IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

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

SIXTH SUPPLEMENTAL DECLARATION IN SUPPORT OF
REQUEST FOR EXTRADITION OF JULIAN PAUL ASSANGE

I, Gordon D. Kromberg, on this 19th day of October 2021, declare and state:

1. I have made six previous declarations and one affidavit in support of the request for extradition of Julian Paul Assange, and incorporate here the description of my background and qualifications that I included in those previous declarations. *See* Gordon D. Kromberg, Declaration in Support of Request for Extradition of Julian Paul Assange ¶¶ 1-4 (Jan. 17, 2020) (hereafter, "First Declaration"); Gordon D. Kromberg, Supplemental Declaration in Support of Request for Extradition of Julian Paul Assange ¶¶ 1-3 (Feb. 19, 2020) (hereafter, "Second Declaration"); Gordon D. Kromberg, Second Supplemental Declaration in Support of Request for Extradition of Julian Paul Assange ¶ 1 (Mar. 12, 2020) (hereafter, "Third Declaration"); Gordon D. Kromberg, Third Supplemental Declaration in Support of Request for Extradition of Julian Paul Assange ¶ 1 (Mar. 24, 2020)[1] (hereafter, "Fourth Declaration"); Affidavit in Support of Request for Extradition of Julian Paul Assange on Second Superseding Indictment ¶¶ 2-3 (July 14, 2020); Gordon D. Kromberg, Fourth Supplemental Declaration in Support of Request for Extradition of

[1] The Third Supplemental Declaration bears the mistaken date of March 12, 2020.

Julian Paul Assange ¶ 1 (Sept. 3, 2020) (hereafter, "Fifth Declaration"); and Gordon D. Kromberg, Fifth Supplemental Declaration in Support of Request for Extradition of Julian Paul Assange ¶ 1 (Sept. 21, 2020) (hereafter, "Sixth Declaration").

2. I make this declaration for the limited purpose of providing additional information relevant to affidavits submitted by Assange in late September 2021. 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. Department of Justice and other U.S. departments and agencies.

I. THE UNITED STATES' DIPLOMATIC ASSURANCES

3. On or about February 8, 2021, the Embassy of the United States of America at London, England, provided Diplomatic Note 74 to the Government of the United Kingdom of Great Britain and Northern Ireland. In this Diplomatic Note, the Government of the United States made the following assurances should Assange be extradited from the United Kingdom to the United States:

a. The United States will not impose Special Administrative Measures (SAMs) on Mr. Assange, pretrial or post-conviction. This undertaking is subject to the condition that the United States retains the power to impose SAMs on Mr. Assange in the event that, after entry of this assurance, he was to commit any future act that met the test for the imposition of a SAM pursuant to 28 C.F.R. § 501.2 or § 501.3.

b. Pursuant to the terms of the Council of Europe Convention on the Transfer of Sentenced Persons (COE Convention), to which both the United States and Australia are parties, if Mr. Assange is convicted in the United States, he will be eligible, following conviction, sentencing and the conclusion of any appeals, to apply for a prisoner transfer to Australia to serve his U.S. sentence. Should Mr. Assange submit such a transfer application, the United States hereby agrees to consent to the transfer. Transfer will then follow, at such time as Australia provides its consent to transfer under the COE Convention.

c. The United States undertakes that in the event of extradition, and Mr. Assange being held at any time in custody, it will ensure that Mr. Assange will receive any such clinical and psychological treatment as is

recommended by a qualified treating clinician employed or retained by the prison where he is held in custody.

d. The United States undertakes that, pretrial, Mr. Assange will not be held at the United States Penitentiary-Administrative Maximum Facility (ADX) in Florence, Colorado. If he is convicted and sentenced to a term of imprisonment, Mr. Assange will not be held at the ADX save that the United States retains the power to designate Mr. Assange to ADX in the event that, after entry of this assurance, he was to commit any future act that then meant he met the test for such designation.

For ease of reference, I hereafter refer to the assurance in paragraph 3(a) as the "SAMs Assurance," the assurance in paragraph 3(b) as the "Australia-Transfer Assurance," the assurance in paragraph 3(c) as the "Medical-Treatment Assurance," and the assurance in paragraph 3(d) as the "ADX Assurance."

4. Diplomatic Note 74 states that "[t]hese assurances are binding on any and all present or subsequent individuals to whom authority has been delegated to decide the matters." Contrary to the arguments made (at ¶¶ 11-12) in the September 29, 2021 statement of Samuel Weiss, the assurances do not just bind the federal prosecutors on this case or past or current officials. As the Government of the United States recently emphasized in Diplomatic Note 169, dated October 19, 2021, "its assurances are binding on any and all current or subsequent individuals to whom authority has been delegated to decide the matters. This includes the federal prosecutors on this case as well as any relevant current or future officials with authority over the matters set forth in the assurances."

5. In his recently submitted evidence, Assange's affiants repeatedly argue that the United States will violate its assurances, but those arguments have no basis in fact. As stated in Diplomatic Note 169, "[t]he United States and the United Kingdom have a long history of cooperation on law enforcement-related issues, including extradition. The United States has provided assurances to the United Kingdom in connection with extradition requests countless

times in the past. In all of these situations, the United States has fulfilled the assurances it provided. Further, the United States is unaware of a single instance where the United Kingdom communicated a concern about any U.S. assurance going unfulfilled."

6. Assange's affiants are also incorrect in suggesting that he would have no avenue for recourse if the United States violated an assurance. Assange or his representatives could raise the issue with the Government of the United Kingdom. As explained in Diplomatic Note 169, "[i]n the event the United Kingdom had concerns regarding fulfillment of an assurance, or were to believe an assurance had not been fulfilled, it could communicate its concerns, or a protest, directly to the United States. The United States values its extradition relationship with the United Kingdom and would take any concern raised very seriously." Again, however, in light of the United States' history of fulfilling its assurances, there is no factual basis for believing that the United States will not abide by the assurances made in this case.

7. In short, the United States' assurances in Diplomatic Note 74 provide robust protections to resolve District Judge Baraitser's concerns in her January 4, 2021 decision.

II. ASSANGE'S CHALLENGES TO ASSURANCES CONCERNING NATURE OF CONFINEMENT

8. In his "Application to Admit (i) Evidence in Response to Assurances and (ii) 'Fresh Evidence' in Relation to Professor Kopelman" dated September 29, 2021 (hereafter, "Application"), Assange argues (at ¶ 2.3.i) that he has submitted "[e]vidence that demonstrates that the conditional assurances re[garding] the imposition of SAMs, the provision of adequate medical treatment, and location in ADX Florence, do not in fact protect [him] from the very real risk of detention in conditions of severe isolation in any event; nor from the actual imposition of SAMs or detention in ADX Florence; nor do they effectively guarantee adequate medical

treatment." As demonstrated below, Assange's evidence fails to undermine the effectiveness or adequacy of the assurances.

A. Challenges to the SAMs Assurance

9. In arguing that the SAMs Assurance is ineffective, Assange's affiants incorrectly characterize the process and test for imposing SAMs on an inmate.

10. Contrary to the September 27, 2021 declaration of Maureen Baird, the United States does not impose SAMs as a "knee-jerk" reaction to an inmate's behavior or by an arbitrary process with "no definition or indication" of what actions would warrant the imposition of SAMs.

11. As I explained in my First Declaration (at ¶¶ 95-99), the Code of Federal Regulations prescribes the test and procedures for imposing SAMs. The Code of Federal Regulations provides for two categories of SAMs. Section 501.2 of Title 28 of the Code of Federal Regulations governs those measures intended for the protection of national security information, and § 501.3 governs those measures based on violence or terrorism concerns. Based on my knowledge of this case and my experience as a prosecutor, if Assange committed any future act to warrant the imposition of SAMs, it would likely implicate § 501.2.

12. In the event that Assange was to commit an act after the entry of the assurance that warranted SAMs, the United States would be able to impose SAMs only at the direction of the Attorney General of the United States. *See* 28 C.F.R. § 501.2. Because SAMs are imposed at the direction of the Attorney General, they are subject to multiple layers of review within the U.S. Department of Justice, which may include professional investigators, analysts, linguists, and attorneys. Multiple offices and stakeholders within the Department of Justice evaluate a SAMs request, including the U.S. Attorney's Office, the National Security Division, the Federal Bureau of Investigation (FBI), the Bureau of Prisons (BOP), the Office of Enforcement Operations, the

front office of the Criminal Division, and—in the case of an original application for SAMs—the Office of the Deputy Attorney General and the Office of the Attorney General.

