

TRANSCRIPT OF PROCEEDINGS

Ref. U20200010

IN THE CROWN COURT AT WOOLWICH

Belmarsh Road
London

Before DISTRICT JUDGE VANESSA BARAITSER

GOVERNMENT OF THE UNITED STATES OF AMERICA

-v-

JULIAN ASSANGE

**MR J LEWIS QC, MS C DOBBIN & MR J SMITH appeared on behalf of the
Prosecution**

**MR E FITZGERALD QC, MR M SUMMERS QC & MS F IVESON appeared on
behalf of the Defence**

**WHOLE HEARING
24th FEBRUARY 2020, 10.08-16.10**

1 JUDGE BARAITSER: Yes, thank you. Can you ask for Mr Assange to be brought into
2 court.

3 COURT OFFICIAL: He will be brought up.

4 JUDGE BARAITSER: Lovely. Thank you very much, Mr Assange. Please just come
5 forward and just for the time being remain standing. We are just formally going to identify
6 you first. Listen carefully, please.

7 COURT OFFICIAL: Would you confirm for the court, please, that you are Julian Paul
8 Assange? You are Julian Paul Assange, yes?

9 DEFENDANT: That's correct.

10 COURT OFFICIAL: And your date of birth is 3 July 1971?

11 DEFENDANT: Yes.

12 COURT OFFICIAL: Please sit down.

13 JUDGE BARAITSER: You are very welcome to sit down, Mr Assange. Just before I hear
14 from you, Mr Lewis, just before, I just want to make it perfectly clear to members of the
15 public that I expect no interruptions to these proceedings as there has been in the past. Any
16 disturbances will result in the person causing the disturbance from being removed from the
17 public gallery. It is unlikely they will be allowed to return to hear the rest of these
18 proceedings. I hope that is clear. Mr Lewis.

19 MR LEWIS: May it please the court, I appear on behalf of the Government of the United
20 States of America.

21 JUDGE BARAITSER: Just pause for one moment. Can you just make sure your
22 microphone is close enough to you.

23 MR LEWIS: Yes.

24 JUDGE BARAITSER: I can hear you but it is quite a big room.

25 MR LEWIS: Can people hear me?

26 COURT OFFICIAL: If you can move onto the really big microphone.

27 MR LEWIS: This one?

28 COURT OFFICIAL: Because that is the one that is engaged with the recording equipment.
29 It is the one which is engaged with the press annex as well, so. I think you have got one of
30 those on, Mr Fitzgerald. It is the one with the large head, that one.

31 MR LEWIS: Yes.

32 JUDGE BARAITSER: Lovely, thank you. Let us try again.

33 MR FITZGERALD: I am so sorry, madam.

34 JUDGE BARAITSER: Mr Fitzgerald.

1 MR FITZGERALD: Can I just intervene to say it would be of assistance if we could have
2 some idea of how long my learned friend is proposing to be in opening.

3 JUDGE BARAITSER: All right. Mr Lewis.

4 MR LEWIS: Yes. My learned friend has asked me this a number of times this morning. I
5 will endeavour to be finished by the short adjournment.

6 JUDGE BARAITSER: All right, thank you.

7 MR LEWIS: Can I just enquire, madam, we are going to take a break, a mid-morning break?

8 JUDGE BARAITSER: Well, the way I was going to manage the morning was to hear what
9 you had to say and, at a convenient time, if needs be, I was going to stop then, but if you want
10 me to manage this morning minutely in that way I can do.

11 MR LEWIS: Well, no, madam, it is just something to aim at, madam. Perhaps half 11.

12 JUDGE BARAITSER: I am very happy to accommodate that if that is your suggestion. All
13 right, yes.

14 MR LEWIS: May it please the court, I appear for the Government of the United States of
15 America along with Ms Clair Dobbin and Mr Joel Smith. My learned friends, Mr Edward
16 Fitzgerald, Queen's Counsel, Mr Mark Summers, Queen's Counsel and Florence Iveson
17 appear for Mr Assange.

18 JUDGE BARAITSER: Thank you.

19 MR LEWIS: Can I just check the documentation ---

20 JUDGE BARAITSER: Yes.

21 MR LEWIS: --- which seems to have blossomed. Madam, you should have a prosecution
22 core bundle.

23 JUDGE BARAITSER: Yes.

24 MR LEWIS: We now have a defence core submissions bundle which was handed up this
25 morning.

26 JUDGE BARAITSER: Yes, that was very helpful, thank you, yes.

27 MR LEWIS: There is a defence core evidence bundle.

28 JUDGE BARAITSER: Yes, which has been added to.

29 MR LEWIS: And there are six volumes of authorities.

30 JUDGE BARAITSER: Yes, I have not brought the six volumes to court - it was physically
31 impossible to do so - but I have everything else that you have referred to.

32 MR LEWIS: Madam, we will need some of the authorities for extradition crime.

33 JUDGE BARAITSER: In that case, I wonder if the defence can provide a complete copy of
34 the authorities bundles to me during the course of the morning.

1 MR LEWIS: Certainly. This is an application for the extradition of Julian Assange so that he
2 can stand trial in the United States of America on the charges set out in the indictment,
3 included in the request for extradition. There have been many misstatements of the charges
4 against him. The indictment charges him with two things. The first is straightforward
5 criminality, namely conspiracy to steal from and hack into the Department of Defense
6 computer system.

7 This is an ordinary criminal charge and any person, journalist or source, who hacks or
8 attempts to gain unauthorised access to a secure computer system or aids and abets other to
9 do so is guilty of computer misuse. Reporting or journalism is not an excuse for criminality
10 or a licence to break ordinary criminal laws. This is true in the United Kingdom as it is in the
11 United States of America and, indeed, every civilised country in the world. As can be seen
12 from the January declaration in support of the extradition, and for the court's notes that is in
13 the prosecution core bundle.

14 JUDGE BARAITSER: Yes.

15 MR LEWIS: Tab 2, page 8, paragraph 19. I do not ask you to turn it up at the moment,
16 madam.

17 JUDGE BARAITSER: All right.

18 MR LEWIS: But just so we understand and to set the scene, the first set of charges against
19 Mr Assange focus on his complicity in Chelsea Manning's theft and unlawful disclosure of
20 national defence information, counts 1 to 4 and counts 9 to 14; his knowing and intentional
21 receipt of national defence information from Manning, counts 6 to 8; his agreement with
22 Manning to engage in a conspiracy to commit computer hacking and his attempt to crack a
23 password hash to a classified US Department of Defense account, counts 5 and 18. That is
24 the first set of ordinary criminality charges.

25 The second set of charges, counts 15, 16 and 17, concern dissemination of particular
26 classified documents containing national defence information, including the unredacted
27 identity of sources. By doing this, Mr Assange identified informants and dissidents in Iraq
28 and Afghanistan who have helped or given information to America and the coalition forces.

29 It is important to emphasise this: it is the gravamen of what is alleged against Mr
30 Assange that by disseminating the terms in an unredacted form, he knowingly put people,
31 human rights' activists, journalists, advocates, religious leaders, dissidents and their families,
32 at risk of serious harm, torture or even death in states operated by oppressive regimes. These
33 counts are the only counts that charge the dissemination of information obtained by Mr
34 Assange.

1 In 2010, Mr Assange described it as “regrettable” that sources should have been put at
2 risk by WikiLeaks’ disclosure. What is alleged is far more than regrettable. It is criminal.
3 The people whose names were disclosed were people who had already put their safety and
4 lives at risk from dangerous regimes to assist the United States and its allies. Publication
5 made that risk immediate and real.

6 The defence seek to suggest that the risk to these individuals by having their identities
7 as informants revealed is somehow overstated. I remind the court that these were individuals
8 who were passing on information against the interests of countries like Iraq, Afghanistan and
9 Iran or organisations like Al-Qaeda or the Taliban. If the risk to those people really needs to
10 be spelt out, then the court will find a lengthy explanation in the second declaration in support
11 which sets out the actions taken to try and mitigate the risks and those instances where it was
12 not possible to do so.

13 What the court is asked to bear in mind, as this case is opened, is that what Mr
14 Assange seeks to defend by free speech is not the publication of the classified materials but
15 the publication of names of sources, the names of people who have put themselves at risk to
16 assist the US and its allies. This is crucially important and the heart of the matter and it has
17 been consistently misrepresented. I hope those members of the press will note this important
18 part as part of their fair and accurate reporting of these proceedings. Just so that has not been
19 missed, I shall say it again. And it goes without saying that this was not a course which those
20 newspapers which are partnered with WikiLeaks took. It is inconceivable that any member
21 of the press would disclose the identities of informants or dissidents knowing that they or
22 their families might be put at risk of serious harm or death. The publication of the unredacted
23 cables prompted an outcry from those publications which had worked with WikiLeaks. The
24 court too will note that these publications will lay responsibility for this firmly at Mr
25 Assange’s door.

26 And just to give a flavour, the Guardian newspaper published on 2 September 2011
27 the following:

28
29 “WikiLeaks has published its full archive of 251,000 secret US
30 diplomatic cables without redactions, potentially exposing
31 thousands of individuals named in the documents to detention,
32 harm, or putting their lives in danger. This move has been
33 strongly condemned by the five previous media partners, the
34 Guardian, New York Times, El País, Der Spiegel, and Le
35 Monde, who have worked with WikiLeaks publishing carefully
36 selected and redacted documents. We deplore the decision of

1 WikiLeaks to publish the unredacted state department cables
2 which may put sources at risk.”
3

4 The organisation said in a joint statement,
5

6 “Our previous dealings with WikiLeaks were on the clear basis
7 that we would only publish cables which had been subject to a
8 thorough, joint, editing and clearance process. We will continue
9 to defend our previous collaborative publishing endeavour. We
10 cannot defend the needless publication of the complete data.
11 Indeed, we are united in condemning it. The decision to publish
12 by Julian Assange was his and his alone. Diplomats,
13 governments, human rights charities, and media organisations
14 had urged WikiLeaks’ founder, Assange, not to publish the full
15 cache of cables without careful source protection.”
16

17 The newly published archive contains more than 1,000 cables identifying individual
18 activists, several thousand labelled with a tag used by the US to make sources to believe they
19 would be placed in danger. And more than 150 specifically mentioning whistle blowers. The
20 cables also contained references to people persecuted by their governments, victims of sex
21 offences, and locations of sensitive government insulations and infrastructure.

22 The New York Times published on 25 July 2010 the following:
23

24 “The Times and the other news organisations agreed at the
25 outset that it would not disclose either in our articles or any of
26 our online supplemental material, anything that was likely to put
27 lives at risk or jeopardise military or anti-terrorist operations.
28 We have, for example, withheld any names of operatives in the
29 field and informants cited in the reports. We have avoided
30 anything that might compromise America or allied intelligence
31 gathering methods such as communication intercepts. We have
32 not linked to the archives of raw material. At the request of the
33 White House, the Times also urged WikiLeaks to withhold any
34 harmful materials from its websites.”
35

36 The New York Times magazine published on 26 January 2011:
37

38 “Assange was openly contemptuous of the American
39 government and certain that he was a hunted man. He told the
40 reporters that he prepared a kind of doomsday option. He had,
41 he said, distributed highly encrypted copies of his entire secret
42 archive to a multitude of supporters and if WikiLeaks was shut

1 down or if he was arrested, he would disseminate the key to
2 make the information public.

3 “While we assumed we have little or no ability to influence what
4 WikiLeaks did, let alone what happened once this material was
5 loose in the echo chamber of a blogger’s sphere, that did not free
6 us from the need to exercise care in our own journalism. From
7 the beginning, we agreed that in our archives, and in any
8 documents we published from the secret archive, we would
9 excise material that could put lives at risk.

10 “Guided by reporters with extensive experience in the field, we
11 redacted the names of ordinary citizens, local officials, activists,
12 academics and others, who had spoken to American soldiers or
13 diplomats. We edited out any details that might reveal ongoing
14 intelligence gathering operations, military tactics, or locations of
15 material that could be used for fascist terrorist weapons.

16 “He was angry that we declined to link our online coverage of
17 the war logs to the WikiLeaks website, a decision we made
18 because we feared, rightly as it turned out, that its trove would
19 contain the names of low level informants and make them
20 Taliban targets. As for the risk posed by these releases, they are
21 real. WikiLeaks first dated publication of the Afghanistan war
22 logs included the names of scores of Afghans and the Times and
23 the other news organisations had carefully purged from our
24 coverage. Several news organisations including ours reported
25 this dangerous lapse” ----
26

27 JUDGE BARAITSER: Just pause for one moment.

28 Also, is there anything that can be done about the noise? If you can make any
29 enquiries, yes, it is disturbing and it is distracting others. Yes, thank you Mr Lewis.

30 MR LEWIS:

31
32 --- “had carefully purged from our own coverage. Several news
33 organisations including ours reported this dangerous lapse and
34 months later a Taliban spokesman claimed that Afghan
35 insurgence had been pursuing the WikiLeaks site for making a
36 list. I anticipate with dread the day we learn that someone
37 identified in those documents has been killed.

38 “As for our relationship with WikiLeaks, Julian Assange has
39 been heard to boast he served as a kind of puppet master
40 recruiting several news organisations forcing them to work in
41 concert and choreographing their work. This is characteristic
42 like a dossier or as my Guardian colleagues would say,
43 ‘bollocks’. Throughout this experience, we have treated
44 Assange as a source.”
45

1 Now, we do say the disclosure of the damaging information that Mr Assange
 2 disclosed was deprecated by the responsible press and it is the only, and I repeat only,
 3 disclosure of information that Mr Assange is charged with. As could be seen from the
 4 January declaration in support of the extradition – and for your note madam, that is
 5 prosecution core bundle, tab 2, page 9, paragraph 20 – the only instances in which the
 6 superseding indictment charges Assange with the dissemination of national security
 7 information to the public are expressly and explicitly limited to his distribution of documents
 8 classified up to the secret level containing the names of individuals in Afghanistan, Iraq and
 9 elsewhere in the world who risk their safety and freedom by providing information to the
 10 United States and its allies.

11 There are three specific counts which I mentioned earlier: counts 15, 16, and 17.
 12 This is not a case of any charges involving publications of or disclosure of information about
 13 war crimes or matters such as that. It is limited solely to the disclosure of the sources where
 14 there is obvious harm.

15 Count 15 in the indictment charges him with unauthorised possession of significant
 16 activity reports classified up to secret level from the Afghanistan war containing the names of
 17 individuals who risk their safety and freedom by providing information to the United States
 18 and allies, and communicated the documents containing the names of those sources to all the
 19 world by publishing them on the internet.

20 Count 16 charges Mr Assange with possession of significant activity reports classified
 21 up to secret level from the Iraq war containing the names of individuals who risk their safety
 22 and freedom by providing information to the United States and its allies, and communicated
 23 the documents containing the names of those sources to all the world by publishing them on
 24 the internet.

25 Count 17 charges Mr Assange with having unauthorised possession of state
 26 department cables, classified up to the secret level, containing the names of individuals who
 27 risk their safety and freedom by providing information to the United States, and
 28 communicating the documents containing the names of those sources to all the world by
 29 publishing them on the internet.

30 And as the declaration goes on to say at paragraph 21, “In short, Mr Assange was
 31 charged for publishing specific classified documents that contained the unredacted names of
 32 innocent people who risk their safety to provide the information. He was not, for example,
 33 charged with publishing the so-called collateral murder video that WikiLeaks disclosed in
 34 April 2010.

