

# The prosecution of Julian Assange, the destruction of legality and the rise of the national security state

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The extradition proceedings brought by the United States against Julian Assange are to commence in February 2020. The prosecution of Assange marks a new stage in the onslaught on core democratic rights and legality by the US, British and, indeed, global ruling class.

Over the last two decades the ruling class has attacked the constitutional and legal foundations of bourgeois democracy. The rights of due process and free speech have been at the centre of this assault. There are new and dangerous elements in the prosecution of Assange.

The US government historically has made efforts to undermine free speech and the ability of the press to report on the affairs of government and on due process. However, the political and legal attack on Assange represents a qualitative intensification of the destruction of core rights, and on legality itself as the mode of bourgeois rule.

A veritable counter-revolution has been pursued by successive United States administrations in an effort to construct an authoritarian national security state.

The US government now seeks to establish as “law” that journalistic activity, which discloses or publishes classified defence and other information, is criminal and amounts to espionage: that journalists will be imprisoned as spies.

The British government in its treatment of Assange has also run roughshod over Assange’s innumerable fundamental legal rights—including due process, customary legal practice, habeas corpus and the recognition of international law—in the course of acting as America’s prosecutorial handmaiden. This article seeks to address some of the broader political and legal significance of the defence of Julian Assange, and why the case raises immense historical issues for the future of mankind.

## The case of John Peter Zenger

It is almost 300 years since the famous trial of John Peter Zenger, a New York publisher who was charged with libel, an offence at the time of publishing information opposed to the government. The year was 1734 and America was a British colony. The Zenger case had momentous revolutionary implications at a time of the rising ascendancy of a new progressive class, the American bourgeoisie.

John Peter Zenger was a German immigrant and publisher of a journal titled the *New York Weekly Journal*. The publication made harsh criticisms of the Colonial government and the Governor, William S. Cosby. Zenger accused the government of, amongst other things, rigging elections, and Governor Cosby of committing various crimes.

Zenger had only published the material, the sources of the information were anonymous and Zenger refused to reveal their identities. He was thrown into prison for eight months by the Colonial authorities and badly treated, including being denied pen, ink or paper with which to communicate with the outside world and prepare his defence. The Governor arranged for the public burning of the *New York Weekly Journal*.

Zenger was charged with libel, the legal meaning of which, at the time, involved no question of truth or falsity, merely the publication of statements critical of the government. Zenger admitted to publication of the material but advanced a defence, for the first time in the history of the Colony, of a right of free speech. His lawyer, Andrew Hamilton of Philadelphia, addressed the jury on the momentous issue at stake in the trial. Given the actions of the American government today against Julian Assange, it is worth quoting Hamilton’s brilliant and powerful address at length:

It is natural, it is a privilege, I will go farther, it is a right, which all free men claim, that they are entitled to complain when they are hurt. They have a right publicly to remonstrate against the abuses of power in the strongest terms, to put their neighbours upon their guard against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings heaven can bestow....

Power may justly be compared to a great river. While kept within its due bounds it is both beautiful and useful. But when it overflows its banks, it is then too impetuous to be stemmed; it bears down all before it, and brings destruction and desolation wherever it comes. If, then, this is the nature of power, let us at least do our duty, and like wise men who value freedom use our utmost care to support liberty, the only bulwark against lawless power, which in all ages has sacrificed to its wild lust and boundless ambition the blood of the best men that ever lived...

You see that I labor under the weight of many years, and am bowed down with great infirmities of body. Yet, old and weak as I am, I should think it my duty, if required, to go to the utmost part of the land where my services could be of any use in assisting to quench the flame of prosecutions upon informations, set on foot by the government to deprive a people of the right of remonstrating and complaining, too, of the arbitrary attempts of men in power....

But to conclude: The question before the Court and you, Gentlemen of the jury, is not of small or private concern. It is not the cause of one poor printer, nor of New York alone, which you

are now trying. No! It may in its consequence affect every free man that lives under a British government on the main of America. It is the best cause. It is the cause of liberty. And I make no doubt but your upright conduct this day will not only entitle you to the love and esteem of your fellow citizens, but every man who prefers freedom to a life of slavery will bless and honour you as men who have baffled the attempt of tyranny, and by an impartial and uncorrupt verdict have laid a noble foundation for securing to ourselves, our posterity, and our neighbours, that to which nature and the laws of our country have given us a right to liberty of both exposing and opposing arbitrary power (in these parts of the world at least) by speaking and writing truth.

At the end of Hamilton's address, the jury was instructed to convict Zenger, but after deliberating for a very short period returned with a unanimous verdict of Not Guilty. Emerging from the Zenger case there subsequently developed a legal doctrine, ultimately finding concrete expression in the First Amendment to the US Constitution, that truthful information could never be libellous (or seditious) and that speech could not be curtailed by any government action.

Gouverneur Morris, a major figure at the Constitutional Convention of 1787 described the Zenger case as "the germ of American freedom, the morning star of that liberty which subsequently revolutionized America."