13. Because the Attorney General must direct the imposition of SAMs, prison staff cannot impose them and do not have authority to modify them. I understand, however, that BOP staff can—and often do—facilitate SAM modification requests from inmates that might result in the loosening of some SAM restrictions. That is typically done in the case of SAM modifications that permit an inmate to send non-privileged communications to solicit legal representation from a specified attorney, or to expand an inmate's list of permissible non-lawyer contacts, usually by adding communication and visitation privileges with extended family or close acquaintances (following a security vetting). Such requests for less restrictions are submitted to the U.S. Department of Justice's Office of Enforcement Operations for drafting and approval. That office will consult with the U.S. Attorney's Office, the National Security Division, and the FBI to determine if those offices object to the request.

14. Section 501.2 sets forth the test for imposing SAMs to protect classified information. In order for the Attorney General to direct a warden to impose SAMs, the head of a member agency of the U.S. 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." 28 C.F.R. § 501.2(a). Any SAMs that are imposed 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.*

15. In other words, SAMs are not punitive or a form of discipline. Rather, they are a special measure that is imposed only in unique circumstances and must be tailored to serve the purpose for which they are imposed: to protect the information at issue. As I noted in my Fifth

Declaration (at ¶ 59), the number of federal inmates on whom SAMs are imposed constitute a tiny fraction of federal inmates in BOP custody. For example, as of September 1, 2020, of the 156,083 inmates in BOP custody, only 47 were under SAMs.

16. As described in my First Declaration (¶ 97), SAMs 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. Contrary to Maureen Baird's suggestion (at ¶ 14) in her declaration of September 27, 2021, not all inmates under SAMs are foreclosed from having inmate-to-inmate contact. Some SAMs have no provisions regarding inmate-to-inmate contact, and some expressly allow such contact.

17. As described in my First Declaration (¶ 97), the implementing official, at the direction of the Attorney General, determines the period of time an initial SAM is imposed, up to one year. 28 U.S.C. § 501.2(c). The implementing official may also extend SAMs 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.

18. Pursuant to the SAM regulations, the inmate must receive "notification of the restrictions imposed and the basis for these restrictions." 28 C.F.R. § 501.2(b). 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.

19. In my Fifth Declaration (at ¶¶ 59-72), I detailed the various means by which an inmate may challenge the imposition of SAMs. Suffice to say here, an affected inmate may challenge the imposed SAMs through the Administrative Remedy Program, 28 C.F.R. part 542. *See* 28 C.F.R. §§ 501.2(d), 501.3(e). An inmate can also file a lawsuit in federal court to challenge SAMs. An inmate must exhaust all administrative remedies before challenging SAMs in federal court, *see Yousef v. Reno*, 254 F.3d 1214, 1222 (10th Cir. 2001), although, as described below, there is caselaw that courts have jurisdiction to entertain a motion challenging SAMs in a pending criminal case, such as in a pretrial motion, even though the defendant has not exhausted administrative remedies.

20. The case of Syed Hashmi (also known as "Fahad")—which Samuel Weiss discusses (at ¶ 6) in his statement—is illustrative. There, Hashmi filed a pretrial motion challenging SAMs that were imposed on him pursuant to 28 C.F.R. § 501.3. *See United States v. Hashmi*, 621 F. Supp. 2d 76, 84 (S.D.N.Y. 2008) (attached as Exhibit A). The district court determined that it had jurisdiction to consider such a pretrial motion, even if Hashmi had not exhausted his administrative remedies. *See id.* at 84-86. After considering Hashmi's arguments, the court upheld "the SAMs [as] reasonably related to legitimate penological interests." *Id.* at 86. In reaching that conclusion, the court emphasized "the evidence of the Defendant's willingness to provide aid to Al-Qaeda through his cell phone and use of his apartment; the Defendant's stated intention to overthrow the United States through whatever means necessary; and the Defendant's threatening statements to British authorities." *Id.* Thus, contrary to Samuel Weiss's argument (at ¶ 6) that the basis for imposing SAMs on Hashmi "was not remotely plausible," an independent federal judge reviewed the basis for imposing SAMs on Hashmi and upheld their imposition as supported by the evidence.

21. Finally, if the United States imposed SAMs on Assange and he believed their imposition was in violation of the assurances provided to the United Kingdom, Assange or his representatives would have an ability to raise any claim of a breach of the assurances with the Government of the United Kingdom. *See supra* ¶ 6. Of course, should Assange serve out a sentence in Australia, the United States could not impose any SAMs on him, even if he were to commit future acts that might merit SAMs.

B. Challenges to the ADX Assurance

22. In her September 27, 2021 declaration, Maureen Baird wrongly suggests (at ¶ 19) that the ADX Assurance would not bind the BOP. As stated above, the assurances bind any and all individuals, present or subsequent, with authority over the matters set forth in the assurances. *See supra* ¶ 4. That includes the BOP, which is an agency within the U.S. Department of Justice.

23. Ms. Baird also suggests (at ¶ 25) that Assange may end up being held at ADX because "former military [BOP] staff . . . decide to pursue their own vindication against Mr. Assange and retaliate through the form of fabricating or embellishing a negative incident and assigning him blame." Here, I would simply emphasize again the United States' history of fulfilling its assurances. There is no factual basis for believing that it will not abide by the assurances made in this case. Ms. Baird's speculation about the actions of rogue prison staff is insufficient to suggest the United States would breach its assurance.

C. Nature of Confinement

24. In his recently submitted evidence, Assange also attempts to negate the significance of the United States' assurances by suggesting that, even if SAMs are not imposed and he is not held at ADX, his conditions of confinement would still be oppressive. In my First Declaration and Fifth Declaration, I provided evidence that addresses Assange's potential conditions of confinement, and I incorporate those statements herein. For present purposes, I provide the

following summary to demonstrate why Assange's conditions of confinement would not be oppressive and to respond to some of the specific allegations that his affiants make.

1. Conditions of confinement

i. Pretrial confinement

25. As stated in my First Declaration (at ¶¶ 82-94), if a U.S. Magistrate Judge orders that Assange should be detained pretrial, Assange would likely be held at the William G. Truesdale Adult Detention Center (ADC) in Alexandria, Virginia. The ADC houses federal prisoners through a contract with the U.S. Marshals Service (USMS). I do not intend to restate all of the conditions under which prisoners are held at the ADC. The following points are responsive to arguments raised by the defense in this appeal.

26. As noted in my First Declaration (at ¶ 83), 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.

27. Critically, 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.

28. 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.

29. It is also possible that Assange could be placed in administrative segregation. To place Assange in administrative segregation, 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 not cooperate in the intake and admission process.

30. 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.

31. 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. Inmates in administrative segregation are able to attend three programs, including

programs with general population inmates, per week. They also receive all ADC services. Before the COVID-19 pandemic, ADC inmates in administrative segregation had two in-person, non-contact social visits per week (one during the week and one on the weekend). Due to the pandemic, inmates in administrative segregation are limited to one social visit (which is by videoconference) per week.

32. Moreover, placement in administrative segregation has no impact on an inmate's ability to meet with his or her lawyer. Inmates at the ADC are able to conduct videoconference meetings with counsel. There are no limitations on the number of videoconference meetings. They are available on a first served basis and must be scheduled in advance. In-person, non-contact legal visits are also unlimited and must be scheduled in advance. In-person, contact legal visits are limited and must be approved in advance by the Chief Deputy of the Detention Center Bureau or an appropriate designee. There is no variance in the number or frequency of legal visits for inmates in administrative segregation.

ii. Post-conviction confinement

33. As stated in my First Declaration (at ¶ 100), following sentencing, the BOP will designate Assange 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 U.S. Sentencing Commission. *See id.* § 3621(b). Once the prisoner is designated, the USMS will transport the defendant to the designated facility.

34. It is possible that the BOP may place Assange in a Communications Management Unit (CMU). The designation to a CMU process is outlined in great detail in Bureau Program

Statement 5214.02, Communications Management Units, which was attached to my Fifth Declaration as Exhibit C (hereafter, "CMU Program Statement"). Contrary to the assertions of Eric Lewis in his statement dated September 29, 2021 (at ¶ 18), the CMU Program Statement contains specific and detailed procedures and criteria for designating an inmate to a CMU. *See* First Declaration ¶ 104; CMU Program Statement 3-5. Inmates are provided notice of their designation to a CMU. *See* First Declaration ¶ 105; CMU Program Statement 5-6.

35. CMU inmates are afforded the same opportunities to communicate with individuals outside of prison as regular inmates. Their communications may be more extensively monitored, however, or the BOP may impose certain limitations, as noted in the Bureau Program Statement, to prevent them from engaging in additional criminal conduct. Inmates in CMUs are able to participate in the same programs as inmates in the prisons' general populations. CMUs are subject to one national standard and "the nature of the regime" does not "var[y] from facility to facility," nor are they tantamount to "solitary confinement," as Mr. Lewis alleges (at ¶¶ 18, 20).

