Assange to Extradition Court: 'I Won't Surrender to the US for Doing Journalism'

The *WikiLeaks* founder appeared via video link in Westminster Magistrates Court for the first hearing in what could be a lengthy process in the US request for extradition.

By Joe Lauria
Special to Consortium News

Julian Assange had his first day in court on Thursday in his fight against extradition to the United States in an historic press freedom case that could have a profound impact on the future of journalism.

Dressed in jeans, a dark jacket and a T-shirt, Assange appeared on a video screen inside a cramped courtroom in Westminster Magistrates Court in London. "I won't surrender to the U.S. for doing journalism that has won many awards and protected lives," Assange told the court, according to a tweet from a USA Today correspondent.

Assange was arrested on April 11 after Ecuador lifted his political asylum at its embassy in London where Assange had lived since June 2012. On that day the U.S. unsealed an indictment against the publisher for conspiring with *WikiLeaks'* source Chelsea Manning to crack a password needed to hide Manning's identity. Protecting a source is a routine part of investigative journalism.

Watch the replay of a Special Extradition Vigil for Assange webcast Thursday on *Consortium*

News.

(Story continues below video)

The U.S. also filed a request that day to the British government to extradite Assange to face the charges, which carry a maximum sentence of five years in prison. Thursday was Assange's first appearance in the extradition case before Judge Michael Snow.

A large group of Assange supporters gathered outside the courthouse as well as inside Court Three, where many sat on the floor for the 10-minute hearing, the *Daily Expres*s in London reported. Many reporters and supporters were unable to gain entry after the hearing was moved to the smaller courtroom from Court One.

A further procedural hearing was scheduled for May 30, and a substantive court date was set for June 12. On that day the U.S. faces a deadline to reveal any further charges against Assange for which the British courts must base their extradition decision. The court was told resolution of the case was still months away, the *Expres*s reported.

The U.S. is weighing charging Assange under the 1917 Espionage Act for unauthorized possession and dissemination of classified material. It would be the first time the Act would be used to prosecute a journalist for receiving and publishing secret information. "It is not just a man who stands in jeopardy, but the future of the free press," NSA whistleblower Edward Snowden said in a message to a pro-Assange rally in Berlin on Wednesday.

Assange is serving an 11-month sentence for skipping bail

imposed on him on Tuesday connected to a Swedish investigation of sexual abuse allegations that was dropped in 2017. “Julian Assange‘s sentence is as shocking as it is vindictive,” *WikiLeaks* tweeted. “We have grave concerns as to whether he will receive a fair extradition hearing in the UK.”

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From Venezuelan Embassy in Washington, a Talk on Assange

Consortium News Editor Joe Lauria on Sunday delivered this talk about the Assange case to a group of activists who are living inside the Venezuelan Embassy in Washington to stop the illegitimate government of Venezuela from taking it over.

Video by Ford Fischer of News2Share.

Judge Delays Decision Whether to Unseal Assange Criminal Complaint

A hearing was held in Alexandria, Virginia, on Tuesday on a motion to make public the sealed U.S. charges against Julian Assange. Joe Lauria, editor of Consortium News, was in the courtroom and filed this report.

By Joe Lauria
in Alexandria, Virginia
Special to Consortium News

A decision whether to unseal U.S. government charges against Julian Assange was delayed for a week by Judge Leonie Brinkema in the United States District Court for the Eastern District of Virginia on Tuesday.

In her comments to the court, Judge Brinkema appeared to be siding with the government's argument that there is no legal precedent for a judge to order the release of a criminal complaint or indictment in a case before an arrest is made.

However, Katie Townsend, a lawyer for the Reporters Committee for Freedom of the Press, which filed an application to "unseal criminal prosecution of Julian Assange," told the court that the government's inadvertent revelation of charges against the WikiLeaks publisher should prompt the court to release the complaint.

The government says it mistakenly included a passage referring to Assange in a totally unrelated case. The passage was reported this month in the press and was read in full by Judge Brinkema in court. It says the government considered alternatives to sealing, but that any procedure "short of sealing will not adequately protect the needs of law enforcement at this time because, due to the sophistication of the defendant and the publicity surrounding the case, no other procedure is likely to keep confidential the fact that Assange has been charged."

The paragraph goes on to say that the "complaint, supporting affidavit, and arrest warrant, as well as this motion and

proposed order would need to remain sealed until Assange is arrested in connection with the charges in the criminal complaint and can therefore no longer evade or avoid arrest and extradition in this matter."

As additional evidence that the government was pursuing WikiLeaks, Townsend also cited the Jan. 2017 intelligence "assessment" that Russia had interfered in the 2016 election in which WikiLeaks is blamed for playing a role; congressional testimony from former FBI Director James Comey that the bureau had an "intense focus" on WikiLeaks; then CIA Director Mike Pompeo's claim that WikiLeaks was a "hostile, non-state intelligence service;" and the naming of WikiLeaks as "Organization 1" in the government's indictment of Russian intelligence agents for allegedly interfering in the election.

Government Calls Charges 'Speculation'

But Assistant U.S. Attorney Gordon Kromberg argued that the government has never said it was investigating Assange, only WikiLeaks and those leaking to it. He said further that it was "speculation" that there are already charges against Assange based on anonymous press sources, even though the mistakenly published paragraph clearly speaks of the "fact that Assange has been charged."

Kromberg told the court that the government could neither confirm nor deny that the passage relates to Julian Assange, nor could confirm or deny that he has been charged because to do so would admit Assange's status, which the state contends must remain secret.

Judge Brinkema, who called the case "interesting, to say the

least," agreed that it was an "assumption" and "hypothetical" that the WikiLeaks founder has already been charged. But she asked Kromberg in court what "compelling" rationale there was to keep Assange's status secret after the government's inadvertent release.

Kromberg said he could not discuss in public the specifics in this case regarding sealing.

Judge Brinkema then listed the general reasons why indictments and complaints remain sealed before an arrest is made: to prevent a suspect from fleeing, from destroying or tampering with evidence, from pressuring potential witnesses, from being prepared to harm arresting officers and also to protect against alerting other defendants that might be named in a complaint or indictment.

Assange, however, is purposely not fleeing from the Ecuador Embassy in London as he fears he will be arrested by British authorities and extradited to the United States. It is highly unlikely he is armed and could harm arresting officers, who could enter the sovereign territory of Ecuador only with that government's permission. Assange could possibly have alleged evidence on a laptop and others could be named in the complaint.

The judge then asked Townsend to name any case in which a judge had ordered the government to release criminal charges before an arrest was made. Kromberg had argued that there were none. Townsend requested a few days to respond.

Judge Brinkema gave both parties a week to make further submissions to the court.