1 In addition, none of the charges allege that Mr Assange violated the law by obtaining
2 or releasing that video.

3 COURT OFFICIAL: Apologies, the audibility in the press annex is very bad. Can I ask you
4 to put the microphone a little bit closer? Is that all right?

5 MR LEWIS: Sure. I do not know where we have got to.

6 COURT OFFICIAL: Just continue but maybe whenever anyone is addressing the Judge,
7 make sure your microphone is quite close because of the press annex.

8 MR LEWIS: Can I just confirm that this is now better? I can hear it myself.

9 JUDGE BARAITSER: Just one other thing. I appreciate there are supporters outside. I am
10 going to make it clear through an intermediary that they are disturbing the proceedings and
11 whilst of course they are entitled to protest, if it is at the expense of Mr Assange's case, they
12 may wish to know that in deciding whether to continue with their protest in this way.

13 MR LEWIS: Madam, it is certainly within the precincts of the court. So, this court in my
14 respectful submission has jurisdiction to curtail any matters which would interfere ---

15 JUDGE BARAITSER: I was not aware.

16 MR LEWIS: --- with the proceedings.

17 JUDGE BARAITSER: I was not aware it was within the precincts. In any event, if they are
18 aware that it is impacting on Mr Assange's case, they may well desist of their own accord. I
19 wonder if that message can be passed? Because it is very important to Mr Assange that I hear
20 everything that has happened and it is ---

21 MR LEWIS: Certainly.

22 JUDGE BARAITSER: It is disturbing.

23 (Judge Baraitser conferred with the Court Clerk)

24 JUDGE BARAITSER: Yes.

25 MR LEWIS: So, in short and in total, Mr Assange was charged for publishing specific
26 classified documents that contained the unredacted names of innocent people who risked their
27 safety and freedom to provide information to the United States and its allies. He was not, for
28 example, charged for publishing the so-called collateral murder video that WikiLeaks
29 disclosed in April 2010.

30 In addition, none of the charges allege that Mr Assange violated the law by obtaining
31 or releasing that video. And the superseding indictment does not even mention it. This
32 clearly demonstrates the point that what Mr Assange seeks to defend by describing it as free
33 speech or journalism is not the publication of the classified materials but the publication of

1 the names of sources, the names of people who put themselves at risk to assist the United
2 States and its allies.

3 The declaration goes on to say at paragraph 22:
4

5 “As publicly stated by another Department of Justice official in
6 announcing the superseding indictment, the department take
7 seriously the role of journalists in our democracy. It is not, and
8 has never been, the department’s policy to target them for their
9 reporting. Julian Assange is no journalist. This is made plain
10 by the totality of his conduct as alleged in the indictment. He is
11 conspiring with and assisting a security clearance holder to
12 acquire classified information and is publishing the names of
13 human sources. Indeed, no responsible actor, journalist or
14 otherwise, would purposely publish the names of individuals he
15 or she knew to be confidential human sources in war zones
16 exposing them to the gravest of danger.”
17

18 So, it can be seen there are essentially two areas of conduct charged within the
19 indictment. The first is dealing with the theft and computer hacking. And the second with
20 identifying informants and dissidents in Iraq and Afghanistan, knowing they would be subject
21 to the risk of torture and murder. Nothing else. He is not charged with the disclosure of
22 embarrassing or awkward information the government would rather not have disclosed. The
23 disclosure charges are solely where risk of harm was caused.

24 Another matter I wish to dispel is the constant repetition that the government wants to
25 sentence him to 170 years in prison. The defence hyperbole is that it is highly likely he will
26 be sentenced to imprisonment that will constitute the rest of his likely natural lifespan.
27 Sentencing is a function of the trial court, not the prosecution or the government. Indeed, the
28 charges in England would carry as a maximum a similar sentence. The correct position is set
29 out in the declaration in support of extradition. The sentencing exercise is very similar to that
30 in the United Kingdom; and most, if not all of the same factors would be taken into
31 consideration.

32 In the United States of America, there are federal sentencing guidelines. The sentence
33 must: (a) reflect the seriousness of the offence, promote respect for the law and provide just
34 punishment for the offence; (b) afford adequate deterrence to criminal conduct; (c) protect the
35 public from further crimes of the defendant; (d) provide the defendant with needed
36 educational or vocational training, medical care or other correctional treatment in the most
37 effective manner.

38 And a key factor to be considered by the sentencing court in the United States is the

1 need to avoid unwarranted sentence disparities among the defendants with similar records
 2 who have been found guilty of similar conduct. Chelsea Manning is, in fact, not a similar
 3 defendant, in that the military courts consider parole after one third of the sentence. In
 4 seeking to avoid an unwarranted sentence disparity for Mr Assange, his sentencing judge will
 5 likely consider sentences recently imposed in the United States civilian courts, federal courts,
 6 where Mr Assange would be tried, for unauthorised disclosure of classified information to the
 7 media. In the *United States v Sterling* [2017], the defendant was sentenced to 42 months. In
 8 the *United States v Albury*, 26 October 2018, sentenced to 48 months. *United States v*
 9 *Winner*, 24 August 2018, sentenced to 63 months.

10 It is of note that none of the offences charged in the superseding indictment requires
 11 imposition of a consecutive or mandatory minimum sentence. So while it is difficult to
 12 estimate a possible sentence at this early stage of the criminal proceedings, people should not
 13 be beguiled by the hyperbole of the defence on sentence.

14 And finally, can I, in my opening remarks, emphasise that this is an extradition
 15 hearing. It is not a trial; it is a preliminary hearing. The guilt or innocence of Mr Assange
 16 will be determined at trial in the United States, not here in this court. The function of this
 17 court is, in an extradition hearing, is a screening to ensure there is dual criminality and there
 18 is no bar to extradition.

19 I anticipate that the defence will endeavour to turn this into a trial under the guise of
 20 abuse of process. The sole questions are whether the statutory requirements of the
 21 Extradition Act 2003 are satisfied. And I also anticipate that the defence attempt to use this
 22 application for abuse of process in extradition proceedings as a means of collateral challenge
 23 to the facts set out in the request. The Supreme Court has held this to be impermissible.

24 Also, if they are attempting to use an application for abuse as a means of dealing with
 25 trial issues, that again is impermissible. The words of Lord Templeman in *Re Evans*, setting
 26 out the role of the magistrate in extradition proceedings are apposite. He said:

27

28 “The magistrate will first consider whether the equivalent
 29 conduct will constitute an offence against the equivalent law of
 30 the United Kingdom. The magistrate is not concerned with the
 31 proof of the facts, the possibilities of other relevant facts or the
 32 emergence of any defence. These are matters for trial. Again,
 33 the magistrate is not concerned with the proof of facts, the
 34 possibility of other relevant facts or the emergence of any
 35 defence. These are matters for trial in the foreign state.”

36

1 The issues which Mr Assange raises, notwithstanding we say they are completely
2 without merit and an attempt to deflect from his criminal behaviour, can be determined once
3 he is returned to the United States.

4 The defence wishes to cast Mr Assange as the embodiment of free expression and to
5 paint him in glowing colours of liberty, but it is not up to this court to decide whether
6 Mr Assange is a journalist or a whistleblower or a hacker for that matter. It is Mr Assange's
7 charged conduct which must be the sole focus of the court; not who he is or what good or bad
8 deeds he has done in the past, but the conduct he is alleged to have committed
9 between November 2009 and September 2011.

10 And madam, with those opening remarks I would like to turn to the actual request
11 which we have at tab 2 of the government's core bundle.

12 JUDGE BARAITSER: Yes.

13 MR LEWIS: But it is important, as these proceedings are in public, that I read out the
14 conduct against which Mr Assange is accused. So can I just turn ---

15 JUDGE BARAITSER: You are very welcome to, but are you not going to provide
16 documents to those that wish to see them, in any event? Do you need to read, word-for-word,
17 all of the information in the request?

18 MR LEWIS: Madam, it is usual in these type of extradition proceedings to read it out.

19 JUDGE BARAITSER: Will the request be made available, should it need to be, to those that
20 wish to see it? I am very happy for you to read it out, if that is what you would like to do.

21 MR LEWIS: Well, I think I should read out various sections of it, madam.

22 JUDGE BARAITSER: Yes.

23 MR LEWIS: Because this being a public proceeding, it is absolutely essential that people
24 know precisely what the indictment is about.

25 JUDGE BARAITSER: If you wish to, you are very welcome to, but I was wondering
26 whether that was the most economical way of managing the information.

27 MR LEWIS: Madam, I will do my best to skip passages which are not relevant ---

28 JUDGE BARAITSER: So be it.

29 MR LEWIS: --- in the request. So if you turn to tab 1 in the prosecution core bundle. And
30 I will pick it up at paragraph 4, which is the summary of the case.

31 JUDGE BARAITSER: Yes.

32 MR LEWIS: I hope this microphone is still working, but I really cannot lean over it
33 anymore, if it is not picking me up.

34 UNIDENTIFIED SPEAKER: It was working perfectly just now.

1 MR LEWIS: Good.

2 JUDGE BARAITSER: It was working, Mr Lewis. I am just wondering whether, now you
3 are moving slightly to your left, it is not going to be quite so effective.

4 MR LEWIS: Yes. I have got a bad back.

5 JUDGE BARAITSER: Let's start, but I think people do need to hear what you are saying.

6 MR LEWIS: I will see how I get on. So summary of the case, paragraph 4, page ---

7 JUDGE BARAITSER: Mr Lewis, I do not think you are being picked up. I wonder if you
8 could move it.

9 MR LEWIS: Can it be resensitised? Because otherwise I am ---

10 JUDGE BARAITSER: That is perfect, if you are able to stay there.

11 MR LEWIS: I will try.

12 "These charges are the result of an FBI investigation into a conspiracy to commit
13 computer hacking, as well as to otherwise unlawfully obtain and disclose classified
14 information, including information that endangered human sources, by the website
15 WikiLeaks and Assange, its founder and leader.

16 "WikiLeaks is a website that solicits and publishes documents that have been stolen, obtained
17 by illegal computer hacking, disclosed in violation of law or otherwise obtained illegally. In
18 at least one instance, Assange agreed to assist a member of the US Army in committing
19 an unlawful computer intrusion in order to further the scheme, to steal classified documents
20 from the United States and publish them via WikiLeaks. In addition, Assange did in fact
21 publish classified documents which were stolen from the United States via WikiLeaks,
22 knowing that the documents were unlawfully obtained classified documents, relating to
23 security intelligence, defence and international relations with the United States of America;
24 including documents containing the unredacted names of people who had provided
25 intelligence to the United States and its allies.

26 "By outing these human sources, many of whom lived in war zones or other oppressive
27 regimes, Assange created a grave and imminent risk that the innocent people, he knew, would
28 suffer serious physical harm and/or arbitrary detention. The disclosure of these classified
29 documents was damaging to the work of the security intelligence services of the
30 United States. It damaged the capability of the armed forces of the United States of America
31 to carry out their tasks and endangered the interests of the United States of America abroad.
32 Assange knew publishing them on the internet would be so damaging."

33

1 Introduction, paragraph 5:

2 “These charges relate to one of the largest compromises of classified information in
3 the history of the United States. Between, in or around January 2010 and May 2010, Chelsea
4 Manning, then known as Bradley Manning, an intelligence analyst serving in the US Army,
5 downloaded a vast amount of classified documents. These documents included four nearly
6 complete and largely classified databases with approximately 90,000 Afghanistan war-related
7 significant activity reports, 400,000 Iraq war-related significant activity reports, 800
8 Guantanamo Bay detainee assessment briefs and 250,000 United States Department cables.
9 They also included Iraqi war rules of engagement files. Manning provided these records to
10 WikiLeaks, a website founded and led by Assange. On its website, WikiLeaks expressly
11 solicited classified information for public release. WikiLeaks publicly released many of
12 these classified documents in May 2010 and 2011. Many remain on the WikiLeaks website.

13 “The evidence shows that Assange agreed with Manning to obtain, receive and
14 communicate some of the classified materials discussed above, namely Guantanamo Bay
15 detainee assessment briefs, US Department cables and Iraqi war rules of engagement files.
16 With regard to these sets of classified documents, Assange also encouraged and caused
17 Manning to illegally obtain the documents so that Manning could provide them to Assange.
18 He illegally obtained and received the documents knowing they had been and would be
19 obtained and handled contrary to law and encouraged and caused Manning to illegally
20 communicate, deliver and transmit the documents to Assange.

21 “The evidence also shows that in the course of the above activities, Assange agreed
22 with Manning in March 2010 to crack a password hash stored on the United States
23 Department of Defense computers, connected to the secret internet protocol network, the
24 United States government network used for classified documents and communications. At
25 the time Assange agreed with Manning to crack the password hash, Manning had already
26 provided WikiLeaks with hundreds of thousands of downloaded classified documents,
27 including the Afghanistan war-related significant activity reports and the Iraq war-related
28 significant activity reports. Had Assange and Manning been able to crack the password hash,
29 Manning may have been able to log on to classified computers under a user name that did not
30 belong to her, making it more difficult for investigators to identify Manning as the source of
31 disclosures of classified information to Assange and WikiLeaks. By taking steps to crack the
32 password hash, Assange was also attempting to illegally obtain and receive classified
33 documents.

34 “Separate from the conduct described in the previous two paragraphs, Assange also

1 illegally communicated to the public Afghanistan war-related significant activity reports, Iraq
2 war-related significant activity reports and US State Department cables containing the names
3 of human sources who provided information to the US and coalition forces and of US
4 diplomats. Assange communicated these documents to the public by publishing them on the
5 internet via WikiLeaks, thereby creating a grave and imminent risk that the human sources he
6 named would suffer serious physical harm and arbitrary detention.

7 “Assange knew the disclosure of these classified documents would be damaging to
8 the work of the security and intelligence services of the United States. These disclosures
9 damaged the capability of the armed forces of the United States of America to carry out their
10 tasks and endangered the interests of the United States of America abroad. Manning, a US
11 citizen and member of the US Army, as part of the conspiracy, attempted to gain
12 unauthorised access to the Department of Defense computers located in the United States of
13 America, and did transfer classified documents from those computers to persons not
14 authorised to receive them.

15 “Further, the classified information published by Assange was published in the United
16 States of America and elsewhere through the internet and downloaded in the United States of
17 America and elsewhere.

18 “11. Assange is the public face of WikiLeaks, a website he founded with others as
19 an intelligence agency of the people. To obtain information to release on the WikiLeaks
20 website, Assange encouraged sources to: (1) circumvent legal safeguards and information; (2)
21 provide that protected information to WikiLeaks for public dissemination; and (3) continue
22 the pattern of illegally procuring and providing protected information to WikiLeaks for
23 distribution to the public.

24 “12. The WikiLeaks website explicitly solicited restricted materials; until 2010,
25 classified materials. As the website then stated, WikiLeaks accepts classified, censored or
26 otherwise restricted material of political, diplomatic or ethical significance. Assange
27 personally and publicly promoted WikiLeaks to encourage those with access to protected
28 information, including classified information, to provide it to WikiLeaks for public
29 disclosure. For example, in 2009 Assange and a WikiLeaks affiliate gave a presentation to
30 the 26th Chaos Communication Congress, described by its website as an annual conference
31 attended by the hacker community and others, that is hosted by the Chaos Computer Club
32 which was video recorded and posted online. In the presentation, WikiLeaks described itself
33 as the leading disclosure portal for classified, restricted or legally threatened publications.

