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How Britain Would Be Obligated to Free Julian Assange, While Biden ‘Considers’ Ending the Case

UPDATED: The High Court ruled the U.S. must assure free speech and no death penalty for Julian Assange or the court might have to free the publisher who marked five years in prison today, reports Joe Lauria.



Assange supporters in October 2022 circle the Justice Department Building in Washington. (Joe Lauria)

President Joe Biden's remark on Wednesday that his administration is considering ending the prosecution of *WikiLeaks* publisher Julian Assange appears based on a calculation that the U.S. could lose in court on Assange's appeal against Britain's order to extradite him.

The High Court of England and Wales in its ruling last month has given the United States until Tuesday to assure Assange will not face the death penalty or the court would have no choice but to follow the law and free Assange.

The two-judge panel also ruled the U.S. must provide a First Amendment guarantee equivalent to Article 10 of the European Convention on Human Rights or it would be "arguable" that Assange's extradition is "incompatible" with the Convention, which Britain is legally bound to follow.

Because the U.S. appears unable to legally provide the free speech assurance, its prospects of losing an appeal to Assange may have led Biden to say he's "considering" ending the prosecution.

According to the U.K. Crown Prosecution Service, the violation of the free speech and death penalty provisions would require Assange be set free:

"In all extradition cases, the judge must consider whether extradition would be compatible with the requested person's human rights. If the judge finds that extradition would not be compatible with the requested person's human rights, that person's extradition cannot be ordered, and the judge must discharge them."

Those human rights are laid out in the European Convention (and in the 1998 British Human Rights Act) and include freedom from capital punishment and freedom of speech.

On the death penalty, the High Court said bluntly in its ruling that if extradition "would be contrary to Convention rights under the Human Rights Act 1998" article 3 [against 'torture, ... inhuman or degrading treatment' or punishment], "then extradition must be refused."

That language is unequivocal: The U.S. must guarantee there will be no death penalty or Assange will walk out of Belmarsh Prison, where he's been held since April 11, 2019, exactly five years today.

On the right to freedom of speech, the judges said if Assange "is not permitted to rely on the First Amendment, then it is arguable that his extradition would be incompatible with article 10 of the Convention." In that case, the court could arguably be bound to also order Assange be freed.

Despite the CPS saying if denied his human rights, including freedom of expression, "the judge must discharge" Assange, the High Court limited its language to him only having an "arguable" case on speech.

The problem is the U.S. can't legally guarantee Assange's First Amendment rights. And after four years it still hasn't offered an assurance it would not seek the death penalty.

Without both assurances by next Tuesday, the High Court said Assange will be granted a full appeal, which the United States could lose if the court follows the law on freedom of speech.

Thus Assange's extradition is more in doubt than ever before, especially after a reporter asked Biden Wednesday: "Do you have a response to Australia's request that you end Julian Assange's prosecution?"

And he responded: "We are considering it."

Given the U.S. faces a deadline it cannot meet, and after what Biden has said, will the U.S. end Assange's prosecution by Tuesday?

Why the U.S. Can't Guarantee the First Amendment



The U.S. Supreme Court building. (Joe Lauria)

In *USAID v. Alliance for Open Society*, the U.S. Supreme Court ruled in 2020 that non-U.S. citizens outside the U.S. don't possess constitutional rights. Both former C.I.A. Director Mike Pompeo and Gordon Kromberg, Assange's U.S. prosecutor, have said Assange does not have First Amendment protection.

Marjorie Cohn, law professor and former president of the National Lawyers' Guild, told *Consortium News'* webcast **CN Live!** last month, that because of the separation of powers in the United States, the executive branch's Justice Department can't guarantee to the British courts what the U.S. judicial branch decides about the rights of a non-U.S. citizen in court.

“Let’s assume that ... the Biden administration, does give assurances that he would be able to raise the First Amendment and that the [High] Court found that those were significant assurances,” Cohn said. “That really doesn’t mean anything, because one of the things that the British courts don’t understand is the U.S. doctrine of separation of powers.”

“The prosecutors can give all the assurances they want, but the judiciary, another [one] .. of these three branches of government in the U.S., doesn’t have to abide by the executive branch claim or assurance,” Cohn said.

Assange contends that if he’s given First Amendment rights, “the prosecution will be stopped,” Cohn said. “The First Amendment is therefore of central importance to his defense. And so that’s why they are giving Assange another shot at possibly raising this issue on appeal.”