Joe Lauria is editor-in-chief of Consortium News and a former correspondent for *The Wall Street Journal, Boston Globe*, *Sunday Times* of London and numerous other newspapers. He can be reached at joelauria@consortiumnews.com and followed on Twitter @unjoe .

The Fate of Julian Assange: Chris Hedges Interviews Consortium News Editor-in-Chief Joe Lauria

On his program "On Contact," journalist and author Chris Hedges interviews Joe Lauria, CN editor, on the moves to prosecute Julian Assange using the Espionage Act; the media's cravenness and the latest on Assange's condition in London.

Obama's Abuse of 'Espionage' Act

President Obama who took office vowing "transparency" has run one of the most opaque administrations in U.S. history, hiding information that the public needs to know and destroying the lives of government officials who dare to share some secrets with the citizenry, ex-CIA officer John Kiriakou says.

By John Kiriakou

Chelsea Manning's attorneys are gearing up for a long and hard appeal of the former soldier's espionage convictions. It's not going to be easy: The Supreme Court has had several opportunities in the past to rule the Espionage Act unconstitutionally broad (which it is), but has not done so. Let's hope the Court has come to its senses. It's time for the Espionage Act to go.

The Espionage Act was written in 1917 to combat German saboteurs during World War I. And it was updated only once, in the early 1950s during the hysteria surrounding the trial of Julius and Ethel Rosenberg.

The truth of the matter is that the Espionage Act is almost never used. At least it wasn't until Barack Obama became president. You see, from 1917 until 2008, the Espionage Act was used only three times to prosecute individuals not accused of aiding a foreign country. But President Obama's Justice Department has charged nine individuals with espionage since he became president.

None of those individuals gave or sold classified information to a foreign power. None sought personal gain in any way. Instead they were charged with passing what the statute calls "national defense information" to members of the press or academia. Most of them were prosecuted for whistleblowing.

In most cases, what they did was the definition of whistleblowing: They revealed evidence of waste, fraud, abuse, or illegality. I am one of those individuals. I was charged with three counts of espionage. And for telling the press that the U.S. was torturing prisoners at black sites around the world and that torture was official U.S. government policy, I was sentenced to 30 months in prison. I served 23 months.

The Justice Department's decision to file espionage charges against Edward Snowden under the same act is another example of the Obama administration's policy of using an iron fist against human rights and civil liberties activists.

But there are other cases, too. Tom Drake, a senior executive at the National Security Agency (NSA), blew the whistle on an illegal and wasteful program to intercept the communications of American citizens. He didn't go to the press. He went to the NSA's Inspector General, the General Counsel, the Pentagon Inspector General, and then to the Congressional Oversight Committee, just like he was supposed to. His reward was 10 espionage charges, all of which were eventually thrown out, but not until he had lost his job, his home, and his pension.

And one man, a State Department analyst named Stephen Kim, took a plea to an espionage charge after he was arrested for having a conversation with a Fox News reporter about North Korea. This was something that was a regular part of his job. And an administration official called the information that Kim was convicted of giving Fox "a nothing burger."

But that didn't stop the Justice Department from forcing Kim to take a plea to a felony that sent him to prison for a year and a half. Kim also lost his job, his home and his family. His wife left him and moved back to South Korea. And just to add insult to injury, as a part of his plea bargain, Kim had to stand before the judge and say, "I am not a whistleblower."

President Obama has used the Espionage Act to prosecute those whose whistleblowing he wants to curtail. But it's more than that. The purpose of

an Espionage Act prosecution is to ruin the whistleblower personally, professionally and financially. It is meant to send a message to anybody else considering speaking truth to power: Challenge us and we will destroy you.

The effect of an Espionage Act charge on a person's life being viewed as a traitor, being shunned by family and friends, incurring massive legal bills is all a part of the plan to frighten other people from revealing governmental waste, fraud, abuse and illegality. It forces the whistleblower into personal ruin, to weaken him to the point where he will plead guilty to just about anything to make the case go away. I know. That's exactly what happened to me.

In early 2012, I was arrested and charged with three counts of espionage and one count of violating the Intelligence Identities Protection Act (IIPA). (I was only the second person in U.S. history to be charged with violating the IIPA, a law that was meant to be used against rogues like Philip Agee, who wrote a book in the 1960s that listed the names of hundreds of undercover CIA officers.)

Two of my espionage charges were the result of a conversation I had with a New York Times reporter and an ABC News reporter about torture. Specifically, the classified information I was accused of giving the reporter was this: That the CIA had a program to capture or kill members of al-Qaeda. That's right. The CIA argued in my case that the fact that we were looking for al-Qaeda fighters after the Sept. 11 attacks was Top Secret. Seriously. The CIA "declassified" the information solely for the purpose of prosecuting me.

I gave the reporter no classified information only the business card of a former CIA colleague who had never been undercover and who was then working in the private sector. The other espionage charge was for giving the same unclassified business card to a reporter for ABC News. All three espionage charges were eventually dropped, but only after I agreed to take a plea. I agreed to 30 months in prison so as not to risk the possibility of 45 years in prison that I could have gotten had I been found guilty at trial.

That's what the Justice Department does. It heaps on charges so that the person pleads guilty to something anything to make the case go away. Believe me, very, very few people risk the 45 years. That's why the government has a conviction rate of 98.2 percent.

(As an aside, when Saddam Hussein got 98 percent of the vote in his last presidential election, we screamed to the international community that it was rigged. When the Justice Department wins 98 percent, we say they're all geniuses.)

So, why charge a whistleblower with a crime in the first place? Leaks happen all

the time in Washington. But the leaks that make the government look good are never prosecuted. Former Defense Secretary and CIA Director Leon Panetta boastfully revealed the identity of the Seal Team member who killed Osama bin Laden in a speech to an audience that included uncleared individuals.

That's a violation of the Intelligence Identities Protection Act. Panetta also shared his memoir with his publisher before it was cleared by the CIA's Publications Review Board. That is exactly this administration's definition of espionage: Sharing national defense information with a person not entitled to receive it.

Former CIA director General David Petraeus gave classified information to his girlfriend, including the names of undercover officers. He then lied to the FBI about it. But he was allowed to plead guilty to a misdemeanor. There was no Espionage Act charge for him.

The Obama administration's so-called "cybersecurity czar," General James "Hoss" Cartwright, allegedly told The New York Times that the White House was behind the release of the Stuxnet virus, which attacked computers being used in the Iranian nuclear program. That, too, is the definition of espionage.

But why wasn't Cartwright prosecuted? In addition to being known in the press as President Obama's favorite general, the Cartwright leak made the White House look good, tough and active against Iran. So there were no charges.

In my case, prosecution was my punishment for blowing the whistle on the CIA's torture program and for confirming to the press, despite government protestations to the contrary, that the U.S. government was, indeed, in the business of torture.

