case law in the United Kingdom seems to interpret “[p]olitical” as descriptive of an object to be achieved must...be confined to the object of overthrowing or changing the government of a state or inducing it to change its policy or escaping from its territory the better so to do.” See *Tsai v. Governor of Pentonville Prison* [1973] AC 931 (HL) 938 (quoting Viscount Radcliffe’s opinion below).

<sup>21</sup> See Katelyn Polantz et al., *Julian Assange in conspiracy to commit computer intrusion in 2010*, CNN (Apr. 11, 2019, 11:01 A.M.), <https://www.cnn.com/2019/04/11/politics/julian-assange-us-charges/index.html> (“Justice Department officials expect to bring additional charges Assange, a US official briefed on the matter said. It is unclear when such charges would be brought.”).

<sup>22</sup> See *id.*

<sup>23</sup> Restatement (Third) of Foreign Relations Law § 477 (1987).

<sup>24</sup> U.S.–U.K. extradition treaty, *supra* note 16, at art. 18.

arrangement” is present.<sup>25</sup> However, there is a circuit split concerning whether a defendant has standing to raise a violation of the rule of specialty before American courts.<sup>26</sup> In cases where the extraditing state has not objected to a purported violation of the rule, the Second<sup>27</sup> and Fifth<sup>28</sup> Circuits have denied defendants’ standing to challenge alleged violations of the same whereas the Eighth<sup>29</sup> and Tenth<sup>30</sup> have not. Thus, should the U.K. government not object to additional charges, the proceedings’ venue will determine whether prosecutors may add to Assange’s indictment once and if he is brought onto American soil.

Assange’s indictment was filed in the Eastern District of Virginia. The question of individuals’ standing under the rule of specialty remains unsettled in the Fourth Circuit<sup>31</sup> but at least one district court therein has ruled against individuals’ standing to complain of its violation.<sup>32</sup> Additionally, the United Kingdom has the right to waive its objections under the rule.<sup>33</sup> Consequently, prosecutors may have some leeway in adding charges to Assange’s indictment once and if he is on American soil.

## CONCLUSION

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<sup>25</sup> Extradition Act 2003, c. 41, § 95 (U.K.). However, the view in the U.K. is that a treaty provision is sufficient to meet that “specialty arrangement” requirement. *See* *Welsh v. Secretary of State for Home Dep’t* [2007] 1 W.L.R. 1281, at ¶ 28 (noting that the United States had met the “specialty arrangement” requirement “through treaty.”).

<sup>26</sup> *See generally Application of Doctrine of Specialty to federal criminal prosecution of accused extradited from foreign country*, 112 A.L.R. Fed. 473 (analyzing differences in courts’ application of rule of specialty).

<sup>27</sup> *See* *United States v. Barinas*, 865 F.3d 99 (2d Cir. 2017) (denying a defendant standing to challenge extradition based on the rule of specialty); *United States v. Suarez* 791 F.3d 363 (2d Cir. 2015) (same).

<sup>28</sup> *See* *United States v. Kaufman* 874 F.2d 242 (5th Cir. 1988) (denying an application for a rehearing *en banc* where the State Department filed a submission indicating that “only an offended nation can complain about a purported violation of an extradition treaty.”).

<sup>29</sup> *See* *United States v. Thirion*, 813 F.2d 146 (8th Cir. 1987) (recognizing a defendant’s standing to raise a challenge to his extradition based on the violation of the rule of specialty).

<sup>30</sup> *See* *United States v. Levy*, 905 F.2d 326 (10th Cir. 1990) (finding an extraditee’s right to challenge his extradition based on the rule of specialty).

<sup>31</sup> *See* *United States v. Day*, 700 F.3d 713, 721 (4th Cir. 2012) (“As we have noted before, the circuits are split on the question of whether an individual defendant has standing to raise a specialty violation, and the Fourth Circuit has yet to rule on the matter.”).

<sup>32</sup> *See* *Abel v. Shearing*, No. CIV.A. RWT-11-3366, 2014 WL 2616973, at \*5 (D. Md. June 11, 2014) (finding “no individual rights for criminal defendants” under the doctrine of specialty) (citing *United States v. Al-Hamdi*, 356 F.3d 564, 574 n.13 (4th Cir. 2004)).

<sup>33</sup> *See, e.g.,* *United States Attorney Manual* § 9-15.500 (“Federal prosecutors who wish to proceed against an extradited person on charges other than those for which extradition was granted must contact the Office of International Affairs (OIA) for guidance regarding the availability of a waiver of the Rule by the sending State.”).

Although slim, the Assange indictment proves to be a quite thoroughly planned piece of work. Prosecutorial discretion, likely informed by knowledge of the legal and political obstacles that lie ahead, has produced a single-count indictment that seems off-balance with Assange's years of publicly disseminating hundreds of thousands of classified documents. The prosecutors in Assange's case seem to have chosen their battles strategically, likely in an attempt to simply secure his presence before an American court. Once and if Assange is present on American soil, prosecutors may have some leeway in abandoning their reticent approach and presenting additional charges against him. Until then, the prosecutors in Assange's case will probably continue to tread lightly.