IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 1:18cr111
	)	
JULIAN PAUL ASSANGE,	)	
	)	
Defendant.	)	

DECLARATION IN SUPPORT OF REQUEST
FOR EXTRADITION OF JULIAN PAUL ASSANGE

I, Gordon D. Kromberg, being duly sworn, depose and state:

1. I am a citizen of the United States.

2. I am an Assistant United States Attorney in the Eastern District of Virginia, and have been so employed since 1991. I received my Bachelor's degree from Princeton University in 1979, and a Juris Doctor degree from New York University School of Law in 1982. Before joining the United States Attorney's Office, I served as a trial attorney in the United States Department of Justice, and as a defense attorney in the United States Army's Judge Advocate General's Corps.

3. My duties as an Assistant United States Attorney include the prosecution of persons charged with violations of the criminal laws of the United States, including laws prohibiting computer intrusion and mishandling of national security information. For my work as an Assistant United States Attorney, I have received various awards, including the Attorney General's Award for Excellence in Furthering the Interests of U.S. National Security, and, on three separate occasions, the FBI Director's Award for Outstanding Counterterrorism

Investigation. Based on my training and experience, I am an expert in the criminal laws and procedures of the United States.

4. In the course of my duties as an Assistant United States Attorney, I have become familiar with the evidence and charges in the case of *United States v. Julian Paul Assange*, Case Number 1:18-CR-111, pending in the United States District Court for the Eastern District of Virginia. I make this declaration for the limited purpose of providing additional information relevant to several objections that Assange has made to the request of the United States for his extradition. The statements in this declaration are based on my experience, training, and research, as well as information provided to me by other members of the U.S. government, including members of the United States Department of Justice, the FBI, and other federal agencies.

5. This declaration does not respond to every assertion or allegation made in the defense case. I understand that a number of these can be answered by reference to matters which have already been decided as a matter of English extradition law. If I have not addressed a matter in this declaration, my failure to do so should not be regarded as an acceptance of the accuracy of such matter.

I. Assange's Challenges to the Superseding Indictment Lack Merit

A. The Charges in the Superseding Indictment Are Based on the Evidence and Rule of Law

6. Based on the evidence and applicable law, a grand jury found probable cause to charge Julian Paul Assange for violating United States law. An independent grand jury issued these charges based on evidence of the following actions that Assange knowingly took, in committing the charged criminal offenses:

- His *complicity in illegal acts* to obtain or receive voluminous databases of classified information;

- His agreement and attempt to obtain classified information through *computer hacking*; and

- His publishing certain classified documents that contained the *un-redacted names of innocent people* who risked their safety and freedom to provide information to the United States and its allies, including local Afghans and Iraqis, journalists, religious leaders, human rights advocates, and political dissidents from repressive regimes.

7. Contrary to the claims of Cary Shenkman and others, such acts are illegal and not protected by the U.S. Constitution. There is a "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). Regardless of whether one considers Assange to be a journalist, it is well-settled that journalists do not have a First Amendment right to steal or otherwise unlawfully obtain information. *See Bartnicki v. Vopper*, 532 U.S. 514, 532 n.19 (2001) (noting that the First Amendment does not protect those who "obtain[] … information unlawfully"); *Cohen*, 501 U.S. at 669 ("The press may not with impunity break and enter an office or dwelling to gather news."); *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972) ("It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news."); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (observing that the First Amendment "right to speak and publish does not carry with it the unrestrained right to gather information," for example, "the prohibition of unauthorized entry

into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right"). Like Assange, numerous people have been charged in the United States for conspiracy to commit computer hacking even though they engaged in that hacking purportedly to obtain newsworthy information or for political purposes. *See, e.g.*, *United States v. Liverman*, 16-cr-313 (E.D. Va. 2016) (defendant sentenced to five years' imprisonment for conspiring to hack the email account of a former CIA director and causing the hacked materials to be distributed online, among other crimes); *United States v. Hammond*, 12-cr-185 (S.D.N.Y. 2012) (defendant sentenced to ten years' imprisonment for conspiring to hack websites related to U.S. law enforcement and U.S. cybersecurity and intelligence contractors for the stated purpose of exposing alleged corruption, among other crimes).

8. Distributing the names of individuals who provide intelligence to the United States also is not protected speech under the First Amendment. In *Haig v. Agee*, 453 U.S. 280 (1981), the United States Supreme Court considered the validity of the U.S. State Department's revocation of the passport of Phillip Agee, a former intelligence officer who engaged in a campaign to identify and disclose the identities of CIA agents operating abroad. *Id.* at 283. The U.S. Supreme Court acknowledged that the "revocation of Agee's passport rests in part on the content of his speech: specifically, his repeated disclosures of intelligence operations and names of intelligence personnel." *Id.* at 308. Still, the Supreme Court found that his speech was "clearly not protected by the Constitution." *Id.* For support, the Supreme Court quoted the well-settled principle that "'[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.'" *Id.* (quoting *Near v. Minnesota*, 283 U.S. 697 (1931)). The

Supreme Court added that "[t]he mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law." *Id.* at 309.

9. More recently, the U.S. Court of Appeals for the Fourth Circuit upheld the conviction of a former intelligence officer who willfully caused a reporter to publish information about an intelligence source. *See United States v. Sterling*, 860 F.3d 233 (4th Cir. 2017). Similarly, the U.S. Department of Justice's Office of Legal Counsel, which issues authoritative opinions on constitutional questions, has twice determined to be consistent with the First Amendment proposed legislation (ultimately signed into law as the Intelligence Identities Protection Act, Title 50, United States Code, Section 3121) criminalizing, in certain circumstances, the intentional public disclosure of the names of intelligence agents and sources. These opinions were issued in 1980 and 1981 during two different Presidential administrations, from rival political parties. Although the Superseding Indictment does not charge Assange under the Intelligence Identities Protection Act, the Office of Legal Counsel opinions on that act are relevant here, because they show that the U.S. Department of Justice (along with the U.S. Congress, and Presidents of the United States of both political parties) has long viewed the intentional outing of intelligence sources as generally outside the protection of the First Amendment.

10. Assange also has alleged that the charges against him are politically motivated. Defense Summary of Issues ¶¶ 7-9. Prosecutors from the U.S. Department of Justice (i.e., federal prosecutors), however, are required to act in a manner free from political bias or motivation. This is true irrespective of any sentiments or statements made by politicians from any political party.

11. The superseding indictment here reflects no such political bias or motivation. Similar to what I understand to be *The Code for Crown Prosecutors*, the United States has publicly promulgated policies and practices to guide prosecution decisions by federal prosecutors, including whether to seek charges and what charges to seek. These so-called "Principles of Federal Prosecution" serve two important purposes. *See* Justice Manual, Principles of Federal Prosecution, *available at* https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution (last visited Jan. 8, 2020). The first important purpose is to ensure "the fair and effective exercise of prosecutorial discretion and responsibility." *Id.* § 9-27.001. The second important purpose is to promote "confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case." *Id.* § 9-27.110.

12. The Principles of Federal Prosecution set forth specific factors that federal prosecutors may *not* consider "[i]n determining whether to commence or recommend prosecution or take other action against a person." *Id.* § 9-27.260. Among other impermissible factors, federal prosecutors are forbidden from considering a person's "*political association, activities or beliefs*," the prosecutor's own personal feelings, or the possible effect on the prosecutor's own personal or professional circumstances. *Id.*

13. My colleagues and I take these responsibilities seriously, and the superseding indictment reflects these principles. As publicly stated by a U.S. Department of Justice official in announcing the superseding indictment against Assange, "in making any prosecutorial decision, the United States looks to the principles of federal prosecution, which provide that . . . [a] determination to prosecute represents a policy judgment that the fundamental interests of society require the application of federal criminal law to a particular set of circumstances." *See*

U.S. Dep't of Justice, Remarks from the Briefing Announcing the Superseding Indictment of Julian Assange, *available at* https://www.justice.gov/opa/press-release/file/1165636/download (last visited Jan. 16, 2020) (discussing that the superseding indictment is consistent with the Justice Manual, Principles of Federal Prosecution, § 9-27.001).

14. My colleagues and I presented these charges and the evidence that supports them to a federal grand jury, which found probable cause to proceed: at least 16 grand jurors must have been present for the vote and at least 12 must have voted in favor.

15. In the United States, the grand jury, composed of independent citizens, is an essential component required in the enforcement of its federal criminal laws. The federal version, enshrined in the Fifth Amendment to the U.S. Constitution, has its origins in English common law and statutes. "There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes." *Costello v. United States*, 350 U.S. 359, 362 (1956).

16. The grand jury serves "'as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity.'" *United States v. Dionisio*, 410 U.S. 1, 17 n.15 (1973) (quoting *Ex Parte Bain*, 121 U.S. 1, 11 (1887), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625 (2002)). Like federal prosecutors, grand jurors are bound to examine evidence objectively, and they take an oath to that effect, one that "binds them to inquire diligently and objectively into all federal crimes committed within the district about which they have or may obtain evidence, and

to conduct such inquiry without malice, fear, ill will, or other emotion." Administrative Office of the United States Courts, Handbook for Federal Grand Jurors 7 (2012), https://www.uscourts.gov/sites/default/files/grand-handbook.pdf.

17. In short, the superseding indictment is based on the evidence and the rule of law, not Assange's political opinions. If Assange wishes to challenge this, he may do so in the United States, as further discussed below, by asking an independent court to dismiss the superseding indictment because of selective prosecution.[1]

18. Assange also has alleged that the superseding indictment is part of some "escalating public '*war*'" against journalists or publishers. Defense Summary of Issues ¶ 8. Indeed, Assange asserts that "[a]ll charges seek to criminalise the act of publishing leaked information." Defense Summary of Issues ¶ 6. He further asserts that "criminalisation of journalistic activities," such as "the public interest in publication" of the "collateral murder video," and "conditions in Guantanamo Bay," "strikes at the very essence of Article 10" of the European Convention on Human Rights. Defense Summary of Issues ¶ 13. The grand jury, however, did not charge Assange for passively obtaining or receiving classified information; neither did it charge him for publishing in bulk hundreds of thousands of these stolen classified documents.

19. Rather, the charges against Assange focus on his complicity in Manning's theft and unlawful disclosure of national defense information (Counts 1-4, 9-14), his knowing and

[1] Assange would need to proceed with any such motion under the U.S. Constitution instead of the Principles of Federal Prosecution because those principles, and internal office procedures adopted pursuant to them, are intended solely for the guidance of attorneys for the government. They are not intended to create a substantive or procedural right or benefit, enforceable at law, and may not be relied upon by a party to litigation with the United States. *See* Principles of Federal Prosecution, *supra*, § 9-27.150.

intentional receipt of national defense information from Manning (Counts 6-8), his agreement with Manning to engage in a conspiracy to commit computer hacking, and his attempt to crack a password hash to a classified U.S. Department of Defendant account (Counts 5 and 18).

20. The only instances in which the superseding indictment charges Assange with the distribution of national security information to the public are explicitly limited to his distribution of "documents classified up to the SECRET level containing the names of individuals in Afghanistan, Iraq, and elsewhere around the world, who risked their safety and freedom by providing information to the United States and our allies to the public." Superseding Indictment, Count 1, ¶B(4); *see also id.*, Count 15 ¶C ("Specifically, . . . ASSANGE, having unauthorized possession of significant activity reports, classified up to the SECRET level, from the Afghanistan war containing the names of individuals, who risked their safety and freedom by providing information to the United States and our allies, communicated the documents containing names of those sources to all the world by publishing them on the Internet."); *id.*, Count 16 ¶C ("Specifically, . . . ASSANGE, having unauthorized possession of significant activity reports, classified up to the SECRET level, from the Iraq war containing the names of individuals, who risked their safety and freedom by providing information to the United States and our allies, communicated the documents containing names of those sources to all the world by publishing them on the Internet."); *id.* Count 17 ¶C ("Specifically, . . . ASSANGE, having unauthorized possession of State Department cables, classified up to the SECRET level, containing the names of individuals, who risked their safety and freedom by providing information to the United States and our allies, communicated the documents containing names of those sources to all the world by publishing them on the Internet.").

21. In short, Assange was charged for publishing specified classified documents that contained the *un-redacted names of innocent people* who risked their safety and freedom to provide information to the United States and its allies. He was not, for example, charged for publishing the so-called "Collateral Murder" video that WikiLeaks disclosed in April 2010; in addition, none of the charges alleges that Assange violated the law by obtaining and releasing that video, and the superseding indictment does not even mention it.

22. As publicly stated by another Department of Justice official in announcing the superseding indictment, "[t]he Department takes seriously the role of journalists in our democracy . . . and it is not and has never been the Department's policy to target them for their reporting. Julian Assange is no journalist. This [is] made plain by the totality of his conduct as alleged in the indictment – i.e., his conspiring with and assisting a security clearance holder to acquire classified information, and his publishing the names of human sources. Indeed, no responsible actor – journalist or otherwise – would purposely publish the names of individuals he or she knew to be confidential human sources in war zones, exposing them to the gravest of danger." *See* U.S. Dep't of Justice, Remarks from the Briefing Announcing the Superseding Indictment of Julian Assange, *available at* https://www.justice.gov/opa/press-release/file/1165636/download (last visited Jan. 16, 2020). As summarized in the next section, Assange placed these individuals in grave danger.

23. Assange also has suggested that the addition of a number of new charges against him in the Superseding Indictment somehow reflects an increased bias against him. That suggestion is based on a misunderstanding of both the practice and policy of federal prosecutions in the United States. First, it is quite common for a case to be initially charged with a single crime, and then followed by one or more superseding indictments that add charges or defendants.

This regular practice permits a case to be initiated with limited evidence, while the investigation of more complex charges can be more fully investigated. In some cases involving national security issues, declassification of necessary evidence can be a time-consuming and complex process which prohibits all charges from being brought at the very outset of the case. Likewise, once a defendant is charged, additional witnesses may be located or come forward, which permits additional charges to be brought.