36. In limited and strictly prescribed circumstances, the BOP houses some inmates in Special Housing Units (SHUs). The BOP's use of SHUs is authorized by Title 18, U.S. Code, §§ 4042(a)(2) and 4042(a)(3), and governed by § 541 of Title 28 of the Code of Federal Regulations. The BOP's Program Statement regarding SHUs is publicly available and attached as Exhibit B. *See* U.S. Dep't of Justice, Federal Bureau of Prisons, Program Statement 5270.11: Special Housing Units (Nov. 23, 2016), *available at* https://www.bop.gov/policy/progstat/5270.11.pdf (hereafter, "SHU Program Statement").

37. As set forth in the applicable regulations, SHUs "are housing units in Bureau institutions where inmates are securely separated from the general inmate population, and may be housed either alone or with other inmates," and they "help ensure the safety, security, and orderly

operation of correctional facilities, and protect the public, by providing alternative housing assignments for inmates removed from the general population." 28 C.F.R. § 541.21. An inmate can be placed in a SHU for either administrative or disciplinary reasons. *Id.* § 541.22. Inmates must receive notice when they are placed in the SHU. *Id.* § 541.25. Placement in the SHU is subject to periodic reviews and scheduled hearings. *See id.* § 541.26(a)-(c) (providing for 3-day, 7-day, and 30-day reviews). Inmates can "submit a formal grievance challenging [their] placement in the SHU through the Administrative Remedy Program, 28 CFR part 542, subpart B." *Id.* § 541.26(d).

38. Living conditions in SHUs must "meet or exceed standards for healthy and humane treatment." *Id.* § 541.31. The Code of Federal Regulations and BOP's Program Statement prescribe the clothing, bedding, food, personal hygiene, and exercise that inmates in a SHU must receive. *Id.* Notably, inmates in SHUs receive telephone and visiting privileges. *See* § 541.31(j)-(k). Inmates in SHUs receive daily visits from "qualified health personnel and one or more responsible officers the Warden designates (ordinarily the Institution Duty Officer)." SHU Program Statement 14.

39. Inmates in SHUs receive medical and mental health treatment. "A health services staff member will visit [the inmate] daily to provide necessary medical care," and "[e]mergency medical care is always available." 28 C.F.R. § 541.32(a). The BOP strictly regulates the placement of inmates with mental health issues in SHUs. According to the Program Statement, "[i]f an inmate who has been identified by Psychology/Health Services as a Care-3 (MH), Care-4 (MH), psychology alert in SENTRY, or identified on the monthly SHU advisory (Hot List), is placed in Special Housing, psychology services should be notified and conduct a mental health evaluation within 24 hours of placement." SHU Program Statement 15-16. Likewise, staff

members are to "conduct a psychiatric or psychological assessment, including a personal interview, when administrative detention exceeds 30 days." *Id.* at 16. Finally, the BOP requires quarterly training for staff assigned to the SHU. *Id.* at 17.

40. The BOP has approximately 15,000 Special Housing Unit beds. The typical SHU cell is designed to be a double occupancy cell. The BOP strives to place SHU inmates with a cellmate within the SHU cell. In fact, with the exception of some specialized units (e.g., ADX, CMU) nearly all of the SHU cells have double occupancy.

41. The BOP generates a daily roster reflecting the length of inmates' stay in SHUs. For example, as of October 15, 2021, approximately 15% had been housed in SHU more than 90 days, approximately 4% had been in SHU for more than 6 months, and less than 1% had been housed in SHU for more than a year.

2. Mental health treatment

42. As stated in my First Declaration (at ¶¶ 88-91) and Fifth Declaration (at ¶¶ 6-11), the ADC will provide Assange with quality mental health treatment. All prisoners are screened upon arrival at the ADC. Mental health treatment is available to all inmates, regardless of where they are housed within the ADC. To provide mental health treatment, one clinical supervisor, six full-time therapists, and one part-time therapist are assigned to the ADC. The staff is comprised of five licensed clinical social workers (LCSWs) and two licensed profession counselors (LPCs), with recruitment efforts underway to fill four staffing vacancies. In addition, the ADC employs a psychiatrist who provides 20 hours of psychiatric services per week.

43. Mental health team staffing is available during weekday business hours, and one therapist works a partial day on Saturdays. After-hours services are available and are provided by the Alexandria CSB Emergency Services team. This team consists of LCSWs and LPCs. While

at the ADC, Assange could be seen by an outside mental health professional for psychotherapy, testing, or other supportive/diagnostic services, subject to approval by the USMS.

44. On occasion, federal prisoners at the ADC are transferred to federal BOP facilities. Based upon my experience and discussions with the USMS, these transfers are *not* made because the ADC is unable to handle prisoners' mental health needs. Rather, they are made because a federal judge has ordered that the inmate receive an evaluation to determine whether such inmate is competent to stand trial or because the prisoner has a serious health condition that requires specialized health care in a hospital setting.

45. As stated in my Fifth Declaration (at ¶¶ 17-21), BOP will also meet Assange's health care needs. As noted above, once BOP designates a prisoner to a facility, the USMS will transport the defendant to the designated facility. *See supra* ¶ 33. 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 he may have.

46. Emergent/urgent health care is available 24 hours a day by on-site or community medical staff. All BOP staff are trained to provide first-aid, CPR, AED, and treatment of opioid overdose with naloxone. Less urgent acute medical conditions are triaged and scheduled at an appropriate time interval. Health care staff make daily rounds in segregation units (SHUs) to triage requests for care.

47. Inmates with chronic conditions are seen by a physician at least once every 12 months, or more frequently as clinically indicated either by a physician or advance practice

provider (nurse practitioner or physician assistant). Similar to health insurance plans, the BOP has a defined scope of services which determines the care provided to inmates in its custody. Medically necessary care is provided to all inmates. Elective health care which may improve quality of life is assessed on a case-by-case basis through a process called utilization review. Health care with limited medical value or expressly for the inmate's convenience is not routinely approved. The final category of care is extraordinary and must be approved by the BOP medical director.

48. The BOP also uses a medical classification system to identify inmates with different levels of medical and mental health needs based on the complexity or risk of the condition or the frequency of services required. Institutions are also assigned a Care Level based upon on-site and community capabilities for providing health care. Inmates are designated to specific institutions to align their care level with the care level of the facility. Care Level 1 includes inmates who are essentially healthy or who have medical conditions that are stable and easily treated or controlled. At the other end of the spectrum are Care Level 4 inmates with more advanced health care needs who are housed at BOP medical centers for treatment such as 24-hour nursing care, dialysis, cancer treatments, and organ transplant services. These medical centers have contracts with local health care systems of national and international renown who provide advanced health care services to the inmate population consistent with established standards of care.

49. With regard to staffing, individual institutions maintain a multidisciplinary complement of full-time health services staff. Full-time Regional and Central Office clinical staff supplement the institution staff and provide additional services through telepsychiatry, telehealth or periodic on-site visits. Institutions also contract with local civilian health care providers and health systems for additional services either on site at the correctional facility or in the community.

50. BOP's Care 2 and 3 facilities are accredited by the Accreditation Association for Ambulatory Health Care, a national health care accreditation organization. In addition, all BOP institutions are also accredited by the American Correctional Association, which applies both health care standards and correctional standards.

D. Response to Allegations Regarding Individual Prisoners

51. Throughout Assange's affidavits, his affiants make allegations about U.S. inmates whom they suggest were subjected to oppressive conditions of confinement. While the United State has had only a limited amount of time to prepare this responsive declaration, I have identified multiple instances in which the descriptions were mischaracterized, incomplete, or inaccurate. For example, in paragraphs 110 to 118 below, I explain how the allegations concerning Sami Al-Arian, Chelsea Manning, and Ali Al-Timimi are misleading and inaccurate, based on my personal knowledge from my involvement in those cases.

52. As for the other U.S. inmates discussed in Assange's affidavits, I was not involved in those prosecutions, and I have not had an opportunity to learn enough about them in order to verify or dispute all of the allegations that Assange's witnesses make about them. Although it appears that these allegations are largely irrelevant to this appeal, they are not accepted and I reserve the right to refute them at a later time.

53. The U.S. inmates identified within Assange's affidavits are inapposite to Assange's extradition. The United States has made diplomatic assurances that resolve the issues identified by District Judge Baraitser about Assange's confinement. The only instance in which an affiant suggests the United States has breached a diplomatic assurance to the United Kingdom is Gareth Peirce's discussion of Haroon Aswat, which I address below. None of the other examples provided in Assange's affidavits suggest that the United States breached diplomatic assurances to the United Kingdom. To reemphasize what I stated above, the United States is unaware of a single instance

in which the Government of the United Kingdom has communicated a concern about any such U.S. assurance going unfulfilled.

54. In her Ninth Witness Statement, Gareth Peirce suggests - - without outright alleging - - that the United States breached assurances that it made in securing the extradition of Aswat. As demonstrated below, this suggestion is unfounded.