She added that the U.S.-U.K. Extradition Act “bars extradition if an individual might be prejudiced due to his nationality and due to the centrality of the First Amendment to his defense. If he’s not permitted to rely on the First Amendment because of his status as a foreign national, he’ll thereby be prejudiced, potentially very greatly prejudiced by reason of his nationality.”

‘If he has the right to free expression and freedom of speech, then what he did, what he’s accused of doing, would not violate the law,” Cohn said.

So if the U.S. cannot provide the First Amendment assurance its case violates Article 10 of the European Convention and according to the CPS, “extradition cannot be ordered, and the judge must discharge” Assange.

The High Court would only go so far as to say Assange had an “arguable case,” however. But it is a case that the United States could arguably lose.

Why Hasn’t the U.S. Assured No Execution Yet?

On the second day of Assange’s Feb. 20-21 High Court hearing came a startling admission from Ben Watson KC, representing the Home Office. He said in open court that the home secretary signed Assange’s extradition order on June 17, 2022 without ever asking the U.S. for an assurance against the death penalty, a normally routine undertaking in extradition cases in Britain involving states that still have capital punishment.

Watson went further, however. Cohn said he “admitted the facts alleged against Assange could sustain a charge of aiding or abetting treason or espionage, and that if he’s extradited, there’s nothing to prevent a charge of aiding or abetting treason or a charge of espionage from being added to the indictment.”

Craig Murray, former British diplomat, told **CN Live!:**

“I think that it’s actually very surprising that no assurance has been given on the death penalty, because that’s absolutely routine. It happens in loads of extraditions. It’s normal. It’s a template taking 2 minutes to do it. They’re very used to doing that and there’s no reason not to. They actually don’t want to execute Julian. They want to keep him entombed for life in an incarcerated kind of slow death which is a warning to other journalists as opposed to providing a martyr through execution.”

Then why didn’t the Home Office ask for one? And why hasn’t the U.S. offered the “routine” assurance after four years? Were the DOJ and the Home Office hoping they could keep the option of the death penalty open? Why has this only become an issue after four years? It makes little sense.



Royal Courts of Justice where the High Courts sits in London. (Joe Lauria)

The startling admission that the U.S. had given Britain no assurance that it wouldn’t seek the death penalty — and that the Home Office hasn’t even asked for one even though the U.S.-U.K. Extradition Treaty bars extradition without it — led some commentators to believe the U.S. and Britain did it on purpose to get out of this mess.

“It was a rather extraordinary thing for the U.S. .. to say, well, if the Trump administration comes into office, they may seek the death penalty based on new charges,” said U.S. constitutional attorney Bruce Afran on **CN Live!**

“I read it as the Biden administration trying to get a denial of extradition to get off the hook, so to speak. Australia is pushing heavily for Julian to be sent back home. Australia is a critical U.S. defense ally,” Afran said.

He added:

“I’m reading it that that concession was made to set up the basis for a denial by the court in the U.K. because clearly if the death penalty is available, there can be no extradition. And it looks to me that the decision was very predictable once that concession was made. So I see it as the U.S. is trying to kind of get out of a difficult position by making the very concession that would block extradition.”

Murray, however, believes the U.S. will give the capital punishment assurance on Monday or Tuesday. “You absolutely cannot extradite without assurance on the death penalty,” he said. “So they have to get on and they will get it by the deadline. They’ll get right up to the deadline, but they will give it on deadline.”

The controversy over the death penalty led one columnist for *The Boston Globe* to actually complain that a reason the U.S. should not have the death penalty is because it is preventing the extradition of Assange. “No matter what you may think about Assange — that he’s a hero of radical transparency or a treasonous leaker of government secrets — the failure of the US government to promise that he will not face the death penalty is a needless roadblock to resolving his case,” wrote the columnist, adding that capital punishment presented “an obstacle to the government’s interest in bringing Assange here to face trial.”

‘Appear to Be the Same’

So U.S. prosecutors cannot guarantee Assange’s First Amendment rights to satisfy Article 10 of the ECHR because of the U.S. Supreme Court ruling and so far, inexplicably, the U.S. has failed to guarantee he won’t get the death penalty.

On capital punishment the High Court is unequivocal, while on the free speech issue, it is hedging, though both are found in the European Convention and the U.K. Human Rights Act.

“They appear to be the same issue, as both arise under the human rights provision, obviously, though the contours of the free expression issue are more nuanced, and give rise to greater scope for extradition,” said Afran. “Clearly, whether or not the death penalty is available, is a blunt and stark issue, whereas the scope of free speech is always more blurred. But I think the legal standard is the same.”