24. Moreover, the Principles of Federal Prosecution also call for prosecutors to "charge and pursue the most serious, readily provable offenses." Justice Manual at 9-27.300. As additional evidence is gathered and declassified, the Principles counsel the addition of "readily provable offenses." While the United States will not waive its deliberative process privilege to discuss the specific decision-making process in this case, I note that there are many reasons for adding charges in a superseding indictment which are consistent with the exercise of independent prosecutorial decision-making in line with the Principles of Federal Prosecution.

B. Many Individuals Outed By Assange Were Placed Placed at Grave Risk and Suffered Grave Harm

25. The significant activity reports from the Afghanistan and Iraq wars that WikiLeaks published included the names of local Afghans and Iraqis who had provided information to U.S. and coalition forces. The State Department cables that WikiLeaks published included the names of persons, throughout the world, who provided information to the U.S. government in circumstances in which they could reasonably expect that their identities would be kept confidential. These sources included journalists, religious leaders, human rights advocates, and political dissidents living in repressive regimes, who, at great risk to their own safety, reported to the United States the political conditions within their own countries and abuses of their own governments.

26. Based on information provided by people with expertise in military, intelligence, and diplomatic matters, as well as individuals with expert knowledge of the political conditions and governing regimes of the countries in which some of these sources were located, I know that, by publishing these documents without redacting the human sources' names or other identifying information, Assange created a grave and imminent risk that the innocent people he named would suffer serious physical harm and/or arbitrary detention.

1. The United States Identified And Attempted to Notify Hundreds of People Whom Assange Endangered

27. After WikiLeaks published the Afghanistan significant activity reports on or about July 25, 2010, the U.S. Department of Defense ("DoD") established an "Information Review Task Force," commonly known as the "IRTF." The purpose of the IRTF was to conduct a DoD review of the classified records published by WikiLeaks, as well as classified records obtained but not yet published by WikiLeaks. Among other things, the IRTF was tasked with reviewing the records to understand the risks that the disclosure of the records posed to sources named within them. Over the course of its review, the IRTF identified hundreds of Afghans and Iraqis whom it assessed were potentially endangered by the publication of the significant activity reports in unredacted form.

28. Similarly, upon learning of the compromise of the diplomatic cables described in paragraph 25, the U.S. Department of State established a "WikiLeaks Persons at Risk Task Force," which identified hundreds more individuals who could be endangered if the cables were published or otherwise disclosed to the governments and/or nonstate actors in the countries where the individuals resided. The State Department defined "Persons at Risk" as those facing "death, violence, or incarceration."

29. Both the U.S. Department of Defense and the U.S. Department of State engaged in extensive efforts to notify sources who were put at risk by the WikiLeaks disclosures. Not all sources, however, could be notified. Some people deemed at risk could not be located. Other at-risk people were not warned because the United States assessed that the act of warning might draw further attention to their relationship with the United States and, thus, put them in more danger. Still other at-risk people were not notified because military officials determined that an attempt to notify them could present an unacceptable risk of harm to U.S. forces in carrying out the notification.

2. Individuals Named in Wikileaks Cables Have Been Harassed, Investigated, Surveilled, Arrested, Disappeared, and/or Forced to Flee Their Homelands

30. The State Department determined that well over 100 people were placed at risk from the disclosures. In turn, approximately 50 people sought and received assistance from the United States. For some of these individuals, the United States assessed that it was necessary and advisable for them to flee their home countries. The United States assisted in moving some of these individuals to the United States or to safe third countries. In some instances, the United States also assisted in moving the spouses and/or families of these individuals to the United States or to third countries.

31. All of the individuals who had to flee their homelands because they were identified by WikiLeaks in State Department cables suffered actual harm attributable to Assange. Some of these harms are quantifiable, such as losing employment or having assets frozen by the autocratic regimes from which they fled. Other harms suffered by sources forced to flee are not easily quantifiable, but are, nonetheless, very real.

32. The United States also is aware of individuals whose unredacted names and/or other identifying information were contained in classified documents published by WikiLeaks,

and who subsequently disappeared, although the United States cannot prove at this point that their disappearance was the result of being outed by WikiLeaks.

33. The United States also is aware of individuals who were investigated and/or arrested because they were named in the State Department cables published by WikiLeaks. For example, according to the Committee To Protect Journalists and media reports, an Ethiopian journalist was forced to flee Ethiopia after he was interrogated and threatened by Ethiopian authorities regarding the contents of a cable published by WikiLeaks. According to the WikiLeaks cable, the Ethiopian journalist had told U.S. diplomats in 2009 that an Ethiopian government source had told him of a plot to arrest the editors of an Ethiopian publication that had been critical of the government. According to information the journalist reportedly told the Committee to Protect Journalists and the BBC, Ethiopian police interrogated him after WikiLeaks published this cable, and threatened to jail him if he did not reveal his government source; rather than reveal his source or risk prison, the journalist reportedly fled his country.

34. The United States also is aware of at least one instance where an individual named in the State Department cables released by WikiLeaks was subsequently arrested and detained. In that case, a news organization close to the arresting regime openly stated that the arrest was based, at least in part, on information revealed by WikiLeaks showing the arrested individual's relationship with the State Department.

35. People named by WikiLeaks as having provided information to the State Department also reportedly faced threats and harassment by non-state actors. According to Canada's *Globe and Mail*, "[s]ome of China's top academics and human rights activists are being attacked as 'rats' and 'spies' after their names were revealed as U.S. Embassy sources in the unredacted WikiLeaks cables that have now been posted online." Mark MacKinnon, *Leaked*

Cables Spark Witch-Hunt for Chinese 'Rats,' Globe and Mail (Sept. 14, 2011), https://www.theglobeandmail.com/news/world/leaked-cables-spark-witch-hunt-for-chinese-rats/article594194/. The *Globe and Mail* further reported that WikiLeaks' "release of the previously protected names has sparked an online witch-hunt by Chinese nationalist groups, with some advocating violence against those now known to have met with U.S. Embassy staff. 'When the time comes, they should be arrested and killed,' reads one typical posting on a prominent neo-Maoist website." *Id.* One Chinese national who was named in the WikiLeaks cables and consequently fled to the United States reported experiencing harassment from non-state actors.

3. Hostile Foreign Governments, Terrorist Groups, and Criminal Organizations Have Exploited Wikileaks Disclosures in Order to Gain Actionable Intelligence

36. Hostile foreign governments, terrorist groups, and criminal organizations have exploited WikiLeaks disclosures in order to gain intelligence to be used against the United States and to be used against foreign nationals who provided assistance to the United States. For example, on May 2, 2011, United States armed forces raided the compound of Osama bin Laden in Abbottabad, Pakistan. During the raid, they collected a number of items of digital media, which included (1) a letter from bin Laden to another member of the terrorist organization al-Qaeda in which bin Laden requested that the member gather the DoD material posted to WikiLeaks, (2) a letter from that same member of al- Qaeda to Bin Laden with information from the Afghanistan War Documents released by WikiLeaks, and (3) Department of State information released by WikiLeaks.

37. On July 30, 2010, the New York Times published an article entitled "Taliban Study WikiLeaks to Hunt Informants." The article stated that, after the release of the Afghanistan war significant activity reports, a member of the Taliban contacted the New York Times and

stated, "We are studying the report. We knew about the spies and people who collaborate with U.S. forces. We will investigate through our own secret service whether the people mentioned are really spies working for the U.S. If they are U.S. spies, then we will know how to punish them."

38. In addition, the Department of Justice and the FBI have conducted interviews with several experts on Syria, Iran, and China. These experts uniformly reported that foreign intelligence services would have read the WikiLeaks cables to gain actionable intelligence.

4. Assange Endangered Afghans and Iraqis Who Provided Information to U.S. and Coalition Forces

39. The U.S. Department of Defense identified hundreds of Iraqis and Afghans whose lives and freedom were endangered by Assange's publication of the unredacted significant activity reports discussed above. The Superseding Indictment describes a sample of these significant activity reports as follows:

a. Classified Document Cl was a 2007 threat report containing details of a planned anti-coalition attack at a specific location in Afghanistan. Classified Document Cl named the local human source who reported the planned attack. Classified Document Cl was classified at the SECRET level;

b. Classified Document C2 was a 2009 threat report identifying a person who supplied weapons at a specific location in Afghanistan. Classified Document C2 named the local human source who reported information. Classified Document C2 was classified at the SECRET level;

c. Classified Document DI was a 2009 report discussing an improvised explosive device (IED) attack in Iraq. Classified Document DI named local human sources who provided information on the attack. Classified Document DI was classified at the SECRET level; and

d. Classified Document D2 was a 2008 report that named a local person in Iraq who had turned in weapons to coalition forces and had been threatened afterward. Classified Document D2 was classified at the SECRET level.

40. Assange placed in extreme danger the above-referenced individuals, along with many other Iraqis and Afghans whom Assange named as having provided information to U.S. and coalition forces. According to experts with the U.S. Department of Defense, in and around 2010, the Taliban in Afghanistan and the insurgency in Iraq were known to take brutal measures against Iraqis and Afghans whom they believed (rightly or wrongly) to have collaborated with U.S. and coalition forces.

41. According to the State Department's 2010 Human Rights Report on Afghanistan, the Taliban continued its "politically-targeted killings" in 2010 and killed numerous Afghan civilians. On July 18, 2010, "Taliban leader Mullah Omar issued new rules of engagement, calling on Taliban commanders to capture or kill civilians working for foreign forces or the government." In addition, "[t]he media reported that the Taliban issued 'night letters' threatening anyone who made peace with the government, a charge Taliban spokesmen denied," and "[t]here were numerous reports of summary justice by the Taliban resulting in extrajudicial executions." Moreover, "Media reports and firsthand accounts accused the Taliban of employing torture in interrogations of persons they accused of supporting coalition forces and the central government. The Taliban contacted newspapers and television stations in several such cases to claim responsibility." And "[i]n areas not under government control, the Taliban enforced a parallel judicial system. The Taliban issued punishments including beatings, cutting off fingers, beheadings, hangings, and stonings. On March 9 [2010], the Taliban killed a man for allegedly spying." https://2009-2017.state.gov/documents/organization/160445.pdf.

42. Moreover, as noted above, the Taliban openly stated in July 2010 that it was reviewing the WikiLeaks publications in order to identify "spies" whom they could "punish."

43. According to the State Department's 2010 Human Rights Report on Iraq, "[v]iolence against the civilian population perpetrated by terrorist groups remained a problem during [2010], and bombings, executions, and killings were regular occurrences throughout all regions and sectors of society." In particular, in 2010 Iraq saw "an increase in AQI [al-Qaida in Iraq] attacks against Sunnis cooperating with the government." For example, "[o]n April 20, [2010], gunmen killed five family members, beheading three, of the local anti-AQI militia in Tarmiyah." Similarly, "[o]n July 18, [2010], a suicide bomber killed at least 45 anti-al Qaida Sunni fighters waiting for their paychecks."

5. Assange Endangered Many Iranians By Outing Them As Having Provided Information to the United States

44. The State Department's persons-at-risk task force identified many individuals in Iran whose lives and freedom were endangered by Assange's publication of the unredacted State Department cables described above. The Superseding Indictment describes two such cables as follows:

a. Classified Document Al was a 2009 State Department cable discussing a political situation in Iran. Classified Document A1 named a human source of information located in Iran and indicated that the source's identity needed to be protected. Classified Document A1 was classified at the SECRET level; and

b. Classified Document A2 was a 2009 State Department cable discussing political dynamics in Iran. Classified Document A2 named a human source of information who regularly traveled to Iran and indicated that the source's identity needed to be protected. Classified Document A2 was classified at the SECRET level.

45. Assange placed in extreme danger the above-referenced individuals, along with many other people located in Iran or who regularly travel to Iran, whom Assange named as having provided information to U.S. diplomats. According to State Department personnel with expertise in Iran, the Iranian regime in 2011 and continuing to the present, is repressive. Iranians who spoke to the United States without authorization faced reprisal.

46. According to the State Department's 2011 Human Rights Report on Iran, "the government increased its oppression of media and the arts, arresting and imprisoning dozens of journalists, bloggers, poets, actors, filmmakers, and artists throughout [2011]." This "suppression and intimidation of voices of opposition continued at a rapid pace at year's end. The most egregious human rights problems were the government's severe limitations on citizens' right to peacefully change their government through free and fair elections, restrictions on civil liberties, and disregard for the sanctity of life through the government's use of arbitrary detention, torture, and deprivation of life without due process." In particular, "[s]ecurity forces under the government's control committed acts of politically motivated violence and repression, including torture, beatings, and rape. The government administered severe officially sanctioned punishments, including amputation and flogging. Security forces arbitrarily arrested and detained individuals, often holding them incommunicado."

47. The State Department further noted that "[t]he UN special rapporteur for human rights in Iran noted in his October [2011] report that at least 83 persons, including three political prisoners, were known to have been executed in January alone." In addition, "[h]uman rights activists reported that the government executed an average of two persons a day during the first six months of [2011]" and "exiles and human rights monitors alleged that many persons supposedly executed for criminal offenses such as narcotics trafficking were actually political dissidents." Iranian "law criminalizes dissent and also applies the death penalty to offenses such as 'attempts against the security of the state,' 'outrage against high-ranking officials,' 'enmity towards god,' and 'insults against the memory of Imam Khomeini and against the supreme leader of the Islamic Republic.'"

48. The State Department further reported that in 2011 "[a]rbitrary arrest was a common practice [in Iran] and was used by authorities to spread fear and deter activities deemed against the regime." The State Department relied on a study from International Campaign for Human Rights in Iran (ICHRI), which concluded that "an estimated 500 persons were arbitrarily detained [in Iran in 2011] for peaceful activities or the exercise of free expression, and another 500 prisoners of conscience had been sentenced to lengthy prison terms following unfair trials." The State Department Human rights report further noted that detainees in Iran face a high risk of physical violence and abuse while incarcerated.

6. Assange Endangered Many Chinese Nationals by Outing Them as Having Provided Information to the United States

49. The State Department's persons-at-risk task force identified many individuals in China whose lives and freedom were endangered by Assange's publication of the unredacted State Department cables. The Superseding Indictment describes one of those cables as follows:

> Classified Document A3 was a 2009 State Department cable discussing issues related to ethnic conflict in China. Classified Document A3 named a human source of information located in China and indicated that the source's identity needed to be protected. Classified Document A3 was classified at the SECRET level.