34 “To further encourage the disclosure of protected information, including classified

1 information, the WikiLeaks website posted a detailed list of ‘the most wanted leaks of 2009’
 2 organised by a country and stated that the documents or materials nominated to the list must
 3 be ‘likely to have political, diplomatic, ethical or historical impact on release and be plausibly
 4 obtainable to a well-motivated insider or outsider’.

5 “As of November 2009, WikiLeaks’ most wanted leaks for the United States included
 6 the following. (a), bugged databases, including an encyclopaedia used by the United States
 7 intelligence community, called Intellipedia; (b), military and intelligence documents,
 8 including documents that the list described as classified up to the secret level; for example,
 9 Iraq and Afghanistan wars of engagement; operating and interrogation procedures in
 10 Guantanamo Bay.

11 “16. The evidence gathered in the course of the investigation showed that Assange
 12 intended the most wanted leaks list to encourage and cause individuals to illegally obtain and
 13 disclose protected information, including classified information to WikiLeaks, contrary to
 14 law. For example, in 2009, Assange spoke at the Hack In The Box Security Conference in
 15 Malaysia. In a video recording of that speech, Assange referenced the computers capture the
 16 flag hacking contest and noted that WikiLeaks had its own list of flags that it wanted
 17 captured, namely the list of most wanted leaks posted on the WikiLeaks website. Assange
 18 encouraged people to search the list and for those with access to obtain and give to
 19 WikiLeaks information responsive to that list.”

20 Chelsea Manning was an intelligence analyst in the United States Army who was
 21 deployed to a forward operating base, Hammer, in Iraq. According to records from the US
 22 Department of Defense, Manning held the top secret security clearance and signed
 23 a classified information non-disclosure agreement, acknowledging that the unauthorised
 24 disclosure or retention or negligent handling of classified information could cause irreparable
 25 injury to the United States or to be used for the advantage of a foreign nation.

26 According to forensic evidence obtained from the US Department of Defense
 27 computers beginning in at least November 2009, Manning responded to Assange’s
 28 solicitation for classified information made through the WikiLeaks website; for example,
 29 WikiLeaks military and intelligence most wanted leaks category, as described above, and
 30 solicited the CIA detainee interrogation videos.

31 On November 28, 2009, according to forensic evidence obtained from US DoD
 32 computers, Manning searched Intelink, a classified US Department of Defense network
 33 search engine, for “retention plus of plus interrogation plus videos”. The next day, Manning
 34 searched the classified network for “detainee plus abuse” which was consistent with the

1 most wanted leaks request for detainee abuse photographs withheld by the Obama
2 administration, under WikiLeaks' military and intelligence category.

3 On 30 November 2009, according to forensic evidence obtained from Manning's
4 personal computer, an external hard drive was seized from her living quarters at the time of
5 her arrest. Manning saved a text file entitled "WL press.txt" to her external hard drive and an
6 encrypted container on her computer. The file stated:

7 "You can currently contact our investigations editor directly in Iceland; 24-hour
8 service. Ask for Julian Assange."

9 Similar on 8 December 2009, according to forensic evidence obtained from the
10 United States Department of Defense computers, Manning ran several searches on Intelink
11 relating to Guantanamo Bay detainee operations, interrogations and standard operational
12 procedures or SOPs. These search terms were yet again consistent with WikiLeaks'
13 most wanted leaks which sought Guantanamo Bay operating and interrogation SOPs under
14 the military and intelligence category.

15 Between, in or around January 2010 and May 2010, according to forensic evidence
16 obtained from the US Department of Defense computers and Manning's own admission at
17 her court martial, consistent with WikiLeaks' most wanted leaks, solicitation of bulk
18 databases and military and intelligence capacities, Manning downloaded four nearly complete
19 databases from departments and agencies in the United States. These databases contained
20 approximately 90,000 Afghanistan war-related significant activity reports. 400,000 Iraq
21 war-related significant activity reports, 800 Guantanamo Bay detainee assessment briefs,
22 250,000 US Department State cables. According to US Department of Defense records and
23 the markings on the documents themselves, the United States had classified many of these
24 records up to secret level. Manning nevertheless provided the documents to WikiLeaks, so
25 that WikiLeaks could publicly disclose them on its website.

26 On or around 27 May 2010, Manning was taken into military custody forward
27 operating base Hammer in Iraq. Manning was charged in the military court with 22
28 violations of the Uniform Code of Military Justice. On 30 July 2013, Manning was convicted
29 of the bulk of these charges, including unlawfully gathering or transmission of national
30 defence information, computer intrusion and theft of government property. Manning was
31 acquitted of aiding the enemy.

32 Also on about 27 May 2010, the US Army seized Manning's personal computer from
33 her living quarters at FOB Hammer and conducted a forensic examination, pursuant to a
34 search and seizure authorisation issued by the military and magistrate judge. The forensic

1 examination of that computer revealed that Manning had been exchanging instant message
2 communications for months, using the instant message server Jabber, with a person using the
3 Jabber account, “PressAssociation@JabberCCC.DE”. In this affidavit, I refer to those
4 communications as the “Jabber communications”. For the reasons stated below, the evidence
5 demonstrates that the person using the Press Association Jabber was Mr Assange. Therefore
6 in this affidavit, I refer to the person using the Press Association Jabber account as Assange.

7 (d) Assange encouraged Manning to continue her theft of classified documents and
8 agreed to help her crack a password hash to a military computer. During large portions of the
9 same time, between November 2009 when Manning first became interested in WikiLeaks,
10 through her arrest on or about 27 May 2010, according to the Jabber communications and
11 other forensic evidence obtained from Manning’s personal computer, Manning was in direct
12 contact with Assange who encouraged Manning to steal classified documents from the
13 United States and unlawfully disclosed that information to WikiLeaks. In furtherance of the
14 scheme, according to the Jabber communications, Assange agreed to assist Manning in
15 cracking a password hash stored on the United States Department of Defense computers
16 connected to the secret internet protocol network, a United States government network used
17 for classified documents and communications.

18 As background, a US Army forensic expert provided the following information about
19 how a Microsoft Windows operating system, circa 2010, stored passwords. Windows did not
20 store users’ passwords in plain text for security reasons. Instead, the computer stored
21 passwords as hash values. When a user creates a password for the relevant user name, the
22 password passes through a mathematic algorithm which creates a hash value for the
23 password. Essentially the creation of a hash value is in the form of encryption for storing the
24 password. The hash value, not the plain text of the password, is then stored on the computer.
25 As additional security, the computer does not store the full hash in one location; so the hash
26 value for that user name is broken into two parts. One is stored in the Security Accounts
27 Manager, the SAM database, as the SAM registry file. The SAM file in the Windows
28 operating system keeps user names and parts of the password hash associated with the user
29 name. The other part of the password hash is stored in the system file. To obtain the full
30 hash value associated with the password, Windows locks the SAM file and the system file.
31 Only users with administrative level privileges can access SAM and the system files.

32 Manning, who had access to US Department of Defense computers in connection with
33 her duties as an intelligence analyst, was also using the computers to download classified
34 records to transmit to WikiLeaks, according to forensic records from the US Department of

1 Defense computers and from Manning's admissions at her court martial. Army regulations
2 prohibited Manning from attempting to bypass or circumvent security mechanisms on
3 government provided information systems from sharing personal accounts and authenticators
4 such as passwords.

5 The Jabber communication shows that on or about 8 March 2010, after Assange
6 indicated that he was good at hash cracking and that he had a type of tool used to crack
7 Microsoft password hashes, Manning provided Assange with an alpha-numeric string. A US
8 Army forensic expert subsequently examined the secret internet protocol in the net computers
9 used by Manning and determined that the alpha-numeric string that Manning sent to Assange
10 to crack was identical to a password hash stored on the SAM registry file of a secret internet
11 protocol, the source net computer used by Manning that was associated with an account that
12 was not assigned to any specific user.

13 According to the US Army forensic expert, had Manning retrieved the full password
14 hash for that account, that is the hash in the SAM file and the system file, had Assange and
15 Manning successfully cracked it, Manning may have been able to log on to net computers
16 under a user name that did not belong to her. Such a measure would have made it more
17 difficult for investigators to identify Manning as the source of disclosures of classified
18 information.

19 Based on forensic evidence from the US Department of Defense computers and
20 Manning's personal computer, as well as Manning's admissions at her court martial, prior to
21 the formation of the password cracking agreement, Manning had already provided WikiLeaks
22 with hundreds of thousands of documents classified at the secret level that she had
23 downloaded from departments and agencies in the United States, including Afghan
24 war-related significant activity reports and Iraq war-related significant activity reports.

25 Based on the Jabber communications, it is clear Assange knew, understood and fully
26 anticipated that Manning was taking and illegally providing WikiLeaks with classified
27 records containing national defence information of the United States that she was obtaining
28 from classified databases, and was knowingly receiving such classified records from
29 Manning for the purpose of publicly disclosing them on the WikiLeaks website. Such
30 knowledge and intent is clear from the Jabber communications and those are then all set out.

31 Accordingly, it is clear that Assange entered into the password cracking agreement
32 with Manning for the purpose of assisting and joining Manning's ongoing efforts to steal
33 classified information from US government computers.

34 (e) At Assange's direction and agreement, Manning continued to steal classified

1 documents and provide them to Assange. According to forensic evidence obtained from the
2 Department of Defense computer and Manning's personal computer, as well as Manning's
3 admissions made at her court martial, following Assange's "curious eyes never run dry"
4 comment, on or about 22 March 2010, consistent with WikiLeaks' most wanted leaks,
5 solicitation and Iraq and Afghanistan US Army rules of engagement. As described above,
6 Manning downloaded multiple Iraq rules of engagement files from her secret internet
7 protocol net computer and burned these files to a CD and provided them to Assange and
8 WikiLeaks. On 5 April 2010, WikiLeaks released on its website the rules of engagement
9 files that Manning had provided. It titled four of the documents as follows, and those are
10 then set out.

11 Paragraph 37. At the time Assange agreed to receive and received from Manning the
12 classified Guantanamo Bay detainee assessment briefs, the US Department of State cables
13 and the Iraq rules of engagement files, Assange knew that Manning had unlawfully obtained
14 and disclosed or had unlawfully disclosed such documents. This conclusion is based, among
15 other evidence, not only on the fact that Assange already received thousands of
16 military-related documents classified up to secret level from Manning, but also on the Jabber
17 communications which show that Manning and Assange chatted about military jargon, made
18 references that suggested that Manning was a government and military source, discussed the
19 releasability of certain information by Assange, discussed measures to prevent the discovery
20 of Manning as Assange's source, such as cleaning logs and use of a crypto phone and
21 discussed a code phrase to use if something went wrong.

22 Assange revealed the names of human sources and created grave and imminent risk to
23 human life. Also following Manning's arrest during 2010 and 2011, Assange published, via
24 the WikiLeaks website, documents classified up to secret level that he had obtained from
25 Manning, including approximately 75,000 Afghan war-related significant activity reports,
26 400,000 Iraq war-related significant activity reports, 800 Guantanamo Bay detainee
27 assessment briefs and 250,000 US Department of State cables.

28 The significant activity reports from the Afghanistan and Iraq wars that Assange
29 published included names of local Afghans and Iraqis who had provided information to US
30 and coalition forces. The State Department cables that WikiLeaks published included the
31 names of persons throughout the world who had provided information to the US government,
32 in circumstances in which they could readily expect their identities would be kept
33 confidential. These sources included journalists, religious leaders, human rights activists and
34 political dissidents who were living in oppressive regimes and reported to the United States

1 the abuses of their own governments and the political conditions within their countries, at
 2 great risk to their own safety. According to information provided by people with expertise in
 3 military intelligence and diplomatic matters, as well as individuals with expert knowledge of
 4 the political conditions and governing regimes of the countries in which some of these
 5 sources were located, by publishing these documents without redacting the human sources’
 6 names or other identifying information, Assange created a grave and imminent risk that the
 7 innocent people he named would suffer serious physical harm and/or arbitrary detention.

8 On 2 May 2011, the United States armed forces raided the compound of Osama bin
 9 Laden in Abbottabad, Pakistan. During the raid, they collected a number of digital media,
 10 which included the following: a letter from bin Laden to another member of the terrorist
 11 organisation of al-Qaeda, in which bin Laden requested the member gather the Department of
 12 Defense material posted to WikiLeaks; a letter from the same member of al-Qaeda to bin
 13 Laden with information from the Afghanistan war documents provided by Manning to
 14 WikiLeaks and released by WikiLeaks; (3) Department of State information provided by
 15 Manning to WikiLeaks and released by WikiLeaks. The information published by Assange
 16 was useful to an enemy of the United States of America.

17 The following are examples of significant activity reports related to the Afghanistan
 18 and Iraq wars that Assange published without redacting the names of human sources who are
 19 vulnerable to retribution by the Taliban in Afghanistan or the insurgency in Iraq.

20 (a) Classified document C1 was a 2007 threat report containing details of a planned
 21 anti-coalition attack at a specific location in Afghanistan. Classified document C1 named the
 22 local human source who reported the planned attack. It was classified as secret. Classified
 23 document C2 was a 2009 threat report identifying a person who supplied weapons at
 24 a specific location in Afghanistan. Classified document C2 named the local human source
 25 who reported the information; again classified secret. Classified document D1 was a 2009
 26 report, discussing an improvised explosive device IED attack in Iraq. Classified document
 27 D1 named the local human sources who provided information on the attack. Classified D1
 28 again was classified as secret. Classified document D2 was a 2008 report that named a local
 29 person in Iraq who had turned in weapons to coalition forces and had been threatened
 30 afterwards; again, classified as secret.

31 The following are examples of State Department cables that Assange published
 32 without redacting the names of human sources who were then vulnerable to retribution.
 33 Classified document A1 was a 2009 State Department cable, discussing the political situation
 34 in Iran. Classified document A1 named a human source of information located in Iran and

1 indicated the source's identity needed to be protected; classified as secret.

2 Classified document A2 was a 2009 State Department cable discussing the political
3 dynamics in Iran. Classified document A2 named a human source of information who
4 regularly travelled to Iran and indicated the source's identity needed to be protected;
5 classified as secret.

6 Classified document A3 was a 2009 State Department cable discussing issues related
7 to ethnic conflict in China. Classified document A3 named a human source of information
8 located in China and indicated the source's identity needed to be protected; again, classified
9 as secret.

10 Classified document A4 was a 2009 State Department cable discussing relations
11 between Iran and Syria. Classified document A4 named human sources of information
12 located in Syria and located the source's identity needed to be protected; classified as secret.

13 Classified document A5 was a 2010 State Department cable discussing human rights
14 issues in Syria. Classified document A5 named a human source of information located in
15 Syria and indicated the source's identity needed to be protected; classified as secret.

16 Although the charged crimes do not require the United States to prove that
17 WikiLeaks' disclosures caused actual harm to named sources, it is worth noting the
18 following.