Obama declared a war on whistleblowers virtually as soon as he assumed office. Some of the investigations began during the Bush administration, as was the case with Tom Drake, but Espionage Act cases have been prosecuted only under Obama. Indeed, former Attorney General Eric Holder said just before he left office in early 2015 that he wished he had prosecuted more leak cases.

This policy decision to target whistleblowers smacks of modern-day McCarthyism. Washington has always needed an "ism" to fight against, an idea against which it could rally its citizens like lemmings. First, it was anarchism, then socialism, then communism. Now, it's terrorism. Any whistleblower who goes public in the name of protecting human rights or civil liberties is accused of helping the terrorists.

That the whistleblower has the support of groups like Amnesty International, Human Rights Watch or the American Civil Liberties Union doesn't matter. The

administration simply presses forward with wild accusations against the whistleblower: “He’s aiding the enemy!” “He put our soldiers’ lives in danger!” “He has blood on his hands!” Then, when it comes time for trial, the espionage charges invariably are either dropped or thrown out.

Yet another problem with the Espionage Act is that it has never been applied uniformly. Immediately after its passage in 1917, American socialist leader Eugene V. Debs was arrested and imprisoned under the Espionage Act simply for criticizing the U.S. decision to enter the First World War. He ran for president from his prison cell.

Nearly a century later, when the deputy director for national intelligence revealed the amount of the highly-classified intelligence budget in an ill-conceived speech, she was not even sent a letter of reprimand despite the fact that the Russians, Chinese and others had sought the figure for decades. When the disclosure was reported in the press, the CIA simply fluffed it off as an “accident.”

When a White House scheduling secretary in 2012 released the name of the senior CIA officer in Afghanistan to an email list of hundreds of reporters, the White House called it “inadvertent” and moved on.

The Obama administration’s espionage prosecutions are political actions for political reasons, and are carried out by political appointees. The only way to end this or any administration’s abuse of the Espionage Act is to rewrite the law. It is so antiquated that it doesn’t even mention classified information; the classification system hadn’t yet been invented. The law is still so broad and so vague that many legal scholars argue that it is unconstitutional.

The only hope of ending this travesty of justice is to scrap the Espionage Act and to enact new legislation that would protect whistleblowers while allowing the government to prosecute traitors and spies. This would require Congressional leadership, however, and that is something that is very difficult to come by.

Giants like the late Senators Daniel Patrick Moynihan and Frank Church, and the late Rep. Otis Pike, who boldly took on and reformed the intelligence community in the 1970s, are long-gone. Until someone on Capitol Hill begins to understand the concept of justice for national security whistleblowers, very little is likely to change.

The press also has a role to play, one that, so far, it has largely ignored. That role is to report on and investigate the whistleblower’s revelations of illegality, not on the kind of car he drives, the brand of eyeglasses he wears, where he went to college, or what his next door neighbor has to say about his

childhood.

The attacks on our civil liberties that the whistleblower reports are far too important to move off-message into trivialities. After all, the government is spying on all of us. That should be the story. If Congress can't or won't right this wrong, the Supreme Court must.

John Kiriakou is an Associate Fellow with the Institute for Policy Studies in Washington DC. He is a former CIA counterterrorism operations officer and former senior investigator for the Senate Foreign Relations Committee. [Reader Supported News is the Publication of Origin for this work. See: http://readersupportednews.org/opinion2/277-75/33288-focus-if-congress-wont-scrap-the-espionage-act-maybe-the-supreme-court-will]

Jeffrey Sterling's Selective Prosecution

Exclusive: The leak conviction of ex-CIA officer Jeffrey Sterling exposed a range of double standards, from how the spy agency treats African-Americans to how favored officials like Gen. David Petraeus get a pass while others get prison, an issue now before President Obama, writes Chelsea Gilmour.

By Chelsea Gilmour

Holly Sterling, the wife of a former CIA officer convicted of leaking details about a botched CIA plan to give flawed nuclear blueprints to Iran, has asked President Barack Obama to pardon her husband who was targeted for prosecution after accusing the CIA of racial discrimination and taking his concerns about the Iran scheme to congressional authorities.

In a 14-page letter to President Obama, Holly Sterling recounted the personal nightmare of the U.S. government's relentless pursuit of her husband, Jeffrey Sterling, an African-American, after an account of the Iran operation codenamed Operation Merlin appeared in *State of War*, a 2006 book by New York Times reporter James Risen.

After a conviction earlier this year based on only circumstantial evidence with Risen refusing to identify his source or sources Jeffrey Sterling was sentenced to 3½ years in prison, a punishment that the judge made more severe because Sterling would not admit guilt and insisted on a trial.

Holly Sterling pleaded with the President to free her husband, noting the disparity between his sentence and the misdemeanor probation given to retired

Gen. David Petraeus who admitted to giving highly classified information to his mistress/biographer and lying about it to FBI investigators.

“How do you explain the obvious disparate treatment of General Petraeus?” she asked Obama. “If one strips away the race, financial status, and political clout of Jeffrey and Mr. Petraeus and solely reviewed the alleged crimes of Jeffrey and those pled by the general, it is glaringly obvious this was selective prosecution and sentencing. Mr. Petraeus pled to far more egregious acts than Jeffrey was convicted of, yet Jeffrey is rotting in a prison cell while Mr. Petraeus continues to live his life as he so chooses.”

She also reminded Obama that he risked going down in history as the president who prosecuted more whistleblowers than all his predecessors combined. Obama’s zealous pursuit of leakers has stifled the normal give-and-take between national security officials and journalists, a process that historically has given the people some insights into what the U.S. government is doing in their name.

In the letter to Obama and at a news conference on Thursday, Holly Sterling sought to provide context for the U.S. government’s aggressive prosecution of her husband. She recalled how he joined the Central Intelligence Agency in 1993 and was trained as a case officer for the Iran Task Force, which included him learning Farsi.

In 1997, as Sterling was preparing to be stationed in Germany for his first overseas post, he was approached by a supervisor and told the job had been given to another employee, as Holly Sterling explained in her letter to the President. “It was at that moment, his supervisor stated [the reasoning], ‘We are concerned you would stick out as a big black guy speaking Farsi.’ With shock and dismay, Jeffrey replied, ‘When did you realize I was black?’”

Based on this episode and subsequent disparate treatment, Jeffrey filed an Equal Employment Opportunity complaint based on racial discrimination, the first African-American to do so, but it was dismissed in part because of the “state secrets privilege.” During this time, Sterling and Risen were in contact about the lawsuit, which Risen described in a New York Times story in 2002.

Risk of Whistle-blowing

After being dismissed from the CIA, Sterling took the steps that would eventually make him a whistleblower and get him targeted as the number one suspect in the leak investigation regarding Operation Merlin.