55. As Ms. Peirce recognizes in her witness statement, the United States gave diplomatic assurances to the United Kingdom in connection with the extradition of Aswat. Diplomatic Note 169 summarizes the diplomatic assurances that the United States made in connection with the extradition of Aswat:

> As regards the assurances provided in the case of Haroon Aswat, which the United States understands has been raised in the Assange proceedings, the United States was requested to provide assurances to the United Kingdom regarding, among other things, the manner by which Mr. Aswat's mental health needs would be initially evaluated upon his extradition to the United States and his detention pending that evaluation. There were no specific assurances regarding his confinement or the manner or form of medical or mental health treatment in the event it was determined that he could be transferred to another facility without compromising his health and safety.

Ms. Peirce makes assertions about Aswat's detention in the years since his extradition to the United States, presumably to suggest that the United States breached its diplomatic assurances. Yet, she does not specify which, if any, diplomatic assurance the United States failed to fulfil.

56. Aswat, in fact, was prosecuted in the U.S. District Court for the Southern District of New York. Moreover, the publicly available record from Aswat's prosecution, which is available online, shows that his mental health needs were assessed shortly after his extradition to the United States. Specifically, following Aswat's extradition from the United Kingdom, Aswat made his initial appearance in the U.S. District Court for the Southern District of New York. I

attach the transcript from Aswat's initial appearance. (Exhibit C.) The day after Aswat's initial appearance, he was transported to South Carolina and admitted to the Columbia Regional Care Center (CRCC). I attach the medical report for Aswat that was publicly filed. (Exhibit D.) After two days of observation and multiple assessments, CRCC's chief psychiatrist found that Aswat did "not currently meet criteria for acute psychiatric hospitalization in [CRCC] and [was] medically and psychiatrically stable and safe for transfer to a federal detention facility." (*Id.* at 5.)

57. I am aware that, in February 2021, attorneys representing Aswat filed a motion that referenced the diplomatic assurances the United States had made in Aswat's case. I attach that motion, which sought the release of Aswat from prison on the grounds that pandemic-related restrictions within BOP would negatively affect his mental health. (Exhibit E.) Although Aswat's attorneys cited to court documents to support their summary of the diplomatic assurances at issue, none of the cited documents are the actual undertakings transmitted to the United Kingdom. Rather, Aswat's lawyers cite to their own arguments from Aswat's sentencing. They also cite two letters authored by Ms. Peirce, one of which is listed as Exhibit A to Aswat's motion but is not accessible via the online public docket, and the other which was submitted to the U.S. District Court for the Southern District of New York in support of Aswat's sentencing. The latter letter included no opinion whatsoever as to whether the United States had breached its assurances. I attach Ms. Peirce's letter submitted in support of Aswat's sentencing. (Exhibit F.)

58. I can confirm to the best of my knowledge that, based on my review of the publicly available filings in Aswat's case, Aswat's counsel may have suggested at times that diplomatic assurances had been breached but Aswat never sought to bring any proceedings in the United States challenging his conditions of detention on the basis that they breached the diplomatic assurances given to the United Kingdom. As observed in Diplomatic Note 169, "the United Kingdom has not

raised with the United States any concerns regarding the assurances provided in the Aswat case." To state again, the United States is not aware of a single instance, including in the Aswat case, in which the United Kingdom has communicated a concern about any U.S. diplomatic assurance going unfulfilled.

59. Moreover, I know that Aswat could have raised perceived or actual breaches of the United States' undertakings by filing a motion before the U.S. District Court for the Southern District of New York that sought a ruling as to whether any diplomatic assurances had been breached. This is because, prior to the imposition of Aswat's sentence, the law of the jurisdiction in which Aswat was prosecuted permitted a defendant in Aswat's position to raise violations of diplomatic assurances if the extraditing country first made an official protest. *United States v. Suarez*, 791 F.3d 363, 367 (2d Cir. 2015). Again, to the best of my knowledge and as reflected in Diplomatic Note 169, the United Kingdom never lodged an official protest with the United States regarding the diplomatic assurances made during Aswat's extradition proceedings. Aswat, of course, had every incentive to vindicate any violation of the applicable undertakings, so his failure to raise the issue directly with the United Kingdom (or, if he did, the United Kingdom's decision not to make an official protest) makes it reasonable to infer that Aswat or the United Kingdom did not believe the United States actually had violated its diplomatic assurances.

60. Further, I can confirm that, based on a review of the publicly available court docket for Aswat's case, the U.S. District Court for the Southern District of New York did not make any findings as to whether the United States had complied with or breached its diplomatic assurances to the United Kingdom despite Aswat's counsel suggesting during his sentencing and compassionate release litigation that the undertakings had been violated.

61. Ms. Peirce also makes allegations regarding the conditions under which Aswat was detained and incarcerated in the United States. I have reviewed the publicly available online court docket for Aswat and identified numerous statements regarding the medical care afforded to Aswat.

62. For instance, on March 30, 2015, Aswat appeared with defense counsel before the U.S. District Court for the Southern District of New York and pleaded guilty to two of the four offenses with which he had been charged. The Court asked Aswat during the plea hearing about his mental health, and Aswat, who had been placed under oath at the beginning of the hearing, averred that he suffered from schizophrenia and no other mental illnesses, was currently under treatment, and was receiving medication from healthcare professionals. I attach the transcript of Aswat's plea hearing. (Exhibit G.) Aswat, moreover, stated under oath that he was not experiencing any auditory or visual hallucinations and had a clear mind. (*Id.* at 5-6.) The Court found that Aswat was "competent to enter a plea" despite Aswat's "prior history of schizophrenia." (*Id.* at 7.) The Court also found that Aswat's "condition [was] being treated with medication, and there [were] no signs or symptoms of that condition" in court. (*Id.* at 7-8.)

63. The United States also addressed Aswat's medical care in the context of his sentencing on October 19, 2015. Prior to the sentencing hearing, the United States filed a memorandum in which it was noted that, to date, Aswat had not claimed he received inadequate medical treatment from the BOP. I attach the United States' sentencing memorandum. (Exhibit H.) The United States added that it was "not aware of any instances when Aswat was denied proper medical care while in U.S. custody." (*Id.* at 24 n.7.) Then, at the hearing, one of the prosecutors reiterated that the United States had "heard no issues with the defendant in terms of the care he's receiving or the treatment he's receiving." (Exhibit I at 24.) The Court, moreover,

imposed a total term of incarceration of 240 months, and implicitly endorsed the ability of the BOP to treat Aswat by recommending that the BOP house Aswat "in a facility that has specialty psychiatric care."[2] (*Id.* at 64.)

64. Aswat's medical care within the BOP was raised again during his compassionate release litigation. I exhibit the United States' Memorandum in Opposition to Aswat's motion for compassionate release, as well as the sur-reply that the United States filed. (Exhibits J and K.) These filings, which set out the United States' account of the treatment afforded to Aswat since he was extradited, indicate Aswat received care from BOP physicians, and his mental state improved when he followed treatment plans. The filings also indicate that, if Aswat has "had difficulties in treatment while incarcerated, that was the result of his own refusal to take his prescribed medication." (Exhibit J at 2.) The U.S. District Court for the Southern District of New York ultimately denied Aswat's motion for compassionate release, and I exhibit the Court's Order. (Exhibit L.)

65. Aside from Aswat, I address the statement by Lindsay Lewis in her affidavit (at ¶ 23) claiming that her client Mustafa Kamel Mustafa "is currently serving a life sentence at ADX Florence despite representations by the U.S. government that he would not be detained there for more than a short period of time." She argues (at ¶ 24) that the United States made such representations in a sworn statement submitted by the former warden of ADX in Mustafa's extradition proceedings. Lewis contends (at ¶ 24) that this distinction—that the representations in

[2] The Court also entered an order directing the removal of Aswat to the United Kingdom "promptly upon his sentencing." Because the Court imposed a term of incarceration and declined to impose a term of supervised release given Aswat's future deportation, it is reasonable to infer that the Court intended that Aswat would be removed promptly upon the completion of his sentence. I attach the Court's removal order. (Exhibit M.)

Mustafa were made in a sworn statement as opposed to a diplomatic assurance—"does not create a meaningful difference."

66. Mustafa litigated this exact issue in the United States in front of two federal courts - - a federal district judge in the U.S. District Court for the Southern District of New York, and on appeal before a three-judge panel of the U.S. Court of Appeals for the Second Circuit. Both courts held that the United States did *not* violate a commitment that it made in Mustafa's extradition concerning his prison designation. *See United States v. Mustafa*, 753 F. App'x 22, 42 (2d Cir. 2018) (attached as Exhibit N); Sentencing Tr. 88:1-19, *United States v. Mustafa Kamel Mustafa*, No. 1:04-cr-00356-AT (S.D.N.Y. Jan. 9, 2015) (attached as Exhibit O). The district court determined that "no one said that there would be no housing ever under any circumstances at the ADX. That was just simply not a commitment that was ever made." Exhibit O, at 88:17-19. The Second Circuit reached a similar conclusion in holding that "the record [did] not support Mustafa's commitment assertion." *Mustafa*, 753 F. App'x at 42. As these decisions reflect, Mustafa had a full and fair opportunity to litigate the issue in the U.S. courts, and the U.S. courts found no merit to the argument. Lewis is simply relitigating issues that she previously lost in front of independent federal judges in the United States.