Perhaps more than any other event, the Zenger trial began the process towards the American Revolution.

## Natural Law

Zenger's defence rested on conceptions of Natural Law which were considered the basis of rights. These conceptions, which were gaining ground in America, were the product of the English revolutions and the ideas of John Locke and the emerging Enlightenment, which went back to the classical philosophical debates of antiquity on the question of the meaning of law, and might versus right, as discussed for example in Plato's work, *The Republic*.

In the late 16th century the Dutch Jurist and humanist Grotius first advanced the modern conception of Natural Law. Grotius asserted that true law was not an accidental human creation, not an emanation of political society, the State or the Church, but a genuine and necessary characteristic of Man, reflecting his essential social nature. The concept of Natural Law faced two major obstacles—the arbitrary power of Kingly rule, and the Church and its theological and hierarchical conceptions.

In the course of the Enlightenment, conceptions of democratic rights based on natural law were advanced by great original thinkers, such as Locke, Montesquieu and Voltaire. In his revolutionary work *The Spirit of Laws* published in 1748, Montesquieu wrote:

Laws in their broadest sense, are the necessary relations which are derived from the nature of things: Once free from the yoke of religion, we should still be subject to the rule of Justice... Law, like mathematics has its objective structure, which no arbitrary whim can alter, before there were any enacted laws, just relations were possible. To say that there is nothing just or unjust, excepting that which positive laws command or forbid is like saying that before one has drawn a circle all of its radii were not equal.

The idea of an objective necessity in law expressing the social nature of Man was profoundly influenced by the scientific revolution that preceded these intellectual conquests. These conceptions of natural law and democratic rights were a momentous advance in human consciousness—fundamental and vital to the ongoing progress and civilisation of Mankind. People everywhere revelled in the transformation that these ideas represented. Voltaire at the time likened the advance in consciousness to a child beginning to walk. These conceptions found their expression in the great democratic Declarations, which accompanied the American and French revolutions and formed the ideological basis for the Constitutional form of government they created. Several passages from Locke's *The Second Treatise on Government* were reproduced verbatim in the Declaration of Independence, including the references to "inalienable rights" and "a long train of abuses."

Drawing on the Natural Law conceptions of the Enlightenment, the American revolutionaries set about creating a government and Constitution based on reason. The principal idea was that rights were not granted by any political power, but emerged from the nature of Man himself. As John Dickinson declared in 1766:

Our rights and liberties are not annexed to us by parchments and seals. They are created in us by the decrees of Providence, which establishes the laws of our nature. They are born with us; exist with us; and cannot be taken from us by any human power, without taking our lives. In short, they are founded on the immutable maxims of reason and justice (quoted in Gordon S Wood; *The Creation of the American Republic 1776–1787*. Chapel Hill, 1969 p. 293).

The nature of American democracy, created out of the revolution and embodied in its constitution, reflected both a unique and intense political outlook. The idea of the "Sovereignty of the People" and the inalienability of their rights was radical through and through. As Gordon Wood wrote in his seminal work *The Creation of the American Republic*:

The trite theory of popular sovereignty gained a verity in American hands that European radicals with all their talk of all power in the people had scarcely considered imaginable except at those rare times of revolution. "Civil liberty" became for Americans "not 'a government of laws,' made agreeable to charters, bills of rights or compacts, but a power existing in the people at large, at any time, for any cause, or for no cause, but their own sovereign pleasure, to alter or annihilate both the mode and essence of any former government, and adopt a new one in its stead. (op. cit., p. 362).

## Madison and free speech

James Madison, one of the American founding fathers, was the primary architect of the Bill of Rights and chief proponent of the need in a true democracy for the right of free speech to be absolute. Under the doctrine of Sovereignty of the People, Madison argued, "for the people to rule wisely, they must be free to think and speak without fear of reprisal." Initially opposed to the enumeration of rights separate to the structure of the Constitution, on the basis that an enumeration would imply a limitation, Madison however acknowledged the popular will expressed in

the ratifying conventions, which had approved remedies to the Constitution and shaped them into the Bill of Rights.

On the right of free speech, and its absolute centrality to a free and democratic society, Madison was unequivocal and adamant. Public disclosure had to be utterly free and unfettered. Madison had a decided distrust of popular government; for that reason he insisted that political disclosure needed to be robust and vigorous so that the government could be freely criticised and its abuses exposed. “Public opinion” he wrote in 1791 “sets bounds to every government, and is the real sovereign in every free one.”

According to democratic theory, it is the people, and only the people, who rule. And for the people to rule wisely they have to be able to communicate with one another—freely without fear of governmental suppression. Freedom of speech and of the press were, therefore, essential preconditions for democratic government. Madison’s commitment to free speech was absolute. His presidency (1809–1818) has not generally been viewed favourably, but it is significant that even in times of great crises (such as the war of 1812) Madison did not abridge rights, and insisted on the right of free speech even in time of war.