19 Upon learning that WikiLeaks had possession of classified documents stolen from the
20 United States, the United States government devoted enormous resources to identifying
21 people who would be put at risk, if and when WikiLeaks outed them as being sources for the
22 United States. The United States identified hundreds of at risk and potentially at risk people
23 and made efforts to warn these people. Upon being warned, a number of these people
24 expressed fear of retribution and were relocated from their countries with the assistance of the
25 United States. Some people deemed at risk could not be located.

26 Other at risk people were not warned because the United States assessment was that
27 the act of warning might draw further attention to their relationship with the United States
28 and thus put them in more danger. The United States is aware of sources that used
29 unredacted names or other identifying information that was contained in classified documents
30 published by WikiLeaks who subsequently disappeared; although the United States cannot
31 prove at this point that their disappearance was as a result of being outed by WikiLeaks.

32 (g) Assange knew that the dissemination of the names of sources endangered these
33 individuals. In a recorded interview given at the Frontline Club in London in August 2010,
34 Assange called it regrettable that sources disclosed by WikiLeaks may face some threat as

1 a result, but in the same interview Assange insisted “We are not obligated to protect other
2 people’s sources, military sources or spy organisation sources, except from unjust
3 retribution”. He added in general, “There are numerous cases where people sell information
4 or frame others or are engaged in genuinely traitorous behaviour and actually that is
5 something for the public to know about.”

6 Assange also noted that his publication of the State Department cables endangered
7 sources who he named as having provided information to the State Department. In a letter
8 dated 27 November 2010 from the State Department’s legal adviser to Assange and his
9 counsel, Assange was informed, amongst other things, that the publication of the State cables
10 would “place at risk the lives of countless innocent individuals, from journalists to human
11 rights activists, bloggers to soldiers, to individuals providing information to further peace and
12 security”.

13 Prior to his publication of the unredacted State Department cables, Assange claimed
14 that he intended to gradually roll the cables out in a safe way by partnering with mainstream
15 media outlets, reading through every single cable and redacting identities accordingly.
16 Nonetheless, while Assange and WikiLeaks published some of the cables in redacted form
17 beginning in November 2010, they published over 250,000 cables in September 2011 in
18 unredacted form; that is, without redacting the names of the innocent human sources.

19 On 30 July 2010, the New York Times published an article titled “Taliban Study
20 WikiLeaks to Hunt Informants”. The article stated that after the release of the Afghan
21 war-related significant activity reports, a member of the Taliban contacted the
22 New York Times and stated: “We are studying the report. We know about the spies and
23 people who collaborate with the US forces. We will investigate through our own secret
24 service whether the people mentioned are really spies working for the US. If they are US
25 spies, then we will know how to punish them.”

26 When confronted with such reports, in a recorded interview with 60 Minutes, Assange
27 said: “The Taliban is not a coherent outfit, but we don’t say that it is absolutely impossible
28 that anything we ever publish will ever result in harm. We can’t say that.” Evidence that
29 Assange used Jabber to communicate with Manning is then set out in the request; the forensic
30 examination that proves that point.

31 I need not deal with the procedural history of the case, but I should say something
32 about the charges and pertinent US law; picking it up at paragraph 53. On 21
33 December 2017, a federal magistrate judge in Alexandria, Virginia, issued a criminal
34 complaint charging Assange with conspiracy, entitled “Violation of title 18”. And then on

1 6 March 2018 a federal grand jury in Alexander returned an indictment, which is the
2 superseding indictment, charging Assange with conspiracy. Sorry, this is superseded. In
3 2019, 23 May, a federal grand jury in Alexander, Virginia, returned a superseding indictment
4 charging Assange with the following crimes.

5 Count 1, conspiracy to obtain, receive and disclose national defence information.

6 Madam, it may be helpful, just while keeping a finger in page 23, if you go to exhibit 3 in the
7 request, you will see that the relevant American statutes are set out.

8 JUDGE BARAITSER: Yes, I have them. Thank you.

9 MR LEWIS: It is not paginated, madam, but it is exhibit 3. It is just a few pages from the
10 back.

11 JUDGE BARAITSER: Yes, internal page 17.

12 MR LEWIS: And you will see, on the second page of exhibit 3, it sets out title 18, US code
13 793.

14 Madam, just to put this in context. You will see that section 793 has (a), which is the
15 purpose of the section, and then 793, there is (b), (c), (d), (e), (f) and (g). If we just keep
16 a finger in that page, when we come back to looking at the United States law, you can see
17 how the counts are set out.

18 So if we go back to page 23, while keeping open exhibit 3, the superseding indictment
19 has Count 1. That is the conspiracy count, contrary to section 793(g). Madam, you will see
20 that is on the second page.

21 JUDGE BARAITSER: Yes.

22 MR LEWIS: And that is (g): “If two or more persons conspire to violate any of the
23 foregoing provisions of this section.” So there is a statutory conspiracy there, under that
24 section. Back to paragraph 55. Counts 2 through 4, unauthorised obtaining of national
25 defence information in violation of 793(b). And again, if you just look at (b). This
26 effectively is an aiding and abetting account of what Manning has already been convicted of,
27 which is because Manning made copies and obtained matters connected with national
28 defence. If we go back to counts 5 through 8, that is under 793(c). And the relevant
29 provision there, just so you understand, is: “Wherefore and for the purposes aforesaid,” that
30 is 793(a), “received or obtained.” So that is Mr Assange receiving it from Manning.

31 Counts 9 through 11 is 793(d): “Whoever lawfully having possession of or access to
32 or control over [and that is Manning] the information, transmits or caused to be committed,
33 delivered or transmitted the same to any person not entitled to receive it.” So that is aiding
34 and abetting the transmission from Manning to Assange. Counts 12 through 14, back on

1 page 24, that is 793(e); this is against Mr Assange himself, because this is whoever has
 2 unauthorised possession. So when one looks at 793(e), it is having unauthorised possession
 3 of, and then communicates or delivers that to anyone else. So that is the dissemination count.
 4 He is in unauthorised possession.

5 Counts 15 through 17; this is 793(e) again, but these are the actual counts which deal
 6 with the dissemination. So once they are in the possession of Mr Assange, he unauthorisedly
 7 discloses them to the public. And Count 18 is the conspiracy to commit computer misuse.

8 So these are then set out in more detail, and these I will take a little bit more quickly,
 9 if we go to page 25 of the request, paragraph 59. You will see Count 1. And it sets out that
 10 Count 1 of the superseding indictment charges Assange with conspiracy to obtain, receive or
 11 disclose national defence information. And it sets out the law of conspiracy which is
 12 identical to the law in the United Kingdom. Almost classic directions which we would give
 13 in this jurisdiction. And at 16, acts in furtherance are admissible, as they are in this
 14 jurisdiction. And it then sets out what is needed to convict Assange of conspiracy to obtain.
 15 And what is needed is set out in 62. This is under the American law:

16

17 “That Assange entered into agreement with one or more persons
 18 to accomplish at least one of the illegal objectives charged in the
 19 superseding indictment; here, to obtain, receive or disclose
 20 national defence information without authorisation. (b) Assange
 21 knew the unlawful purpose of the agreement. (c) Assange
 22 knowingly became a member of the conspiracy to commit at
 23 least one of the underlying offences. (d) Assange or another
 24 co-conspirator committed at least one overt act in furtherance of
 25 the conspiracy.”

26

27 In fact, that is just slightly different from English law and under English law we do
 28 not even need an overt act; we simply need an agreement. But at paragraph 63, it sets out
 29 that: “An overt act is any action taken to further an objective of the conspiracy. The
 30 government is not required to prove that the defendant personally did one of the overt acts,”
 31 and then dropping down:

32

33 “As detailed in the superseding indictment, the United States
 34 will establish that, beginning in at least 2009, Assange conspired
 35 with Manning in order to unlawfully receive classified
 36 documents stolen from the United States, encouraged Manning
 37 to steal classified documents from the United States and
 38 provided them to Assange and WikiLeaks and agreed to assist

1 Manning in cracking a password hash stored on the
2 United States Department of Defense computers connected to
3 SIPNet.”

4
5 There is then, at paragraph 65, counts 2 to 4 which we have already looked at in
6 exhibit 3, and it sets out what is needed to be proved; the same as counts 5 to 8, beginning at
7 paragraph 70; and again, at 74, counts 9 to 11. Of course, none of these matter to this court,
8 because it is all American law. Paragraph 78, counts 12 to 14. And then we have the
9 dissemination counts, which are the unredacted names of sources, which are counts 15, 16
10 and 17. They are set out at paragraph 81. And the final count is Count 18, which begins at
11 paragraph 85, which is almost identical to that in the United Kingdom computer misuse and it
12 is charged as a conspiracy.

13 Madam, those are the words I wanted to set out in opening. The next step will, in
14 fact, be - and I note the timing, it is almost perfect - the extradition offence.

15 Now, having spoken to my learned friend about that, he is content that I open the
16 extradition offence, subject to the court’s better view, and then before he opens the case. But
17 if you would like me to stop now and let Mr Fitzgerald ---

18 JUDGE BARAITSER: No, I think it would be very helpful if you open ---

19 MR FITZGERALD: Madam, I obviously cannot stop my friend, if he wants to deal with
20 extradition crime.

21 JUDGE BARAITSER: I would like to hear from him on that.

22 MR FITZGERALD: But I understand your timetable was different. But we would deal with
23 that ---

24 JUDGE BARAITSER: Opening by the defence, including the summary abuse response, and
25 then the extradition offence. My view is, in fact, it would be better to hear from him now on
26 that issue. Do you both agree?

27 MR LEWIS: Yes, madam. It will make more sense because having just opened the facts,
28 and while they are now fresh in everyone’s minds, one can see the transposition exercise
29 which is required to the English offences.

30 JUDGE BARAITSER: That would be helpful. Mr Lewis, it is 11.30. Would you like to
31 continue or would you like a break?

32 MR LEWIS: I would like a 10 minute break. People are probably fed up with the sound of
33 my voice.

34 JUDGE BARAITSER: So be it. 11.45, then back in court. Thank you.

1 (The court adjourned at 11.28)

2 (The court reconvened at 11.47)

3 JUDGE BARAITSER: Thank you. Just so that you know, Mr Lewis, the protesters are on
4 public land and not in the precinct of the court building; so in terms of noise, there is nothing
5 we can do about it. Yes?

6 MR LEWIS: Madam, my team ---

7 JUDGE BARAITSER: Ah yes, indeed.

8 MR LEWIS: Madam, just on that one point of information. Being public, it was completely
9 irrelevant. If one needs authority, the Court of Appeal in the case of Tommy Robinson, who
10 was dealt with for contempt, held that the street outside the court in Leeds and the public
11 precinct, it was all part of the precinct, notwithstanding that it was the shopping centre. So
12 madam, it is entirely a matter for the court to decide what constitutes the precinct and that is
13 what the Court of Appeal held. I do not think it really matters in this case, but I am just
14 giving ---

15 JUDGE BARAITSER: Well, if you find it disturbing or disruptive, let me know, and
16 perhaps you can quote chapter and verse in relation to my powers and I will consider it then.

17 MR LEWIS: Certainly.

18 UNIDENTIFIED SPEAKER: Mr Lewis, we are still having problems with the microphone,
19 particularly the press. If you carry on, but if you let them know what the ---

20 MR LEWIS: It is this microphone.

21 JUDGE BARAITSER: Thank you, Mr Assange. Please have a seat. Mr Lewis?

22 MR LEWIS: Madam, I was just asked to correct one matter, which I will do shortly now,
23 although we will have to turn to it perhaps in more depth, when I object to the evidence of
24 Mr Eller. But if I can explain it in this way. A criticism was made about the use of the words
25 “part hash”.

26 JUDGE BARAITSER: Mmm.

27 MR LEWIS: And we accept it could be described as encrypted part hash.

28 JUDGE BARAITSER: Mmm.

29 MR LEWIS: So the addition of one word, “encrypted”. Because, madam, as you know, if
30 you have got a password, and under Windows, and this was the old system before XP, it runs
31 through an algorithm which produces a hash value. And the hash value is then also
32 separately encrypted and there is a key to the encryption in the SAM file. So you need, in
33 order to do it easily, both. We do not say it is impossible with one being the encrypted hash,
34 but it is right that it could be described, instead of simply “part hash”, as the encrypted part.

1 JUDGE BARAITSER: All right.

2 MR LEWIS: But we will deal with that in due course. Madam, what we have provided for
3 you, I think you should now have the authorities. It should be ---

4 JUDGE BARAITSER: Ah, here we are.

5 MR LEWIS: Six bundles.

6 JUDGE BARAITSER: Yes, right.

7 MR LEWIS: We are only going to look at authority bundles 1 and 2 of abuse, because the
8 relevant authorities are in there. So if you can have those to hand; it would be helpful.

9 Now, can I begin in this way, because it is very important that there is a proper approach to
10 the extradition offence and its determination. And what we would respectfully submit is
11 crucially important for this court is not to elide two separate concepts. My learned friend, we
12 say, consistently seeks to do this in his written arguments and it is a fundamental error.

13 The first concept is extradition crime, and the second and wholly distinct concept is
14 abuse of process. And what it is not possible to do is, by the back door of alleging abuse of
15 process, alter the conduct against which to test whether the conduct amounts to an extradition
16 crime. And that approach, namely eliding an abuse of process conduct with conduct set out
17 in the request, against which to test the extradition offence, is not permissible as a matter of
18 law.

19 Now, the important fact for this court is that in extradition proceedings, the conduct is
20 taken from the request and solely from the request. It is not taken from the defence or how
21 the defence would like it to be put. And we respectfully say that proposition of law is
22 unassailable and has been somewhat confused by the defence.

23 Now, we set it out in our skeleton argument to the court. It is section A, under “Dual
24 criminality, extradition offence”, paragraphs 13 to 24.

25 But before I turn to that, can I just set out the statutory and juridical basis for the
26 submissions which I have just made? The easiest starting point is to look at section 137.7(a).
27 I apologise in advance for inundating you with paper, but it appeared to me last night, when
28 I was going through the matters, that you did not have a statutory ---

29 JUDGE BARAITSER: Fortunately I have a copy of the Extradition Act.

30 MR LEWIS: You do. There is a file here if you want it, madam. It also has the Official
31 Secrets Act 1911 and the Official Secrets Act 1989 and I do not ---

32 JUDGE BARAITSER: Well, you refer to those in your opening note, in any event.

33 MR LEWIS: I am sorry, madam?

34 JUDGE BARAITSER: You refer to those statutes in your opening note, in any event.

1 MR LEWIS: I do.

2 JUDGE BARAITSER: And they are easily accessible.

3 MR LEWIS: I am obliged. It is just in case you needed them to look at them, because we
4 might go through them in a little detail. But if we start with section 137.7(a), which is
5 an amendment to the Extradition Act, and I will just draw the court's attention to that.
6 Madam, if you have it, I have got a Queen's Printers copy here of the Act.

7 JUDGE BARAITSER: Yes.

8 MR LEWIS: Section 137.7(a); reference in this section to conduct, excepting the expression
9 of equivalent conduct which does not apply, are to the conduct specified in the request for the
10 person's extradition. So there is a statutory and mandatory approach to determining
11 extradition crime.

12 And just to make that good, can I just show you one or two authorities? If we go to volume 1
13 in the abuse authorities, tab 15, *Office of the King's Prosecutor v Cando Armas*.