“In 2003, Jeffrey went to the Senate Select Committee on Intelligence to voice concerns he had regarding ‘Operation Merlin,’ which he worked on while at the agency,” Holly Sterling wrote. “He had grave concerns about mismanagement of the

program and potential harm to our country. This was a legal and proper channel for agency employees to voice any such concerns."

Holly Sterling's appeal to Obama reflected the desperation of a 10½-year legal battle that culminated in Jeffrey Sterling's conviction last May on nine felony counts, including seven under the antiquated Espionage Act, a World War I-era law aimed at spies and saboteurs, not whistleblowers.

Her letter seeking a pardon was the catalyst for a press conference about the Sterling case and the Obama administration's "war on whistleblowers." The speakers included Jesselyn Radack, a former ethics adviser to the Justice Department and herself a whistleblower; Thomas Drake, a former senior executive at the National Security Agency where he exposed both waste and privacy violations; former CIA analyst Ray McGovern; and Delphine Halgand, a representative of Reporters Without Borders.

"I would like to remind everyone that Jeffrey Sterling *is* a whistleblower," Radack pointed out. "Sterling is a whistleblower because he met with the Senate Committee on Intelligence [in 2003], a proper internal political channel that we're always hearing people talk about and he made reports about what he saw as a botched CIA operation."

Three years later after Risen's book was published in 2006 the FBI targeted Sterling as the chief suspect, searching his house near St. Louis, where he worked as a fraud investigator. There was a period of relative quiet, until 2011, when Jeffrey was lured by his then-employer to his office under the ploy of a work meeting, and then was arrested by the FBI.

Though there were 90 other CIA officers who knew the details of Operation Merlin – and trial testimony during the Sterling case revealed that the FBI initially believed the leak had come from a member of the Senate Intelligence Committee – Sterling became the focal point of the investigation because he was seen as being a "disgruntled" employee who was fired by the CIA. [See Consortiumnews.com's Persecution of CIA's Jeffrey Sterling]

During the trial, evidence presented against Sterling consisted almost entirely of the metadata of conversations (phone calls and emails) between Sterling and Risen. The metadata provided the logs of conversations but did not include any actual content of the conversations, only that they took place. At no point were the prosecutors able to find any concrete evidence that Sterling had disclosed information regarding Operation Merlin to Risen.

Adequate Evidence?

The circumstantial evidence was deemed adequate, however, because Sterling was

being charged under the Espionage Act, which only requires circumstantial evidence to prove guilt. Besides the relative ease of getting a conviction, the Espionage Act also makes no distinction between revealing information for the benefit of the public interest and engaging in conduct designed to help a foreign enemy in wartime.

“The Espionage Act has become a strict liability law, meaning that the prosecution does not have to prove that the whistleblower had any intent to harm the United States or benefit a foreign nation,” said Jesselyn Radack, who heads the Whistleblower and Source Protection Program (WHISPeR) at ExposeFacts. “Worse, Sterling’s conviction is based on flimsy circumstantial evidence that almost certainly would not result in a conviction, except under the very vague and overbroad Espionage Act.”

Thomas Drake added, “And not only do they [administration officials] go after them [the whistleblowers] under the Espionage Act – it’s selective, it’s malicious, and it’s vindictive. See the problem, and of course, if you’re the government then you know this (they don’t like to admit it, but they will say it when necessary), if you’re charged with espionage there’s no public interest defense.

“If you go to the oversight committee [and the committee officials] decide you might have given something to them [that they] don’t like that you gave to them, even though they have oversight responsibilities, that’s no defense either. So here you are practicing the First Amendment redress in the public interest, and you find yourself criminalized. And that’s what’s happened in this country.”

Since the enactment of the Espionage Act in 1917, the Obama administration has used it to convict more people than all other administrations combined.

“The Obama administration presided over the most draconian crackdown on national security and intelligence whistleblowers in U.S. history,” Radack said. “The Justice Department has used the antiquated Espionage Act as a bludgeon to threaten, coerce, silence, and imprison whistleblowers for alleged mishandling of classified information.”

Radack continued, “Meanwhile, powerful and politically connected individuals accused of the same and much worse conduct receive, at most, a slap on the wrist. Like General David Petraeus, who gave away more secret information at a much higher level to his mistress and received a sweetheart plea deal for a minor misdemeanor.”

Thomas Drake elaborated, “In this country, National Security reigns supreme, it trumps everything. The primacy of national security gives the elite and those in

privileged positions of power no accountability. It gives them immunity from any attempt to hold them responsible. And yet, we have an administration that has no problem licensing unto itself the authorization to leak to the press on an extraordinary level, in fact, leaking highly classified sources and methods for political purposes and to present themselves in the best possible light.

“And yet, if you go to an intel committee which provides oversight on the secret side of government, or if you dare go to the press or have any contact with the press, at all, under any circumstances, then you’ll be charged with espionage. Last time I checked, real spies don’t go to the press. Real spies go to other spies. Real spies don’t make public their secrets.”

Targeting Critics

Drake noted parallels between the Sterling case and his own whistleblowing case, in the context of disparate treatment and seeking appropriate redress in the public’s best interest. He explained that the government will often chalk these whistleblowing cases up to “individuals who have ‘personal grievances.’ So you have in my [Drake’s] case and in Jeffrey Sterling’s case, we bear the full punishment, we bear the burden of the politics of abject and outright personal destruction.

“We, as sources, whether to hold a mirror to those things in government that are wrong, that violate the law, that actually are, in fact, a danger to our national security, we’re the ones that pay the high price, we’re the ones that are put up on the altar of national security as sacrifices.”

In 2010, the U.S. government accused Drake, who had complained about NSA abuses, of mishandling classified material under the Espionage Act. Eventually all 10 original charges were dropped and Drake pled to one misdemeanor charge of exceeding authorized use of a computer.

As for the disparity between Petraeus’s wrist-slap and Jeffrey Sterling’s prison term, Holly Sterling said, “If you honestly look at the two cases you see that General Petraeus committed far more egregious acts than Jeffrey had allegedly done, and he did it for selfish reasons, while Jeffrey had gone to the Senate Intelligence Committee because he was concerned about the citizens of our country and what this possible Operation Merlin could have done.

“So, with General Petraeus’s punishment and Jeffrey’s punishment, it’s basically saying that the thought in this country is that if you are a Caucasian person and you do wrong, that you don’t need to be punished for it and you get a slap on the wrist, while if you are a man of color, you are guilty until proven innocent and you belong behind bars.”

Ray McGovern cited the troublesome use of metadata during the Sterling trial as evidence of guilt, noting that another name for metadata is circumstantial evidence. McGovern recalled that last May, “the former NSA General Council, Stu Baker, said ‘metadata absolutely tells you everything about anyone’s life. If you have enough metadata, you don’t really need any content.’”