Recognition of the critical status of free speech in a democracy was expressed in the right of free speech being the first of the enumerated rights in the Amendments to the Constitution.

### Free speech in war

As a right protected under a bourgeois-democratic constitution (as opposed to a socialist constitution), free speech has been abridged by the ruling class from time to time when it has felt imperilled, and the socialist and communist movements have usually been the primary targets of such suppression when they have opposed the imperialist war aims of the US. In 1917 and 1918, the US government passed the Espionage Act and the Sedition Act respectively, which were consciously directed against socialist opposition to the war.

In the case of *Schenk v United States*, the Supreme Court, including Oliver Wendell Holmes and Louis Brandeis, upheld the conviction of Charles Schenk, a socialist activist for distributing anti-draft pamphlets. The Court held that the Espionage Act did not violate the First Amendment because the anti-draft activities of Schenk presented a “clear and present danger” to the military operations and national security of the US, including the draft. Clearly, the Supreme Court sought to support the imperialist war aims of the US against socialist opposition. The Supreme Court also unanimously upheld convictions in the famous cases of *Debs v United States* (1919) and *Frohwerk v United States* (1919). Both Debs and Frohwerk were prominent socialist opponents of the war, and Debs a four-time presidential candidate for the Socialist Party.

The Sedition Act of 1918 was enacted at the behest of Woodrow Wilson, and outlawed criticism of the government’s war aims, the military and “the promotion of principles contrary to the Act.” More than two thousand cases were filed by the government under the Espionage Act of 1917 and the Sedition Act of 1918, and there were over one thousand convictions. The Sedition Act was repealed in 1920, but the Espionage Act remains largely in force and is relied upon by the US government in its indictment of Julian Assange. This is no accident, but a product of the same militarist drives of US imperialism that prompted the legislation a hundred years ago.

### America’s post-Soviet war drive for world hegemony

The persecution of Julian Assange for publishing documentation of the war crimes of the United States in Iraq must be examined in the historical context of the crisis of US imperialism, the deepening class conflict within the United States, the elites’ fear of revolution, and the consequent assault upon democratic rights and constitutionalism over the last two decades.

Following the collapse of the Soviet Union, the United States turned quickly to an aggressive military foreign policy. At the same time, capitalist triumphalism could not conceal the deep underlying problems emerging in the US economy, arising from the hollowing out of industry, the spectacular rise in financial parasitism and corporate debt, and its accelerating loss of ground to major economic rivals. The Soviet Union had collapsed but the United States was in systemic irreversible decline. The first major post-Soviet symptomatic shock occurred in 1998, with the collapse of the \$126 billion Long Term Capital Management hedge fund. (The head of LTCM was Myron Scholes, who the year before had been awarded the Nobel Prize in Economic Sciences for a method to determine the value of derivatives). Ten years later, with the collapse of Lehman Bros, the death agony of American capitalism was verified beyond any reasonable doubt.

Commencing in the early 1990s, the US ruling class, military and national security establishment embarked on a course of seeking to defend US world hegemony through the use of military force. It pursued a strategy of preventing the emergence of any rival to challenge US hegemony. America would henceforth exercise unchallenged domination over key regions and resources against its major rivals in Europe and Asia, through the global projection of overwhelming military power.

At the NATO summit in Rome in November 1991, the US presented a “New Strategic Concept” for NATO, which emphasised the “global context” and the need for NATO to take a “more expansive and less defensive strategic military role.” The US and Britain both proclaimed the right to conduct “humanitarian interventions,” involving the use of military force to resolve disputes within other nations and to halt “human rights violations.”

The quest of US imperialism to establish unrivalled supremacy over the globe, which accelerated through the 1990s, was expanded, particularly to the energy-rich regions of the Middle East and the Caspian basin.

The 1992 Defence Department document entitled “The Defence Planning Guidance” summarised the new imperialist doctrine thus:

Our first objective is to prevent the re-emergence of a new rival. This is a dominant consideration underlying the new regional defence strategy and requires that we endeavour to prevent any hostile power from dominating a region whose resources would, under consolidated control, be sufficient to generate global power. These regions include Western Europe, East Asia, the territory of the former Soviet Union, and Southwest Asia.

The doctrine of preventive war was adopted as official policy of the US. This doctrine had been gaining ground since the early 1990s among intellectuals who supported a more aggressive US foreign policy. In 1992, for example, the liberal Michael Walzer circulated a document signed by sixty intellectuals formulating the tenets of a new conception of “just war.” In his book *Just and Unjust Wars* (New York, 1992), Walzer argued that, when the US was confronted with “unusual and terrible danger” and a “radical threat to human values,” no restriction of an ethical or legal nature could apply, and any means of preventive destruction was morally legitimate.

In the *Quadrennial Defence Review Report*, September 30, 2001, and the *National Security Strategy of the United States*, September 17, 2002, the US government set out in detail its new preventive war doctrine. The

doctrine proclaimed the right of the US to unilaterally denounce other sovereign states, to force inspections in order to secure “preventive disarmament,” and to use military force if and when it considered it necessary or desirable.

