

THE BARAITSER DECISION'S IMPACT (OR NOT) ON JOURNALISM

Before and since Joe Biden was inaugurated, Julian Assange supporters are unsurprisingly pushing for Biden to direct DOJ to adopt a different stance in the prosecution of Assange.

I suspect that's unlikely. Indeed, while I'm not sure how any of this would work under the extradition law or be tempered by the UK's rejection of extradition based on humanitarian grounds and ongoing appeal of that decision, I think it more likely that DOJ does one of the following:

- Supersedes the existing indictment to incorporate (at least) Vault 7
- Adds conspiring with Russia, potentially showing a timeline of doing so that goes back up to a decade
- Charges non-national security crimes (the quid pro quo for the pardon and possibly extortion) as a way to get around the finding that he'd be put in a SuperMax
- Indicts an omnibus conspiracy naming others, or
- Asks the UK to prosecute Assange under the equivalent crimes (including, possibly, for Vault 7)

I think that not because I believe Joe Biden will be shitty or good on issues pertaining to

journalism or because I have it in for Assange. I think that because unlike virtually everyone weighing in on this topic (Alexa O'Brien is the sole exception I know of) I've actually been covering what has happened to WikiLeaks cases in the US and the public record shows that the US government as a whole and DOJ as an institution – not Presidents Obama, Trump, or Biden – have come to the conclusion that WikiLeaks is not a journalistic institution.

To that end, I want to return to Vanessa Baraitser's ruling in Assange's case, because most people weighing in about how and why Biden might change course are misrepresenting what she said about two issues.

The first issue pertains to the impact of her ruling on journalism. Yes, Baraitser ruled for the US. But all she had to do on this issue was weigh whether the crimes alleged in the indictment have a parallel in UK law (which in this case would be the far more onerous Official Secrets Act) and are permitted under European Convention on Human Rights law's Article 10.

With regards to the former, Baraitser could have just noted that the Official Secrets Act clearly criminalizes the publication of classified information like that covered by the indictment. That was what most people I know honestly expected (even if they didn't say as much publicly).

She didn't. With regards most charges, her ruling relied heavily on the intersecting conspiracies alleged in the superseding indictment that most Assange boosters have not read, one to violate the Espionage Act and the other to violate CFAA (hacking). For the bulk of the charges (the ones covered by Theory One in this post), Baraitser described what Assange does to include a hacking element.

Mr. Assange is accused of aiding and abetting Ms. Manning in her theft and disclosure of the information, as an accessory to her offending. The defence

submits that no offence is committed by Mr. Assange unless he has engaged in a criminal activity separate from Ms. Manning's act of whistle-blowing. However, in my judgment, Mr. Assange's alleged activities went beyond the mere encouragement of a whistle-blower.

Tseehe [sic] design and purpose of WikiLeaks, it is alleged, was to obtain protected information and publish it. Mr. Assange was willing to achieve this, it is alleged, through computer hacking, both by engaging in hacking activities himself but also by recruiting and soliciting others to do the same. This is amply demonstrated in the request in his work with various hacking groups. His work with Ms. Manning, it is alleged, was part of this plan.

[snip]

At the same time as these communications, it is alleged, he was encouraging others to hack into computers to obtain information. This activity does not form part of the "Manning" allegations but it took place at exactly the same time and supports the case that Mr. Assange was engaged in a wider scheme, to work with computer hackers and whistle blowers to obtain information for Wikileaks. Ms. Manning was aware of his work with these hacking groups as Mr. Assange messaged her several times about it. For example, it is alleged that, on 5 March 2010 Mr. Assange told Ms. Manning that he had received stolen banking documents from a source (Teenager); on 10 March 2010, Mr. Assange told Ms. Manning that he had given an "intel source" a "list of things we wanted and the source had provided four months of recordings of all phones in the Parliament of the government of NATO country-1; and, on 17

March 2010, Mr. Assange told Ms. Manning that he used the unauthorised access given to him by a source, to access a government website of NATO country-1 used to track police vehicles. His agreement with Ms. Manning, to decipher the alphanumeric code she gave him, took place on 8 March 2010, in the midst of his efforts to obtain, and to recruit others to obtain, information through computer hacking

[snip]

In relation to Ms. Manning, it is alleged that Mr. Assange was engaged in these same activities. During their contact over many months, he encouraged her to obtain information when she had told him she had no more to give him, he identified for her particular information he would like to have from the government database for her to provide to him, and, in the most obvious example of his using his computer hacking skills to further his objective, he tried to decipher an alphanumeric code she sent to him. If the allegations are proved, then his agreement with Ms. Manning and his agreements with these groups of computer hackers took him outside any role of investigative journalism. He was acting to further the overall objective of WikiLeaks to obtain protected information, by hacking if necessary. Notwithstanding the vital role played by the press in a democratic society, journalists have the same duty as everyone else to obey the ordinary criminal law. In this case Mr. Assange's alleged acts were unlawful and he does not become immune from criminal liability merely because he claims he was acting as a journalist.