50. Assange placed in extreme danger the above-referenced individual, along with many other people in China whom Assange named as having provided information to U.S. diplomats. According to State Department personnel with expertise in China, the Chinese regime in 2011 and continuing to the present, is repressive. In addition, the Chinese intelligence services are vast, well-resourced, and focused on internal dissent, especially dissent from ethnic and religious minorities in the western provinces. Chinese nationals who spoke to the United States without authorization faced reprisal.

51. According to the State Department's 2011 Human Rights report on China, 2011 saw confirmed "[d]eterioration in key aspects of the country's human rights situation" where "[r]epression and coercion, particularly against organizations and individuals involved in rights advocacy and public interest issues, were routine." "Efforts to silence political activists and public interest lawyers were stepped up, and, increasingly, authorities resorted to extralegal measures including enforced disappearance, 'soft detention,' and strict house arrest, including house arrest of family members, to prevent the public voicing of independent opinions." Moreover, "[t]he authorities continued severe cultural and religious repression of ethnic minorities in Xinjiang Uighur Autonomous Region (XUAR) and Tibetan areas." The country also saw "extrajudicial killings, including executions without due process; enforced disappearance and incommunicado detention, including prolonged illegal detentions at unofficial holding facilities known as 'black jails'; torture and coerced confessions of prisoners; detention and harassment of lawyers, journalists, writers, [and] dissidents." In particular, the 2011 State Department Human Rights Report on China specified that "[d]uring the year security forces reportedly committed arbitrary or unlawful killings."

52. The State Department further reported that as of 2011, "[t]ens of thousands of political prisoners remained incarcerated [in China], some in prisons and others in RTL [Reeducation Through Labor] camps or administrative detention" and that in 2011 "[a]uthorities arrested persons on allegations of revealing state secrets, subversion, and other crimes as a means to suppress political dissent and public advocacy." NGOs estimated that in China in 2011 alone "approximately 50 human rights activists and lawyers were formally arrested or placed under extralegal detention, up to 200 people were placed under house arrest, and 15 were charged with 'inciting subversion of state power.'" The Committee to Protect Journalists reported in 2011 that

there were at least "27 known journalists imprisoned in [China], 10 were Tibetan and six were Uighur." Moreover, "[t]here were widespread reports of activists and petitioners being committed to mental health facilities and involuntarily subjected to psychiatric treatment for political reasons."

53. The State Department reported that religious and ethnic minority were particularly vulnerable in China. In 2011, "[t]he government continued to repress Uighurs expressing peaceful political dissent and independent Muslim religious leaders" and "Uighurs continued to be sentenced to long prison terms, and in some cases executed without due process, on charges of separatism and endangering state security."

54. The 2011 State Department Human Rights Report on China further noted that detained political prisoners were at increased risk of violence: "Although ordinary prisoners were subjects of abuse, political and religious dissidents were singled out for particularly harsh treatment. In some instances close relatives of dissidents were singled out for abuse" and "[c]onditions in penal institutions for both political prisoners and criminal offenders were generally harsh and often degrading." Indeed, "[b]eating deaths occurred in administrative detention and RTL facilities" and "[d]etainees reported beatings, sexual assaults, lack of proper food, and no access to medical care."

7. Assange Endangered Many Syrians by Outing Them as Having Provided Information to the United States

55. The State Department's persons-at-risk task force identified many individuals in Syria whose lives and freedom were endangered by Assange's publication of the unredacted State Department cables described above. The Superseding Indictment describes two such cables as follows:

a. Classified Document A4 was a 2009 State Department cable discussing relations between Iran and Syria. Classified Document A4 named human sources of information located in Syria and indicated that the sources' identities needed to be protected. Classified Document A4 was classified at the SECRET level; and

b. Classified Document A5 was a 2010 State Department cable discussing human rights issues in Syria. Classified Document A5 named a human source of information located in Syria and indicated that the source's identity needed to be protected. Classified Document A5 was classified at the SECRET level.

56. Assange placed in extreme danger the above-referenced individuals, along with the other Syrians whom Assange named as having provided information to U.S. diplomats. According to State Department diplomats with expertise in Syria, the Syrian regime in 2011 and continuing to the present, is repressive. Syrians who spoke to the United States without authorization faced reprisal.

57. According to the State Department's 2011 human rights report on Syria, the regime used "massive attacks and strategic use of citizen killings as a means of intimidation and control" over the population. Indeed, in 2011 alone, "there were thousands of reports of arbitrary or unlawful deprivation of life, many as a result of government actions against peaceful prodemocracy protesters." "The vast majority of disappearances reported by activists, human rights observers, and international NGOs appeared to be politically motivated" as "[t]he regime targeted critics and antigovernment protesters."

58. Those detained in Syria remained in serious physical risk as "[t]he government also reportedly tortured detainees to death." In particular, "[a]n August 31 [2011] Amnesty International (AI) report detailed extrajudicial killings in detention facilities," and "not[ed] at least 88 deaths were reported to AI between April 1 and 15 and that there was evidence that torture caused or contributed to death in at least 52 cases." In sum, the State Department's 2011 Human Rights Report for Syria concluded that "[h]arsh and life-threatening prison conditions

were common, especially after arrests stemming from the protests caused a substantial increase in the prison and detention center population."

59. The State Department 2011 Human Rights Report on Syria further concluded that, "[o]ther serious problems included disappearances; torture and abuse; poor prison and detention center conditions; arbitrary arrest and detention; denial of fair public trial; arbitrary interference with privacy; and lack of press, Internet, and academic freedom." And, "[a]s in previous years, government forces [in 2011] detained, arrested, and harassed journalists and other writers for works deemed critical of the state."

8. Assange Endangered Foreign Police and Military Who Received Counter-Narcotics and Counter-Terrorism Training from the United States

60. The State Department cables that Assange published in unredacted form contained hundreds of "Leahy Vetting Requests." The term "Leahy law" refers to two U.S. statutory provisions prohibiting the U.S. Government from using funds for assistance to units of foreign security forces where there is credible information implicating that unit in the commission of gross violations of human rights. One statutory provision applies to the State Department and the other applies to the Department of Defense. The State Department Leahy law was made permanent under section 620M of the Foreign Assistance Act of 1961, 22 U.S.C. § 2378d, *see* https://www.state.gov/leahy-fact-sheet/.

61. In cases where an entire unit is designated to receive assistance, the State Department vets the unit and the unit's commander. When an individual security force member is nominated for U.S. assistance, the State Department vets that individual as well as that individual's unit. Vetting begins in the unit's home country, where the U.S. embassy conducts consular, political, and other security and human rights checks. Frequently, an additional review is conducted by analysts at the State Department in Washington, D.C. The State Department

evaluates and assesses available information about the human rights records of the unit and the individual, reviewing a full spectrum of open source and classified records. *See* https://www.state.gov/leahy-fact-sheet/.

62. As part of the Leahy vetting process, the embassies frequently send cables called "Leahy Vetting Request" to the State Department in Washington, D.C. WikiLeaks published many of these "Leahy Vetting Requests" without redaction. Often, these requests were less than a page and simply provided the full name and personal identifying information of the person being vetted, including date of birth; gender; military identification number, if applicable; place of birth; position; and organization. The cables would then note something to the effect that "Post possesses no credible evidence of gross violations of human rights by the individuals listed below and requests that the department conduct Leahy vetting check."

63. By publishing the names and personal identifying information of particular individuals who received counter-terrorism and/or counter-narcotics training from the United States, Assange put those individuals at grave risk.

64. Indeed, based on information provided to the United States government, the United States assessed that violent non-state groups have attempted to use WikiLeaks disclosures to identify and target military and/or police in their country who were engaged in counter-terrorism and/or counter-narcotics operations.

9. Assange's Disclosures Caused Harm to the State Department's Ability To Report On Human Rights Abuses

65. At the Manning court martial, Ambassador Michael Kozak, who led the State Department's WikiLeaks Person at Risk Task Force, testified that the WikiLeaks disclosures had caused, and would continue to cause, a chilling effect on dissidents and human rights activists around the world, making them afraid to report human rights abuses to U.S. embassies.

Ambassador Kozak reported that WikiLeaks caused incredible harm to "the credibility of the United States." He described U.S. diplomats seeking to report on human rights abuses as "in the same position as newspaper reporters" in that "if you go out and reveal all your sources every time, not too many people will talk to you." Ambassador Kozak further testified that the WikiLeaks disclosures have "meant that some people, some activists in a democracy and human rights field … are no longer active. So that's had an obvious effect on those particular countries where those individuals came from, that you just lost some leaders in that field." Ambassador Kozak added that some human rights activists living under repressive regimes have told him personally that WikiLeaks has made them "nervous" about reporting human rights abuses to the U.S. embassy in the future. Other State Department personnel similarly reported that the WikiLeaks disclosures caused a reduced willingness of dissidents and human rights activists in repressive regimes to report abuses and other valuable information to the United States.

C. If Assange is Extradited, He Can Challenge the Superseding Indictment Before Independent Federal Judges and a Jury

66. The United States established three equal and independent branches of government to provide a system of checks and balances against unjust decision-making. In the United States, federal judges (the judicial branch) are nominated by the president (the executive branch) and confirmed by the Senate (the legislative branch). The Constitution guarantees that federal judges who have been nominated by the president and confirmed by the Senate "shall hold their offices during good behavior." U.S. Const. Art. III, Sec. 1. In practice, this guarantee provides federal judges with life-tenure, and insulates them from political interference. *See* Federalist Paper, No. 78 (A. Hamilton) ("The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the

despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws."). Indeed, courts in the United States have a long history of independent and impartial decision-making, dating back to the Supreme Court's decision in *Marbury v. Madison* in 1803.

67. If Assange is extradited, he will have an opportunity to challenge the charges in the superseding indictment. Any such challenge would be decided by independent federal judges – first at the trial level, and then upon appeal. Assange would have one appeal as of right, and other discretionary appeals up to the United States Supreme Court. *See* Title 28, United Section Code, Section 1291; U.S. Supreme Court Rule 10.

68. For example, Assange could file a pre-trial motion to challenge the superseding indictment on the basis of selective prosecution. To succeed on such a motion, Assange would have to demonstrate that "the prosecution had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. United States*, 470 U.S. 598, 608 (1985). Meeting this heavy burden requires the defendant to establish both (1) that "he has been singled out while others similarly situated have not been prosecuted; and (2) that the decision to prosecute was invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to exercise his constitutional rights." *United States v. Greenwood*, 796 F.2d 49, 52 (4th Cir. 1986).

69. Assange also would have the opportunity to challenge the superseding indictment on the basis that his conduct was protected by the free speech provisions of the First Amendment to the U.S Constitution. Similarly, to the extent Assange believes that Title 18, United States Code, Sections 793 or 1030 is unconstitutionally vague, as the Shenkman Affidavit appears to

assert, *see* Shenkman Aff. ¶¶ 29, 35, 41, he could challenge those laws and their application to him as "void-for-vagueness" under the Fifth Amendment to the U.S. Constitution. A statute is unconstitutionally vague if it fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.

70. Assange could assert the above-mentioned arguments in a number of ways. He could file pre-trial motions with the trial judge, motions following closure of the government's direct case at trial, and again following the closure of all evidence in his case. If convicted, he would have a right to appeal these rulings once as of right to an appellate court as well as discretionary appeals up to the United States Supreme Court.

71. To be clear, the United States has arguments against these potential challenges to the superseding indictment, and does not believe that they would have any merit; otherwise, it would not have proceeded with the charges. Without binding the United States to any position here, however, we could advance a number of arguments in response to those challenges. For example, concerning selective prosecution, the United States could argue that because of Assange's unprecedented conduct, there are no other similarly situated individuals, and even if there were, there was no invidious decision to prosecute. Concerning any First Amendment challenge, the United States could argue that foreign nationals are not entitled to protections under the First Amendment, at least as it concerns national defense information, and even were they so entitled, that Assange's conduct is unprotected because of his complicity in illegal acts and in publishing the names of innocent sources to their grave and imminent risk of harm. *See also* paragraphs 7-9 (summarizing relevant First Amendment Law). Concerning any void-for-vagueness claim, the United States could point out that courts are not to expect statutes to

provide "[p]erfect clarity and precise guidance." *Williams*, 553 U.S. at 304; *see also United States v. Saunders*, 828 F.3d 198, 207 (4th Cir. 2016) ("[A] statute need not spell out every possible factual scenario with 'celestial precision' to avoid being struck down on vagueness grounds."). Moreover, I am confident that our use of the grand jury in this investigation was proper, as explained in Section V, below. Regardless of the arguments the United States will ultimately assert, however, what is important here is that Assange will have an opportunity to challenge the alleged facts before an independent jury, and challenge the law supporting the charges in the superseding indictment before independent United States courts. Those courts are most familiar with the nuances of United States law, and are best suited to address any legal or constitutional challenges that Assange may have to his prosecution.

II. Any Bias Among Potential Jurors Can Be Ferreted Out Through the Robust Jury Selection Process Employed in United States Federal Courts

72. If he is extradited to the United States, Assange will be afforded the right to require the government to prove the charges against him to a unanimous and impartial jury beyond a reasonable doubt. Assange has claimed, however, that he will not receive a fair trial in the U.S. District Court for the Eastern District of Virginia, because of alleged negative statements about him that have been publically reported and because of the nature of the jury pool in the Eastern District of Virginia, which is alleged to have a large number of government workers and/or government contractors. In response, I summarize here some of the rules and procedures employed by U.S. federal courts to ensure that a potential juror is not influenced by exposure to pretrial publicity or by the juror's employer.

73. The Sixth Amendment to the Constitution of the United States guarantees that in all criminal prosecutions, the defendant shall enjoy the right to trial by an impartial jury. Even pervasive and adverse pretrial publicity, however, need not lead to an unfair trial. *See, e.g.*,

United States v. Skilling, 561 U.S. 368, 384 (2010) (widespread negative coverage about Enron did not prevent a former Enron executive from receiving a fair trial).