The *National Security Strategy* of 2002 also proclaimed the right of the US to act “pre-emptively” in circumstances of a perceived threat. The doctrines of preventive war, pre-emptive self-defence, humanitarian war and just war are all illegal in international law. The resort to force, to war, is prohibited following Nuremberg and its codification in international law charters and conventions. The adoption of these doctrines by the US represented, in historical terms, an immense regression in the ideological condition of Western civilisation.

In 2003, the US planned and launched its aggressive war against Iraq. The alleged threats of “weapons of mass destruction” were proven to be fraudulent and, in any event, could not have formed a lawful foundation for the launching of war. According to the precedents established at Nuremberg, those civilian and military leaders who planned and carried out the aggressive war against Iraq should have been arraigned before a properly constituted judicial tribunal, afforded full and proper due process, and tried for crimes against peace, crimes against humanity, and crimes against the laws of war.

The illegal invasion of Iraq in 2003 constituted an immense escalation of America’s post-Soviet strategy. The criminality of America’s actions, and its brutality, expressed in such heinous crimes as the destruction and killings in Fallujah, were reminiscent of the aggression, criminality and violence of Hitler’s attack on Poland in 1939. Most of the information that was published by Assange through WikiLeaks, and is the subject of the indictment, concerned the illegal and criminal activities of the United States in the Iraq and Afghanistan wars, and the treatment of detainees of Guantanamo Bay. Millions of people around the world watched the “Collateral Murder” in Iraq video in horror when it was released in 2010.

### **The attack on constitutionalism and legality**

Since 2000, militarism abroad in furtherance of America’s drive for global hegemony has gone hand in hand with attacks on constitutionalism and democratic rights at home. The opening assault on constitutionalism was the stolen election in 2000, when Republicans, Democrats and the Supreme Court alike defrauded American citizens of their right to vote. Albert Gore may have understood the seriousness of the implications, but did not fight to defend the peoples’ rights. In the following two decades, there has been a conscious drive by the bourgeoisie in the United States to disassemble the established constitutional order, implement a repressive legal regime and establish authoritarian rule.

The George W. Bush administration seized on 9/11 to use the pretext of the “War on Terror” to vastly expand the powers of the state, advance executive rule and eviscerate constitutionalism.

Under cover of the “War on Terror,” the Bush administration sought to place itself above the law in an unprecedented manner. The Guantanamo Bay legal black hole, designed to deny habeas corpus, was perhaps the most extraordinary anti-constitutional measure taken in centuries. The attack on constitutionalism was fully supported by the Democratic Party. Numerous steps were taken to advance authoritarian rule under cover of America’s war drive in the Middle East, including:

\* The Patriot Act and Homeland Security Act, which authorised arbitrary search, arrest, detention, monitoring and surveillance.

\* The creation of non-legal categories such as “enemy-combatant” to deny due process.

\* The practice of torture.

\* The rejection of international law norms, including the disavowal of the Geneva Conventions and rejection of the jurisdiction of the International Criminal Court.

The USA PATRIOT Act (full name Uniting and Strengthening America by Providing Appropriate Tools to Restrict, Intercept and Obstruct Terrorism Act 2001), and the establishment of Guantanamo Bay commenced the project of the ruling class to reconstitute America’s legal regime on authoritarian foundations. The Act provided for virtually unlimited powers of arrest, indefinite detention, warrantless search and seizure, surveillance and monitoring. Computer and phone communications, business records, library records, and other personal information were all liable to be seized under the Act by the FBI.

In a very real sense, the Act provided the legislative framework for a national security state. There were dozens of court cases challenging the Act on constitutional grounds and, in virtually all instances of success, Congress, (with overwhelming bipartisan support) legislated additional laws to overcome the constitutional obstacles in order to maintain the repressive framework.

With some amendments, which did not alter its fundamental police-state character, the PATRIOT Act was reauthorised over the last 18 years, including by the Obama administration which, in 2015, re-legislated parts of the Act that were due to expire in 2015 under an Act entitled The USA Freedom Act.

An offshoot of the PATRIOT Act was the Terrorist Surveillance Program, which enabled the government to secretly track billions of phone calls, texts and computer communications made by millions of American citizens, without warrant. Under various different legislative guises (beginning with the Foreign Surveillance Intelligence Act 2008) warrantless surveillance continued under the Obama and Trump administrations, including the PRISM surveillance system exposed by Edward Snowden, the data collected under that system now being retained by major telecommunication corporations.

The extraordinary denial of habeas corpus and due process at Guantanamo Bay paralleled the counterrevolutionary character of the PATRIOT Act (see WSWS article: “Guantanamo Bay, habeas corpus and the Texan who would be king,” 5 January 2004).