67. Finally, I understand that in his statement dated September 29, 2021, Aitor Martínez Jiménez suggests (at ¶¶ 5-21) that the United States breached assurances that it made to Spain in two cases. Given the time constraints in preparing this responsive declaration, my colleagues and I have focused on obtaining the information necessary to respond to the allegations concerning assurances made to the United Kingdom. That said, Mr. Jiménez's allegations that the United States breached its assurances are not accepted and I reserve the right to refute them at a later time. In any event, with respect to David Mendoza-Herrarte, it should be noted that, as reflected

in publicly available court dockets, the United States ultimately granted Mendoza-Herrarte's prisoner transfer request and transferred him to Spain. To reiterate, the United States' history of fulfilling its assurances to the United Kingdom shows that there is no factual basis for believing that the United States will not abide by the assurances made in this case.

III. ASSANGE'S CHALLENGE TO THE AUSTRALIA-TRANSFER ASSURANCE

68. In his Application, Assange also argues (at ¶ 2.3.ii) that he has submitted the following types of evidence contesting the Australia-Transfer Assurance:

> Evidence that demonstrates that the assurances about repatriation to Australia do not address the problem that there is likely to be lengthy detention in the US both pre-trial and during any appellate process, before any question of repatriation could arise; and that the repatriation assurance may well not lead to repatriation in any event because of problems of securing the consent of the Australian authorities, particularly if they consider that the sentence imposed is disproportionately long for the alleged offences. There is further evidence as to the non-implementation of repatriation assurances in other cases and the risk of lengthy grand jury proceedings taking place to obtain further evidence from [Assange] even after the conclusion of the normal trial and appellate process. This would further delay any prospect of repatriation.

Contrary to Assange's argument, his evidence does not undermine the significance of this assurance.

A. Evidence Regarding the Potential Length of Proceedings in the United States

69. Assange's evidence attempting to forecast the potential length of the proceedings in the United States is unreliable speculation. There are many determinative variables that remain unknown - - perhaps most importantly the schedule that the presiding Court will follow for bringing the case to trial. In addition, how Assange decides to conduct the litigation will be a significant factor in determining the length of the proceedings. For example, if he files frivolous motions or is indiscriminate in the issues that he seeks to litigate, he could prolong the proceedings.

Given the number of unknown variables, neither Assange's affiants nor I can reliably predict the length of the proceedings.

70. That said, U.S. law has protections in place to ensure that the proceedings are not unduly delayed. As the U.S. Supreme Court has recognized, the U.S. legal system has "checks against delay" at each stage of criminal proceedings. *Betterman v. Montana*, 578 U.S. 437, 441 (2016). Most relevant here, the Speedy Trial Clause of the Sixth Amendment to the U.S. Constitution guarantees criminal defendants "the right to a speedy and public trial." U.S. Const. amend. VI. As described further below, Congress enacted the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, to effectuate the Sixth Amendment by setting forth statutorily mandated deadlines for bringing a case to trial. *See United States v. Jarrell*, 147 F.3d 315, 316 (4th Cir. 1998).

71. As I described in my First Declaration (at ¶ 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* Fed. R. Crim. P. 5(a)(l)(A). At the initial hearing, the magistrate judge will ensure Assange is represented by counsel, and will set a time for a detention hearing to determine if pretrial detention is lawful and necessary.

72. Assange's first appearance before a judicial officer in the Eastern District of Virginia - - which will likely be his initial appearance before the magistrate judge - - will trigger the Speedy Trial Act's 70-day deadline for starting trial. Specifically, the statute provides, in relevant part, as follows:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer

> of the court in which such charge is pending, whichever date last occurs.

18 U.S.C. § 3161(c)(1). To be sure, the Speedy Trial Act excludes certain periods of time in calculating the 70-day deadline, *see* § 3161(h),[3] the practical effect of which means that many trials, particularly in complex cases, do not occur within 70 days of the defendant's first appearance. In my experience, national security cases often are complex and take longer than the average case, but they are nevertheless subject to the strictures of the Speedy Trial Act. The 70-day deadline serves as a benchmark that protects the defendant's and public's right to a speedy trial. *See Jarrell*, 147 F.3d at 316 (recognizing that the Speedy Trial Act reflects a "balancing of the interests of the public and defendants in expeditious resolution of criminal charges against the need to account for various factors that legitimately contribute to trial delays, particularly defendants' need for adequate pretrial preparation").

73. Violations of the Speedy Trial Act can have dire consequences for a prosecution. Under the Act, the failure to comply with the required time limits generally requires a court to dismiss a case, potentially (although not necessarily) with prejudice. *See* 18 U.S.C. § 3162(a)(2).

74. An undue delay in bringing a case to trial can also warrant dismissal of an indictment if the court determines that the delay violated the Speedy Trial Clause of the Sixth

[3] For example, the 70-day calculation does not include "delay resulting from any interlocutory appeal," § 3161(h)(1)(C), "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion," § 3161(h)(1)(D), "delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable," § 3161(h)(1)(F), or "[a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," § 3161(h)(7)(A). However, the Speedy Trial Act specifically states that the court cannot grant a continuance "because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government." § 3161(h)(7)(C).

Amendment. *See Barker v. Wingo*, 407 U.S. 514, 522 (1972). In making this determination, courts weigh the following factors: "(1) whether the delay before trial was uncommonly long, (2) whether the government or the criminal defendant is more to blame for that delay, (3) whether, in due course, the defendant asserted his right to a speedy trial, and (4) whether he suffered prejudice from the delay." *United States v. Burgess*, 684 F.3d 445, 451 (4th Cir. 2012). "The duration of the delay, in addition to being a factor in this test, also is a threshold requirement because the defendant must establish that the length of the delay is at least presumptively prejudicial." *Id.* A delay approaching one year is presumptively prejudicial so as to meet this threshold requirement. *Id.* at 452.

75. In addition to moving to dismiss the indictment under the Speedy Trial Act and the Sixth Amendment, should Assange believe any condition or the length of his pretrial detention is punitive and not related to a legitimate nonpunitive objective, he may file a motion challenging it under the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

76. A pretrial detainee "may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). In determining whether pretrial detention restrictions and conditions "amount to punishment," courts must examine whether "the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id.* at 538. "Absent a showing of an expressed intent to punish," courts will examine "'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Id.* Stated another way, "[t]o establish that a particular condition or restriction of his confinement is constitutionally impermissible 'punishment,' the pretrial detainee must show either that it was (1) imposed with an expressed

intent to punish or (2) not reasonably related to a legitimate nonpunitive governmental objective, in which case an intent to punish may be inferred." *Slade v. Hampton Roads Reg'l Jail*, 407 F.3d 243, 251 (4th Cir. 2005).

77. Therefore, should Assange believe that any restriction or condition imposed as part of his pretrial detention is punitive, he has an adequate remedy in the United States: he can file a claim pursuant to the Fifth Amendment. The same holds true for the length of Assange's pretrial detention.

78. Pretrial detention for regulatory purposes - - such as preventing danger to the community and ensuring a defendant's presence at trial - - "does not constitute punishment before trial in violation of the Due Process Clause." *United States v. Salerno*, 481 U.S. 739, 748 (1987). Courts have recognized, however, that when the length of pretrial detention becomes substantial or excessively prolonged so to become punitive, it may violate due process. *See, e.g., United States v. Zannino*, 798 F.2d 544, 547-49 (1st Cir. 1986). There is no set period or bright-line test, and the inquiry is case and fact specific. *Id.* at 547 (considering factors relevant to the initial detention decision and additional factors, such as the length of detention, the complexity of the case, and whether the strategy of one side or the other added needlessly to that complexity); *United States v. Briggs*, 697 F.3d 98, 101 (2d Cir. 2012) (considering "the strength of the evidence justifying detention, the government's responsibility for the delay in proceeding to trial, and the length of the detention itself").

79. In short, a variety of legal protections—most notably, the Speedy Trial Act, the Speedy Trial Clause of the Sixth Amendment, and the Due Process Clause of the Fifth Amendment—exist to ensure that Assange's prosecution proceeds expeditiously and without

undue delay, and that the conditions and length of Assange's pretrial detention do not cross the line into punishment.

80. In his Third Statement (at ¶ 15), Robert Boyle cites his experience with a case from the U.S. District Court in the Eastern District of New York as a yardstick to gauge the amount of time Assange's case would take for trial, appeal, and collateral review. While I cannot vouch for the specific length of time for the disposition of Assange's case at this stage, the case cited by Mr. Boyle may not be an apt comparison.