McGovern described a meeting between Stu Baker and former NSA Director Michael Hayden, in which Baker’s metadata quote was repeated in the presence of Hayden. McGovern said, “General Hayden said, ‘If you have enough metadata you don’t need any content, we kill people based on metadata.’ Well, we also imprison people based on, mostly illegally acquired, metadata” a reference to the NSA’s collection of metadata on people around the world, including American citizens.

Dangerous Precedent

Delphine Halgand cited the dangerous precedent for whistleblowers and journalists that the Sterling trial represented because of the use of metadata: “The Department of Justice built a case against Sterling based entirely on circumstantial evidence and they sustained his conviction in what the BBC called, ‘a trial by metadata.’ How is it possible that proving the simple existence of contacts between a former CIA operative and a journalist is sufficient to convict someone of espionage?

“Is a relationship with a reporter the new catalyst for government prosecution of whistleblowers, whether alleged or actual? If anybody can be sentenced in the United States just because he was merely talking to a journalist on a regular basis, where is press freedom heading in the country of the First Amendment?”

Halgand continued, “It is really clear that the Department of Justice chose to make an example of Jeffrey, to warn government employees against talking to journalists. Leaks are the lifeblood of investigative journalism in this country given that nearly all information related to national security is considered secret and classified.

“In fact, the war on whistleblowers is designed to restrict all but the officially approved version of events. The United States has witnessed an alarming trend in curtailing freedom on information these recent years, and as we heard earlier, President Obama’s so-called ‘war on whistleblowers’ played an important role in this decline.”

As Thomas Drake put it, “In the United States, national security is currently engaging in unamending the First Amendment. The cornerstone, the foundation of the Bill of Rights and all of our liberties and freedoms. If you don’t have the ability to do redress for grievances, if you don’t have the ability to publish

what is in the public interest, to inform people, to associate freely one to another, then what we call our constitutional republic, this special form of democracy, begins to erode and disappear."

Jesselyn Radack summed up the issue by reminding that whistleblower-leak investigations "mak[e] clear that punishing whistleblowers is a backdoor way of punishing journalists." While curtailing the freedom of the press may be the ultimate target of this "war on whistleblowers," Radack and Drake both remarked that, tragically, it is usually the whistleblower, the source, who takes the brunt of the law.

Holly Sterling reiterated that sentiment in her letter to Obama. "Not only has Jeffrey suffered but so have his family, his friends, community and society. And now an intelligent, strong, ethical, and productive member of our world feels as though he ceases to exist while in prison."

While Holly Sterling has requested a presidential pardon, Sterling's team is also appealing the court's decision. But as media critic Normon Solomon, who helped host the press conference, put it, "'Glacial' would be overstating the speed with which the U.S. government is willing to proceed on such appeals."

Radack added, "A pardon is *vastly* preferable to an appeal because appeals can take years and cost tons of extra money whereas a pardon can be done in a snap and it also erases the crime." But she added, "I predict that General Petraeus will have a pardon before Jeffrey Sterling gets either a pardon or an appeal."

Chelsea Gilmour is an assistant editor at Consortiumnews.com. She has previously published "The Mystery of the Civil War's Camp Casey" and "Jeb Bush's Tangled Past."]

Risen Deflects Queries in Leak-Case Testimony

After years of pressuring New York Times national security correspondent James Risen to testify in the leak or "Espionage Act" case against ex-CIA official Jeffrey Sterling, the prosecutors never directly asked Risen to name Sterling as his source, as Sam Husseini describes.

By Sam Husseini

James Risen sat alone in the far corner of the expansive hallway outside the courtroom. It was a fitting beginning for a day in which he seemed alone, even

apart from his lawyers.

Risen was there in response to a government subpoena to testify in a pre-trial hearing in the case of Jeffery Sterling. The government claims that Sterling, while working for the CIA, was a source in Risen's reporting on an alleged U.S. government scheme to transfer flawed nuclear weapons blueprints to Iran more than a decade ago.

Risen's testimony on Monday featured him stalling government questioning, but ultimately relenting and responding to limited queries from the government, defense and the judge regarding his reporting, as anticipated by Marcy Wheeler for ExposeFacts. However, Risen had made clear before, and repeated today, that he would not reveal who his confidential source or sources were, and in the end no one actually asked that question.

There was no dramatic: "The government calls Mr. Risen to the stand." Instead, District Judge Leonie Brinkema, after noting that the government had called Risen, said: "Mr. Risen, would you go to the witness stand?"

After confirming from Risen that he'd authored numerous articles relevant to the government's case against Sterling, the government lawyer repeatedly asked regarding chapter 9 of his book *State of War* some variation of: "Did you have a confidentiality agreement with source or sources?"

Risen repeatedly responded with some variation of: "When I said I had identified sources, I identified those sources; when I said I had unidentified sources, I had unidentified sources."

After several go-arounds, the judged chimed in: "Mr. Risen, that is not an answer to the question," and then noted that his attorney did not object to the question about if he used confidential sources. Risen responded: "That's not the question he asked."

The judge asked the lawyer for the prosecution, James Trump, to rephrase and he did. The prosecution proceeded to unpack their questions, which Risen initially repeatedly refused to answer with some variation of: "I decline to answer that question because I don't want to help prove or disprove the mosaic that the government is attempting to create here."

This included questions regarding what other methods of reporting Risen might use besides confidential sources. However, the government lawyer eventually drew from Risen's past affidavits where he did respond to such questions. At some points, it appeared Risen was unfamiliar with his prior affidavit, or was at least highlighting the fact that he was compelled to testify.

At one point the judge raised the prospect of perjury. After another question from the prosecution, Risen said: “Can I talk to my lawyers?” and the judge gave a five-minute recess.

After the recess, Risen gave terse, “yes” or “no” replies to the government lawyer. These included acknowledging that he used other methods in his reporting besides sources, including congressional testimony; that he went to Vienna to report on nuclear issues, and, finally, that Sterling was a named source in a previous story by Risen.

The prosecution repeatedly asked if Risen would divulge who his unidentified sources were if asked and he said he would not. But they never actually asked.

When the defense questioned Risen, the lawyers attempted to highlight this. The government had sought to compel Risen’s testimony and the question was brought before the U.S. Supreme Court, which allowed a lower court ruling to stand, in effect siding with the government, allowing it to compel Risen’s testimony.

A seemingly exasperated Edward MacMahon for the defense stressed that in the drawn-out case of Mr. Sterling, the government had gone to such extraordinary lengths to compel Risen to disclose his source or sources and then, when they had him on the stand, never asked the question.

The defense also highlighted a document that had apparently been described by some as a book proposal for *State of War*, but that Risen described as promotional material for a book fair. At one point, Risen questioned how the government obtained such a document, leading to laughter in the court and the judge to respond: “It doesn’t work that way”, that Risen wasn’t permitted to ask questions here.