The government’s actions were justified on the basis of legal concepts formulated by far right lawyers in the Justice Department led by John Yoo. They advanced an extreme version of the “unitary executive theory,” drawing on authoritarian Germanic legal notions of *Staats Recht*, stressing the primacy of national security over core democratic rights and legality.

Yoo later gave testimony, at a subsequent Justice Department enquiry into the torture memos which he had drafted, that, in his view “ the President’s war making authority was so broad that he had the constitutional power to order a village to be massacred.” Not surprisingly, the view of the Justice Department and the State Department during the “War on Terror” was that the Geneva Conventions were a quaint irrelevance, which did not bind the United States. John Yoo is now a professor of law at UC Berkeley Law School.

The denial of habeas corpus to Guantanamo detainees was challenged in the US Supreme Court in the case of *Rasul v United States of America* (2004). The Court ruled 6-3 (Rehnquist, Scalia and Thomas dissenting) that Guantanamo detainees, irrespective of their citizenship, were entitled to challenge the legality of their detention in federal courts.

The government responded by passing legislation outlawing access to the courts, titled the Detainee Treatment Act, which was passed with overwhelming Democratic support. The Act also gave immunity to government agents and military personnel from prosecution for “enhanced interrogation” methods that had been justified by the statist legal theories of Department of Justice Officials. The Signing Statement by President Bush, laying out his formal interpretation of the law, stated:

The Executive branch shall construe [the provisions] relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief, and consistent with the Constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President to protect the American people from further terrorist attacks.

### National security liberalism

The onslaught on constitutionalism under the Bush administration was largely defended by the liberal elites. Corrupted by decades of stock market profits, they had long ago abandoned any even notional support for constitutional norms or international law. This was reflected in the writings of authors such as Michael Ignatieff, who, in his book in 2004 *The Lesser Evil: Political Ethics in the Age of Terror*, promoted the “War on Terror” myth and supported the abridgement of constitutional rights on the absurd basis that “the Constitution is not a suicide pact.”

Vast layers of the affluent liberal upper middle class were becoming strident supporters of the pre-eminence of “national security,” over the constitutional protection of core rights.

In its current impeachment drive, the Democratic Party is seeking to remove a democratically elected president whom they view as an obstacle to the war aims of the Democrat-CIA-Pentagon Complex. The real objective and concern of the impeachment is regime-change in Russia, not the upholding of the Constitution of the US, to which the Democratic Party has no principled allegiance.

The Obama administration, far from taking any steps to alter the course of America’s hegemonic strategy or defend its constitutional foundations, deepened the United States’ reactionary trajectory and the counter-revolutionary program of the bourgeoisie. The administration stridently advanced the doctrine of “preventive war.”

In his acceptance speech for the Nobel Peace Prize in 2009, Obama specifically embraced the doctrine. In this respect, to the extent that his presidency supposedly represented a liberal alternative to the foreign policy objectives of the ruling class, it was absolutely clear that within the entire political spectrum of the establishment there was overwhelming support for the destruction of the international law framework and legality between nations.

Obama chastised “ambivalence over the use of military force” and proclaimed Washington’s right to use military power for the purposes of “Just War,” “preventive war” and “pre-emptive war”—all the illegal doctrines with medieval roots condemned at Nuremberg as nothing more than cloaks for aggression and conquest. The *Wall Street Journal* heartily applauded Obama’s Oslo declaration.

Having made it clear that aggressive war was its foreign policy, the Obama administration proceeded to get on with extra judicial killings, indicating that its views on US Constitutional law were at one with its views on the Nuremberg principles. Drone killings were a favourite practise of the President. There were hundreds of them. Deportations of undocumented immigrants was another favourite. There were millions of those.

In corroboration of its constitutional law outlook with its militarist war drive, the Obama administration expressed openly counter-revolutionary perspectives. After the killing of Anwar al Awlaki, a US citizen, in one of its drone strikes, there was an expression of dread and foreboding from various constitutional law groups. Are extra-judicial killings of US citizens legal? they asked. The chief lawyer of the US government, the Attorney General Eric Holder, in response to questions at Northwestern

University Law School about al Awlaki’s killing, gave the following chilling answer:

Some have argued that the President is required to get permission from a Federal Court before taking action against a United States citizen who is a senior operational leader of al Qaeda or associated forces. This is simply not accurate. “Due process” and “judicial process” are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.

This legal solecism has no precedent in over 800 years of legal history since the Magna Carta declared in 1215 that “no freeman will be seized, dispossessed of his property or harmed except by the “law of the land” (Chapter 29), an expression that referred to the customary practices of the courts of England.

In order to ensure that fundamental rights (including the right to life and liberty) could only be abridged by a court, and to eliminate any possible uncertainty about that arising from the language of the Magna Carta, during the rule of King Edward III (reigned 1327–1377), parliament enacted six statutes to clarify the meaning and scope of the liberties that Magna Carta guaranteed.