14 JUDGE BARAITSER: Volume 1, tab?

15 MR LEWIS: Tab 15, madam. And I just want to draw your attention to paragraph 16.

16 JUDGE BARAITSER: Sorry, just pause for one moment. My volume 1 goes to tab 12. Do
17 I have a different numbering to you?

18 MR LEWIS: Can I just check that you are looking at the abuse authorities, rather than the
19 political offence?

20 JUDGE BARAITSER: The political offence? Tab 15. Thank you.

21 MR LEWIS: So madam, if we turn to it. I have had to move the microphone, because it does
22 not pick up. Can it not be made any more sensitive? Well, I will try it on the end of the
23 bench. OK, right.

24 So this is one of the earlier cases of the 2003 Act; and in passing, madam, you will see that
25 both myself and my learned friend were in this case. And I just pick it up in the speech of
26 Lord Bingham at paragraph 16: "Although this is dealing with a part 1 case, sections 64 and
27 65 are in pari materia with section 137 of the Act."

28 JUDGE BARAITSER: Mmm.

29 MR LEWIS: 16: "I would accept the submission of counsel for the prosecutor that the
30 conduct in section 65 means the conduct complained of or relied on in the warrant."

31 And in this case, we would have to substitute the word "request": "Such a reading is
32 consistent with the language and purpose of the framework decision." And it is consistent
33 with *Nilsson*.

34 If we then turn in the same volume to *Evans*, which is at tab 4, the case I mentioned in

1 my opening remarks; and just pick it up at page 1012; between E and F. Although this was
2 under the 1989 Act, it applies with equal force.

3 JUDGE BARAITSER: Yes.

4 MR LEWIS: Between the two perforations, 1012, between E and F:

5

6 “The Chief Metropolitan Stipendiary Magistrate, sitting as the
7 court of committal, refused to allow the applicant to call
8 evidence, and being satisfied that the offences with which the
9 Secretary of State’s authority could proceed with related to
10 extradition offences, committed the applicant on bail to await
11 the Secretary of State’s decision as to his return. It is now
12 submitted that the magistrate ought to have allowed the
13 applicant to call evidence for the purpose of the magistrate’s
14 determination in accordance with section 9.8 of the Act.”

15

16 And if we go over the page and pick it up between B and C, you will see: “For the
17 purposes of the court of committal, the conduct or facts are those set forth in the request for
18 extradition.” And notwithstanding the defence application to put in matters, if we go over the
19 page, 1014, just above B: “Again, the magistrate is not concerned with the proof of facts, the
20 possibility of other relevant facts or the emergence of any defence. These are matters for the
21 trial in a foreign state.” And if we just go to bundle 2 in the abuse authorities, there are two
22 cases I will just show you, madam.

23 The first is at tab 22, which is a decision of the House of Lords in *Norris*. So it is
24 volume 2, tab 22. And I just want to pick it up at paragraph 79. Do you have that, madam?

25 JUDGE BARAITSER: I do, yes.

26 MR LEWIS: At 79. So it is a case dealing with the 2003 Act, in the House of Lords, 79; the
27 *Office of the King’s Prosecutor* which we have just looked at.

28 JUDGE BARAITSER: Yes.

29 MR LEWIS: It drops down: “The conduct occurred in the category 1 territory and no part of
30 it occurs in the United Kingdom. Lord Bingham of Cornhill said at paragraph 16,” and he
31 sets out what I have just shown you, madam, in that case; and at 80, Lord Hope of Craighead
32 similarly said, at paragraph 30: “The judge need not concern himself with the criminal law of
33 the requesting state, when he is addressing the question of whether the offence specified in
34 the part 1 warrant is an extradition offence.”

35 So you are only looking at the English side, in order to test the conduct against
36 English law. Madam, to make good the submission that it is wrong to elide the concepts, can

1 I take you to the case of *Shlesinger*, which is in the same volume at tab 38? And this is
2 a judgment given by the President. I will just pick it up at paragraph 5:

3

4 “For the purposes of deciding whether the offence specified in
5 the request is an extradition offence, the test of dual criminality
6 has to be applied in a part 2 case. Under section 137 of the 2003
7 Act, the court has to consider whether the conduct alleged
8 against him is an offence in a part 2 state and also constitutes
9 an offence under the law of the relevant part of the
10 United Kingdom, punishable with imprisonment or another form
11 of detention for a term of 12 months or more. It is clear from
12 the decision in *Norris*, paragraph 91 [which we just looked at],
13 the court must look at the conduct alleged in the documentation
14 constituting the request to see if the conduct constitutes
15 an offence under the law of the United Kingdom.”

16

17 And then go over to paragraph 11. You can see how it is on the other side in this
18 particular one, at paragraph 11:

19

20 “It was submitted by counsel on the respondent’s behalf that in
21 determining whether the conduct alleged in the extradition
22 request constituted an offence under the law of England and
23 Wales, it was permissible for the court to consider extraneous
24 evidence served by the requested person. He accepted there was
25 no authority to this effect, but contended it must be open to the
26 court to receive such evidence, as to whether the conduct
27 constituted an offence under the law of England and Wales
28 would not be determined in the state to which he was returned.
29 He submitted that the decision was analogous to the position
30 that arises when the court considers bars to extradition, such as
31 those related to human rights, the rule against double jeopardy,
32 the passage of time and other matters set out in the 2003 Act. In
33 such cases, the court always receives evidence from the
34 requested person.

35

36 “We cannot accept that submission. It is clear that the
37 scheme of the Act and such authority as it is, leads to the very
38 clear conclusion that in determining the issue of dual criminality
39 the court examines the documents constituting the extradition
40 request. It determines the basis on the material whether the
41 conduct alleged in the documents constitutes an offence under
42 the law of England and Wales. It is not permissible for
43 a requested person to put in evidence contradicting what is set
44 out in the extradition request, unless he can put himself in the
very narrow exception which is referred to at 14.”

45

1 That has been superseded by Zakrzewski abuse. “The court must proceed to
2 determine the issue of dual criminality on what is set out in the extradition request alone.” So
3 madam, it is quite clear, in our respectful submission, that when one is looking at extradition
4 offence, all one looks at is that it is set out in the request and the accompanying documents
5 presented on behalf of the requesting states. So can I just pick that up from our skeleton? If
6 we go to our skeleton argument, which is at the prosecution core bundle, tab 5.

7 JUDGE BARAITSER: In fact, it has been rather helpfully amalgamated into another
8 document, called the “submissions bundle”. I wonder if I can use that. It includes both your
9 submissions and the defence submissions in one bundle.

10 MR LEWIS: Right.

11 JUDGE BARAITSER: So I have it.

12 MR LEWIS: Yes. I will give you the references to that, then; or someone will help me with
13 those.

14 JUDGE BARAITSER: Thank you, tab 1. If you would rather use your own, I am happy for
15 that to ---

16 MR LEWIS: No, I am more than happy to make it convenient for the court. So it is our
17 skeleton argument, which is at tab 6.

18 JUDGE BARAITSER: All right. Could I just ask whether you are dealing, not only with
19 dual criminality, but also with the abuse now; or are you just confining yourself with dual
20 criminality?

21 MR LEWIS: I am not, madam. I am simply dealing with the dual criminality. But to set the
22 scene, I simply wanted to point out that as you will see from our skeleton argument, that there
23 is a bright line between the two.

24 JUDGE BARAITSER: Yes.

25 MR LEWIS: So that one only refers to the material which is set out in the request and in
26 accompanying documents; and that is the sole juridical basis for determining the extradition
27 offence. So if we pick it up in our skeleton argument, just to make that good; although this is
28 in the abuse side, it simply points that out. If you go to paragraphs 20 to 24.

29 JUDGE BARAITSER: Yes.

30 MR LEWIS: Madam, you will see we have referred to in our written argument at paragraph
31 21.3.77(a), and at 22 we make the observation, “There is a bright line between determining
32 an extradition offence and any abuse of process application”. We will deal with the *Sakresky*
33 type of abuse separately, but it is a separate submission. So all we look at now is what is in
34 the request. No ---

1 JUDGE BARAITSER: This is because the statutory paperwork that the defence refer to in
2 their abuse argument is the dual criminality issue. That is why you are referring to it now, is
3 that right?

4 MR LEWIS: Yes. Madam, it appears to be that the defence wish to use some of the
5 evidence which they have submitted as material upon which you should test extradition
6 crime. I am pointing out you cannot do that. If the information or evidence comes within the
7 very narrow abuse position, you look at it for an abuse but it is completely irrelevant to
8 extradition crime; so that all we are doing at the moment, and the only exercise you can carry
9 out as a matter of law, is look at the request and see if that contains matters which are
10 sufficient to demonstrate conduct, if it had occurred in the United Kingdom, that would
11 amount to a crime here carrying more than 12 months.

12 JUDGE BARAITSER: Yes. And part of the abuse, the narrow abuse raised by the defence,
13 has to be pinned, in effect, to a statutory provision and the provision they are pinning it to, it
14 seems, is the dual criminality issue and you are saying that is wrong.

15 MR LEWIS: It is obviously wrong, madam. I do not think my learned friend will go as far
16 as to say he is doing that. I do not think he will say he is pinning it to a statutory provision.
17 They are going to run it as a general abuse of process argument, but there is no way in which
18 we would respectfully say that it opens up the door at all.

19 JUDGE BARAITSER: All right.

20 MR LEWIS: There is no jurisdiction in this court to test what I am about to show you other
21 than against the request and supporting information, full stop.

22 JUDGE BARAITSER: Well, if as part of their abuse they are not concerned with the dual
23 criminality provisions, then I do not need to consider the abuse aspect of this submission yet.

24 MR LEWIS: That is correct.

25 JUDGE BARAITSER: I can confine myself to the offences.

26 MR LEWIS: There is no abuse at the moment raised.

27 JUDGE BARAITSER: All right.

28 MR LEWIS: And we say, as a matter of law, they cannot raise abuse at this point. It has got
29 nothing to do with extradition crime that, as you will see from the judgment of Lord
30 Sumption, the abuse is the sole juridical basis for abuse.

31 JUDGE BARAITSER: All right. In that case, let me hear your submissions in relation to
32 extradition offence.

33 MR LEWIS: Yes. For the avoidance of doubt, for example, what you cannot do at this point
34 is look at Mr Eller's evidence for this test. It cannot come in at all for extradition offence and

1 I will be surprised if my learned friends argue to the contrary. So we test the conduct in the
2 request against English criminal law and if we have the prosecution opening note handy,
3 which is the one which was originally ---

4 JUDGE BARAITSER: It is at tab 1 of the combined bundle.

5 MR LEWIS: Tab 1 of the combined bundle. I am going to use mine, which is marked. Tab
6 1 of the combined, and if we look at paragraphs 28 to 63 which deal with the equivalent
7 offences. Madam, you will see there is a subheading at page 8 of that bundle headed,
8 “Offences this conduct could constitute had it occurred in England”. The first one is
9 “soliciting, aiding or abetting an offence contrary to section 1 of the Official Secrets Act”.

10 Madam, I do not know if you have the Official Secrets Act handy?

11 JUDGE BARAITSER: Well, I have them electronically. It is easier to have them in hard
12 copy. If you have a spare copy, I am very happy to receive it.

13 MR LEWIS: We do. There is also the Computer Misuse Act there for completeness.

14 JUDGE BARAITSER: Thank you. Yes. What are you looking at first, then?

15 MR LEWIS: So if we look at section 1 of the 1911 Act.

16 JUDGE BARAITSER: Yes.

17 MR LEWIS: “Penalties for spying”, this is 1(1), “If any person for any purpose prejudicial to
18 the safety or interests of the State,” and at (c), “obtains or communicates to any other person
19 any secret official code word or password ... or other document or information which is
20 calculated to be or might be intended to be directly or indirectly useful to an enemy; he shall
21 be guilty of felony.” Madam, you will remember there is an express provision in the request
22 which I read out when it dealt with the material found on the raid in Pakistan of Osama bin
23 Laden’s compound and, therefore, it expressly states that the information was useful to an
24 enemy.

25 Subsection (2), “On a prosecution under this section, it shall not be necessary to show
26 the accused person was guilty of any particular act tending to show a purpose prejudicial to
27 the safety or interests of the State,” and there is a deeming provision. The way in which the
28 Government has put this matter as an extradition offence is to charge it as a solicitation or an
29 aiding and abetting of Chelsea Manning committing what would be conduct contrary to
30 section 1 of the Official Secrets Act. So if we go back to our written opening ---

31 JUDGE BARAITSER: Can I just ask you, Mr Lewis, if obtaining is one of the conduct
32 which amounts to the offence, is it not by virtue of any external person obtaining the
33 information enough?

34 MR LEWIS: It is.

1 JUDGE BARAITSER: So even without aiding and abetting somebody else obtaining, which
2 is what is alleged here, the mere fact of, for example, a newspaper outlet obtaining the
3 information, provided the other criteria are satisfied, would be enough, is that your reading of
4 this section?

5 MR LEWIS: It is potentially wide enough. Can I just have one moment, madam?

6 JUDGE BARAITSER: Yes.

7 MR LEWIS: I do not want to overstretch. I am helpfully pointed out by Ms Dobbin, as we
8 say at paragraph 32 the principal offence can be committed by a British citizen or British
9 officer anywhere. Obviously, in corresponding circumstances, because Chelsea Manning, the
10 request says she was a US citizen and a soldier, that brings in the equivalent circumstance.
11 But to answer your specific question, the section may well be wide enough to catch anyone
12 who obtains by any means.

13 JUDGE BARAITSER: Is there a limiting section?

14 MR LEWIS: No.

15 JUDGE BARAITSER: Which requires a British citizen, for example.

16 MR LEWIS: Under normal circumstances, the limit would be, madam, under normal
17 jurisdictional provisions, that an offence is only committed territorially or if the statute
18 stipulates extraterritorially in certain circumstances. There is a line of jurisprudence from *Air*
19 *India v Wiggins* to *Stonehouse v DPP* say effectively all crime is local so that you would start
20 off by saying this would only occur in the territory of England and Wales.

21 There is a provision which allows it to include anyone who is a British citizen or
22 British officer. In fact, it is section 10. It is page 8 of that printed copy. There is a
23 jurisdictional provision that the "Act shall apply to all acts which are offences under this Act
24 when committed in any part of [Her] Majesty's dominions" because it is a pre-empire Act,
25 "or when committed by British Officers or subjects elsewhere".

26 JUDGE BARAITSER: So it would not apply in these circumstances because Julian Assange
27 is not a US citizen?

28 MR LEWIS: Ah, no, it does, no, no. It applies because he is aiding and abetting ---

29 JUDGE BARAITSER: Oh, yes, in that sense, yes.

30 MR LEWIS: So he himself ---

31 JUDGE BARAITSER: But in my question the answer would be no.

32 MR LEWIS: He himself would not be guilty.

33 JUDGE BARAITSER: Yes.

34 MR LEWIS: But a conspiracy to ---

1 JUDGE BARAITSER: Yes.

2 MR LEWIS: --- or aiding and abetting would.

3 JUDGE BARAITSER: My question was would he himself and the answer is no because he
4 is not a US citizen but he is, nevertheless, you say, aiding and abetting somebody else.