At least one question seemed to suggest that at times Risen may have presented information as true in his own voice when it may have been based on an allegation by an unidentified source.

The judge, whose court does not allow recording devices, asked the journalist about his use of quotes, italics and regular text. Risen hesitated and then remarked that writing books allows the writer to assert his own voice more than regular newspaper writing.

The defense quoted at length from prior statements by Risen about the need to scrutinize government claims about WMDs regarding Iran, citing the “flawed” intelligence prior to the 2003 invasion of Iraq.

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In Defense of a CIA Whistleblower

The mainstream U.S. news media sometimes rallies to the defense of a reporter who is pressured to reveal a source but not so much for the brave whistleblower who is the target of government retaliation. Such is the case for ex-CIA officer Jeffrey Sterling, writes Norman Solomon.

By Norman Solomon

The trial of former CIA officer Jeffrey Sterling, set to begin in mid-January, is shaping up as a major battle in the U.S. government's siege against whistleblowing. With its use of the Espionage Act to intimidate and prosecute people for leaks in "national security" realms, the Obama administration is determined to keep hiding important facts that the public has a vital right to know.

After fleeting coverage of Sterling's indictment four years ago, news media have done little to illuminate his case – while occasionally reporting on the refusal of *New York Times* reporter James Risen to testify about whether Sterling was a source for his 2006 book *State of War*.

Risen's unwavering stand for the confidentiality of sources is admirable. At the same time, Sterling – who faces 10 felony counts that include seven under the Espionage Act – is no less deserving of support.

Revelations from brave whistleblowers are essential for the informed consent of the governed. With its hostilities, President Barack Obama's Justice Department is waging legalistic war on our democratic rights to know substantially more about government actions than official stories. That's why the imminent courtroom clash in the case of "United States of America v. Jeffrey Alexander Sterling" is so important.

Sterling is accused of telling Risen about a CIA operation that had provided flawed nuclear weapon blueprints to Iran in 2000. The charges are unproven. But no one disputes that Sterling told Senate Intelligence Committee staffers about the CIA action, dubbed Operation Merlin, which Risen's book later exposed and brought to light as dumb and dangerous. While ostensibly aiming to prevent nuclear proliferation, the CIA risked advancing it.

When he informed staff of the Senate oversight committee about Operation Merlin,

Sterling was going through channels to be a whistleblower. Presumably he knew that doing so would anger the CIA hierarchy. A dozen years later, as the government gears up for a courtroom showdown, it's payback time in the security-state corral.

The relentless prosecution of Sterling targets potential whistleblowers with a key implicit message: *Do not reveal any "national security" secrets that make the U.S. government look seriously incompetent, vicious, mendacious or dangerous. Don't even think about it.*

With so much at stake, the new petition "Blowing the Whistle on Government Recklessness Is a Public Service, Not a Crime" has gained more than 30,000 signers in recent weeks, urging the government to drop all charges against Sterling. The initial sponsors include ExposeFacts, the Freedom of the Press Foundation, the Government Accountability Project, *The Nation*, *The Progressive* / Center for Media and Democracy, Reporters Without Borders and RootsAction.org. (A disclaimer: I work for ExposeFacts and RootsAction.)

Pentagon Papers whistleblower Daniel Ellsberg has concisely summarized the context of the government's efforts in the Sterling prosecution. "Sterling's ordeal comes from a strategy to frighten potential whistleblowers, whether he was the source of this leak or not," Ellsberg said in an interview for an article that journalist Marcy Wheeler and I wrote for *The Nation.*

"The aim is to punish troublemakers with harassment, threats, indictments, years in court and likely prison – even if they've only gone through official channels to register accusations about their superiors and agency. That is, by the way, a practical warning to would-be whistleblowers who would prefer to 'follow the rules.' But in any case, whoever were the actual sources to the press of information about criminal violations of the Fourth Amendment, in the NSA case, or of reckless incompetence, in the CIA case, they did a great public service."

Such a great public service deserves our praise and active support.

Norman Solomon is the executive director of the Institute for Public Accuracy and the author of *War Made Easy: How Presidents and Pundits Keep Spinning Us to Death*. He is a co-founder of RootsAction.org.

Making the World the 'Enemy'

After 9/11, President George W. Bush turned to Civil War precedents to create military tribunals for trying alleged "terrorists." But in applying those

draconian rules to a worldwide battlefield, he created the nightmarish potential for a global totalitarianism, as retired U.S. Army JAG officer Todd E. Pierce explains.

By Todd E. Pierce

Edward Snowden, the admitted U.S. National Security Agency whistleblower, is charged with violations of the U.S. Espionage Act of 1917, codified under Chapter 37, “Espionage and Censorship.” It is seemingly not an oversight that Chapter 37 is entitled “Espionage and Censorship,” as censorship is the effect, in part, of this chapter.

In fact, the amendment of §793 that added subsection (e) was part of the Subversive Activities Control Act of 1950, which was, in turn, Title I of the Internal Security Act of 1950. In addition, these statutes were initially passed as the U.S. was entering World War I, with what was called the Sedition Act of 1918 added as amendments to the Espionage Act in short order.

They were codifications into federal law of what had been put into practice during the previous major war the U.S. fought, its own Civil War, codifying such martial law offenses as “corresponding with” or “aiding” the enemy by such acts as “mail carrying across the lines.” [See 1880 JAG Digest, W. Winthrop, attached to Prosecutors Brief.]

During the Civil War, draconian and extra-constitutional means had been used to suppress dissenting speech with the use of military commissions to enforce martial law and to punish any act, to include speech, that was deemed disloyal.

As a disclaimer, this isn’t to demonize President Abraham Lincoln or to sympathize with the Confederate cause. The South’s system of slavery, along with the slavery that still existed in parts of the North, was the epitome of tyranny, with totalitarian martial law applied to every single slave under the legal regime which had been created. But here the intent is to show how great a threat it is to free speech and a free press to use legal cases from that period as precedent for what the U.S. government is doing in the military commissions today.

This Civil War-era repression of free speech and the press, though unconstitutional under the First Amendment, was justified under the pretense of the “law of war,” falling under the President’s “war powers.”

Lieber’s Code of 1863 or General Order No. 100 was the first codification of the law of war and was named after the German-American jurist Francis Lieber. With all its virtues of more humanitarian treatment of prisoners of war, it was

foremost a martial law regulation, as the first section addresses, establishing the authority of the military over civilians and declaring what acts constituted offenses.

But as the Supreme Court stated in the 1866 case, *Ex Parte Milligan*, "for strictly there is no such thing as martial law; it is martial rule; that is to say, the will of the commanding officer, and nothing more, nothing less." [See *Ex Parte Milligan*, 71 U.S. 2, 35 (1866)]

After the Civil War, so repudiated were those extra-constitutional practices i.e., decrees by a president that they weren't resorted to again when the U.S. entered World War I, although the same passions were ignited in 1917. Yet, instead of executive decree implementing martial law, repressive laws were passed legislatively as the U.S. Espionage Act of 1917 and the Sedition Act of 1918.