81. The time between filing a case and its disposition varies significantly between cases and court districts. To provide some context, it is useful to compare the general pace of cases in the Eastern District of Virginia to the pace of cases in the Eastern District of New York. I offer these statistics not as a suggestion for how long Assange's case will take to resolve, but merely to illustrate that Mr. Boyle's experience in the Eastern District of New York may not be an apt comparison here.

82. As demonstrated in the chart below, during the 12-month period ending March 31, 2021, the median time of all closed, criminal felony cases from filing to disposition in the Eastern District of Virginia was 8.6 months, while the median time in the Eastern District of New York was 24 months.[4]

[4] "Time is computed from filing date to either sentencing date or the dismissal/acquittal date, including excludable delays under the Speedy Trial Act, for all criminal felony defendants (excluding transfers) terminated." Federal Court Management Statistics, March 2021, Explanation of Judicial Caseload Profiles, District Courts, *available at* https://www.uscourts.gov/statistics-reports/federal-court-management-statistics-march-2021.

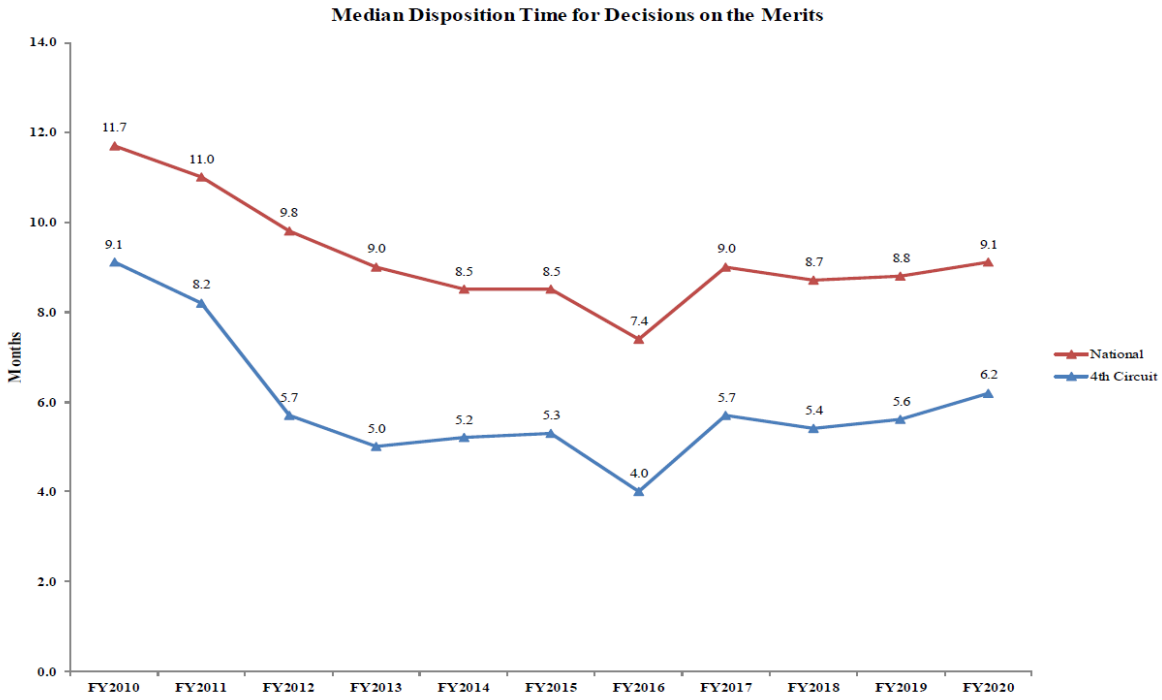
	Comparison of Districts Within the Fourth Circuit — 12-Month Period Ending March 31, 2021										
			MD	**NC,E**	**NC,M**	**NC,W**	**SC**	**VA,E**	**VA,W**	**WV,N**	**WV,S**
Median Time (Months)	From Filing to Disposition	Criminal Felony	15.9	11.7	8.8	10.7	17.9	8.6	12.5	10.7	9.5
		Civil [1]	9.3	9.5	9.5	9.0	10.1	6.3	11.7	10.1	55.3

	Comparison of Districts Within the Second Circuit — 12-Month Period Ending March 31, 2021									
			CT	**NY,N**	**NY,E**	**NY,S**	**NY,W**	**VT**		
Median Time (Months)	From Filing to Disposition	Criminal Felony	17.2	14.5	24.0	17.6	12.6	14.5		
		Civil [1]	8.9	9.6	8.8	6.7	15.1	10.5		

U.S. District Court – Combined Civil and Criminal, Federal Court Management Statistics – Comparison Within Circuit (March 31, 2021), *available at* https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distcomparison0331.2021.pdf.

83. The same holds true for the amount of time it might take between the filing of an appeal and a decision on its merits: each case and appellate circuit differs. As the chart below demonstrates, the median disposition time to obtain a decision on the merits in the Fourth Circuit, which would have jurisdiction of any appeal by Assange, was 6.2 months in fiscal year 2020, as opposed to the national average of 9.1 months.

IV. MEDIAN DISPOSITION TIME



U.S. Court of Appeals for the Fourth Circuit Monthly Statistical Report, at 6 (September 30, 2021), *available at* https://www.ca4.uscourts.gov/docs/pdfs/publicstats.pdf?sfvrsn=5524a238_239.

84. As the following tables show, in the 12-month period ending March 2021, the median time from the filing of a notice of appeal to the date of final disposition of all cases terminated on the merits in the Second Circuit, which hears appeals from the U.S. District Courts in the Eastern District of New York, was a little more than 14 months.[5] This compares to seven months in the Fourth Circuit, which would hear any appeal brought by Assange from the Eastern District of Virginia.

[5] Federal Court Management Statistics, March 2021, Explanation of Judicial Caseload Profiles, Courts of Appeals, *available at* https://www.uscourts.gov/statistics-reports/federal-court-management-statistics-march-2021.

SECOND CIRCUIT		12-Month Periods Ending					
		Mar 31 2016	Mar 31 2017	Mar 31 2018	Mar 31 2019	Mar 31 2020	Mar 31 2021
Pending Appeals		734	750	838	852	981	909
Median Time	Median Time From Filing Notice of Appeal to Disposition	10.9	10.1	10.8	11.3	12.0	14.2
Other Caseload per Judgeship	Applications for Interlocutory Appeals [2]	6	2	10	3	2	3
	Petitions for Rehearing	28	36	42	26	27	36

FOURTH CIRCUIT		12-Month Periods Ending					
		Mar 31 2016	Mar 31 2017	Mar 31 2018	Mar 31 2019	Mar 31 2020	Mar 31 2021
Pending Appeals		510	500	431	503	622	673
Median Time	Median Time From Filing Notice of Appeal to Disposition	5.3	3.9	5.6	5.4	5.8	7.0
Other Caseload per Judgeship	Applications for Interlocutory Appeals [2]	1	1	1	1	2	1
	Petitions for Rehearing	78	95	86	73	67	62

U.S. Court of Appeals, Federal Court Management Statistics – Profiles (March 31, 2021), *available at* https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2021/03/31.

85. As these statistics reflect, the Eastern District of New York case described by Mr. Boyle may not be an appropriate yardstick here.

B. Challenges to Effectiveness of Prisoner Transfers to Australia

86. In a statement dated September 28, 2021, Martin Hodgson has provided an opinion on prisoner transfers to Australia. While I do not have the requisite knowledge to speak to the veracity of Hodgson's statements about how Australia handles prisoner transfer requests, there are a few observations that I can make.

87. In speculating as to how a transfer application by Assange might unfold, Hodgson does not highlight a single example of where, as here, the United States has committed to consenting to a prisoner transfer to Australia before the prisoner has even appeared in U.S. courts, much less been convicted and sentenced. While the COE Convention requires that both the sentencing State (here, the United States) and the administering State (here, Australia) agree to the transfer, it bears emphasizing that the United States' assurance guarantees its consent, thereby preemptively satisfying a major condition to any transfer application under the COE Convention.

88. Hodgson states (at ¶ 6) that "Australia and many other nations with whom Australia conducts such transfers have a minimum sentence they believe must be served prior to transfer as a percentage of the original sentence." The United States, however, does not require a prisoner to serve a minimum portion of such prisoner's sentence before applying for a transfer.

89. Hodgson notes (at ¶ 17) that "[o]f the conditions required by Australia to be met for a prisoner to be eligible for transfer, that stating 'neither the sentence of imprisonment nor the conviction on which it is based is subject to appeal,' is the one that most often frustrates transfer from the United States to Australia." It should be noted that it is a basic requirement of the COE Convention that no pending appeals exists; it is not a requirement unique to Australian law. Hodgson further states that "[g]iven the nature of the US system and the almost endless avenues on which to base appeals, this condition is rarely if ever met." Hodgson then discusses this problem in the context of death-penalty cases, which is an irrelevant issue because this case does not involve the death penalty.