He said that because the U.S. conceded in court the death penalty is still possible and has still not provided an assurance it is “unlikely the British court could ever extradite under U.K. law. For this reason, a plea agreement would be a fair, and face saving resolution for all sides.”

Cohn added:

“There is a possibility that instead of filing assurances, the Biden administration will opt to avoid the political pitfalls of Assange being extradited to the U.S. before the election and actually offer a plea bargain with credit for time served to end the case.”

A Plea Deal

Biden confirmed the U.S. is considering a way to end the prosecution amid the weaknesses of the U.S. case and the rising political costs. Assange now appears to be holding some valuable cards.

The possibility of freeing Assange on a reduced charge of mishandling official information was raised by Afran last summer in a **CN Live!** webcast.

Assange pleading to a misdemeanor instead of being prosecuted under the Espionage Act appears to have been discussed between U.S. prosecutors and Assange’s lawyers according to a much-scrutinized March 20 article in *The Wall Street Journal*.

Last August, Afran told *Consortium News’ CN Live!* webcast:

The *WSJ* reported:

“The U.S. Justice Department is considering whether to allow Julian Assange to plead guilty to a reduced charge of mishandling classified information. ... If prosecutors allow Assange to plead to a U.S. charge of mishandling classified documents—something his lawyers have floated as a possibility—it would be a misdemeanor offense.”

Afran told *Consortium News* that because Assange was not a U.S. government employee, if he wanted a deal along these lines, he would have to plead guilty to having conspired to mishandle official information with Chelsea Manning, who at the time of her leak was a serving member of the U.S. military. In August Afran called this the “worst case scenario,” in other words the worst thing he could have done, and a guilty plea can not create a precedence for future journalists, Afran said.

(Federal statute §1924 would not apply to Assange because it only targets government employees or officers mishandling official material, Afran said.)

“The conspiracy statute is 15 U.S.C. 371,” he said. “That carries a fine or imprisonment of less than five years. So the government could let him off with a fine, or give him credit for time served [exactly five years] in the U.K. while awaiting extradition.”

Afran added: “Similarly, he could serve one day in Australia, and still satisfy the statute.” The Australian government would have to consent, however, and since it has called for the case to end, it should.

Assange can plea to the misdemeanor without fear of criminalizing the reporter-source relationship as a “conspiracy” because a guilty pleas is not precedential, said Afran.

Only a Remote Plea



Albert V. Bryan United States Courthouse in Alexandria, Virginia, the United States District Court for the Eastern District of Virginia, where Assange would be tried if extradited. (Tim Evanson/Wikimedia Commons)

A likely sticking point to a deal would be if the U.S. insisted that Assange go to the U.S. to enter into the plea. That could well scuttle any negotiated deal, no matter how favorable to Assange.

Gabriel Shipton, Assange's brother, told the *Sydney Morning Herald* last year that Assange going to the U.S. to complete a deal was a "non-starter." He said: "Julian cannot go to the US under any circumstances."

According to Afran,

"Usually American courts don't act unless a defendant is inside that district and shows up to the court. However, there's nothing strictly prohibiting it either. And in a given instance, a plea could be taken internationally. I don't think there's anything wrong with that. It's not barred by any laws. If all parties consent to it, then the court has jurisdiction."

The U.S. could insist on Assange voluntarily going to the U.S. for two reasons, according to Afran:

- 1). it would remove the chance of a European Court of Human Rights injunction stopping his extradition should the High Court in London reject his last appeal; and
- 2). it would give the U.S. an opportunity to "change its mind" once Assange was in its clutches inside the Virginia federal courthouse.

“The U.S. sometimes finds ways to get around these agreements,” said Afran, who is representing *CN* in its case against the U.S. government and NewsGuard. “The better approach would be that he pleads while in the U.K.”

Interestingly, the *WSJ*, without attribution, said a remote plea is possible. The *Journal* story said:

“Under such a deal, Assange potentially could enter that plea remotely, without setting foot in the U.S. The time he has spent behind bars in London would count toward any U.S. sentence, and he would likely be free to leave prison shortly after any deal was concluded.”

A Non-Denial Denial



Barry Pollack, right with former F.B.I. agent Holden Triplett. (Joe Lauria)

A statement issued in reaction to the *WSJ* story by Assange’s U.S. lawyer, Barry Pollack, was interpreted by some commenters on social media as a denial that any negotiation has taken place. Pollack said:

“It is inappropriate for Mr. Assange’s lawyers to comment while his case is before the UK High Court other than to say we have been given no indication that the Department of Justice intends to resolve the case and the United States is continuing with as much determination as ever to seek his extradition on all 18 charges, exposing him to 175 years in prison.”