But as the enforcement of these laws became evermore repressive, resulting in the McCarthyism of the 1950s, U.S. Courts began rolling back the suppression of speech, culminating with the 1969 Supreme Court decision in *Brandenburg v. Ohio*. In *Brandenburg*, it was held that speech could only be forbidden or proscribed, even if it advocates the use of force, "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).]

When 'Everything Changed'

But with the attack on the World Trade Center and the Pentagon in 2001, military commissions were once again established by Executive Order invoking the "law of war." Congress later ratified this substitution of military authority for civil authority with the Military Commission Acts of 2006 and then 2009, and expanded the authority even further with Section 1021 of the 2012 National Defense Authorization Act.

But beginning with the charges when the first Military Commission convened, vague offenses of "material support for terrorism" and conspiracy were claimed to be "war crimes" triable by military commissions. These were offenses that were analogized to "aiding the enemy" by Military Commission prosecutors. However, "aiding the enemy," as interpreted during the Civil War, could be mere criticism of government officials, such as "publicly expressing hostility to the U.S. government," according to documents filed by Military Commission prosecutors.

Under a strict reading of Section 793(e) of the Espionage Act, it is conceivable that the U.S. government, if it so chose, could prosecute any

publisher, journalist, blogger or anyone else who may pass on classified information such as by forwarding a news article with WikiLeaks information in it. The over-classification of this information thus serves to censor the very sort of information necessary for a functioning democracy; what our government does in our name, whether embarrassing or not.

And, while prosecution under a federal statute would entitle a defendant to the due process rights of the U.S. Constitution, under military commissions, there is only the barest due process required, with a chimerical "right" to habeas corpus. So this parallel body of "law" outside the Constitution and international treaties guaranteeing a free press and free speech should be chilling to journalists and other communicators of political information, especially since the U.S. government asserts that prosecutions under U.S. military commissions apply globally.

Applying Civil War Precedents

This body of law is what Military Commissions Chief Prosecutor Mark Martins terms the "U.S. common law of war." [See Brief for Respondent at 54, Al Bahlul v. United States (D.C. Cir.)(No. 11-1324).] With the exception of a couple of spying cases, this so-called "U.S. common law of war" is entirely drawn from the martial law cases of the Civil War, all in U.S. territory Union states, not Confederate.

In making this argument, U.S. Military Commission prosecutors have argued that "it has long been clear that a class of wartime offenses exists that national authorities may criminalize and punish as a matter of domestic law." This disingenuously ignores that these are only "offenses" when they are committed within the national territory of the authorities criminalizing them thus the term "domestic" and when the "offender" is captured in that same territory.

Military Commission prosecutors argue, however, that this "U.S. common law of war" is available to them in the prosecution of anyone regardless of where the alleged offense or the capture took place.

This colossal claim of universal jurisdiction by the U.S. military, using as precedent offenses that were acts of disloyalty in Union territory for the most part, raises the very real possibility that any global dissent to U.S. policy by journalists, bloggers or political activists can in the future be seen as violations of the "U.S. common law of war."

This has the potential for any journalist whether from a close ally, such as Great Britain, or from a "third-class partner," such as Germany to be subject to U.S. military arrest for any role they may have had in "communicating" U.S.

classified information or anyone who may further disseminate it.

Using the Civil War offenses as precedents, this could also include offenses such as “publicly expressing hostility to the U.S. government,” which in fact was an offense cited by Brig. Gen. Martins as part of a list of offenses from the 19th Century JAG Digest to support his current proposition for the existence of a “U.S. common law of war.”

Totalitarian Foundation

To fully understand the totalitarian foundation of what is being called the “U.S. common law of war” and noting the “law of war” was also the basis of “law” under such regimes as the German Nazis, the Soviet Union and Pinochet’s Chile it is necessary to look at the original Civil War sources.

Brig. Gen. Martins’s Civil War predecessor in an equivalent position was William Whiting, Solicitor General of the War Department. He compiled what was a “legal guide” for Union Army Commanders, entitled “Military Arrests in Time of War,” and then expanded that to “War Powers Under the Constitution of the United States.” The guide was printed as one volume in 1864 as a compilation of opinions previously issued by the War Department.

In this legal guide, Whiting outlined and justified why it was necessary for civilians in the North to be subject to military arrest if their acts should in any way cause them to be the “enemy,” not just to “aid the enemy,” and what offenses those acts would be constituted as under the law of war, or martial law.

To be clear on terms, Whiting explained, “Martial Law is the Law of War.” Or, as General Henry W. Halleck, an acknowledged international law expert at the time of the Civil War, wrote in his treatise on international law. “Martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions is in truth and reality no law, but something indulged rather than allowed as a law.” [See Henry W. Halleck, Vol. 1, Halleck’s International Law or Rules Regulating the Intercourse of States in Peace or War 501 (1878)(1st Ed. 1861).]

This understanding of the law of war, or martial law, was echoed by U.S. Supreme Court Justice Stephen Johnson Field, when he wrote in 1878: “It may be true, also, that on the actual theatre of military operations what is termed martial law, but which would be better called martial rule, for it is little else than the will of the commanding general, applies to all persons, whether in the military service or civilians. . . . The ordinary laws of the land are there superseded by the laws of war.” [See Beckwith v. Bean, 98 U.S. 266, 293-294

(1878).]

But Justice Field added, “This martial rule – in other words, this will of the commanding general is limited to the field of military operations. In a country not hostile, at a distance from the movements of the army, where they cannot be immediately and directly interfered with, and the courts are open, it has no existence.”

Worldwide Battlefield

Today, however, U.S. government officials routinely describe the whole world as the battlefield, with seemingly the global population subject to the “U.S. common law of war,” as interpreted under the Civil War precedents, meaning President Lincoln’s Martial Law Proclamation of Sept. 24, 1862.

This read, in pertinent part: “ all Rebels and Insurgents, their aiders and abettors within the United States, and all persons . . . guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of the United States, shall be subject to martial law and liable to trial and punishment by Courts Martial or Military Commission.”

An 1862 U.S. Army Order is quoted at the embarkation point for Alcatraz: “The order of the President [Abraham Lincoln] suspending the writ of habeas corpus and directing the arrest of all persons guilty of disloyal practices will be rigidly enforced.”

Disloyal practices were not limited to actual acts of rebellion but could be an offense such as any of the following: unauthorized correspondence with the enemy; mail carrying across the lines; and publicly expressing hostility to the U.S. government or sympathy with the enemy. [See William Winthrop, A Digest of Opinions of The Judge Advocate General of the Army 328-29 (1880).]