74. It is not uncommon in the course of voir dire for a venire member to disclose familiarity with a case by virtue of pre-trial publicity. Indeed, this occurs just as often in locally notorious cases as in cases of national interest. *See, e.g.*, *United States v. John Walker Lindh*, 212 F. Supp. 2d 541, 549 (E.D. Va. 2002) (regarding the selection of a jury for an American captured in Afghanistan fighting for the Taliban). Yet, what ultimately matters to a U.S. judge is not simply whether a potential juror has heard or read about a case, but whether a prospective "juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 722–23 (1961). As the United States Supreme Court stated in *Irvin*:

> To hold that the mere existence on any notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. at 723.

75. If Assange is extradited to face trial in the United States, the district judge would conduct a thorough voir dire of all potential jurors, in the presence of attorneys for both the government and the defendant, to ensure the selection of a fair and impartial jury that is able to set aside any pre-conceived notions regarding this case, and to render an impartial verdict based solely on the evidence presented in the case and the district court's instructions of law. Only those prospective jurors found to be capable of fair and impartial jury service after careful voir dire will be declared eligible to serve as jurors. *See Lindh*, 212 F. Supp. 2d at 552. The defendant can challenge any number of jurors for good cause. Moreover, even if the district court

judge disagrees that such good cause exists, the defendant will be entitled to challenge ten jurors without any cause at all (other than race or sex). *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019); Fed. R. Crim. P. 24(b)(2). These without cause challenges are known as "peremptory challenges."

76. The U.S. District Court for the Eastern District of Virginia in particular has been the venue for many high profile criminal trials, including trials of defendants accused of crimes involving national security. Past experience provides reasonable assurance that a sufficient number of qualified, impartial jurors would be identified as a result of the voir dire in this case. *See Lindh*, 212 F. Supp. 2d at 552. After all, a jury seated in this district refused to return the death verdict sought by the United States against Zacharias Moussaoui, who pleaded guilty to the conspiracy to murder thousands of Americans on 9/11, even though as part of that conspiracy, a hijacked airliner was crashed into the Pentagon, just a few miles away from the very courthouse in which the jury sat. *See United States v. Moussaoui*, 591 F.3d 263, 265 (4th Cir. 2010).

77. Any potential for prejudice in this case is also mitigated by the large size of the jury pool in Northern Virginia. *Mu'Min v. Virginia*, 500 U.S. 415, 429 (1991). After all, more than 1,100,000 people reside in Fairfax County, and Fairfax is but one county in the Alexandria Division of the Eastern District of Virginia. *See* Country of Fairfax, Virginia, Demographic Reports (2019), https://www.fairfaxcounty.gov/demographics/sites/demographics/files/assets/demographicreports/fullreport.pdf; *see also Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1044 (1991) (noting that there is a reduced likelihood of prejudice where venire was drawn from a pool of over 600,000 individuals); *United States v. Taylor*, 942 F.3d 205, 223 (4th Cir. 2019) (noting that the likelihood of prejudice from extensive pretrial publicity was reduced by the fact that the City of Baltimore had a population of approximately 620,000).

78. All prospective jurors in this case will be questioned carefully as to what they have seen, read, or heard about the case and whether they have formed any opinions or impressions. No juror will be qualified to serve unless the district judge is satisfied that the juror is (i) able to put aside any previously formed opinions or impressions, (ii) prepared to pay careful and close attention to the evidence as it is presented in the case, and finally (iii) able to render a fair and impartial verdict, based solely on the evidence adduced at trial and the district court's instructions of law. *See Lindh*, 212 F. Supp. 2d at 549.

79. The district judge will follow a similar process to determine whether any potential jurors would be biased based on their employment by the U.S. government or a government contractor. "A juror employed by the government is not disqualified from a case in which the government is a party simply by reason of his employment. To challenge for cause, a party must show 'actual partiality growing out of the nature and circumstances of [the] particular case.'" *United States v. Tibesar*, 894 F.2d 317, 319 (8th Cir. 1990) (citations omitted). *See Zia Shadows, L.L.C. v. City of Las Cruces*, 829 F.3d 1232, 1246–47 (10th Cir. 2016) (a juror employed by the government could be disqualified if the juror's answers "establish actual bias").

80. The district judge will ask questions to ascertain whether any prospective juror's employment would render such juror incapable of being fair in a case in which the U.S. government is a party. Further, the judge will ask questions to determine whether any prospective juror can put aside pre-existing views about the U.S. government, and decide the case based purely on the evidence and the instructions from the judge. In any event, if Assange

believes that a juror determined by the judge to be qualified to serve is, in fact, biased against him, he can exercise one of his ten peremptory challenges to strike the juror without cause.[2]

81. The particular practices that judges in our district use to select jurors vary, but all act to ensure that the jurors ultimately selected are able to render a fair and impartial verdict. For example, in a highly publicized terrorism case in which I was involved, the judge ordered the parties to submit a proposed jury questionnaire. Four days before jury selection started, the judge used the submissions of the parties to craft a detailed questionnaire and provide it to an unusually large jury pool of 120 prospective jurors. Upon the basis of the answers to the questionnaire and individualized voir dire that occurred over two days, the district judge ultimately found 27 prospective jurors to be qualified. After the parties exercised peremptory challenges, a jury of 12 jurors and two alternates were seated to hear the evidence in the case.

III. Conditions of Confinement in the United States

82. Following extradition, Assange will be brought before a federal magistrate judge "without unnecessary delay," which, in practice, typically means the same day as he arrives in the country, or the following day. *See* Federal Rule of Criminal Procedure 5(a)(1)(A). At the initial hearing, the magistrate judge will ensure Assange is represented by counsel, and set a time for a detention hearing to determine if pretrial detention is lawful and necessary. If Assange is ordered to be detained, the United States Marshals Service ("USMS") will be responsible for housing him pre-trial, and, if he is convicted, until he is sentenced. If he is held in custody pre-trial, Assange will likely be held in the William G. Truesdale Adult Detention Center ("ADC") in Alexandria, Virginia. The ADC houses federal prisoners through a contract with the USMS. In

[2] In contrast, in the U.S. District Court for the Eastern District of Virginia, the government is traditionally only allowed six "peremptory challenges." See Federal Rule of Criminal Procedure 24(b)(2).

2018, the ADC housed an average of 373 inmates in 2018. Of these, roughly one-third were federal prisoners. The ADC is one of approximately 38 correctional facilities nationwide to be accredited by the American Correctional Association, the Commission on Accreditation for Law Enforcement Agencies, and the National Commission on Correctional Health Care.

83. If and when Assange arrives in the ADC, he will initially be held in the booking area of the facility. ADC staff will interview Assange to determine where he should be placed in the ADC. ADC staff will also complete a risk assessment to determine any risks to Assange from his detention. Using an objective point scale, the ADC staff will make a recommendation about where Assange should be housed. He will then be assigned to the appropriate housing unit. There is no solitary confinement in the ADC. The seven housing categories are:

- General Population;
- Administrative Segregation;
- Disciplinary Segregation and Pre-Hearing Segregation (the latter of which is used for inmates who are charged with but not yet found guilty of violating a Detention Center rule);
- Medical Segregation;
- Protective Custody; and
- Critical Care Mental Health Unit.

84. It is possible Assange could be placed in protective custody because of his notoriety. Protective custody is a classification for inmates who need protection from other inmates. Inmates in protective custody are not permitted to attend programs with general population inmates, but they do receive all Detention Center services, unless their presence causes a safety or security risk to the inmate or the facility.

85. It also is possible that Assange could be placed in administrative segregation status if, for example, he presents a safety risk to himself. For that to happen, the ADC would have to find that one or more of the following factors was present:

- During a prior incarceration, the inmate participated in an incident that posed a safety or security risk;
- The inmate is a safety risk to other inmates, prison staff, or one's self;
- The inmate is a security risk to the ADC;
- The ADC staff has concerns about the inmate's adjustment to incarceration;
- The inmate has an extensive criminal history or a serious charge; and/or
- The ADC does not have sufficient information about an inmate to make an informed housing decision because, for example, the inmate does cooperate in the intake and admission process.

86. Inmates in administrative segregation are housed in their cells for a maximum of 22 hours per day. They receive breaks according to an established break schedule. The inmates typically use these breaks to make personal telephone calls and attend to hygiene needs. Inmates in administrative segregation are able to attend three programs, including programs with general population inmates, per week. They also receive all ADC services. By contrast, inmates in protective custody are only permitted to interact with other inmates in protective custody. Inmates in administrative segregation do not have to choose between receiving their break and participating in a program. Prison staff assess inmates in administrative segregation or on special protocols daily. In addition, the ADC's Inmate Management team meets weekly. The Inmate Management team comprises members from the following divisions: Security, Medical, Classification, and Mental Health. The ADC may choose to restrict programs or services if its staff determines at intake, or at any other time, that participating in a program or receiving a service poses a safety or security risk.

87. Typically, there are several inmates in administrative segregation. Inmates in administrative segregation are able to speak to one other through the doors and windows of their cells. Additionally, if it is safe to do so, they may be in a day-room at the same time as other inmates. Moreover, placement in administrative segregation has no impact on an inmate's ability to meet with his or her lawyer.

88. I am aware that Assange has raised an issue as to his mental health and that it is anticipated that he will be subject to further medical examination on behalf of the United States. I will, therefore, describe the general context of the provision of medical care to prisoners in the ADC.

89. Like all facilities used by the USMS, the ADC is required to provide full medical care to prisoners. This care includes medical, dental, and mental health care. Prisoners routinely receive care for chronic conditions within the ADC. All outside medical care must be pre-approved by the USMS, based upon established health standards. In the event of an emergency, the detention facility must proceed immediately with medical treatment. If necessary, prisoners in need of urgent care are immediately transported to the hospital.

90. If necessary, I can provide more detailed information regarding mental health treatment and suicide prevention protocols at the ADC and in penitentiaries of the United States Bureau of Prisons ("BOP"). For now, I offer the following general information. At intake in the ADC, all inmates are assessed for risk of suicide. If the ADC staff determines, at intake or at any other time, that an inmate poses a risk of suicide, he will be placed in the suicide protocol. The ADC staff will consider, among other things, any mental health diagnoses and whether an inmate has communicated suicide concerns verbally or has taken actions consistent with attempting suicide.

91. The suicide protocol is as follows. The inmate is provided a safety smock and a safety blanket, placed on suicide watch, and evaluated by a mental health professional as soon as possible. If the inmate communicates a suicide plan or takes actions consistent with attempting suicide, the case is deemed acute. In acute cases, inmates are watched by a prison staff member one-on-one and continuously. In non-acute cases, inmates are checked by a prison staff member every 15 minutes. In both circumstances, inmates also are monitored through cameras. Prisoners on suicide watch are visited by mental health staff daily, and a psychologist three times per week. Only a psychologist can remove an inmate from the suicide protocol.

92. To determine whether the ADC meets basic criteria related to conditions of confinement and is suitable for use by the USMS, the USMS inspects the ADC annually. The USMS inspection process includes reviewing the ADC's average detainee population and staffing data; security; use of force; hygiene and sanitation; availability of medical care; availability of suicide prevention; and legal access and visitation. The ADC was last inspected by USMS personnel on August 5, 2019, and found to be in compliance. The Commonwealth of Virginia also conducts annual inspections of the ADC. The Virginia Department of Corrections last inspected the ADC from July 23-25, 2019. The Virginia Department of Corrections found the ADC to be in compliance with its standards. The USMS relies on the Commonwealth's inspections, in addition to its own, to determine whether to hold prisoners at the ADC.

93. During the last inspection period, which began in August 2017, there were no suicides in the ADC.

94. Inmate classification decisions are subject to appeal by an inmate. To appeal, Assange would send an Inmate Request Form to the captain of the Security Division. In addition, defendants are permitted to raise issues regarding the conditions of their pretrial

confinement with the district court judge presiding over their criminal case. In sum, there are procedural protections in place for pretrial detainees.

95. It is possible that Assange would be subjected to special administrative measures ("SAMs") during pretrial detention and, if he is convicted, during any period of incarceration. *See* 28 Code of Federal Regulations ("C.F.R.") § 501.2. There are two categories of special administrative measures, both of which are described in the C.F.R. 28 C.F.R. § 501.2 governs those measures intended for the protection of national security information, and 28 C.F.R. § 501.3 governs those measures based on violence or terrorism concerns. Based on my knowledge of this case and my experience as a prosecutor, any special administrative measures imposed in this case would likely be imposed under Section 501.2.

96. In order for the Attorney General to direct a warden to impose these special administrative measures, the head of a member agency of the United States intelligence community must certify that the unauthorized disclosure of classified information would pose a threat to the national security, and that there is a danger that the inmate will disclose such information. The special administrative measures must be "reasonably necessary to prevent disclosure of classified information that would pose a threat to the national security if the inmate disclosed such information." *Id.* In other words, special administrative measures are not punitive. Rather, they must be tailored to protect the information at issue.

97. Special administrative measures may include restricting social visits, mail privileges, phone calls, access to other inmates and to the media, as well as placing an inmate in administrative segregation. Regulations generally exempt from monitoring correspondence, calls, and contacts between the inmate and his attorney. The implementing official, at the direction of the Attorney General, determines the period of time an initial special administrative

measure is imposed, up to one year. *Id.* The implementing official may also extend such special administrative measures in increments of time not to exceed one year. An extension requires, however, that the intelligence community certifies that there is a continued danger that the inmate will disclose classified information and that the unauthorized disclosure would pose a threat to the national security.

98. The affected inmate will receive written notification of the restrictions imposed and the basis for these restrictions. The bases set forth in the notification may be described as in the interest of prison security or safety, national security, or to protect against acts of violence or terrorism. In addition, the inmate must sign for and receive a copy of the notification. *See* 28 C.F.R. §§ 501.2(b), 501.3(b). Similar inmate notification and acknowledgment are also required for a renewal.

99. An affected inmate may challenge the imposed special administrative measures through the Administrative Remedy Program, 28 C.F.R. part 542. *See* 28 C.F.R. §§ 501.2(d), 501.3(e). An inmate who has exhausted all administrative remedies may challenge those special administrative measures in federal court. *Yousef v. Reno*, 254 F.3d 1214, 1222 (10th Cir. 2001).