The statutes interpreted the expression “the law of the land” as the judicial procedures that protect a subject’s liberties. One of the laws, enacted in 1354, introduced the term “due process of law”—the first appearance of that phrase in Anglo-American law—to describe Magna Carta’s guarantee of judicial protections. The Fifth Amendment to the US Constitution reproduces this language in its Due Process clause.

The proposition that the government should be able to kill citizens anywhere in the world on the basis of legal standards and evidence that are never submitted to a court, either before or after the fact, could not prove in clearer terms that “liberalism” was morphing into fascism.

Holder’s essential premise, that law and executive power are one, echoed the Nazi jurisprudence of the Third Reich’s chief lawyer, Carl Schmitt. Schmitt developed legal theories that the leader’s (Führer’s) will was law—particularly in periods of crisis—but also generally in the framework of his authoritarian jurisprudence.

One of the principal tasks assigned to Schmitt as the Nazi’s crown jurist was to elaborate legal justifications for extra-judicial killings by Hitler. In his work “Führer Schützt das Recht” (The Führer Protects the Law) in 1934, written following “The Night of Long Knives,” when Hitler ordered the murder of leading members of the SA and several prominent conservative politicians, including Kurt Schleicher, the former chancellor, Schmitt wrote:

The Führer protects the Law from the worst abuse if he, at the moment of danger, by virtue of his leadership as the Supreme Judge, immediately creates justice. The real Leader is always Judge too. Judgeship flows from the Leadership. Those who seek to separate the two seek to unravel the state with the help of the Judiciary.” (Published in *Deutsche Juristische Zeitung*, August 1934)

That, in essence was Holder’s view. And smooth-talking Harvard lawyer Barack Obama’s as well.

## The US 2018 “great power” strategy

Declaring its intensification of the drive to global hegemony, the US announced, in its 2018 National Defence Strategy document, that its two-decade policy of the “War on Terror” was now being superseded by a strategy focused directly against China and Russia. The militarist drive of the US, commenced after the collapse of the Soviet Union, was now to be taken to a higher stage—to a major conflict with nation state rivals.

Based on the strategic escalation, an armaments build-up of gargantuan scale has been initiated. In June 2018, a \$716 billion military spending bill was passed—with overwhelming Democrat support. In the midst of the impeachment drive (and a brutal illegal war backed by the US in Yemen) on December 12, 2019, a \$738 billion military budget was passed, again with overwhelming Democratic support.

Through the inexorable processes of world economic development over the last 40 years, America has transformed into its opposite. Like Nazi Germany, it is not confident or free enough to respect legal constitutions and give a citizen a fair trial. Waging aggressive wars, destroying the rights of its citizens, embracing irrationalism and authoritarianism, are signs that the ruling class, and the elites and judiciary who support it, have reached a historical dead end and have become intellectually and morally bankrupt. In this historical and political setting, the US elites have commenced the prosecution of Julian Assange, marking a new stage in the counter-revolution.

## The prosecution of Assange

Before examining the indictment, it is worthwhile to consider briefly the lawless character of Assange’s persecution by Britain and the United States (and, indeed, Sweden) prior to his expulsion from the Ecuadorian embassy.

Since the beginning of the matter, Assange has been subjected to endless procedural abuses and political interference in the legal process. Virtually every customary precept, practice and procedural protection, which an accused is traditionally afforded, has been discarded in the effort to railroad him.

Assange was never the subject of any charges in Sweden. The extremely weak evidentiary basis for the allegations led to a declaration by the original Stockholm chief prosecutor, Eva Finne, that “There is no suspicion of any crime whatsoever.” The prosecution was subsequently reopened under political pressure.

Although he was discharged by Swedish authorities and not required to remain in Sweden, he was later issued with an Interpol Red Notice, usually reserved for terrorists and dangerous criminals. The United Kingdom Supreme Court approved Assange’s extradition to Sweden, based upon a clearly flawed European arrest warrant that was not signed by a judicial officer, as required by law. The UK government subsequently amended the terms of the European arrest warrant agreement to sanction the illegality.

The Swedish prosecutor, Marianne Ny, blocked Assange’s right to appeal to the European Court of Human Rights. The prosecution had been reopened following representations by the complainant’s lawyer, a leading campaigner in the Swedish women’s rights movement, a member of the Social Democratic Party and of the organisation calling for a tax on men. The UK Supreme Court approved Assange’s extradition, even though Swedish authorities refused to provide an assurance that he would not be extradited to the United States, notwithstanding that the US was preparing an Espionage Act prosecution against him.

In breach of its legal obligations the Australian government took no action to provide assistance to Assange, and Australian Prime Minister Julia Gillard threatened to strip Assange of his citizenship, until she was advised that this was illegal.

As was his right, Assange sought political asylum, which was granted by Ecuador. In violation of customary international law, neither Britain nor the United States recognised Assange’s asylum. Consequently, Assange remained imprisoned for many years in the Ecuadorian embassy. In 2016, legal experts with the United Nations Working Group on Arbitrary Detention ruled that Assange was being detained unlawfully by Britain and Sweden. Those countries ignored its rulings.