5 MR LEWIS: Yes.

6 JUDGE BARAITSER: I see.

7 MR LEWIS: That is exactly right.

8 JUDGE BARAITSER: All right. Yes.

9 MR LEWIS: So it is limited to, as one can see in our written argument, soliciting, aiding or
10 abetting an offence. He is not charged as principal. At paragraph 34, we summarise the
11 allegations which can be distilled from the request and, rather than take you back to the
12 request, can I just highlight those,

13

14 “Chelsea Manning, a US citizen and serving soldier, obtained
15 and communicated to Mr Assange documents and information
16 which were or might have been directly or indirectly useful to an
17 enemy. Chelsea Manning knew the materials which she was
18 obtaining and communicating were documents of a nature that
19 their unauthorised disclosure could reasonably be expected to
20 cause serious damage to the national security of the United
21 States.”

22

23 JUDGE BARAITSER: I am sorry, Mr Lewis, I can hear but I am sure many people cannot
24 hear what you are saying.

25 MR LEWIS: I will try again.

26 JUDGE BARAITSER: Thank you.

27 MR LEWIS: Paragraph 34.

28 JUDGE BARAITSER: All right, thank you. Yes.

29 MR LEWIS: Now, paragraph 34,

30

31 “As regards the allegations set out in the request, the following
32 is relied on. 1. That Chelsea Manning was a US citizen and
33 serving soldier, obtained and communicated to Mr Assange
34 documents and information which were or might have been
35 directly or indirectly useful to an enemy; 2. Chelsea Manning
36 knew that the materials which she was obtaining and
37 communicating were documents of a nature that their
38 unauthorised disclosure could reasonably be expected to cause
39 serious damage to the national security of the United States; 3.

1 Mr Assange knew the documents and information were of this
2 nature and knew that they were or might be directly or indirectly
3 useful to an enemy; 4. Mr Assange solicited from the world at
4 large via the WikiLeaks website” - we heard that, the “Most
5 Wanted” leaks - “the provision of such materials; 5. Mr
6 Assange solicited the provision of materials specifically from
7 Chelsea Manning; 6. Mr Assange encouraged Chelsea Manning
8 to provide the materials.”
9

10 So, in those circumstances, the conduct, had it occurred in England and Wales, would
11 amount to soliciting, aiding or abetting an offence contrary to section 1.

12 JUDGE BARAITSER: So, to be very specific, the aiding and abetting, the acts of aiding and
13 abetting, are the “Most Wanted” posts; anything else in particular that you wish to rely upon
14 to show that he aided and abetted her?

15 MR LEWIS: Yes. Well, it is stated. I think most of the request deals with it.

16 JUDGE BARAITSER: Is it three aspects, the drop box, the “Most Wanted” leaks and the ---

17 MR LEWIS: Yes.

18 JUDGE BARAITSER: The cache, encrypted cache, are those the three areas which you say
19 assist you?

20 MR LEWIS: No, madam. We rely on the entirety of the request. Wherever it says that
21 Julian Assange aided and abetted, that in itself is sufficient because that is the conduct set out
22 in the request. It does not require any evidence of it. So I would not like to limit it to any of
23 those examples which are shown because both in the introductory affidavit and the
24 indictment which I am also entitled to rely upon, it specifically says that Mr Assange aided
25 and abetted or he conspired with. And that in itself is sufficient.

26 JUDGE BARAITSER: All right.

27 MR LEWIS: And so if we look at for instance ---

28 JUDGE BARAITSER: A fair statement of the words you say will do.

29 MR LEWIS: They will.

30 JUDGE BARAITSER: Thank you. All right.

31 MR LEWIS: For instance, if we looked at in the request which is in the prosecution core
32 bundle, tab 1.

33 JUDGE BARAITSER: Yes.

34 MR LEWIS: And we look at page 5 at (b), paragraph 11 is relied on, 12, 13, 14, 15, 16. All
35 the paragraphs in section (c) which is Chelsea Manning responded to Assange’s solicitation,

1 at 19, 20, 21. At (d), page 10, paragraphs 24, 25, 26, the Jabber Communications are relied
2 upon. Paragraph ---

3 JUDGE BARAITSER: To be clear Mr Lewis, whether or not these are relied upon you say
4 you do not need to identify the conduct which supports the allegation of aiding and abetting?
5 The mere fact that it is stated in the request will do.

6 MR LEWIS: It will do.

7 JUDGE BARAITSER: All right.

8 MR LEWIS: But in any event, it is set out by way of example in addition. So, I do not want
9 to limit it to the examples but the examples are quite clear. What we have not looked at is the
10 indictment and if there would be any doubt on it, I can take you through the indictment which
11 specifically alleged the overacts. So, the overacts are alleged in the indictment which deal
12 with aiding and abetting.

13 And so for instance, when we look at paragraph 63 of the request, pick it up in the
14 middle of paragraph 63, “Assange conspired with Manning in order to unlawfully receive
15 classified documents stolen from the United States.” That conduct itself is sufficient. It goes
16 on to say, “Assange encouraged Manning to steal classified documents.” That is aiding and
17 abetting. “And to provide them to Assange.” That is soliciting and aiding and abetting,
18 counselling or procuring. “He agreed to assist Manning in cracking the password.” That is
19 aiding and abetting, counselling or procuring.

20 If we went to paragraph 66, you will see at 67 we have got “Assange aided and
21 abetted, counselled, commanded, induced or procured.” Very similar words to our own
22 statute. And if we turn to the indictment itself that we have not yet looked at and is part of
23 the request, which begins as exhibit 1 in tab 1 of the prosecution bundle, the overacts set out
24 in paragraphs 2, page 2 of the – do you have that madam? That is the indictment.

25 JUDGE BARAITSER: Yes.

26 MR LEWIS: “Assange and WikiLeaks repeatedly sought, obtained, and disseminated
27 information. Assange personally and publicly promoted WikiLeaks to encourage those with
28 access to provide it.” That’s solicitation. At 4, the Most Wanted leaks, 5, the most wanted
29 leaks, 6, Assange intended the most wanted leaks list to encourage and cause individuals to
30 illegally obtain. And then we have got the response to the solicitation and the indictment
31 then sets out at (c), paragraphs 14 and following, “the encouragement of Manning” which is
32 aiding and abetting. So madam, I do not think there can be – there will be, I am almost
33 certain – there will not be a serious challenge to the fact that the conduct set out amounts to
34 an extradition crime in the request.

1 JUDGE BARAITSER: Can I just clarify then with Mr Fitzgerald then that there is no dispute
2 that the conduct amounts to an extradition offence?

3 MR FITZGERALD: I am so sorry?

4 JUDGE BARAITSER: There is no dispute that the conduct does indeed amount to an
5 extradition offence?

6 MR FITZGERALD: There is a dispute. We say that the Official Secrets Act operates
7 subject to the constraints of Article 10, that these activities are journalistic activities and
8 protected by Article 10, that the US case to the contrary about knowing risk of harm is – does
9 not even cover eight of the counts and that is 4, 8, 11, 14-2, 6, 9 and 12, and in respect of the
10 remainder, we say that they are also covered by Article 10. Madam, of course it is right to
11 say and my learned friend has indicating that we also say that in fact the account of events
12 relied on is so misleading that it amounts to a Zakrzewski abuse, I accept that is a separate
13 point, but we do not accept that this constitutes an extradition crime. That is for the
14 prosecution to establish and for you to rely on.

15 JUDGE BARAITSER: Thank you very much. Well, you heard that Mr Lewis.

16 MR LEWIS: Well, any submission my learned friend makes he will have to found upon the
17 material in the request. So, when he wants to say it is journalistic, he does not say that in the
18 request so he cannot say it. So, he is fixed with that which is set out in the request and he
19 cannot elaborate or make assertions which are not contained in the request when we are
20 dealing with extradition crime. He can make his argument on Article 10 as a bar to
21 extradition under section 87 but that is a different point.

22 JUDGE BARAITSER: All right.

23 MR LEWIS: It was not clear to me that he was contesting it was an extradition crime on
24 Article 10 grounds. I do not understand how that works because we are looking at it – we
25 will have to look at it in due course. The House of Lords in the case of *Shayler* contented not
26 to prevent the Official Secrets Act applying and that none of the provisions, particularly
27 under the 1989 Act, engaged or prevented a conviction because the argument was specifically
28 run that there should be some form of public interest or Article 10 defence. The House of
29 Lords rejected that. I am not sure if we have got *Shayler* in the bundle.

30 JUDGE BARAITSER: Well, before we move to that. Do you want to then continue to go
31 through the Official Secrets Acts which you think are relevant to this allegation?

32 MR LEWIS: Yes.

33 JUDGE BARAITSER: So, you have dealt with section 1 of the 1911 Act.

34 MR LEWIS: Yes.

1 JUDGE BARAITSER: What else do you want to draw to my attention?

2 MR LEWIS: Can I just ---

3 (Counsel conferred)

4 MR LEWIS: --- well, we have not currently got *Shayler* in the bundle. If this is going to be a
5 sensible argument put forward by the defence we will have to go to it.

6 JUDGE BARAITSER: Well, you can deal with it by way of response. So, anything you
7 want to say by way of opening in relation to the offence or?

8 MR LEWIS: Yes. So, I just wonder if my learned friend can help with that because it may
9 be entirely our fault, but my learned junior and I, my learned juniors and I had not
10 appreciated that argument was going to be made. I wonder where he could point out it is
11 made in any written submissions so we can deal with it.

12 JUDGE BARAITSER: Mr Fitzgerald, I do not want you to make the argument.

13 MR FITZGERALD: Yes. Madam, we do not – the basic position is you have our position
14 on Zakrzewski abuse. We say that the statements made in the extradition request are so
15 misleading that they lead to the question of extradition crime being decided on a distorted
16 basis, but we do not accept that even on my learned friend's account it necessarily constitutes
17 an extradition crime. *Shayler* had to do with the position of the leaker, not the position of the
18 press recipient.

19 JUDGE BARAITSER: I think the question is, have you flagged this argument somewhere in
20 your skeleton arguments?

21 MR FITZGERALD: Yes. It is paragraph 6 of our statement of issues.

22 JUDGE BARAITSER: All right Mr Lewis. Do you want to just continue with the British
23 legislation, the UK legislation on this issue so that I have it ---

24 MR LEWIS: Certainly.

25 JUDGE BARAITSER: --- and then you can deal with any human rights issues that are raised
26 in response to that.

27 MR LEWIS: Certainly.

28 JUDGE BARAITSER: So, at least what is clear is the aiding and abetting aspect of this is
29 clearly not disputed. It seems to be accepted that on the face of it there is evidence for aiding
30 and abetting ---

31 MR LEWIS: Yes.

32 JUDGE BARAITSER: --- a crime.

33 MR LEWIS: So, we then go to our second offence and of course, just one is good enough.
34 (b) is the conspiracy to commit an offence. So, the same conduct effectively will cover a

1 conspiracy to commit as ours was agreement to obtain and hand over that material. So, we
2 do say that an offence to commit an offence contrary to section 1 of the Official Secrets Act
3 1911 is also made out.

4 We then move to the 1989 Act, Offences under the Official Secrets Act 1989. The ---

5 JUDGE BARAITSER: Do you have that in your bundle?

6 MR LEWIS: We have got that in the bundle. The 1989 Act was specifically enacted after
7 the *Pontin* case madam by the then Conservative government to remove any arguments about
8 public interest. So, if we look at the Official Secrets Act, it is tab 2.

9 JUDGE BARAITSER: Yes.

10 MR LEWIS: And the first one is security and intelligence, section 1 (1), “A person who is or
11 has been” – and we rely on (b) – “a person notified that he is subject to the provisions of this
12 sub-section” – madam, you will have noticed when I read out the request, paragraph 18 of the
13 request specifically said that Chelsea Manning had been notified in the same way as would
14 require under this sub-section.

15 JUDGE BARAITSER: Yes.

16 MR LEWIS: So, the conduct applies under section 1 (1) because that is “a person who is or
17 has been notified that he is subject to the provisions of the sub-section is guilty of an offence
18 to that lawful authority if he discloses any information, document, or other article relating to
19 security or intelligence which is or has been in his possession by virtue his position as a
20 member of those services or in the course of his work.” So, we say that is an all fours with
21 Chelsea Manning.

22 In addition, we can look at section 1 (3). “A person who is or has been a Crown
23 servant or government contractor is guilty of an offence if without lawful authority he makes
24 a damaging disclosure.” Now madam, you will notice that the difference between 1 (1) and 1
25 (3) is that 1 (3) requires a damaging disclosure. 1 (1) does not. So, if you are
26 a member of the security intelligence service or have been asked to sign the Official Secrets
27 Act you get caught by 1 (1), 1 (3) catches a Crown servant or government contractor as long
28 as there is a damaging disclosure.

29 In this particular case, we say the request makes it lucidly clear that there has been an
30 a damaging disclosure and, therefore, section 1 (3) is also engaged, because when one looks at
31 section 1(4):

32

33 “For the purposes of subsection (3) above a disclosure is
34 damaging if—

1 (a)it causes damage to the work of, or of any part of, the security
2 and intelligence services; or
3 (b)it is of information or a document or other article which is
4 such that its unauthorised disclosure would be likely to cause
5 such damage or which falls within a class or description of
6 information, documents or articles the unauthorised disclosure
7 of which would be likely to have that effect.”
8

9 So section 1(1) and 1(3) are both engaged. If we turn back to our opening note.

10 JUDGE BARAITSER: A “Crown servant” includes military personnel, does it?

11 MR LEWIS: Sorry?

12 JUDGE BARAITSER: A “Crown servant” includes military personnel?

13 MR LEWIS: Yes.

14 JUDGE BARAITSER: Thank you. Yes.

15 MR LEWIS: If we look at paragraph 37, page 10 of our opening note, as we say there in the
16 second sentence, “The offence created by section 1 of the Act is distinct and it does not
17 require the prosecution to demonstrate the disclosure is damaging.” In fact, Shayler was
18 charged with 1(1) when we come to it. It is submitted that an offence under section 1 is made
19 out here having regard to the description of the conduct, because Chelsea Manning was
20 subject to an agreement which is analogous to a notification under section 1. Ultimately, it
21 does not matter here, however the United States have described the many ways in which the
22 disclosures made by Chelsea Manning were published by Mr Assange were damaging, so we
23 rely on 1(3).

24 The offences are, again, aiding and abetting an offence contrary to 1(1) or 1(3). We
25 set out there at paragraph 41 the allegations against Mr Assange include that:

26
27 “By his direct contact with her, he encouraged Chelsea Manning
28 to make disclosures of materials and information which he knew
29 to be classified as secret and knew to relate to security or
30 intelligence which Ms Manning had possession of by virtue of
31 her position or in the course of work.”
32

33 Go over the page:
34

35 “(ii) That he assisted her in making such a disclosure, including
36 by providing a cloud drop box operated by WikiLeaks and a
37 directory which had been created for Ms Manning. (iii) That he
38 assisted Ms Manning in attempting to create a password hash in
39 order to gain access to an account in the United States’

1 Department of Defense computers connected to the Secret
2 Internet Protocol Network.” And “That the purpose of
3 encouraging and assisting the principal offence was so that these
4 materials could be published by WikiLeaks in America and
5 elsewhere.”
6

7 Again, it is irrelevant that Mr Assange and Chelsea Manning would, if the conduct
8 was transposed to England, have been outside the jurisdiction. That is because she is an
9 American citizen and after transposition you would adopt the position in relation to British
10 citizen, or she is an American Crown servant, she is a soldier in the American Army, and it
11 would be the same position here.