100. If Assange is convicted, then following his sentencing, the BOP will designate him to an appropriate facility for service of any sentence of incarceration. The BOP has sole authority to designate the place of confinement for federal prisoners. *See* 18 U.S.C. § 3621. By statute, the BOP is required to consider the type of offense; the length of sentence; the defendant's age; the defendant's release residence; the need for medical or other special treatment; any placement recommendation made by the court; and guidance issued by the United States Sentencing Commission. *Id.* Once a prisoner is designated, the USMS will transport the prisoner to the designated facility. The USMS will prepare a transportation package that contains

information regarding the prisoner's physical and mental health as well as any potential alert notifications, including suicidal tendencies. Upon arrival at the designated BOP facility, the staff will conduct an intake screening and obtain the necessary information to further classify the prisoner, so that he is housed and managed in accordance with BOP guidelines and any special needs the prisoner may have.

101. Upon direction of the Attorney General, the Director of the BOP may authorize a warden to implement special administrative measures. Such measures and processes related to their implementation are the same as those discussed in the section above regarding pretrial detention. Even if SAMs are not imposed, existing BOP regulations and policies constrain, to varying degrees, an inmate's communications and contacts. Under BOP regulations, all incoming correspondence potentially is subject to monitoring, 28 C.F.R. § 540.12, as are all phone calls, 28 C.F.R. § 540.102. All visits also are monitored, although the intensity of the monitoring depends on the security level of the facility. BOP regulations generally exempt from monitoring correspondence, calls, and person contacts between the inmate and his attorney.

102. Not all inmates who are under special administrative measures are housed at the Administrative Maximum Security United States Penitentiary ("ADX"), although many are. For example, prisoners under SAMs may be housed at a medical facility if necessary. There also may be other circumstances that result in a prisoner subject to such special administrative measures being housed at a facility other than ADX.

103. If he is sentenced to a period of incarceration, it is possible that Assange will be placed under special administrative measures for at least a portion of his sentence. As outlined above, such measures are imposed on a case-by-case basis using a number of different factors. It also is possible that the government will not seek to impose SAMs on Assange, but otherwise

seek to limit and monitor his visits and communications. If that is the case, Assange may be designated to a facility with a Communications Management Unit ("CMU"). There currently are two prisons with CMUs, and neither of these prisons is ADX.

104. CMUs house inmates who, due to their offense of conviction, offense conduct, or other verified information, require increased monitoring of their communications. Designation to a CMU is not punitive. In accordance with the Code of Federal Regulations, "A CMU is a general population housing unit where inmates ordinarily reside, eat, and participate in all educational, recreational, religious, visiting, unit management, and work programming, within the confines of the CMU. Additionally, CMUs may contain a range of cells dedicated to segregated housing of inmates in administrative detention or disciplinary segregation status." 28 C.F.R. 540.200(b). Inmates may be designated to a CMU if evidence of the following exists:

> (a) The inmate's current offense(s) of conviction, or offense conduct, included association, communication, or involvement, related to international or domestic terrorism;
>
> (b) The inmate's current offense(s) of conviction, offense conduct, or activity while incarcerated, indicates a substantial likelihood that the inmate will encourage, coordinate, facilitate, or otherwise act in furtherance of illegal activity through communication with persons in the community;
>
> (c) The inmate has attempted, or indicates a substantial likelihood that the inmate will contact victims of the inmate's current offense(s) of conviction;
>
> (d) The inmate committed prohibited activity related to misuse or abuse of approved communication methods while incarcerated; or
>
> (e) There is any other substantiated/credible evidence of a potential threat to the safe, secure, and orderly operation of prison facilities, or protection of the public, as a result of the inmate's communication with persons in the community.

28 C.F.R. § 540.201.

105. Inmates receive written notice of the initial designation to a CMU. The designation is reviewed regularly by the inmate's Unit Team, and the inmate is provided "notice

and an opportunity to be heard, in accordance with the Bureau's policy on Classification and Program Review of Inmates." *Id.* § 540.202. "The inmate may challenge the CMU decision, and any aspect of confinement therein, through the Bureau's administrative remedy program." *Id.* The restrictions in a CMU vary but include limitations on written correspondence and electronic messages, telephone communications, as well as visits. *See* §§ 540.203-205. If requested, I can provide more detail on the specifics of these limitations. Inmates in CMUs are permitted to communicate and visit with their attorneys as necessary in furtherance of litigation.

106. As noted above, SAMs are reviewed annually. Likewise, an inmate's designation is reviewed at least once every six months. Specific to ADX, inmates who demonstrate periods of clear conduct and positive institutional adjustment, may progress from the General Population Units to the Intermediate, Transitional, and Pre-Transfer Units. Those inmates successful in the Pre-Transfer Unit may transfer out to an appropriate BOP facility. The types of privileges afforded to the inmates are determined by their housing unit assignments in this stratified system, or program. It will take an inmate a minimum of 36 months to work his way through the stratified system of housing. The minimum stay in a General Population Unit is 12 months; the minimum stay in an Intermediate Unit is six months; the minimum stay in a Transitional Unit is six months; and the minimum stay in a Pre-Transfer Unit is 12 months.

107. As noted above, I understand that Assange is to be examined on behalf of the United States in relation to his mental health. Given that such examination is outstanding, I will not address here any issues that might arise as to his access to mental health care in the event that he is convicted.

IV. Access to and Use of Evidence and Classified Materials in U.S. Federal Court

108. Contrary to his claims, Assange's defense team will not be severely limited in its access to material necessary to prepare for trial. Under Rule 16 of the Federal Rule of Criminal Procedures, the U.S. government is obligated to produce, *inter alia*, "any relevant written or recorded statements of the defendant." Fed. R. Crim. P. 16(a)(1)(B). The government also must permit the defendant to inspect and copy materials such as books, papers, documents, and data that are in the government's possession if "(i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant." *Id.* 16(a)(1)(E). The government is also required to produce information that is exculpatory, *see Brady v. Maryland*, 373 U.S. 83 (1963); information that can be used to challenge a witness's credibility, *see Giglio v. United States*, 405 U.S. 150 (1972); and prior statements of any government witnesses, *see* 18 U.S.C. § 3500; Fed. R. Crim. P. 26.2. These obligations exist in all cases, regardless of whether the information is classified.

109. To fulfill its discovery obligations in this case, we expect to provide defense counsel with classified information. Further, we expect that the defendant will retain counsel who have or can obtain security clearances, or that the court will appoint counsel with security clearances. These attorneys, commonly referred to as "cleared counsel," are authorized to receive and review discoverable classified material.

110. As a practical matter, Assange will be able to review certain classified information that has been disclosed by the prosecution in accordance with its discovery obligations. The federal courthouse in Alexandria, Virginia has several secure classified information facilities ("SCIFs") that are designated for use by defense counsel. The SCIFs contain safes for the storage of hard copy documents as well as computers to review electronic evidence. The federal

courthouse is approximately one-half mile from the ADC, and defendants in national security cases are routinely transported to-and-from the defense SCIFs so that they can prepare for trial. Nevertheless, some classified information may be provided only to cleared counsel and not to the defendant.

111. The Classified Information Procedures Act ("CIPA"), Title 18, United States Code, App. 3, governs the use of classified information in a criminal prosecution. CIPA is a procedural statute; it does not change the government's discovery obligations or alter the rules of evidence. *See, e.g.*, *United States v. Sedaghaty*, 728 F.3d 885, 903 (9th Cir. 2013); *United States v. Wilson*, 750 F.2d 7, 9 (2d Cir. 1984) (district court did not err in applying "generally applicable evidentiary rules of admissibility" to classified materials). Thus, CIPA does not affect a defendant's right to a fair trial. Rather, CIPA provides procedural mechanisms to protect classified information and a defendant's rights under the Due Process Clause of the U.S. Constitution. Accordingly, courts have explained that CIPA's fundamental purpose is to "'harmonize a defendant's right to obtain and present exculpatory material upon his trial and the government's right to protect classified material in the national interest.'" *United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996) (quoting *United States v. Wilson*, 571 F. Supp. 1422, 1426 (S.D.N.Y. 1983)).

112. The government may withhold potentially discoverable material on the ground that it is classified only if the trial judge agrees that it is not relevant and helpful to the defense. Under CIPA and related caselaw, the government may file a motion *ex parte* and *in camera* asking for authorization to withhold this material from the defendant. *See* 18 U.S.C. App. 3 § 4; *United States v. Moussaoui*, 382 F.3d 453, 471-72 (4th Cir. 2004). The government may seek to protect information partially or in its entirety, to substitute a summary of any classified

information that is relevant and helpful, or to substitute a statement admitting relevant facts the classified information would tend to prove. *Id.* §§ 4, 6; *see United States v. Yunis*, 867 F.2d 617, 621-25 (D.C. Cir. 1989).

113. If either party intends to disclose classified information in a pretrial proceeding or at trial, the government may request a hearing governing the use, relevance, and admissibility of the information. 18 U.S.C. App. 3 § 6(a). The hearing is *in camera* if the Attorney General certifies to the court that a public proceeding may result in the disclosure of classified information. *Id.* The United States must provide the defendant with the classified information at issue. *Id.* § 6(b)(1). The court, upon request of the defendant, may order the United States to provide the defendant, prior to trial, such details as to the portion of the indictment at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing. *Id.* § 6(b)(2).

114. In the United States, witnesses rarely testify under pseudonyms. Ordinarily, the Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees a defendant the right to question an adverse witness about identifying information, including his full name and address. *Smith v. Illinois*, 390 U.S. 129, 131 (1968). A defendant's right to identifying information about witnesses is not absolute, however, and a district court has discretion to determine whether effective cross-examination is possible if the witness's identity is concealed. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (holding that the Confrontation Clause permits limitations on cross-examination "based on concerns about, among other things … the witness' safety").

115. At this point, the trial team does not anticipate that any of its trial witnesses will testify under a pseudonym. In any event, the government cannot withhold witness identifying information unilaterally. To convince a court to authorize the withholding of identifying

information for a witness from the defendant or the public, courts require the government to show that doing so is necessary to protect the witness from harm. For example, based on the "heightened level of danger to which El Salvadorians who testify against MS-13 in U.S. courts are subject," a U.S. federal district court permitted the government to withhold the true names of El Salvadorian witnesses from both the defendant and the public. *United States v. Ramos-Cruz*, 667 F.3d 487, 501 (4th Cir. 2012).[3] In contrast, in *United States v. Sterling*, 724 F.3d 482, 517 (4th Cir. 2013), a judge in my district allowed the government to withhold the true names of CIA operatives from the jury, but not from the defendant or his lawyers, on the grounds that neither defendant nor lawyers posed a threat to the safety of the witnesses. *Sterling*, 724 F.3d at 516. As with any evidentiary ruling, a defendant can challenge in the district court and later, in the court of appeals, a witness's use of a pseudonym.

116. CIPA does not alter the Federal Rules of Evidence regarding relevance and admissibility. In other words, CIPA does not preclude the admission of evidence simply because it is classified. CIPA includes procedural mechanisms for a defendant who wishes to use classified information. The defendant must provide notice to the government of any classified information he wishes to use in a pretrial proceeding or at trial. 18 U.S.C. App. 3 § 5. The notice must provide a "brief description" of any classified information the defendant "reasonably expects to disclose or to cause the disclosure of." *Id.* The "brief description" must provide the government sufficient notice as to the information at issue, "setting forth specifically the classified information which the defendant reasonably believes to be necessary to his defense." *United States v. Collins*, 720 F.2d 1195, 1999 (11th Cir. 1983).

[3] Mara Salvatrucha, commonly known as "MS-13", is an international criminal gang.

117. As discussed above, if the government opposes the defendant's request to use classified information, the court must hold a hearing. 18 U.S.C. App. 3 § 6(a). The hearing is *in camera* if the Attorney General certifies to the court that a public proceeding may result in the disclosure of classified information. *Id.* The defendant bears the burden of showing that the classified evidence is both relevant and admissible. *See, e.g.*, *United States v. Miller*, 874 F.2d 1255, 1277 (9th Cir. 1989). The defendant may use classified information that is "relevant and material to the defense." *United States v. Abu Ali*, 528 F.3d 210, 248 (4th Cir. 2008). The information must be "at least essential to the defense, necessary to [the] defense, and neither merely cumulative nor corroborative." *United States v. Smith*, 780 F.2d 1102, 1110 (4th Cir. 1985) (*en banc)*.

118. If the court finds that the noticed classified information is admissible, the government may request that in lieu of the disclosure of such specific classified information, the court order: (a) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or (b) the substitution for such classified information of a summary of the specific classified information. *See* 18 U.S.C. App. 3 § 6(c). The court shall grant the government's motion to substitute or summarize the classified information if the alternative provides the defendant with "substantially the same ability to make his defense as would disclosure of the specific classified information." *Id.* These hearings may also be held *in camera* at the government's request. In support of its request to use a summary or substitution in lieu of the actual classified information, the government may "submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis

for the classification of such information." *Id.* This affidavit is to be examined *in camera* and *ex parte*.

119. CIPA also imposes a duty of reciprocity on the government. *See* 18 U.S.C. App. 3 § 6(f). "Whenever the court determines pursuant to subsection (a) that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information." *Id.* This obligation may continue through the duration of the proceedings. *Id.* If the United States fails to comply with this duty, "the court may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information."

120. Entering classified information into evidence need not alter its classification status. To protect classified information from unnecessary disclosure, a court may order that only portions of an exhibit be admitted into evidence and may excise any classified information. *Id.* § 8. During the examination of any witness, the government may object to any question or line of inquiry that may result in the disclosure of classified information. *Id.* Following such objection, the court shall take "suitable action" to safeguard against the compromise of classified information. *Id.* This action may include a proffer from the parties concerning the nature of information sought and the nature of the information at risk of disclosure.

V. Manning Has Been Treated Fairly and According To Law**.**

121. In his affidavit, Robert J. Boyle has made a number of allegations concerning grand jury proceedings in the United States involving Chelsea Manning. At the outset, it is important for this court to note the extent of due process Manning has received from U.S. courts

in response to her refusal to provide testimony to the grand jury. As outlined below, two federal trial judges have independently considered and rejected her many claims, as has a three judge panel on the court of appeals.