90. While a prisoner cannot be transferred if an appeal or postconviction challenge to his conviction or sentence is pending, *see* 18 U.S.C. § 4100(c), Assange has a great deal of control over this condition to the transfer. It is not the possibility that an appeal could be filed that impacts

the transfer but rather the actual existence of the appeal or collateral challenge. Assange could elect to waive or forego some or all of his appellate or postconviction litigation rights in order to expedite any transfer to Australia. *See, e.g.*, *United States v. Archie*, 771 F.3d 217, 221 (4th Cir. 2014) ("It is well settled that a criminal defendant may waive the statutory right to appeal his sentence."). A government appeal is possible, but government appeals in criminal cases are relatively rare.

91. Hodgson refers to a number of cases that are inapposite to this situation. For example, it is unclear how cases involving prisoner transfers from Hong Kong or Indonesia to Australia are relevant. Hodgson also refers (at ¶ 17) to the transfer applications of Australian Russell Moore, but based on information provided by attorneys in the U.S. Department of Justice Office of International Affairs (OIA), I understand that Moore was convicted by the State of Florida. In the United States, a foreign national prisoner who is in state custody must follow the transfer application procedure required by the state which sentenced him, and for a state prisoner to obtain a transfer to his home country, his application must be approved at both the state and federal levels. With respect to Moore, Florida denied his transfer on two occasions. Consequently, the federal government was never presented with the opportunity to consider the request. Here, in contrast, Assange is being prosecuted in federal court. The United States has given its assurance that it will consent to his transfer under the COE Convention. No U.S. state will have any involvement in the process, so the example of Moore has no relevance.

92. Nor is Hodgson's reference (at ¶ 24) to the case of David Hicks relevant to this matter. Based on information provided by OIA attorneys, I understand that Hicks was a suspected terrorist who was sentenced by a military tribunal and that any attempts to "transfer" him were

unrelated to the International Prisoner Transfer Program, but rather involved discussions and negotiations between Australia and the United States outside of the transfer process at issue here.

93. Finally, Hodgson argues (at ¶ 19) that "[i]t is conceivable that an Attorney General could refuse to transfer Mr Assange to Australia because a discrepancy between the respective sentence lengths for the particular conviction(s) could constitute a variance with the Australian equivalent so disproportionate so as to impede transfer." Hodgson further speculates (at ¶ 19) that "[t]he Attorney General could decline to incarcerate a person in Australia where to do so would far exceed the sentence length had the conviction been within Australia." Hodgson, however, fails to explain how his argument comports with the terms of the COE Convention and Australian law and policy.

94. The COE Convention recognizes that an administering State (Australia) can administer a transferred prisoner's sentence to ensure that it is consistent with its laws and procedures for a similar offense. Specifically, Article 9 provides that an administering State can either "continue the enforcement of the sentence immediately or through a court or administrative order," *or* "convert the sentence, through a judicial or administrative procedure, into a decision of that State, thereby substituting for the sanction imposed in the sentencing State a sanction prescribed by the law of the administering State for the same offence." Article 9 further provides that "[t]he enforcement of the sentence shall be governed by the law of the administering State and that State alone shall be competent to take all appropriate decisions."

95. Article 10 of the COE Convention provides the conditions that apply when the administering State decides to continue enforcement of the sentence. It provides that "the administering State shall be bound by the legal nature and duration of the sentence as determined by the sentencing State." But Article 10 provides a notable caveat:

> If, however, this sentence is by its nature or duration incompatible with the law of the administering State, or its law so requires, that State may, by a court or administrative order, adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. As to its nature, the punishment or measure shall, as far as possible, correspond with that imposed by the sentence to be enforced. It shall not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum prescribed by the law of the administering State.

96. Article 11 of the COE Convention provides the conditions that an administering State must follow if it decides to convert a sentence. It states that the administering State:

> a. shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing State; b. may not convert a sanction involving deprivation of liberty to a pecuniary sanction; c. shall deduct the full period of deprivation of liberty served by the sentenced person; and d. shall not aggravate the penal position of the sentenced person, and shall not be bound by any minimum which the law of the administering State may provide for the offence or offences committed.

97. While I cannot attest as to how Australia handles prisoner transfers, the Australian Government Attorney-General's Department's International Transfer of Prisoners Statement of Policy states that "Australia applies the continued enforcement method of sentence enforcement to all prisoners transferred to Australia under the [International Transfer of Prisoners] scheme." Australian Government Attorney-General's Department's International Transfer of Prisoners Statement of Policy, at 1 (Feb. 1, 2019), *available at* https://www.ag.gov.au/sites/default/files/2020-03/ITP-Statement-of-Policy.pdf (attached as Exhibit P).

98. In any event, under both the continued enforcement method and conversion method, the COE Convention provides the administering State with the flexibility to administer the transferred prisoner's sentence to be consistent with its laws and procedures, even if that means the transferred inmate spends less time in prison. Mr. Hodgson fails to adequately explain why

Assange's potential sentence would prevent his transfer, when the COE Convention allows Australia to administer his sentence to comport with its laws and procedures.

C. Challenges to the Length of Sentence

99. As noted above, Assange also introduces affidavits attempting to show that he will be subjected to a lengthy prison sentence, which he argues could affect whether Australia would consent to his transfer application. I described the facts relevant to estimating the potential sentence in this case in my First Declaration (at ¶¶ 183-188), and I reincorporate those statements here. As I stated in my First Declaration (at ¶ 188), 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. Nothing in Assange's current evidence changes that conclusion.

1. Calculation of the applicable Sentencing Guidelines

100. In his declaration, Douglas Berman opines (at ¶ 5) that the base offense level under the U.S. Sentencing Guidelines upon conviction for Assange "most likely" would be the Level 35 that is triggered by the theft of "Top Secret" information rather than the Level 30 that is triggered by the theft of information classified at the "Secret" level. According to Professor Berman (at ¶ 5 n.1), this is so because, even though Assange is not accused of stealing information classified at the "Top Secret" level, Assange solicited "Top Secret" materials and Manning had a "Top Secret" clearance. Based on my knowledge of the facts in this case, it is not at all clear to me that the applicable base offense level for Assange would be based on "Top Secret" information when the information that he is charged with actually handling was at only the "Secret" level. A court that calculated guidelines based on information that was only at the "Secret" level likely would use a base offense level of no more than 30. The sentencing range for an offender without a prior

criminal history and a final offense level of 30 would be 97 to 121 months. By including this information in this declaration, I am not attempting to suggest what Assange's final guideline range would be. Instead, I do so only to show that Professor Berman cannot now provide a reliable prediction of what that final guideline range actually will be.

101. Moreover, it is important to reiterate that the U.S. Sentencing Guidelines are advisory. As explained in my First Declaration (at ¶ 184), the U.S. Sentencing Guidelines are but one factor to be taken into consideration along with the 18 U.S.C. § 3553(a) factors in making a sentencing decision. *See United States v. Kimbrough,* 552 U.S. 85, 90 (2007) ("[T]he Guidelines . . . serve as one factor among several courts must consider in determining an appropriate sentence.").

2. Courts can, and do, impose sentences below the applicable guidelines

102. In recognizing that the Sentencing Guidelines are advisory, Professor Berman cites (at ¶ 4) statistics from the U.S. Sentencing Commission indicating that "70% of cases in the Eastern District of Virginia, were sentenced 'under the Guideline Manual.'" Yet those same statistics reflect that, in fiscal year 2020, only approximately 60% of those sentences imposed in the Eastern District of Virginia were within the applicable guidelines range. *See* U.S. Sentencing Comm'n, Statistical Information Packet, Eastern District of Virginia, at 12 tbl. 8 (Fiscal Year 2020), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2020/vae20.pdf. Of the rest of the sentences, approximately 28% of the sentences involved a downward variance and almost 9% of the sentences involved a downward departure from applicable guidelines range. Less than 3% of the

sentences imposed involved an upward variance or upward departure.[6] As these statistics reflect, courts frequently impose sentences below the advisory guidelines range.

103. Of relevance here, I handled the recent sentencing of Daniel Hale. Hale was convicted of stealing and communicating information classified at the "Top Secret" level, and the Virginia court calculated the sentencing range under the U.S. Sentencing Guidelines to be 87 to 108 months. The court, after considering all of the relevant sentencing factors, ultimately sentenced Hale to 45 months in prison.