12 At 43, the conduct would also constitute an offence contrary to section 44 of the
13 Serious Crime Act “intentionally encouraging assisting an offence”, or an offence contrary to
14 section 45 of the Act, “encouraging or assisting an offence believing it will not be
15 committed”, insofar as the request discloses Mr Assange encouraged and assisted Chelsea
16 Manning to commit an offence contrary to section 1(1).

17 The conduct we similarly charge in England would be a conspiracy, and you will see
18 that at paragraph 44 we have indicated a conspiracy to commit an offence contrary to section
19 1(1), and at (e) there is another offence, which we have not yet looked at, which is section
20 2(1) of the Official Secrets Act. If we go back to the 1989 Act, you will see section 2(1)
21 creates an offence. It is in relation to:

22
23 “A person who is or has been a Crown servant or government
24 contractor is guilty of an offence if without lawful authority he
25 makes a damaging disclosure of any information, document or
26 other article relating to defence which is or has been in his
27 possession by virtue of his position as such.”
28

29 So this specifically relates to defence, so section 2(1) is engaged. Madam, we have set that
30 out at paragraph 46.

31 At 47 we say upon transposition (i) Chelsea Manning would be regarded in this
32 jurisdiction as being a Crown servant, because she was in the armed forces. (ii) For the
33 purposes of the offence, under section 1(3) the disclosures which she made were documents
34 or information, the unauthorised disclosure of which would be damaging to the security
35 intelligence services. And for the purposes of an offence under section 2(1), the disclosures
36 which she made were documents or information, the unauthorised disclosure of which would

1 be damaging to the capability of the armed forces to carry out its tasks, endanger the interests
2 of the United Kingdom abroad - transposed to America - or likely to have those effects.

3 Paragraph 48, we can also charge the conduct in the United Kingdom as the offence
4 of conspiracy under the Criminal Law Act to commit an offence under sections 1(3) or 2(1)
5 of the Official Secrets Act. And at 49, we also point out that it would amount to various
6 offences under the Serious Crime Act. So we rely upon sections 1(1), 1(3), 2(1) of the 1989
7 Act.

8 In addition, as a specific offence under section 5, which mirrors the American offence
9 - would you just give me a moment?

10 JUDGE BARAITSER: Yes.

11 MR LEWIS: And section 5 is information resulting from unauthorised disclosures or
12 entrusted in confidence. So any information, document or other article protected against
13 disclosure by the foregoing provisions of this Act has come into a person's possession as a
14 result of having been disclosed by a Crown servant. This is the classic catching newspapers.

15 JUDGE BARAITSER: That was what I was going to ask you. The same question as I asked
16 you in relation to section 1 of the 1911 Act, can I ask it again in relation to section 5 of the
17 1989 Act.

18 MR LEWIS: They are unquestionably caught.

19 JUDGE BARAITSER: Are they caught?

20 MR LEWIS: They are caught.

21 JUDGE BARAITSER: So in this jurisdiction a newspaper would be guilty of a crime of
22 merely disclosing the information which has come into its possession unauthorised without
23 aiding or abetting the obtaining of the information?

24 MR LEWIS: Yes. And, in fact, that specific matter was set out in the White Paper. If we
25 pick it up in our written argument at 52: this offence is carried out by an individual who is not
26 a Crown servant, a contractor or notified person, so this would apply to a journalist. Section
27 5 reflects the concern that an unauthorised disclosure published by a newspaper or anyone
28 else may be just as harmful in the interests of the state as a disclosure by categories of a
29 person specified in the Act. The White Paper, which undermined the 1989 Act, explained
30 this at paragraph 54 of the White Paper. It said:

31

32 "The objective of Official Secrets legislation is not to enforce
33 Crown service discipline, that is not a matter for the criminal
34 law, but to protect information which in the public interest
35 should not be disclosed. Such protection would not be complete

1 if it applied to disclosure only by certain categories of persons.
2 The Government accordingly proposes that the
3 unauthorised disclosure by any person of information in the
4 specified categories in the circumstances where harm is likely to
5 be caused should be an offence.”
6

7 So there is no public interest. So if a journalist or newspaper publishes secret information
8 which is likely to cause harm within the categories, it commits an offence.

9 JUDGE BARAITSER: And how does it assert its Article 10 rights?

10 MR LEWIS: Article 10. Well, the House of Lords effectively had dealt with this. The
11 Article 10 does not prevent anyone being charged with or convicted of such an offence.
12 Article 10 is clearly constrained by its own terms. And Article 10 would never, in our
13 respectful submission, either be engaged or prevent conviction by Article 5. As my learned
14 junior points out, under section 5, the Article 10 argument just simply does not apply.

15 JUDGE BARAITSER: Are you saying it does not even engage those rights?

16 MR LEWIS: This is a criminal offence. It does not engage. It is not a defence. You cannot
17 engage against this criminal offence because it is a statutory offence.

18 JUDGE BARAITSER: And in light of the Human Rights Act, then how is the Convention
19 taken into account?

20 MR LEWIS: Well, the Convention never comes to this. Article 10 just simply does not get
21 to this standard, because otherwise you could just publish anything you wanted to, which is
22 clearly contrary to the statutory intention.

23 JUDGE BARAITSER: The question is in what forum does the defendant make the
24 argument? How do they assert their rights?

25 MR LEWIS: They could make an argument. This is only hypothetical because it does not
26 apply ---

27 JUDGE BARAITSER: Before you answer the ---

28 MR LEWIS: --- but if you wanted to ---

29 JUDGE BARAITSER: Before you answer the question, it is 10 to 1. You may want to look
30 at your House of Lords case which you seem to think deals with this issue. Do you want to
31 do that over lunch or would you rather answer the question now?

32 MR LEWIS: Well, certainly the approach which is taken in Scotland, not on Article 10 but
33 on other breaches such as Article 6, is that the prosecutor cannot apply if it is a flagrant
34 breach or a breach of the ECHR. But this clearly is not a breach and therefore Article 10 is
35 not engaged. I will come back to it after lunch.

1 JUDGE BARAITSER: Does that conclude your - apart from the Computer Misuse Act. Do
2 you want to finish off with that and then that is your final statute?

3 MR LEWIS: Yes.

4 JUDGE BARAITSER: All right.

5 MR LEWIS: The Computer Misuse Act, it cannot possibly be said there is any Article 10
6 right or any other right here otherwise we would have wrongly convicted all the journalists
7 from the News of the World, Millie Dowling, and all the other hacking offences, when they
8 have committed Computer Misuse Act type offences. There is no licence to commit a
9 criminal offence simply because you say it is for journalistic purposes, and there is no public
10 interest defence under the Computer Misuse Act. So the Computer Misuse Act here is almost
11 identical to the American one. It is aiding and abetting or a conspiracy to commit unlawful
12 access to the Department of Defense computer. Madam, it is set out there in paragraphs 58 to
13 62. It is really self-evident if there was either a conspiracy or aiding and abetting, Chelsea
14 Manning was not entitled to access the computer in an unauthorised manner.

15 If we look at paragraph 58, under section 1(1),

16

17 “It is alleged that Chelsea Manning caused a computer to
18 perform a function with intent to secure access to data held on a
19 computer. The particular access to data she secured was
20 copying on moving the data to a storage medium other than on
21 which it was held. This was unauthorised in that Chelsea
22 Manning was accessing this data for the purpose of searching
23 for, downloading, storing or providing information or materials
24 to Mr Assange and not for the purpose of her role as an
25 intelligence officer.”

26

27 You will see there the footnote is *R v Bow St Magistrates Court and Allison (No.2)*.
28 In that case, the House of Lords rejected an argument that simply because a person had
29 authority for one purpose to access a computer, they had authority to do it for all purposes. In
30 that case it was a person who worked for American Express and she had the right passwords
31 and authority to get to the material of information relating to customers of American Express.
32 She gave it to an accomplice and they committed frauds. The House of Lords said that she
33 was accessing it for an unauthorised purpose, notwithstanding she had the right level of
34 authorisation and passwords.

35 At five, it is quite clear that Chelsea Manning was not herself entitled to control
36 access to the client in question nor did she have consent to access the data from any person

1 who was so entitled to provide it. It therefore comes either charged as a conspiracy, aiding
2 and abetting or offences under the Serious Crime Act 2007.

3 So, Madam, in all those different ways what is the conduct complained of? In
4 particular, count 18 in the indictment would amount to an offence in this jurisdiction.

5 JUDGE BARAITSER: And you are looking at this globally in the sense that you are looking
6 at the conduct alleged in total and looking at how that fits in with the statutory framework
7 here? You are not looking at individual counts, you are looking at the conduct as alleged?

8 MR LEWIS: Yes. We cannot look at individual counts. We have to take the conduct as a
9 whole. However, I am entitled to point out the description of the conduct set out in the
10 particular counts so that the conduct as described in the request and the indictment, the
11 accompanying papers, one transposes. One ignores the actual nomenclature of the American
12 offences, so I do not say "This is count 1, this is count 2, this is count 18", we just take the
13 conduct and see whether that conduct amounts to offences in England and Wales, which we
14 say it undoubtedly does.

15 JUDGE BARAITSER: Thank you. In relation to the Article 10 issue, do you want to deal
16 with that by way of response once you know what the defence are ---

17 MR LEWIS: Yes.

18 JUDGE BARAITSER: --- arguing?

19 MR LEWIS: Yes.

20 JUDGE BARAISTER: And do you then complete your opening with that?

21 MR LEWIS: Madam, that would be most helpful.

22 JUDGE BARAISTER: Lovely. All right, Mr Fitzgerald, 2 o'clock then you will deal with
23 those two issues.

24 MR FITZGERALD: Madam ---

25 JUDGE BARAISTER: Just before you speak, Mr Assange, just have a word with your
26 lawyer. It may be that they can assist you.

27 DEFENDANT: I already have.

28 JUDGE BARAISTER: Well, ---

29 DEFENDANT: I am having difficulty concentrating.

30 JUDGE BARAISTER: All right.

31 DEFENDANT: The noise is not helping either. I am very appreciative of the public support
32 and I do understand that it must be ---

33 JUDGE BARAISTER: Mr Assange, rather than let you speak, it is very unusual. Generally,
34 because you are well represented - let me just finish for a moment - I am going to ask you to

1 speak to your lawyer. If there is anything that she wishes to raise on your behalf I am very
2 happy to hear it, but generally I do not hear from people in this kind of context. Let me ask
3 Ms Pearce.

4 MR FITZGERALD: As I understand it, what Mr Assange is saying is that he cannot hear
5 and cannot concentrate because of the noise outside and ---

6 JUDGE BARAISTER: Well, if you wish to raise that as an issue and you wish to ---

7 MR FITZGERALD: Well.

8 JUDGE BARAISTER: --- tell me what my powers are to stop it, I would be very happy to
9 hear from you, Mr Fitzgerald. Not now, perhaps at 2 o'clock.

10 MR FITZGERALD: We will certainly try to sort it. Madam, just so that I can make it clear,
11 of course on the timetable that, Madam, you had provided us with ---

12 JUDGE BARAISTER: Yes.

13 MR FITZGERALD: --- we were going to do extradition offence after we had opened. Can I
14 just take this course? I have summarised the position very briefly in relation to extradition
15 crime.

16 JUDGE BARAISTER: Yes.

17 MR FITZGERALD: Can I summarise our whole case and then Mr Summers is going to deal
18 with Zakrzewski abuse and extradition offence very briefly tomorrow. Zakrzewski abuse,
19 that is what I would prefer to do if you would permit me.

20 JUDGE BARAISTER: Well, let us revisit it at 2 o'clock. I will have a think about what you
21 have said and we can consider the timetable then.

22 MR FITZGERALD: Yes.

23 JUDGE BARAISTER: 2 o'clock and any issues in relation to noise, please let me know if
24 you think there is anything I can do about it.

25 MR FITZGERALD: Yes, Madam, if there is something we can do, but obviously we will see
26 if a message can be passed on behalf of all of us.

27 JUDGE BARAISTER: So be it. Thank you very much.

28 (Luncheon adjournment)

29 JUDGE BARAISTER: Thank you. Would you ask Mr Assange to be brought in. This
30 actually applies to everybody, I am told that unless we are within centimetres of the
31 microphone it cannot be heard in the press annex. It applies to me as it does to everybody.

32 COURT OFFICIAL: Mr Assange apparently will not be able to hear as well.

33 JUDGE BARAISTER: Yes, thank you. Thank you. Please sit down, Mr Assange. Now, Mr
34 Fitzgerald, you proposed earlier ---

1 MR FITZGERALD: Yes.

2 JUDGE BARAITSER: --- that you would open the defence case this afternoon.

3 MR FITZGERALD: Yes.

4 JUDGE BARAITSER: And that Mr Summers would deal with the abuse argument and the
5 response to the dual criminality issues tomorrow.

6 MR FITZGERALD: If that is acceptable.

7 JUDGE BARAITSER: There seems to be enough time this week to accommodate that.

8 MR FITZGERALD: Yes.

9 JUDGE BARAITSER: So I am very happy.

10 MR FITZGERALD: I am very grateful.

11 MR LEWIS: Before my learned friend starts ---

12 JUDGE BARAITSER: Yes, of course.

13 MR FITZGERALD: --- if I may just spend two moments to answer the question the court
14 asked immediately prior to the short adjournment. Madam, you asked how Article 10 factors
15 in at this point. Our short answer for the prosecution is that it does not and the focus ---

16 JUDGE BARAITSER: Just pause, I think your microphone, you can hear when the sound is
17 being amplified and I can hear that your sound is not being amplified.

18 MR LEWIS: I will start again, madam. You asked how Article 10 factors in at this point.

19 The prosecution's position is the short answer is that it does not. The focus is on the conduct
20 as alleged in the request and whether it would constitute an offence in this jurisdiction. You
21 determine that without regard to any defence that might be run. Neither the requesting state
22 in an extradition nor the prosecution in a domestic proceedings have to prove the publication
23 was not an interference with Convention rights in order to prove a case.

24 If Article 10 is raised as a bar to extradition, then we will deal with it as a bar, but the
25 issue then will be whether extradition is compatible with Article 10 not whether or not there
26 is an extradition offence. So there is a material distinction in those ways. When it comes to
27 Article 10, it is not for this court to judge whether the Official Secrets Act comply with
28 Article 10, nor whether the US law complies with Article 10. The issue may be under section
29 87, whether Mr Assange's extradition complies with Article 10. But, as foreshadowed, we
30 say Article 10 is not engaged by the publication of the names and sources who might be at
31 risk of serious injury or death as opposed to publication of other material.