122. Set out below is an overview of the relevant aspects of the federal grand jury system in the United States, a brief description of Manning's legal proceedings, and specific responses to Boyle's opinions regarding the legality of Manning's proceedings under U.S. law. In summary, Boyle's opinions should not be given any weight for the following reasons: (1) Boyle, as a nonparticipant in the grand jury proceedings, lacks the necessary information to render his opinion; (2) Manning was properly subpoenaed to testify before the grand jury in connection with a legitimate criminal investigation; (3) Manning has already raised, and the U.S. courts have already rejected, the exact same arguments advanced by Boyle; and (4) in any event, Assange will have an opportunity to raise these arguments in the U.S. judicial system after he is extradited.

A. Overview of the Grand Jury System in the United States

1. Functions of the Grand Jury

123. "The institution of the grand jury is deeply rooted in Anglo-American history." *United States v. Calandra*, 414 U.S. 338, 342 (1974). It was "brought to [the United States] by the early colonists and incorporated in the Constitution by the Founders." *Costello v. United States*, 350 U.S. 359, 362 (1956). "[T]he Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by 'a presentment or indictment of a Grand Jury.'" *Calandra*, 414 U.S. at 343. The Grand Jury Clause of the Fifth Amendment to the U.S. Constitution states, in full, that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a

presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." U.S. Const. amend. V.

124. The American grand jury "was intended to operate substantially like its English progenitor." *Costello*, 350 U.S. at 362. Its "mission is to clear the innocent, no less than to bring to trial those who may be guilty." *United States v. Dionisio*, 410 U.S. 1, 16-17 (1973). To achieve those ends, the grand jury "serves two interrelated but distinct functions." SARA SUN BEALE ET AL., GRAND JURY LAW & PRACTICE § 1:7 (2d ed. 1997).

125. First, the grand jury serves as "an investigatory body charged with the responsibility of determining whether or not a crime has been committed." *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991). The grand jury conducts "ex parte investigation[s] to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person." *Calandra*, 414 U.S. at 343-44. It has "broad investigative powers," *Dionisio*, 410 U.S. at 15, and generally may "inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred," *R. Enters.*, 498 U.S. at 297.

126. Second, the grand jury protects individuals from "hasty, malicious and oppressive," *Wood v. Georgia*, 370 U.S. 375, 390 (1962), or otherwise "unfounded criminal prosecutions," *Branzburg v. Hayes*, 408 U.S. 665, 686-87 (1972). Under the Fifth Amendment, federal prosecutors must obtain an indictment from a grand jury to prosecute an individual for a felony offense, *see* U.S. Const. amend. V, unless the individual waives the right to be charged by indictment, *see* Fed. R. Crim. P. 7(b). In determining whether to return an indictment, the grand jury alone deliberates and decides whether there is probable cause to believe that the individual committed the crime. *See Kaley v. United States*, 571 U.S. 320, 328 (2014); *United States v.*

Williams, 504 U.S. 36, 48 (1992). Thus, the grand jury serves as a "kind of buffer or referee between the Government and the people." *Williams*, 504 U.S. at 47.

127. In the Eastern District of Virginia, a grand jury consists of 23 members who generally meet for three (3) consecutive days per month for six (6) to 18 months. *See* Jury Service FAQ's, United States District Court for the Eastern District of Virginia, *available at* http://www.vaed.uscourts.gov/jury/jury-service.htm (last visited Jan. 7, 2020). The grand jurors take an oath that "binds them to inquire diligently and objectively into all federal crimes committed within the district about which they have or may obtain evidence, and to conduct such inquiry without malice, fear, ill will, or other emotion." Handbook for Federal Grand Jurors, *supra*, at 7. To return an indictment, at least 16 grand jurors must be present and at least 12 must vote in favor of it. *See* Fed. R. Crim. P. 6(f); Handbook for Federal Grand Jurors, *supra*, at 7.

128. The grand jury "belongs to no branch of the institutional Government." *Williams*, 504 U.S. at 47. "[T]he Fifth Amendment's constitutional guarantee [of the grand jury] presupposes an investigative body acting independently of either prosecuting attorney or judge." *Id.* at 49 (quoting *Dionisio*, 410 U.S. at 17-18) (internal quotation marks omitted). While prosecutors present evidence to the grand jury and ask the grand jury to return indictments, the grand jury is not a part of, or subservient to, the Executive Branch. *See United States v. (Under Seal)*, 714 F.2d 347, 349 (4th Cir. 1983) (recognizing the "simple, but fundamental, concept that the grand jury serves an independent investigatory function and is 'not meant to be the private tool of the prosecutor'" (quoting *United States v. Fisher*, 455 F.2d 1101, 1105 (2d Cir. 1972))).

2. The Ex Parte and Secretive Nature of Grand Jury Proceedings

129. "A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated." *Calandra*, 414 U.S. at 343. Instead, a grand jury

proceeding is an "ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person." *Id.* at 343-44. The grand jury hears evidence presented by prosecutors and then deliberates in private to decide whether probable exists to charge an individual by indictment. *See* BEALE ET AL., *supra*, § 1:6; Handbook for Federal Grand Jurors, *supra*, at 4-5, 11-13. "The target of the grand jury's investigation is not entitled to be present, and witnesses are not entitled to have counsel accompany them into the grand jury room (although the witness may leave the room to consult with counsel)." BEALE ET AL., *supra*, § 1:6. If the grand jury finds probable cause to charge an individual, the accused then has a constitutional right to an adversarial, fair trial to adjudicate his guilt or innocence. *See* U.S. Const. amend. VI.

130. In addition to their ex parte nature, the general rule is that grand jury proceedings are conducted in secret. The secretive nature of grand jury proceedings serves to protect the accused as well as the integrity of the system:

> First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 219 (1979).

131. To safeguard these interests, the law imposes secrecy obligations on participants (except for witnesses) in grand jury proceedings. *See* Fed. R. Crim. P. 6(e)(2). The general rule is that participants, including government attorneys, may "not disclose a matter occurring before the grand jury." *Id.* R. 6(e)(2)(B). These secrecy obligations are subject to a number of carefully

delineated exceptions. *See id*. R. 6(e)(3); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 424-25 (1983).

3. The Power of the Grand Jury to Subpoena Witnesses

132. As part of its broad investigative powers, the grand jury may subpoena witnesses to testify before it. *See Branzburg*, 408 U.S. at 688. Generally speaking, prosecutors will "advise grand jurors as to what witnesses should be called" and issue the appropriate subpoenas. Handbook for Federal Grand Jurors, at 8. When a witness appears before the grand jury, the prosecutors usually will question him first and then allow the grand jurors an opportunity to question him. *See id.* at 9. The grand jury may also request that the prosecutors call additional witnesses. *Id.* at 8.

133. Every person called as a "witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry." *Blair v. United States*, 250 U.S. 273, 282 (1919). The grand jury "has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg*, 408 U.S. at 688 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)) (internal quotation marks omitted). "The duty to testify [before the grand jury] has long been recognized as a basic obligation that every citizen owes his Government." *Calandra*, 414 U.S. at 345.

134. There are limits to this power, however. In calling witnesses, a grand jury cannot "violate a valid privilege, whether established by the Constitution, statutes, or the common law." *Id.* at 346. As particularly relevant here, the Fifth Amendment to the U.S. Constitution generally precludes individuals from being compelled to incriminate themselves before the grand jury. *See Kastigar v. United States*, 406 U.S. 441, 443-45 (1972). That said, under federal law, a court can

grant a witness "use immunity," which generally prevents the witness's testimony from being used against the witness, *see* 18 U.S.C. § 6002, and then compel the witness to testify before the grand jury, even if the testimony would otherwise incriminate him, *see* 18 U.S.C. § 6003(a); *Kastigar*, 406 U.S. at 462.

135. Where a person refuses to comply with a grand jury subpoena to testify, courts have the inherent authority to enforce the subpoena through its civil-contempt powers. *See Shillitani v. United States*, 384 U.S. 364, 370 (1966). That inherent authority is supplemented by the recalcitrant witness statute, which allows a court to order a witness's confinement when the witness refuses, "without just cause shown," to comply with the court's order to testify before the grand jury. 28 U.S.C. § 1826(a). The witness may be confined "until such time as the witness is willing to give such testimony" or for "the life of . . . the term of the grand jury," whichever is earlier, but not to "exceed eighteen months." *Id.* In addition to confinement, the court may impose other sanctions tailored to compel compliance with its order, such as fines. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994); *In re Grand Jury Proceedings*, 280 F.3d 1103, 1109-10 (7th Cir. 2002).

136. The purpose of civil-contempt sanctions is that they are "coercive and avoidable through obedience." *Bagwell*, 512 U.S. at 827. That means the contemnor must be able to "end the sentence and discharge himself at any moment by doing what he had previously refused to do." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911). Because "the contemnor is able to purge the contempt and obtain his release by committing an affirmative act," he is considered to "carr[y] the keys of his prison in his own pocket." *Bagwell*, 512 U.S. at 828 (quoting *Gompers*, 221 U.S. at 442) (internal quotation marks omitted).

4. Limitations on the Grand Jury's Investigative Powers

137. While the grand jury's investigative powers are broad, they can be used only in furtherance of a legitimate function of the grand jury. "[P]ractices which do not aid the grand jury in its quest for information bearing on the decision to indict are forbidden." *(Under Seal)*, 714 F.2d at 349. For example, the grand jury cannot "engage in arbitrary fishing expeditions" or "select targets of investigation out of malice or an intent to harass." *R. Enters.*, 498 U.S. at 299. Likewise, "prosecutors cannot use grand jury proceedings for the 'sole or dominant purpose' of preparing for trial on an already pending indictment." *United States v. Alvarado*, 840 F.3d 184, 189 (4th Cir. 2016) (quoting *United States v. Moss*, 756 F.2d 329, 332 (4th Cir. 1985)). That said, even after returning an indictment, the grand jury's investigative powers may still be used if the investigation relates to a superseding indictment involving additional defendants or additional crimes by an indicted defendant. *See Alvarado*, 840 F.3d at 190; *Moss*, 756 F.2d at 332.

138. Courts maintain a supervisory role to resolve allegations of grand jury abuse. *See Calandra*, 414 U.S. at 346; *Branzburg*, 408 U.S. at 688. While the grand jury enjoys a great degree of "operational separateness from its constituting court," it does not have the power to compel compliance with its subpoenas and "must appeal to the court when such compulsion is required." *Williams*, 504 U.S. at 48-49. A court will not require compliance with a grand jury subpoena when it would abuse the grand jury process or infringe on a valid privilege. *See id.* Where a grand jury subpoena is used for an improper purpose, the court may quash it. *See (Under Seal)*, 714 F.2d at 349-50.

5. Department of Justice Regulations on Prosecutors' Conduct Before the Grand Jury

139. In addition to the limitations imposed by judicial oversight, the U.S. Department of Justice's internal policies and procedures regulate federal prosecutors' conduct before the grand jury. For example, federal prosecutors are directed to observe the following standard of conduct:

> In dealing with the grand jury, the prosecutor must always conduct himself or herself as an officer of the court whose function is to ensure that justice is done and that guilt shall not escape nor innocence suffer. The prosecutor must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecution but also the protection of the citizenry from unfounded criminal charges. The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, the prosecutor must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors.

Justice Manual 9-11.010, *available at* https://www.justice.gov/jm/jm-9-11000-grand-jury#9-11.010 (last visited Jan. 7, 2020). These internal policies and procedures further protect witnesses and the targets of investigation from governmental overreach.

B. Background on Chelsea Manning

140. Chelsea Manning is a former intelligence analyst in the United States Army. In October 2009, Manning deployed to Iraq. During that deployment, Manning downloaded hundreds of thousands of classified documents and transmitted them to one or more agents of WikiLeaks, including Assange, for disclosure on its website. The classified documents included, among other things, significant activity reports related to the ongoing wars in Iraq and Afghanistan, Guantanamo Bay detainee assessment briefs, and United States Department of State cables.

141. In May 2010, Manning was arrested for these disclosures, and was prosecuted in a military court-martial. In February 2013, Manning pleaded guilty to lesser-included offenses of some but not all of the outstanding charges. Manning did not have a plea agreement with the prosecution.

142. When Manning entered guilty pleas to the lesser-included offenses, the military judge conducted a "providence inquiry" pursuant to the Rules for Courts-Martial. A providence inquiry is simply a colloquy designed to "ensure that a plea is voluntary and that there is a factual basis for the plea." *Partington v. Houck*, 723 F.3d 280, 282-83 (D.C. Cir. 2013). The Rules for Courts-Marital provide that "[t]he military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea." Manual for Courts-Martial, United States, R.C.M. 910(e), at II-102 (2012 ed.), *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf (last visited Jan. 7, 2020). The discussion notes to the rule explain that "[t]he accused need not describe from personal recollection all the circumstances necessary to establish a factual basis for the plea. Nevertheless the accused must be convinced of, and able to describe all the facts necessary to establish guilt." *Id.*

143. At Manning's providence inquiry, Manning first read a voluntary statement to provide a factual basis for the guilty pleas. Then, the military judge questioned Manning specifically about the factual basis of certain elements of the lesser-included offenses to which Manning was pleading guilty. In other words, Manning chose what facts to admit to support the guilty pleas, and the military court engaged in a limited inquiry to ensure the factual basis for the pleas. Manning was not subjected to exhaustive questioning about the offenses or the totality of the circumstances.

144. After Manning entered guilty pleas to the lesser-included offenses, the military prosecutors elected to go forward with the more serious offenses with which Manning was charged. Manning was ultimately convicted of Espionage Act and other offenses related to the unauthorized disclosures, while acquitted of other charges. In 2013, Manning was sentenced to 35 years of imprisonment. In January 2017, the President of the United States commuted Manning's sentence so that Manning would be released in May 2017, after serving approximately seven years in prison.

C. Manning's Grand Jury Proceedings[4]

145. In January 2019, Manning was subpoenaed to testify before a grand jury empaneled in the Eastern District of Virginia. The Honorable Claude M. Hilton, a federal judge who sits on the United States District Court for the Eastern District of Virginia, entered an order requiring Manning to testify and granting her use immunity. After Manning raised concerns that her testimony could still be used against her in future court-martial proceedings, a general court-martial convening authority in the Department of Army issued its own order granting Manning use immunity. These immunity orders eliminated any concern that compelling Manning to testify would violate her Fifth Amendment rights.