After refusing to interview Assange in London for six years, the Swedish prosecutor finally interviewed him in London in 2016. However, she barred Assange’s Swedish lawyer from being present, a fundamental denial of Assange’s basic legal rights. As a result of that outrage a Stockholm Judge in 2017 issued a demand to the prosecutor that she be questioned about prosecutorial misconduct. Rather than face that questioning she closed the investigation. It later emerged that she had also deleted email correspondence with the FBI.

After the Swedish investigation was dropped, Assange’s lawyers requested that the British arrest warrant for his bail breach also be dropped. There was a solid legal foundation for doing so, because the Swedish allegations, which were the subject of the bail, had been withdrawn and he had an international legal right to seek asylum, which had been granted by a sovereign state. In addition, he had been in a state of imprisonment for seven years.

Judge Emma Arbuthnot rejected the request. As a matter of law, however, she should not have sat on the case. She should, in fact, have recused herself, as she was the wife of a leading government member of parliament and a business partner of the head of MI6, Britain’s equivalent of the CIA.

Assange’s right of habeas corpus was flagrantly violated in the punishment of one-year imprisonment inflicted upon him for the bail breach, when, in usual circumstances, a non-custodial sentence is imposed. There could not have been a more transparent example of the court lending its hand to executive illegality. Throwing Assange into Belmarsh high security prison, and hampering his preparation of the defence to the extradition request, was an open act of callous political vindictiveness and lawlessness. In this respect the conduct of the British government is the same as the colonial governor’s treatment of Zenger in 1734.

In 2015, a federal court in Washington blocked the release of all information in respect of the Department of Justice investigation of WikiLeaks, on the basis that it was an active and ongoing “national security investigation” and could potentially harm the “pending prosecution” of Assange. Judge Barbara J. Rothstein in her decision opined “it is necessary to show appropriate deference to the executive in matters of national security.”

## The counter-revolutionary indictment

The original six-page US indictment, dated March 6, 2018, charged Assange with one count of conspiring with Chelsea Manning to gain access, without authority, to Defence Department computers. In particular, it alleged that Assange attempted to crack a password to facilitate access to secret records so that Manning’s identity could be concealed. The password was not cracked.

The indictment was based on the Computer Fraud and Abuse Act (CFAA), the main US anti-hacking statute. The pleading was factually

threadbare, and legally very narrow, and clearly designed to obviate the necessity of directly confronting First Amendment issues regarding Assange's right of protected free speech activity. The count was, however, transparently a pretext to criminalise Assange's journalistic activity of obtaining information and publishing it on the WikiLeaks website.

The amended "Superseding Indictment," running to 37 pages, filed on May 23, 2019, levelled 17 counts against Assange based on the Espionage Act 1917 (Title 18 US Code Section 793 and related sections) and retained the computer hacking allegation as count 18.

The first 14 counts of the superseding indictment are based on allegations that Assange conspired with, and coordinated with Manning directly, in accessing the classified information as well as publishing it. The facts alleged, however, do not disclose that Assange did anything fundamentally outside of journalistic practice of obtaining information, including assisting a source conceal their identity. There is no doubt that Assange acted zealously in the pursuit of information disclosing the conduct of the United States in Iraq, Afghanistan and Guantanamo Bay. The First Amendment, however, zealously protects the rights of citizens to free speech.

In much of the commentary in defence of Assange, his activity is properly defended on the basis that he was a journalist. It needs to be borne in mind however, that the First Amendment protection of free speech is not a right limited to journalists. Every citizen has the right to publish information without government curtailment. As Chief Justice Warren Burger stated in 1977, "Freedom of the press is of limitless scope. The First Amendment does not belong to any definable category of persons or entities; it belongs to all who exercise its freedoms."

Counts 15 to 17 inclusive are counts which allege pure publishing of state secrets, independently of any antecedent activity involving Manning in illegally obtaining the information. Under these three counts, the government seeks specifically to criminalise pure acts of publication of classified defence information. These counts are truly counter-revolutionary elements in the indictment, directed at destroying First Amendment protection of publication of classified government information. The legal theory upon which these three counts are based involves the proposition that if someone, anywhere in the world, received classified defence material in the mail, from an anonymous source, and published it, they would be guilty of a crime of spying.

There have only been two prosecutions in American legal history of non-government third-party publishers under the Espionage Act: The 1971 prosecution of Daniel Ellsberg's friend, Anthony Russo, for helping Ellsberg copy the Pentagon papers, and the case of *United States v Rosen* in 2009. In both cases, the indictments were withdrawn by the government after pre-trial judicial rulings questioning the legality of the prosecutions and prosecutorial misconduct. Significantly, the Pentagon papers case involved an attempt to stop publication, not to punish publication as a crime.