104. The government did not appeal that sentence even though it was less than what we recommended. In our sentencing memorandum, we asserted the Sentencing Guidelines range was properly calculated at 108 to 135 months in prison and argued for "a significant term of imprisonment" (not, as Bridget Prince suggests in paragraph 14 of her declaration, a specific term of imprisonment of nine years). Moreover, we defined "a significant term of imprisonment" as one that was "significantly longer than the one imposed on Reality Winner." Position of the United States on Sentencing, at 2, 18, *United States v. Hale*, No. 1:19-cr-59 (E.D. Va. July 19, 2021) (Dkt. No. 227). Reality Winner, a former National Security Agency contractor, received a sentence of 63 months. *See* Judgment, *United States v. Winner*, No. 1:17-cr-34-JRH-BKE (S.D. Ga. 2018) (Dkt. No. 327).

105. For their part, Hale's attorneys highlighted for the Virginia district court cases in which defendants committed similar criminal offenses as Hale and received sentences below the applicable sentencing guidelines. *See* Defense Position on Sentencing, *United States v. Hale,* 1:19-cr-59 (E.D. Va. July 22, 2021) (Dkt. No. 240). For instance, Hale noted that, in *United States v.*

[6] Indeed, as I stated in my First Declaration (at ¶ 186), statistics compiled by the U.S. Sentencing Commission show that, out of 68,902 sentences imposed in 2018 for which data were collected, sentences were imposed within the guidelines range in approximately 51% of the cases, below the guidelines range in approximately 46% of cases, and above the guidelines range in approximately 3% of cases.

Kiriakou, 2013 WL 3186394 (E.D. Va. Jan. 25, 2013), a Virginia district court sentenced a former CIA employee to 30 months in prison for intentionally disclosing information identifying a covert agent, in violation of 50 U.S.C. 421(a), even though his Sentencing Guidelines range was 97 to 121 months. Likewise, Hale pointed to *United States v. Sterling*, 860 F.3d 233 (4th Cir. 2017), where a Virginia district court sentenced a former CIA employee to 42 months in prison upon his conviction after trial for leaking top secret information to a reporter, even though the applicable guidelines range was 235 to 293 months. Further, Hale pointed to *United States v. Frese*, 1:19-cr-304 (E.D. Va.), where the defendant was sentenced to 30 months in prison for transmitting "Top Secret" and "Secret" material to reporters even though his guidelines range was 151 to 188 months. And Hale cited *United States v. Fondren,* 417 F. App'x 327 (4th Cir. 2011), where the defendant was sentenced to 36 months in prison for selling classified information to a foreign government even though his guidelines range was 63 to 78 months.

106. The upshot of the foregoing is that it is not unusual for defendants to be sentenced to terms of imprisonment significantly less than the applicable guideline range.

3. The government rarely appeals sentencing decisions

107. Professor Berman asserts (at ¶ 11) that "Federal Circuit courts fairly regularly reverse on appeal by prosecutors any sentence that stray too far from the Guidelines' recommended prison terms, especially in cases that implicate national security concerns." This assertion is inconsistent with my more than 30 years of experience as a federal prosecutor. As noted above, it is not unusual for sentences to be imposed below the Guidelines' recommended prison terms. Yet, based upon my experience and discussions with other U.S. Department of Justice attorneys, I know that government appeals of sentences are rare. Indeed, in my career, I have prosecuted only one case in which the government appealed the sentence of a convicted defendant.

108. In any event, the cases Professor Berman cites in which appeals were taken involved inexplicable sentences imposed by judges against terrorists convicted of seeking to commit or support mass murder. In *United States v. Daoud*, 980 F.3d 581 (7th Cir. 2020), the guidelines called for life in prison for a defendant convicted of a plan to bomb a nightclub and, separately, to murder an FBI agent, but the district judge imposed a sentence of 16 years. In *United States v. Ressam*, 679 F.3d 1069 (9th Cir. 2012), the guidelines called for life in prison for a defendant sent by al-Qaeda to blow up the Los Angeles airport, but the judge sentenced him to 22 years in prison (even *after* he reneged on his plea agreement). In *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011), the district judge departed 152 months from the applicable guideline range for al-Qaeda terrorist Jose Padilla, who came to the U.S. to engage in terror plots. In *United States v. Ceasar*, 10 F.4th 66 (2d Cir. 2021), the guidelines called for life in prison for a defendant providing material support to ISIS, but the judge sentenced her to less than four years in jail even though she continued to support ISIS and obstruct justice even after entering her guilty plea. In the *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), the government appealed the 30-year sentence imposed on a defendant who joined al Qaeda to kill high ranking government officials (including the President), and remained unrepentant. Every one of the sentences initially imposed in these cases was shockingly low in the context of the terrorism offense that the defendant committed.

IV. RESPONSES TO ALLEGATIONS ABOUT SAMI AL-ARIAN, CHELSEA MANNING, AND ALI AL-TIMIMI

109. Assange's affiants make a number of misleading and inaccurate allegations regarding Sami Al-Arian, Chelsea Manning, and Ali Al-Timimi. These allegations should be irrelevant in this case, where the United States has made diplomatic assurances that resolve the concerns about Assange's nature of confinement. Because I was personally involved in those

cases, I will address some, but not all, of those allegations - - but my decision to refrain from engaging on others of them should not be taken as my agreement or acquiescence to them.

110. For example, Mr. Turley offers the misleading assertion (at ¶ 141) that "Mr. Kromberg's use of the grand jury extended Al-Arian's confinement from 2006 to 2015." In fact, Al-Arian was released from custody in 2008, and stayed on home detention as a condition of pre-trial release until 2013, when even that condition was removed from his release order. (Exhibit Q, at 2; Exhibit R.) In addition, Mr. Turley's assertion omits from his causation analysis any reference to the judges that ordered Al-Arian's confinement. *See In re Grand Jury Subpoena*, 221 F. App'x 250, 251 (4th Cir. 2007) (affirming the decision of the Virginia district judge that Al-Arian be confined for refusing to testify before the grand jury with immunity).

111. Mr. Turley also omits from his analysis any reference to Al-Arian's own decision to engage in contumacious conduct. As I explained in my First Declaration (at ¶ 133), every person called before the grand jury 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 duty to testify [before the grand jury] has long been recognized as a basic obligation that every citizen owes his Government." *United States v. Calandra*, 414 U.S. 338, 345 (1974).

112. Further, as I explained in First Declaration (at ¶¶ 135-136), where a person refuses to comply with a grand jury subpoena to testify, courts have the inherent authority to enforce the subpoena through their 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).

113. 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).

114. The argument that the order for Al-Arian to testify in Virginia was a breach of his plea agreement in Florida was rejected by the Florida district judge who accepted his guilty plea. When Al-Arian appealed that decision, it was affirmed. *United States v. Al-Arian*, 514 F.3d 1184 (11th Cir. 2008). In short, no analysis of Al-Arian's confinement should ignore the fact that he was jailed for refusing to comply with court orders to testify. He could have secured his own freedom at any time by agreeing to testify in compliance with the court orders.

115. Mr. Turley also focuses (at ¶¶ 143-154) on the civil contempt proceedings against Chelsea Manning. I described those proceedings at length in my First Declaration (at ¶¶ 140-163), and reiterate those statements today. I add only that, on March 12, 2020, after the grand jury had been released, Manning was released from confinement, on the grounds that - - with the grand jury

released - - confinement had no further coercive purpose. (Exhibit S.) On April 3, 2020, Manning paid in full the fines imposed against her for her failure to testify.

116. In 2005, Al-Timimi was sentenced to life in prison upon his convictions for a variety of offenses related to his actions shortly after 9/11, including soliciting others to levy war against the United States. (Exhibit T.) Despite the offenses of his convictions, SAMs were not imposed upon him until 2010. *See* Turley Declaration ¶ 45. The absence of SAMs imposed against Timimi between 2005 and 2010 undercuts Turley's statements (at ¶¶ 31-32) that "[t]he likelihood of Assange being subject to SAMs is exceptionally high despite the demonstrably low need for such restrictions" and that my acknowledgment that the imposition of SAMs was "possible" was "an almost whimsical understatement."

117. Finally, Mr. Turley (at ¶ 49) states that the Al-Timimi "defense has filed dozens of motions challenging alleged false statements by the government, the withholding of material evidence, and the continued viability of Al-Timimi's convictions in light of intervening Supreme Court authority that cast doubt on the legal theories that the government used to charge him." From the time he was sentenced in 2005 through 2014, every one of Al-Timimi's motions was rejected by the district court. (Exhibit T.) With one exception, the remainder of Al-Timimi's post-trial motions are predicated on legal issues arising from U.S. Supreme Court cases that post-dated his sentencing by more than 10 years. The one remaining motion (made in 2015) alleges that the government failed to provide certain information to Al-Timimi in pre-trial discovery, but in response to that motion, the government publicly filed (in 2015) the documents that established that the relevant information had, in fact, been provided to Al-Timimi pre-trial. (Exhibit U.)

118. The facts and information contained in this Declaration are true and correct according to the best of my knowledge, information, and belief.

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