146. Manning's grand jury appearance date was set for March 5, 2019. Before her scheduled grand jury appearance, Manning filed an extensive motion to quash the subpoena. As

[4] All of the publicly filed documents in this litigation can be found on PACER, https://www.pacer.gov/, a website developed by the Administrative Office of the United States Courts to provide public access to records of the U.S. courts. The litigation involved the following dockets: *In re Grand Jury Subpoena for Chelsea Manning*, No. 1:19-dm-00003-CMH-1 (E.D. Va.) (Judge Hilton); *United States v. John Doe 2010R03793*, No. 1:19-dm-00012-AJT-2 (E.D. Va.) (Judge Trenga); *In re Grand Jury Subpoena*, 19-1287 (4th Cir.) (Fourth Circuit).

particularly relevant here, Manning alleged, among other things, that prosecutors had issued the subpoena for improper purposes, such as to harass and retaliate against her.

147. On March 5, 2019, Judge Hilton, who oversaw the relevant grand jury, held a hearing on the motion to quash. After hearing extensive argument from the parties on the issues, Judge Hilton denied Manning's motion. Manning's grand jury appearance was scheduled for the next day.

148. Manning appeared before the grand jury but refused to answer questions posed to her. Judge Hilton therefore conducted a hearing on March 8, 2019, to determine whether Manning should be held in civil contempt for disobeying his order that she testify before the grand jury. At the hearing, at which Manning was represented by counsel, Judge Hilton found that Manning did not have just cause to refuse to answer the questions posed to her. Judge Hilton held Manning in civil contempt and ordered that she be incarcerated until she purged herself of the contempt or for the life of the grand jury.

149. Approximately one week later, Manning filed an appeal to the United States Court of Appeals for the Fourth Circuit. On appeal, Manning argued, among other things, that Judge Hilton had erred in holding that she failed to demonstrate any evidence of grand jury abuse. She claimed that prosecutors improperly used the grand jury process to harass and retaliate against her, and to prepare for trial against an already indicted defendant. On April 22, 2019, a three-judge panel from the United States Court of Appeals for the Fourth Circuit filed an order "find[ing] no error in the district court's rulings and affirm[ing] its finding of civil contempt."

150. Shortly thereafter, on May 9, 2019, the term of the grand jury expired. Consistent with the terms of Judge Hilton's contempt order, Manning was released from incarceration on that date. On May 8, 2019, however, Manning was served with a second subpoena to appear

before another grand jury empaneled in the Eastern District of Virginia. In connection with this subpoena, The Honorable Anthony J. Trenga, another federal judge who sits on the United States District Court for the Eastern District of Virginia, and the Department of Army again issued orders granting Manning with use immunity. Judge Trenga oversaw the second grand jury that Manning was called to testify before.

151. After being served with the second subpoena, Manning publicly announced that she would not testify in front of the grand jury and informed prosecutors, through counsel, that she would refuse to answer the same questions posed to her in her prior grand jury appearance. The prosecutors therefore scheduled a hearing with Judge Trenga on May 16, 2019.

152. The day before the hearing, Manning filed two motions, including a Motion to Quash. As relevant here, Manning sought to quash the grand jury subpoena on the ground that prosecutors were improperly using the grand jury proceedings to prepare for trial on an already indicted defendant, Julian Assange. On April 11, 2019, after Assange was arrested, the United States unsealed an indictment charging him with one count of conspiracy to commit computer intrusion.

153. To refute Manning's argument while also maintaining grand jury secrecy, the prosecutors submitted an ex parte pleading that described for Judge Trenga the nature of the grand jury's ongoing investigation. This pleading demonstrated that Manning's testimony was directly relevant to an ongoing investigation into charges or targets that were not included in the pending indictment. Due to the grand jury secrecy rules, this pleading remains under seal, and I cannot disclose its contents.

154. At the hearing on May 16, 2019, Judge Trenga heard argument on Manning's motions and denied both of them. Judge Trenga then questioned Manning directly to determine

whether she would testify in front of the grand jury. Manning clearly and unequivocally stated that she would not testify in front of the grand jury, despite Judge Trenga's order that she do so. Manning claimed that she objected on principle to the grand jury system and that imprisonment would not compel her to testify. Judge Trenga found that Manning did not have just cause to refuse to testify and held her in civil contempt. Judge Trenga ordered that Manning be incarcerated until she purges herself of her contempt or for the life of the grand jury, but in no event to exceed 18 months. Judge Trenga also directed that Manning pay a conditional fine of $500 per day after 30 days from the issuance of his order, if she still had not complied by that time. *See id.* Judge Trenga further directed that, if Manning still had not complied within 60 days of the order, the fine would increase to $1000 per day. *See id.*

155. Two weeks later, on May 31, 2019, Manning filed a motion requesting that Judge Trenga reconsider the sanctions. She argued that the sanctions were improper and that the superseding indictment returned against Assange on May 23, 2019, had eliminated the need for her testimony. In opposing Manning's motions, the prosecutors filed with Judge Trenga another ex parte pleading that explained why Manning's testimony remained relevant and essential to an ongoing investigation into charges or targets that are not included in the superseding indictment against Assange. On August 5, 2019, Judge Trenga issued an order denying Manning's motion to reconsider. Even though she had the right, Manning did not appeal Judge Trenga's rulings.

156. As of this filing, Manning continues to refuse to comply with the court's order to testify in front of the grand jury and therefore remains incarcerated and incurring fines.

D. Response To Boyle's Conclusions

157. In his statement, Boyle reaches (at 25-26) two principal conclusions. First, Boyle argues (at 25) that Manning will never testify and, as a result, "her continued confinement is now

punitive and consequently has become an abuse of the grand jury process." Second, Boyle argues (at 25) that Manning was improperly subpoenaed before the grand jury "to gather evidence for use at Assange's criminal trial and/or to get a preview of Manning's trial testimony, should she be called as a defense witness." As explained below, Boyle's opinions are unpersuasive.

158. As an initial matter, Manning's grand jury subpoena, refusal to testify, and subsequent confinement for contempt have little or no bearing on this extradition proceeding. If this information is being submitted to demonstrate that Assange is being prosecuted unfairly or some type of abuse of process, it should be noted that subpoenaing convicted defendants, such as Manning, to obtain additional evidence about criminal conduct in which they may have been involved is a common occurrence, as is holding recalcitrant witnesses in contempt. If anything, the history of Manning's guilty plea, subsequent conviction on other counts, pardon, and litigation over her grand jury testimony demonstrate the extraordinary level of due process which she has been accorded.

159. In any event, Boyle is unqualified to render his opinions. His own affidavit reflects that he was not involved in Manning's grand jury proceedings. As a nonparticipant, Boyle lacks the necessary facts to opine on whether Manning was properly subpoenaed before the grand jury. Boyle is not privy to the purpose and direction of the grand jury's investigation, or the reasons why Manning has been subpoenaed to testify. Without this knowledge, Boyle lacks the critical information necessary to assess whether Manning's grand jury testimony was properly sought. Because Boyle's allegations of impropriety necessarily rest on conjecture, his opinions are not entitled to any weight.

160. In contrast, as a government attorney who was involved in Manning's grand jury litigation, I am privy to the information necessary to assess whether her grand jury testimony was properly sought. Unlike Boyle, I know the purpose and direction of the grand jury's investigation, and the reasons why Manning has been subpoenaed to testify. In this setting, however, the law on grand jury secrecy precludes me from divulging any matters that occurred or are occurring before the grand jury. *See* Fed. R. Crim. P. 6(e)(2)(B). Still, I am able to represent the following: Manning was lawfully subpoenaed by a grand jury to testify in connection with a legitimate, ongoing criminal investigation, and the United States did not subpoena Manning to testify for the sole or dominant purpose of preparing for trial on an already pending indictment.

161. Further, Manning extensively litigated the propriety of the grand jury subpoenas in the United States courts. As previously described, she challenged the subpoenas in front of two different federal judges who sit on the United States District Court for the Eastern District of Virginia—Judge Hilton and Judge Trenga. Manning had the opportunity to appeal their rulings to the United States Court of Appeals for the Fourth Circuit, and she did so once. On each of these occasions, the United States courts rejected Manning's arguments challenging the propriety of the grand jury subpoenas.

162. Boyle's opinions simply rehash arguments that Manning made in the United States courts. As discussed above, after prosecutors subpoenaed Manning to appear before the grand jury in May 2019, Manning filed a Motion to Quash the subpoena. *See* Motion to Quash Grand Jury Subpoena*, United States v. John Doe 2010R03793*, No. 1:19-dm-00012-AJT-2 (E.D. Va. May 16, 2019) (Dkt. No. 7). In that motion, Manning made the same argument raised by Mr. Boyle—that prosecutors were improperly using the grand jury process in an attempt to obtain

evidence to use against Assange at trial. *Id.* at 5-8. We opposed Manning's motion and filed an ex parte motion with the court "show[ing] her testimony is directly relevant and important to an ongoing investigation into charges or targets that are not included in the pending indictment." Gov't's Resp. in Opp'n to Chelsea Manning's Mots. to Quash and for Disclosure of Electronic Surveillance, at 1-2, *United States v. John Doe 2010R03793*, No. 1:19-dm-00012-AJT-2 (E.D. Va. May 16, 2019) (Dkt. No. 5). After receiving this information and hearing argument, Judge Trenga denied Manning's motion in its entirety. *See* Order, *United States v. John Doe 2010R03793*, No. 1:19-dm-00012-AJT-2 (E.D. Va. May 16, 2019) (Dkt. No. 9).

163. Likewise, Judge Trenga has rejected the argument that Manning's confinement is impermissibly punitive. At Manning's May 16, 2019 contempt hearing, her attorney argued that her continued confinement would be impermissibly punitive. *See* Tr. of Hr'g, at 9-13, *United States v. John Doe 2010R03793*, No. 1:19-dm-00012-AJT-2 (E.D. Va. June 13, 2019) (Dkt. No. 18). Judge Trenga rejected Manning's argument and ordered her confinement. *See id.* at 23-26. After the hearing, Manning moved for Judge Trenga to reconsider the civil-contempt sanctions that he imposed, arguing again that she would never testify and therefore the civil-contempt sanctions had become impermissibly punitive. *See* Motion to Reconsider Sanctions, at 3-9, *United States v. John Doe 2010R03793*, No. 1:19-dm-00012-AJT-2 (E.D. Va. May 31, 2019) (Dkt. No. 14). Judge Trenga again denied Manning's motion. *See* Order, *United States v. John Doe 2010R03793*, No. 1:19-dm-12-AJT-2 (E.D. Va. Aug. 5, 2019) (Dkt. No. 28).

164. Because Boyle's legal opinions have already been litigated and rejected in the United States courts, they should be afforded no weight here.

165. Finally, Assange will have an opportunity to raise arguments related to the improper use of the grand jury system in the United States. Federal courts retain supervisory

authority to address allegations of grand jury abuse, *see Calandra*, 414 U.S. at 346, and they may take remedial action when prosecutors have engaged in grand jury abuse, *see Alvarado*, 840 F.3d at 189; *(Under Seal)*, 714 F.2d at 351. For example, if a defendant proves that prosecutors improperly used the grand jury for the sole or dominant purpose of preparing for trial, the district court can preclude prosecutors from using that evidence at trial. *See Alvarado*, 840 F.3d at 189-90; *United States v. Leung*, 40 F.3d 577, 581 (2d Cir. 1994). In addition, a defendant may seek dismissal of an indictment by establishing that "the violation substantially influenced the grand jury's decision to indict, or . . . there is grave doubt that the decision to indict was free from the substantial influence of such violations." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (quoting *United States v. Mechanik*, 475 U.S. 66, 78 (1986)) (internal quotation marks omitted). While I am confident that prosecutors did not engage in grand jury abuse and these arguments would not have a meritorious basis, the point is that Assange will have a forum in the United States courts to raise his allegations.

VI. Assange's Actions Unambiguously Constituted a Conspiracy to Violate the Computer Fraud and Abuse Act

166. Assange argues that the "[t]he password hash 'conspiracy' amounts (at its highest) to a bare request from Manning, with no evidence of agreement, or information being sent." Defense, Summary of Issues ¶ 6. As an initial matter, the Superseding indictment explicitly alleges that "ASSANGE *agreed* to assist Manning in cracking a password hash stored on United States Department of Defense computers connected to the Secret Internet Protocol Network, a United States government network used for classified documents and communications." Superseding Indictment ¶ 15 (emphasis added). Upon Assange's extradition, we intend to prove this agreement, beyond a reasonable doubt, through a variety of evidence, including "electronic messages Manning sent to and received from ASSANGE using her personal computer." *See*

Affidavit in Support of Request for Extradition of Julian Paul Assange, sworn out by one of my colleagues on June 4, 2019 (hereinafter referenced as the "June 14th Affidavit"), at ¶ 88(a).

167. These electronic messages are described extensively in the affidavit that was submitted to the U.S. court by an FBI Special Agent, in support of the initial criminal complaint in this case.[5] In these electronic messages, Manning asked Assange whether he was good at "hash-cracking" to which Assange relied "yes." A password "hash" refers to a password that for security has been converted via an algorithm from its original plan text into a string of numbers and letters. "Hash-cracking" refers to the process of attempting to glean the original plain text password from its corresponding password hash. Assange responded, "yes," indicating he was good at hash-cracking and stated that he had "rainbow tables," which are tools used to crack password hashes. Manning then provided Assange with a password hash and indicated that she had taken the hash from the "SAM" or Systems Account Manager, a reference to the location where Microsoft's operating system stored hashed passwords at the time. Assange then asked Manning questions about the password hash in order to help Assange crack it, such as "any more hints about this lm … no luck so far." A more detailed account of this exchange is described at paragraphs 86-92 of the affidavit submitted in support of the initial criminal complaint in this case.