Thus, even though she didn't have to do so to rule for the US on this point, she nevertheless

distinguished what Assange does from what journalists do because, as alleged in the indictment and in actual fact, hacking is such a central part of what Assange does. It's not clear she would have gotten to this ruling without the language included in the superseding indictment (a superseding indictment which, again, virtually all Assange boosters either willfully ignore or are genuinely ignorant exists). But as it happened, she relied heavily on the language in the superseding indictment and very clearly distinguished what Assange does from what journalists do.

Of particular interest (because this is the language in the indictment that I believe sets up adding Vault 7 to the indictment), Baraitser accepted the US government's description of Assange recruiting people *to hack*.

Mr. Assange, it is alleged, had been engaged in recruiting others to obtain information for him for some time. For example, in August 2009 he spoke to an audience of hackers at a "Hacking at Random" conference and told them that unless they were a serving member of the US military they would have no legal liability for stealing classified information and giving it to Wikileaks. At the same conference he told the audience that there was a small vulnerability within the US Congress document distribution system stating, *"this is what any one of you would find if you were actually looking"*. In October 2009 also to an audience of hackers at the "Hack in the Box Security Conference" he told the audience, *"I was a famous teenage hacker in Australia, and I've been reading generals' emails since I was 17"* and referred to the Wikileaks list of "flags" that it wanted captured. After Ms. Manning made her disclosures to him he continued to encourage people to take information. For example, in December 2013 he

attended a Chaos computer club conference and told the audience to join the CIA in order to steal information stating *"I'm not saying don't join the CIA; no, go and join the CIA. Go in there, go into the ballpark and get the ball and bring it out"*.

Again, it's not just that Assange solicited people to share classified information with him (which journalists do), but that he also explicitly encourages people to hack to get it.

And while the way Baraitser distinguished Assange from others in her ruling on the three most dangerous charges, publishing informants' identities (Theory Three in this post), is less compelling, she nevertheless went beyond a ruling on the act itself. She distinguished Assange's publication online (in bulk, though that distinction is less clear and not one of great comfort to someone who also publishes online) from traditional journalism.

More importantly, Baraitser talked about the balancing involved in Article 10 (particularly with regards to the right of private life).

The defence submits that, by disclosing Ms. Manning's materials, Mr. Assange was acting within the parameters of responsible journalism. The difficulty with this argument is that it vests in Mr. Assange the right to make the decision to sacrifice the safety of these few individuals, knowing nothing of their circumstances or the dangers they faced, in the name of free speech. In the modern digital age, vast amounts of information can be indiscriminately disclosed to a global audience, almost instantly, by anyone with access to a computer and an internet connection. Unlike the traditional press, those who choose to use the internet to disclose sensitive information in this way are not bound by a professional code or

ethical journalistic duty or practice. Those who post information on the internet have no obligation to act responsibly or to exercise judgment in their decisions. In the modern era, where “dumps” of vast amounts of data onto the internet can be carried out by almost anyone, it is difficult to see how a concept of “responsible journalism” can sensibly be applied.

[comparison with other outlets and their condemnation of him]

The law already constrains in various ways what may be published in order to avoid damage to private interests. For example, the High Court recently awarded damages against the Associated Newspaper Ltd, after the MailOnline website published an article, reporting on the arrest of the claimant in the aftermath of the Manchester Arena bombing, and disclosing details capable of leading to his identification (*Alaadeen Sicri v Associated Newspapers Limited*, [2020] EWHC 3541 (QB)). Free speech does not comprise a ‘trump card’ even where matters of serious public concern are disclosed (see *Stoll* above), and it does not provide an unfettered right for some, like Mr. Assange, to decide the fate of others, on the basis of their partially informed assessment of the risks.

This was not necessarily a national security stance. Rather, in language that would apply equally to Assange’s indiscriminate publication of the DNC and Podesta emails (as well as the publication of the Turkish and Saudi emails), Baraitser argued that Assange’s publication in bulk was not protected because it did not and could not properly weigh the risk to others.

This part of the ruling, in particular, would not translate into US law. There is no such

privacy balance in the US outside of much weaker defamation laws. And so this part of the ruling does not offer much comfort with regards the existing charges as precedent in the US context.

But that's an issue Assange supporters have with US law, not with the Baraitser ruling.

With regards to the impact on journalism, Baraitser ruled that the charges before her (which contrary to a lot of WikiLeaks propaganda, doesn't include the Collateral Murder video) were distinguishable from what journalists do.

As such, unless press organizations want to claim hacking is within the job description of journalists, this ruling should not chill journalism.

There's certainly real concern about the charges as precedent in the US, particularly the publishing charges. But that's different than the Baraitser ruling itself.

Update: Corrected ECHR thanks to Chetnolian.