As readily apparent, those offenses go to the core of freedom of expression, as guaranteed under the U.S. First Amendment and internationally under the International Covenant on Civil and Political Rights. But according to 19th Century “law of war” expert Col. William Winthrop, these were “offences against the laws and usages of war.” They were charged generally as “Violations of the laws of war,” or by their specific name or descriptions. [See William Winthrop, Military Law and Precedents 1314 (2d ed. 1920).]

These particular offenses for which civilians were tried by military commissions would have been committed in Union territory, as the population of the Confederate states was given belligerent rights and thus did not have the “duty of loyalty” as did civilians in the North.

The most prominent civilian tried and convicted by military commission was Clement Vallandigham, a former Ohio congressman and a member of the Democratic Party who supported the right of states to secede. In 1863, he was charged with "having expressed sympathies for those in arms against the Government of the United States, and for having uttered . . . disloyal sentiments and opinions." [See *Ex Parte Vallandigham*, 68 U.S. 243, 244 (1863).]

But Vallandigham was only one of hundreds convicted for disloyal speech. Today's Military Commissions prosecutors cite the 1862 case of editor Edmund J. Ellis to support their position that material support for terrorism is a "war crime," even though it involved only disloyal speech from a newspaper editor convicted of violating the laws of war by publishing information "intended and designed to comfort the enemy." [See Special Order No. 160, HQ, Dep't of the Missouri (Feb. 24, 1862), 1 OR ser. II, at 453-57, cited in Bahlul v. U.S., Government brief at 48.]

That might be the same "offense" as the editors of the Guardian and Der Spiegel would be charged with under the so-called "U.S. common law of war."

Defining a Violation

What is a law of war violation? During the Civil War, the War Department's Solicitor General William Whiting provided a definition for the martial law that the U.S. was under:

"Military crimes, or crimes of war, include all acts of hostility to the country, to the government, or to any department or officer thereof; to the army or navy, or to any person employed therein: provided that such acts of hostility have the effect of opposing, embarrassing, defeating, or even of interfering with our military or naval operations in carrying on the war, or of aiding, encouraging, or supporting the enemy." (Emphasis added.)

But as the United States has adopted these Civil War military commissions as precedents, the U.S. government logically has adopted this domestic martial law definition as well for the U.S. military to apply globally. And, as Whiting explained, military arrests may be made for the punishment or prevention of military crimes. [See William Whiting, War Powers under the Constitution of the United State 188 (1864).]

As Whiting stated, "the true principle is this: the military commander has the power, in time of war, to arrest and detain all persons who, being at large he has reasonable cause to believe will impede or endanger the military operations of the country."

He elaborated further: "The true test of liability to arrest is, therefore, not

alone the guilt or innocence of the party; not alone the neighborhood or distance from the places where battles are impending; not alone whether he is engaged in active hostilities; but whether his being at large will actually tend to *impede*, embarrass or hinder the bona fide military operations in creating, organizing, maintaining, and most effectually using the military forces of the country." (Emphasis in original).

"Aiding the enemy" is, in fact, what constitutes the entirety of what Whiting describes as crimes of war. While it exists under martial law as described by Whiting, it is also codified under the U.S. Uniform Code of Military Justice as Article 104.

In either case, it was never contemplated that it criminalized anyone who didn't have a "duty" of loyalty to the United States by being resident within the United States, until the U.S. government adopted an expansive interpretation of it in order to charge non-U.S. citizens with Material Support for Terrorism under the fallacious claim that the two offenses are analogous.

Talking to the 'Enemy'

Under Article 104, Aiding the Enemy is defined as, in pertinent part, any person who: "(2) without proper authority, . . . gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court-martial or military commission may direct." (Emphasis added.)

Article 99 is referenced for the definition of "enemy," which defines enemy as the organized forces of the enemy in time of war and includes civilians as well as members of military organizations. In addition, Article 99 states: "'Enemy' is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and all the citizens of the other."

Article 104c(6) explains the offense of "Communicating with the enemy" further: "No unauthorized communication, correspondence, or intercourse with the enemy is permissible. The intent, content, and method of the communication, correspondence, or intercourse are immaterial. No response or receipt by the enemy is required. The offense is complete the moment the communication, correspondence, or intercourse issues from the accused. The communication, correspondence, or intercourse may be conveyed directly or indirectly." (Emphasis added.)

But this strict rule of non-intercourse, the term used during the Civil War era which strictly prohibits any "communication" with the "enemy," is what provides

the elements of “war treason,” as was frequently charged in the Civil War.

‘War Treason’

Article 90 of Lieber’s Code provided: “A traitor under the law of war, or a war-traitor, is a person in a place or district under Martial Law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.”

As war-traitors are the enemy also, as Solicitor General Whiting wrote, then any communication with a war-traitor as the editor of the Guardian could be defined under the “U.S. common law of war” would also be communication with the enemy, at least under this theory.

This is the foundation of totalitarian law, as we saw in the former Soviet Union and in Nazi Germany. In fact, both those regimes relied on military courts to strictly enforce loyalty by punishing “disloyalty,” war-treason, severely.

Germany under the Nazis even had a dedicated court, the National Socialist People’s Court, or Volksgerichthof (VGH), strictly for the prosecution of disloyal internal “enemies,” to include “non-German ‘terrorists’ in occupied France, Belgium, Norway and Holland, who were deported to Germany to stand trial in the VGH courts.” The court’s motto was; “Those not with me are against me.” [See H.W. Koch, *In the Name of the Volk – Political Justice in Hitler’s Germany*, 5 (1989).]

This isn’t to analogize the United States to totalitarian regimes, though German officials are currently likening the U.S. NSA surveillance program to the tactics of the Stasi. But it is to point out that the body of law that is the so-called “U.S. common law of war” has the same underlying legal theory as totalitarian bodies of “law,” and represents a threat to the global free flow of information and freedom of expression.

In the digital age, it is impossible to avoid “communicating” with the enemies of the United States as everyone on the planet has digital access to the Internet. Nations can no longer cut the telegraph lines to enemy territory to prevent communication, nor can a journalist limit his or her global digital audience.

Consequently, the “U.S. common law of war” hangs like the sword of Damocles over the global exercise of freedom of speech, of the press and of conscience. It is held in abeyance only at the sufferance of the U.S. president, but it could be allowed to fall at the start any new crisis.

As Lt. Col. Ralph Peters, U.S. Army (Ret.) wrote in 2009, “Although it seems

unthinkable now, future wars may require censorship, news blackouts and, ultimately, military attacks on the partisan media." [See Ralph Peters, *Wishful Thinking and Indecisive Wars*, The Journal of International Security Affairs, Spring 2009, www.securityaffairs.org/issues/2009/16/peters.php.]

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