168. Cracking the password hash could have allowed Manning to log onto a classified Department of Defense account under a username that did not belong to her, thus making it "more difficult for investigators to identify Manning as the source of disclosures of classified information." June 14th Affidavit, ¶ 87. Based on this, Assange asserts that "[t]he object alleged

[5] The affidavit is publicly available through PACER, https://www.pacer.gov (as explained above, in Note 2), as Docket Item #2 in the case *United States v. Assange,* 1:18cr111.

was not to gain unauthorised access but to cover tracks." Summary of Issues ¶ 6. This misses the point. The object was to gain unauthorized access to a classified Department of Defense account. The larger goal such unauthorized access furthered was to obscure Manning's identity so that she could continue to steal classified documents on behalf of Assange. *See* June 14th Affidavit ¶ 87 ("the purpose of ASSANGE's password hash-cracking agreement with Manning was to enable Manning to continue to steal classified documents from the United States to provide to ASSANGE with less risk of being detected by the United States.").

169. In his affidavit, Carey Shenkman suggests that the Computer Fraud and Abuse Act (CFAA) is unconstitutionally vague. Shenkman Aff. ¶¶ 35, 40-41. In fact, the CFAA's basic prohibition against intentionally gaining access to a computer "without authorization," Title 18, United States Code, Section 1030(a)(1), is common throughout the world. *See* Council of Europe, Convention on Cybercrime, Sec. 1, Art. II ("Each party shall … establish as criminal offenses under its domestic law, when committed intentionally, the access to the whole or any part of a computer system without right. A party may require that the offense be committed by infringing security measures, with the intent of obtaining computer data…."); ORIN S. KERR, COMPUTER CRIME LAW 40 (4th ed. 2018) ("Every state and the federal government has an unauthorized access statute."). Indeed, as noted in the Opening Note, the United Kingdom's Computer Misuse Act similarly prohibits "Unauthorised access to computer material." Opening Note ¶ 57.

170. In an attempt to make CFAA appear unclear and arbitrary, Shenkman points to a disagreement among U.S. courts as to whether CFAA applies to individuals who have authorized access to a computer system, but abuse that authorization by accessing information for a purpose prohibited by the entity that owns the computer system. *See* Shenkman Aff. ¶45 n.146-47.

Similarly, Shenkman quotes Professor Orin Kerr, a leading U.S. scholar, as suggesting that CFAA is "so 'extraordinarily broad' that without limitation it is unconstitutionally vague." *Id.* ¶ 35 (quoting Orin Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 Minn. L. Rev. 1561 (2010)). But the Kerr article, upon which Shenkman relies, refers to the same dispute referenced above: whether CFAA applies to individuals who have authorized access to a computer system, but exceed the scope of that authorization and use that access for a purpose that is prohibited by the computer's owner. *See* Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 Minn. L. Rev. 1561, 1562 (2010). Kerr merely argues that CFAA would be unconstitutionally vague *if* it were applied to such individuals. *Id.* at 1572. But Kerr acknowledges that there are some "obvious" violations of CFAA, such as when one intentionally obtains and uses the password of another to access an account without permission. *See id.* at 1576 ("To be sure, there are some obvious cases. If A guesses B's password, and logs into B's email account to read B's email, A's access to the computer is clearly unauthorized."); *see also* KERR, COMPUTER CRIME LAW, at 49 ("circumvention of code-based restrictions to a computer constitutes 'access without authorization'").

171. Agreeing and attempting to obtain access to a password in order to access an account without authorization is precisely what Assange has been charged with in this case. Assange has been charged with conspiring to crack (Count 18) and attempting to crack (Count 5) a password hash to an account on a classified U.S. Department of Defense computer system. There is no question that neither Assange nor Manning was authorized to access this account—that is the whole reason why they needed to crack a stolen password hash in the first place. Circumventing a technical restriction on authorization to a computer system is the paradigmatic example of "unauthorized access." *See* KERR, COMPUTER CRIME LAW, at 48 ("Indeed, bypassing

password gates using stolen or guessed passwords is a common way to 'hack' into a computer.") Any uncertainty about how CFAA might apply in completely different circumstances has no application here.

172. Assange has retained a forensic expert who submitted a long forensic report challenging the evidence in support of the hacking charge. *See* Affidavit of Patrick Eller of Metadata Forensics, LLC. The crux of Eller's affidavit seems to be that it would have been very difficult, if not impossible, for Assange's hash-cracking agreement to achieve its ultimate purpose of assisting Manning in the theft of national security information. But it is well-settled that impossibility is not a defense to a conspiracy charge. *See United States v. Jimenez Recio*, 537 U.S. 270, 272, 275 (2003); *United States v. Min*, 704 F.3d 314, 321 (4th Cir. 2013). Eller also suggests that Manning and Assange's hash-cracking agreement might have been simply for "technical curiosity" or "potential business opportunities." Eller Aff. ¶ 78. Whether Assange agreed to help Manning crack a password hash for the reasons Eller suggests or to help Manning gain unauthorized access to a U.S. government account in order to steal classified documents is a question for a jury to decide after hearing all the evidence from both sides.

VII. No Privileged Materials Related to Assange Will Be Used in this Case

173. I am aware of an allegation that a Spanish citizen, David Morales Guillen, and the Spanish company UC Global, carried out acts that allegedly impinged on the privacy of Assange, and on the privacy of his lawyers, by placing bugging devices and other means inside the Embassy of the Republic of Ecuador in London, allegedly without the consent of those affected. I am aware of the further allegation that Guillen and UC Global provided the information thus obtained to third parties or institutions, including agents of the government of

the United States. Finally, I am aware that these allegations are being investigated under the direction of a judge in Spain.

174. I am not in a position to confirm or deny the allegations described above. I can, however, assure this Court that, if Assange is extradited to the United States, no privileged conversations between Assange and his lawyers or doctors will be used against him. I also can confirm that, if the fruits of any surveillance of Assange in the Embassy exist (and regardless of who undertook that surveillance), the prosecutors assigned to this case will not review or use any privileged communications.

175. Moreover, even were this court to assume, arguendo, the truth of the allegations under investigation in Spain, any use of privileged information against Assange would be barred by American law. In courts of the United States, the confidences of wrongdoers made to their attorneys with respect to past wrongdoing are protected by the attorney-client privilege. *See United States v. Zolin*, 491 U.S. 554, 562 (1989). In U.S. federal courts, "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege," unless a contrary statute, constitutional provision, or Supreme Court rule applies. Federal Rule of Evidence 501. The United States Supreme Court has recognized the attorney-client privilege under federal law as "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It exists "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id*. The Supreme Court has recognized that attorney-client privilege requires that clients be free to "make full disclosure to their attorneys" of past wrongdoings, *Fisher v. United States*,

425 U.S. 391, 403 (1976), in order that the client may obtain "the aid of persons having knowledge of the law and skilled in its practice," *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

176. U.S. federal courts also protect confidential communications made in the course of diagnosis or treatment between a patient and his licensed psychiatrist, psychologist, or social worker. *Jaffee v. Redmond*, 518 U.S. 1 (1996). In recognizing this common law privilege, the United States Supreme Court has noted, "[l]ike the spousal and attorney-client privileges, the psychotherapist-patient privilege is rooted in the imperative need for confidence and trust" as effective psychotherapy "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." *Id.* (quotations omitted).

177. Finally, the U.S. Department of Justice has established procedures to prevent agents and prosecutors from receiving and viewing privileged materials related to matters they are investigating or prosecuting. In any case in which privileged communications are inadvertently obtained during an investigation, a team of lawyers and investigators, separate from the prosecution team, is established to protect the privacy of such information. This separate team, known as a "filter" team, identifies potentially privileged material (or information to which the prosecution team arguably is not entitled) and separates it, to ensure that the prosecution team receives only non-privileged and unprotected information. The filter team may attempt to resolve questions of potential privilege through negotiation with a defendant's lawyers or litigation and will create a record to establish what steps were taken with the materials in question.

178. If Assange comes to believe that any evidence offered by the United States during any criminal proceedings in the United States was based on privileged material, he could move the court to have such evidence excluded. *See* Federal Rule of Criminal Procedure 12(b)(3)

(motions to suppress evidence should be filed prior to trial); Federal Rule of Evidence 1101(c) ("The rules on privilege apply to all stages of a case or proceeding."). Like all other motions Assange might make if extradited to the United States, this motion would be considered by an independent judge and could be the subject of an appeal.

VIII. U.S. Courts Ensure That Guilty Pleas Are Knowing, Voluntary, and Supported By The Facts

179. The United States Supreme Court has explained that "a guilty plea is a grave and solemn act to be accepted only with care and discernment." *Brady v. United States*, 397 U.S. 742, 748 (1970). A guilty plea is valid only if done voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences. *Id.*

180. In order for a guilty plea to be valid, the U.S. Constitution imposes the minimum requirement that a guilty plea be the voluntary expression of the defendant's own choice. *Id.* It must reflect "a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford,* 400 U.S. 25, 31 (1970). Accordingly, and pursuant to Rule 11(b)(2) of the Federal Rules of Criminal Procedure, a trial court is required to ensure that a guilty plea is made voluntarily, and not as a result of force, threats, or promises made by the government that are not part of a plea agreement disclosed to the court.

181. Assange suggests that, if brought to the United States, the plea bargaining system will compel him to plead guilty regardless of the facts of his case. To the contrary, the principle is long accepted in the United States that a guilty plea must provide a trustworthy basis for believing that the defendant is, in fact, guilty. *Henderson v. Morgan*, 426 U.S. 637, 651-52 (1976) (White, J., concurring). Accordingly, Rule 11(b)(3) of the Federal Rules of Criminal Procedure prohibits a U.S. federal court from entering a judgment upon a guilty plea without determining that there is a factual basis for such a plea. Thus, before accepting a guilty plea, a

court must make clear exactly what a defendant admits to, and whether those admissions are factually sufficient to constitute the alleged crime. *United States v. DeFusco*, 949 F.2d 114, 116, 120 (4th Cir. 1991). In short, Assange will not be allowed to plead guilty unless he agrees that he is guilty, and a district judge finds a trustworthy factual basis for his guilty plea.

IX. Facts Relevant To Estimating the Potential Sentence In This Case

182. Eric Lewis alleges in his affidavit that Assange is "highly likely to be sentenced to imprisonment that will constitute the rest of his likely natural lifespan." Lewis Aff. ¶ 47. Mr. Lewis's affidavit suffers from critical flaws. For one, Lewis heavily relies on the statutory maximum of 175 years, without acknowledging that only a tiny fraction of all federal defendants receive statutory maximum sentences.

183. The law that controls sentencing in federal courts in the United States sentence is 18 U.S.C. 3553. Pursuant to that statute, the court shall impose a sentence sufficient, but not greater than necessary, to comply with the need for the sentence imposed to (a) reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense; (b) afford adequate deterrence to criminal conduct; (c) protect the public from further crimes of the defendant; and (d) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

184. In determining the particular sentence to be imposed, the district court shall consider the following factors:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed to --
>
> > (a) reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense;

(b) afford adequate deterrence to criminal conduct;

(c) protect the public from further crimes of the defendant; and

(d) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the U.S. Sentencing Commission and any pertinent policy statement issued by the U.S. Sentencing Commission;

(5) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(6) the need to provide restitution to any victims of the offense.

After weighing each of these factors, the sentencing court will arrive at an appropriate sentence. This determination is within the sentencing court's broad discretion and is subject to appellate review under a reasonableness standard or for any procedural defects.

185. As noted above, a key factor to be considered by a sentencing court in the United States is the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. Lewis relies heavily on the sentence initially imposed on Manning, but fails to account for the key fact that, while parole is unavailable in the federal civilian justice system, defendants with sentences of more than a year of incarceration in the military system generally are considered for parole after serving a third of their sentence. As a result, a sentence imposed in a military court of a term of years of imprisonment tends, in practical terms, to be the equivalent of a much lower term of years of imprisonment imposed in a federal civilian court. Moreover, Manning's sentence was, in any event, commuted to a term much shorter than what was originally imposed. Accordingly, the sentence imposed on Manning by the military judge will be of limited use as a factor of

consideration for a judge considering the appropriate sentence for Assange. Instead, in seeking to avoid an unwarranted sentence disparity for Assange, his sentencing judge likely will consider sentences recently imposed in U.S. civilian courts for unauthorized disclosures of classified information to the media. *See United States v. Sterling,* 860 F.3d 233 (4th Cir. 2017) (sentenced to 42 months); *United States v. Albury*, 18-cr-00067-WMW (D. Minn. Oct. 26, 2018) (sentenced to 48 months); *United States v. Winner*, 17-cr-00034-JRH-BKE (S.D. Ga. Aug. 24, 2018) (sentenced to 63 months).

186. Lewis also fails to note that sentences above the range calculated by the United States Sentencing Guide are very rare. The sentencing court has the ability to sentence a defendant above the recommended sentencing guidelines range, but such above-guidelines sentences are rare. According to the United States Sentencing Commission, in 2018, out of 68,902 sentences for which data was collected, sentencing courts imposed sentences within the guidelines range in approximately 51% of cases, below the guidelines range in approximately 46% of cases, and above the guidelines range in approximately 3% of cases. 2018 Datafile, US Sentencing Commission FY18, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/Table29.pdf.

187. If a defendant is convicted of multiple offenses, the sentencing court may run the sentences concurrently or consecutively. *See* 18 U.S.C. § 3584(a). The terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. *Id.* The court is to follow the factors listed in section 3553(a) in determining whether to impose concurrent or consecutive terms. *See* § 3584(b). None of the offenses charged in the superseding indictment requires imposition of a consecutive or mandatory minimum sentence.

188. In short, it is difficult to estimate a possible sentence at this early stage of a criminal proceeding. There are many factors that contribute to the imposition of an actual sentence, and it is difficult to address every conceivable permutation that could occur.

Conclusion

189. The facts and information contained in this Declaration in Support of the Request for the Extradition of Julian Paul Assange are true and correct according to the best of my knowledge, information, and belief.

Gordon D. Kromberg
Assistant United States Attorney
Office of the United States Attorney

SUBSCRIBED and SWORN to before me
this 17th day of January 2020.

Jennie B. Miller

Notary Public

My commission expires 6/30/2020
Alexandria, Virginia

JENNIE B. MILLER
NOTARY PUBLIC
REG. #7682004
MY COMMISSION EXPIRES
06/30/2020
COMMONWEALTH OF VIRGINIA