It may sound like a denial but this carefully-worded, lawyerly statement does not actually deny that talks have taken place or are ongoing. It instead implies the Assange side is dissatisfied with the government’s positions to resolve the case.

Consortium News had received off-the-record confirmation from two sources that negotiations took place from at least last December. The *WSJ* story was further confirmation of this. Biden's remark Wednesday confirms that a deal is actively being considered.

Why the US Would Want a Deal Now

The U.S. first floated the possibility of a plea deal with Assange last August, when Caroline Kennedy, the U.S. ambassador to Australia, told *The Sydney Morning Herald*: "I think that there absolutely could be a resolution."

The newspaper reported: "Pressed on whether US authorities could strike a deal with Assange to reduce the charges against him in exchange for a guilty plea she said: 'That's up to the Justice Department.'"

Gabriel Shipton told the *Herald* at the time: "Caroline Kennedy wouldn't be saying these things if they didn't want a way out. The Americans want this off their plate."

Clearly, the last thing Biden needs in the middle of his re-election campaign is for a journalist to show up in chains to American shores to stand trial for publishing truthful information revealing U.S. state crimes.

Donald Trump, who is responsible for having Assange arrested, imprisoned and fighting extradition, would nonetheless hypocritically blame Biden for Assange's extradition, knowing that parts of his base want Assange free.

The international pressure on Biden has grown significantly in the past year, damaging the U.S.'s image and reputation. Several Latin American presidents have lobbied him to free Assange. The Australian parliament passed a resolution calling on him to do so. Parliamentary groups in numerous U.S.-allied nations have asked Biden to let him go.

International human rights and press freedom groups have called for his release and the Democratic-leaning *New York Times* joined four other major newspapers in calling for the prosecution to be ended.

Add to this the international and domestic outcry over Gaza, and the Democrats are desperately trying to relieve some of the enormous pressure on their 81-year old candidate, who is freaking out over it.

To make a deal with Assange, Biden would have to stand up to the Democratic Party, of which he is the nominal head, presumably still upset over the DNC leaks that some Democratic voters still use to blame Assange for Trump; and to the C.I.A., likely still angry over the Vault 7 release, the largest leak of C.I.A. materials in history.

Throwing Assange as a bone to his critics on the party's left would at least reduce some pressure.

If the Department of Justice leaked the plea story to the *WSJ*, it would have been to put pressure on Assange to accept a deal on U.S. terms, setting Assange up to take the blame if a deal falls through. This tactic might further explain Pollack's pointed response.

The Outlook



U.S. Department of Justice headquarters in Washington, D.C. (M.V. Jantzen, Flickr, CC BY-NC-SA 2.0)

It is highly unlikely that Assange would plead guilty to any part of the Espionage Act charges. Even if that freed him, it would open up prosecution of other journalists in the future under the Act. Assange is the first journalist to ever be successfully indicted under the Espionage Act and he wants to be the last.

So, the parameters of a deal that might be acceptable to Assange could look like this: no admission of violating the Espionage Act; acceptance of some sort of lesser charge ; and Assange entering the plea from Britain without arriving on U.S. soil, where the prosecutors could “change their minds.”

If the U.S. misses Tuesday's deadline for the assurance, a formal High Court appeal becomes automatic to begin months from now. That would still give the U.S. time to complete a deal before the appeal begins.

It might come down to whether the U.S. assesses it could lose the appeal since it can't guarantee Assange's free speech rights, even if it files the assurance on the death penalty. The High Court could in that scenario accept Assange's “arguable” case and interpret the law to mean his extradition would violate his rights and he must be freed.

Little has been normal in the highly-politicized Assange case, however. The High Court wouldn't allow evidence that the foreign intelligence service of the nation seeking his

extradition plotted to kidnap or kill him or that it spied on his privileged conversations with his lawyers. It would not agree that his alleged crime is a political offense that would bar his extradition.

So at this late stage the court cannot be relied on to follow the law and do the right thing. Despite the growing political pressure, Assange's fate is still very much in the hands of people who want to silence him.

CORRECTION: An earlier version of this story incorrectly said that Assange pleading guilty to the misdemeanor of conspiracy to mishandle official information could create a precedent for future journalists by criminalizing the reporter-source relationship as a "conspiracy." In fact, a guilty plea cannot create a binding precedent for future cases.

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