In an effort to intensify the political underpinning of the indictment, the government alleges that Assange published material including "the names of individuals who risked their safety and freedom by providing information to the United States and our allies." However, as a legal matter, the publication of that information is irrelevant. Nothing in the Espionage Act turns on whether or not names were published. Furthermore, it would, in any event, always be open to prosecutors to claim some other "national security harm" to justify Espionage Act prosecutions. The legal issue is one of principle.

The national security juridical perspective underlying the indictment is succinctly set out in paragraph 29 of the indictment, where it pleads that Assange, Manning and others shared the objective of furthering the mission of WikiLeaks "as an intelligence agency of the people subverting lawful measures imposed by the United States government to safeguard

and secure classified information in order to disclose that information to the public."

This Department of Justice legal pleading echoes the statements of Mike Pompeo who, as CIA chief in 2017, denounced WikiLeaks as a "non-state hostile intelligence service." These perspectives have crystallised into the counter-revolutionary conception that the public has no right to be made aware of the activities of the government.

Putting beyond any doubt the political purpose of the prosecution, in 2008 a secret report was prepared by the US Army Counter Intelligence Center on WikiLeaks, which was subsequently leaked and published in 2010. The report declared that WikiLeaks "poses a counter intelligence threat to the US army." It stated "Wikileaks.org, a publically accessible internet website, represents a potential force protection counterintelligence, operational security (OPSEC) and information security (INFOSEC) threat to the US army." The report called for WikiLeaks' closure by destroying the trust of its readers.

The transparently political purpose of Assange's prosecution, and the indictment itself, based on the Espionage Act, an unquestionably political statute, render the extradition effort of the United States in violation of the extradition treaty with the United Kingdom. There are precedents in English law that English courts are not to recognise the laws of other countries which are an affront to human rights.

If the Espionage Act permits the criminalisation of journalistic activity, it constitutes a denial of fundamental human rights, which, according to precedent, must not be sanctioned by English courts. This principle was laid down in the landmark case of *Oppenheimer v Cattermole* (1976) in which the House of Lords declared that English courts would not recognise a Nazi law that constituted a grave infringement of human rights (a "law" stripping Jews of German citizenship).

However, given the lawless character of both governments in respect of Assange, and the contempt of Assange's rights displayed by the judiciary so far, it is by no means clear that the judicial authorities of the United Kingdom will uphold the law.

At the time of Assange's arrest, Daniel Ellsberg, the consultant who leaked the Pentagon papers to the *New York Times*, made the following statement, "The First Amendment is a pillar of our democracy and this is an assault upon it. If freedom of speech is violated to this extent, our republic is in danger. Unauthorised disclosures are the lifeblood of the republic."

The prosecution of Assange represents a qualitative escalation in the two-decade attack on the legal-constitutional order of the United States. The authoritarian legal conception being advanced by the US government is that "national security," which means the militarist war drive of the United States, trumps the peoples' rights. If the case against Assange succeeds, it will criminalise journalism in the United States.

## Conclusion

The Assange case represents a new stage in the global assault on constitutionalism and legality. Democracy is incompatible with the degree of inequality that now exists in the United States, its policy of aggressive war for global hegemony and the character of its ruling elites. The disintegration of the democratic system and the rise of the national security state are hallmarks of the deepening crisis of imperialism.

The Democratic Party is instrumental in this process. Its hostility to Assange is as vicious and hysterical as the fascistic cabal around Trump. The bourgeoisie is dusting off the old reactionary statute books, such as the Espionage Act, to prepare the domestic legal framework for war preparations. For the ruling elites, Assange is just the beginning. These

processes express not the strength of the system, but its historical demise and desperation, and therefore that it must be overthrown. The people have a democratic right to change the system of government and laws, so that it fulfils their needs and aspirations.

History has given to the working class the task of defending (and developing to a higher level) the great revolutionary conquests of the past. The profound meaning and significance of the right of free speech to mankind was once eloquently described by the great liberal, Justice Hugo Black, in the following manner:

Since the earliest days, philosophers have dreamed of a country where the mind and spirit of man would be free; where there would be no limits to enquiry; where men would be free to explore the unknown and to challenge the most deeply rooted beliefs and principles.

Our first amendment was a bold effort to adopt this principle, to establish a country with no legal restrictions of any kind upon the subjects people could investigate, discuss and deny.

The framers knew, better than perhaps we do today, the risks that they were taking. They knew that free speech might be the friend of change and revolution, but they also knew that it is always the deadliest enemy of tyranny. With this knowledge they still believed that the ultimate happiness and security of a nation lies in its ability to explore, to change, to grow, and ceaselessly to adapt itself to new knowledge born of inquiry, free from any governmental control over the mind and spirit of man.

The struggle of the socialist movement to free Assange is an essential component in the struggle against war, reaction and authoritarianism. The working class must defend itself and its rights. It can only do this today through the revolutionary overthrow of the capitalist state and the establishment of a socialist government and society, dedicated to the humane and peaceful progress and well-being of all mankind. The rising tide of revolt against capitalism worldwide must be transformed into the conscious effort to overthrow it.



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