32 Just to explain as it is put, it is right it was mentioned in the statement of issues
33 although not in the skeleton argument at paragraph 6.2. In essence, they say that to prosecute
34 Mr Assange would breach Article 10. Now that is not relevant to the extradition offence. It

1 may be, although we do not accept it will engage, relevant to section 87, if at all. Our
2 position so far as extradition offence is very clear, Article 10 is not engaged.
3 JUDGE BARAITSER: Thank you. You might have to respond to the argument in due
4 course.
5 MR LEWIS: I will. Yes, I am sure I will.
6 JUDGE BARAITSER: Thank you. Mr Fitzgerald.
7 MR FITZGERALD: Yes. Madam, I do have a note of what I am going to say to save you
8 from doing the ---
9 JUDGE BARAITSER: Thank you.
10 MR FITZGERALD: Can I be heard now?
11 JUDGE BARAITSER: Yes.
12 MR FITZGERALD: Thank you.
13 JUDGE BARAITSER: Thank you.
14 MR FITZGERALD: I mean, not may I be heard but am I being heard. Madam, do you have
15 the summary then?
16 JUDGE BARAITSER: We have just been handed the summary now.
17 MR FITZGERALD: Yes.
18 JUDGE BARAITSER: Now, Mr Fitzgerald, it is not an easy task but every time you drift
19 away from the microphone, Mr Assange not least ---
20 MR FITZGERALD: Yes.
21 JUDGE BARAITSER: --- will not clearly be able to hear you.
22 MR FITZGERALD: Yes.
23 JUDGE BARAITSER: So you are going to have to arrange the microphone such that, even
24 when looking at your notes, you stay close to it.
25 MR FITZGERALD: Madam, I will try then to summarise the case for the defence. Madam,
26 can everybody hear me now?
27 COURT OFFICIAL: Mr Assange, can you hear?
28 DEFENDANT: It's quiet now, too quiet.
29 MR FITZGERALD: Can I be heard now?
30 JUDGE BARAITSER: Yes, you can normally hear the amplification.
31 MR FITZGERALD: Yes.
32 JUDGE BARAITSER: So if you cannot hear that, then you will not be heard.
33 MR FITZGERALD: Okay. Well, if I can be jogged. If at any stage I cannot be heard then
34 somebody can tell me.

1 JUDGE BARAITSER: Mr Assange, would you raise your hand if you cannot hear what is
2 being said. You cannot hear now? All right. Well, perhaps when he starts speaking, if you
3 cannot hear just let me know.

4 MR FITZGERALD: Yes. Well, madam, the course I propose to take is, first of all, to deal
5 with the history of the prosecution because we say that that history shows that the prosecution
6 is not motivated by genuine concerns for criminal justice but by politics. Next, I will
7 summarise the three ways in which we say that these proceedings constitute an abuse of
8 process.

9 First, because the prosecution is being pursued for ulterior political motives and not in
10 good faith and that engages the jurisdiction recognised in the successive cases of *Birmingham*
11 and *Tollman*. Secondly, because the request fundamentally misrepresents the facts in order to
12 bring this case within the bounds of an extradition crime, both by misrepresenting that Julian
13 Assange materially assisted Chelsea Manning in accessing national security information and
14 then by misrepresenting that there was a reckless disclosure of the names of particular
15 individuals as alleged in counts 15, 16 and 17. That point engages the jurisdiction recognised
16 in the successive cases of *Castillo*, *Marua* and *Zakrzewski* and we are going to deal with that
17 more fully, madam, tomorrow.

18 But, thirdly, because the extradition request seeks extradition for what is a classic
19 political offence we submit that extradition for a political offence is expressly prohibited by
20 article 4(1) of the Anglo-US Extradition Treaty and, therefore, it constitutes an abuse of this
21 court's process to require this court to extradite on the basis of what is clearly a political
22 offence in breach of the Treaty's express provisions.

23 Madam, that concludes my brief summary of the abuse case. I turn to the special
24 protections set out in the Extradition Act itself and the successive bars to extradition which
25 we rely on. We say that extradition should be refused on the following further grounds.

26 First, extradition is barred under section 81(a) by reason of the political motivation of
27 the request. It is directed at Julian Assange because of the political opinions he holds and that
28 have guided his actions. Moreover, we submit that extradition is barred under section 81(b)
29 because it exposes him to the real risk of discrimination on grounds of his foreign nationality
30 and political opinions at every stage of the criminal justice process in the US.

31 Secondly, extradition is barred under section 87 because it would involve a flagrant
32 denial of his right to a fair trial under Article 6 and a clear violation of his right to freedom of
33 expression under Article 10.

1 Thirdly, extradition is barred because it would expose him to inhuman and degrading
2 treatment contrary to Article 3 and that is because the risk of a wholly disproportionate
3 sentence amounting, in effect, to a life sentence and because of the virtual certainty of
4 inhuman and degrading treatment in prison in the United States, if not an even worse fate.
5 My learned friend has suggested, “Oh, well, he may not get the maximum sentence”. The
6 question is whether, on the expert evidence, there is a real risk that he will receive a sentence
7 of that magnitude and we say that is made out.

8 Fourthly, extradition should be refused under section 91 because it would be unjust
9 and oppressive to extradite him by reason of his mental condition and the high risk of suicide
10 if he is extradited.

11 Fifthly, we say that it would be unjust and oppressive to extradite him by reason of
12 the lapse of time since the alleged offences. We rely also, madam, on section 82. Can I just
13 take these points in turn but can I just say something about the witnesses in relation to the
14 history and political motivation.

15 The witnesses, madam, that you have on that issue are, firstly, Professor Mark
16 Feldstein, a distinguished academic specialising in broadcast journalism and you have him at
17 tab 18, madam. Secondly, Carrie Shenkman, an academic who has made a special study of
18 the history of the Espionage Act and the Computer Fraud and Abuse Act. Thirdly, Jameel
19 Jaffer, the Executive Director of the Knight First Amendment Institute at Columbia
20 University. Fourthly, Professor Michael Tigar, a former journalist and academic specialising
21 in constitutional and criminal law. Fifthly, Professor Noam Chomsky, Professor of Politics
22 and well-renowned author. He is at tab 39, madam. And, finally, Professor Paul Rogers,
23 Emeritus Professor of Peace Studies at Bradford University.

24 And so, those are the expert witnesses who provide the evidence in relation to the
25 background of this extradition who attest to the unprecedented nature of this prosecution and
26 explain the political context in which it is brought.

27 If I can turn to the history of the proceedings, the background history is more fully set
28 out in the chronology which I hope you have madam, is it tab 8? I think it is tab 8 of the
29 bundle. And then also in the particulars of abuse which is tab 5. But madam, what we say
30 very briefly is that extradition here is being sought for the receipt and publication of materials
31 provided to WikiLeaks by Chelsea Manning.

32 All the relevant conduct occurred between 2010 and 2011 and was known about at
33 that time, yet Mr Assange’s prosecution and this request was not even begun until December
34 2017, and the superseding indictment on which the prosecution now rely, did not come until

1 23 May 2019. And moreover, during the intervening period, there was a well-publicised
2 Department of Justice decision under the Obama Administration in 2013 that he should not
3 be prosecuted.

4 Madam, the next point is in relation to Chelsea Manning’s court martial. She was
5 convicted in 2013 and sentenced to 35 years’ imprisonment. At her trial, she explained her
6 motivation for downloading documents and videos which exposed war crimes in Afghanistan
7 and Iraq, and the torture of detainees in Guantanamo. In her plea allocution statement to the
8 court martial on 30 July 2013 she stated, I quote, “The decisions I made to send documents
9 and information to the WikiLeaks website were my own decisions and I take full
10 responsibility for my own actions.” And as we made the point, at that time, no attempt was
11 made to indict Julian Assange.

12 The prosecution say that Julian Assange caused Chelsea Manning to obtain the
13 materials referred to in counts 2 to 4, 9 to 11, and 12 to 14, but her own account gives the lie
14 to that false claim. Madam, can I just take you to page 3 of the chronology which is at tab 8
15 of the submissions bundle and perhaps for present purposes, I can just summarise the
16 evidence that she gave in that allocutus hearing by reference to that page 3.

17 JUDGE BARAITSER: Tab 3 did you say?

18 MR FITZGERALD: Tab 8, page 3.

19 JUDGE BARAITSER: Tab 8. Thank you. Yes, I have it.

20 MR FITZGERALD: So madam, it is under the hearing “Chelsea Manning’s more accurate
21 chronology of events at the court martial hearing”.

22 JUDGE BARAITSER: Yes.

23 MR FITZGERALD: And it is in the allocutus statement. Madam, I will not take you to the
24 individual pages, I will just read out the summary here so as to assist. Her statement was that
25 between November and December 2009, she started to monitor the WikiLeaks website. She
26 saw it as I quote, “dedicated to exposing illegal activities and corruption”. That is page 6751
27 of the court martial proceedings. Then between December 9 and January 2010 she
28 downloaded SIGAT tables, that is page 6749.

29 Then on 8 January 2010 she saved SIGAT reports to her laptop, those are diaries of
30 what is going on during the conflicts in Afghanistan and Iraq. Then January 2010, Manning
31 contacted the Washing Post and New York Times informing them that she had information of
32 value to disclose. On 3 February 2010 she released the first SIGATs to WikiLeaks via TOR,
33 that is page 6760. Then in February 2010 Manning uploaded cables about Iceland to
34 WikiLeaks, that is page 6762 to 3.

1 Then on 21 February 2010, Manning uploaded the Apache air strike video to WikiLeaks.
 2 This records a 2007 incident where two Reuters reporters and innocent civilians were killed.
 3 At the same time, she uploaded rules of engagement documents to WikiLeaks, that is at page
 4 6770. And then on 5 March 2010, she uploaded further reports about federal police actions in
 5 Iraq, that is at page 6775.

6 Turning over the page madam, on 8 March 2010, Manning uploaded Guantanamo
 7 detainee assessment briefs to WikiLeaks, page 6778. And then on 5 April 2010, the Apache
 8 air strike video was published by WikiLeaks. On 10 April 2010, Manning uploaded the
 9 diplomatic cables to WikiLeaks and she gave her reason for doing so to the court martial.
 10 And she said that she believed that the public release of these cables would not damage the
 11 United States but that the disclosure was justified in the public interest, that is at pages 6782
 12 to 3. And then as you know madam, she was arrested on 27 May 2010 and we know the
 13 conviction took place in 2013 with the 35 year sentence being imposed.

14 Madam, if we go on to the sentencing, that is dealt with at page 6 of the chronology.
 15 Manning convicted by court martial and sentenced to 35 years' imprisonment. And you have
 16 the record of what she said about I made the decisions myself. And at that hearing, evidence
 17 was given by Captain Stephen Limb and others that the Afghan and Iraq SIGATs did not
 18 contain sensitive information about sources. We will provide you with those transcripts
 19 madam.

20 Madam then, you know also, and it is at page 8, that at the end in January 2017, on 17
 21 January 2017 President Obama before leaving office commuted the sentence of Chelsea
 22 Manning to the seven year imprisonment served and that was on the basis that the original
 23 sentence was disproportionate and we have given you the reference there madam to the report
 24 of that.

25 Madam so, that is the significance of the Chelsea Manning court martial and we say it
 26 gives the lie to the account given by the prosecution and is wholly inconsistent with it. And
 27 that may go to the issue of Zakrzewski abuse and also to the issue of Article 10.

28 The decision not to prosecute Julian Assange in 2013 is the next stage. A decision
 29 was made under the Obama administration not to prosecute Julian Assange. That was
 30 because of what has been described as I quote, "The New York Times' problem" which is
 31 referred to in the Washington Post article. That is to say the problem of if you prosecute
 32 Julian Assange, you would prosecute journalists and the New York Times' case established
 33 that that would breach their first amendment rights.

1 The US prosecutors concluded that charging Assange would have been tantamount to
 2 prosecuting any journalist who published leaked national security information and would thus
 3 violate the first amendment. And you have the statement of the former Department of Justice
 4 spokesman Matthew Miller setting out the reasons for the decision in 2013 if I quote, “If you
 5 are not going to prosecute journalists for publishing classified information, which the
 6 department is not, then there is no way to prosecute Assange.”

7 And madam, that point is analysed by Professor Feldstein at paragraph 9 of his report
 8 and he there refers to the I quote, “long-standing precedent that publishing secret records is
 9 not a crime. And as all first amendment experts make clear, it is for that reason that no
 10 journalist had ever been prosecuted for like conduct in the US despite” – and this is Professor
 11 Feldstein’s words – “thousands upon thousands of national security leaks to the press.” That
 12 is the evidence of Professor Feldstein and we have given you the reference, tab 18,
 13 paragraphs 5 and 8 to 11 of Carrie Shenkman, and we have given you the reference there and
 14 the evidence of Jameel Jaffer, and the evidence of Professor Tigar.

15 What then happened to change things between 2013 when the decision was taken on
 16 principled constitutional grounds not to prosecute him and the end of 2017 when the decision
 17 was taken to prosecute him? The answer is President Trump came into power with a new
 18 approach to freedom of speech and with a new hostility to the press amounting effectively to
 19 declaring war on investigate journalists. And we set it out at 2.7 that the principled and
 20 consistent stand taken under the Obama Administration was reversed under the present
 21 Trump Administration from early 2017 onwards.

22 The prosecution initiated later in December 2017 was the result of President Trump’s
 23 effective declaration of war on leakers and journalists. You will see from the expert reports
 24 madam that President Trump has I quote, repeatedly referred to the press as “the opposition
 25 party” and “the enemy of the people”. That is in Jameel Jaffer’s report at paragraph 4 and
 26 paragraph 28. He has denounced the news media as a whole as I quote, “sick, dishonest,
 27 crazed, unpatriotic, unhinged, and totally corrupt”, and attacked them as purveyors of fake
 28 news. So, we say it is no surprise that in February 2017 President Trump met with the FBI
 29 director James Comey and agreed that they should be putting a head on a pike as a message
 30 to journalists over leaks, and President Trump stating, “It is time we started putting
 31 journalists in jail”. The source for that is set out in Professor Feldstein’s report and in Carrie
 32 Shenkman’s report.

33 As Professor Feldstein shows, President Trump then instructed his Attorney General
 34 to investigate criminal leaks of fake news reports that had embarrassed the White House. The

1 Trump Administration set about systematically punishing whistle blowers in general and it
2 dramatically escalated the number of criminal investigations.

3 COURT OFFICIAL: Mr Assange is having difficulty hearing (inaudible)

4 MR FITZGERALD: OK. I am so sorry. Maybe I can move it down here. And is this
5 better? And it dramatically – I am so sorry – it dramatically escalated the number of criminal
6 investigations into journalistic leaks. As Feldstein further states, President Trump’s use of
7 government power to punish his media critics is a deliberate attempt to stifle the exercise of
8 the constitutional protections of free speech and the free press, and that all journalists work
9 under the threat of government retaliation.

10 Madam, it is against that background that we say Julian Assange has been made an
11 example of. It was against that background that President Trump and his Administration then
12 decided to make an example of Julian Assange. He was the obvious symbol of all that Trump
13 condemned. He had brought American war crimes to the attention of the world as pointed
14 out by Mr Boyle, and Professor Feldstein puts it in this way, “On a worldwide scale, he
15 disclosed significant governmental duplicity, corruption and abuse of power that had
16 previously been hidden from the public. He exposed outrageous, even murderous
17 wrongdoing, including war crimes, torture, and atrocities on civilians.” You will see set out
18 at paragraph 4 of his report the sheer scale and significance of the revelations brought about
19 by Julian Assange and WikiLeaks.

20 Madam, if I could just trouble you to look at that for one moment. It is at tab 18. And
21 if I can just focus on that paragraph 4, you can see he says there – tab 18 ---

22 JUDGE BARAITSER: I have that. Paragraph 4.

23 MR FITZGERALD: Paragraph 4, page 6.

24 JUDGE BARAITSER: Thank you.

25 MR FITZGERALD: Where he says, “In journalistic terms these scoops were blockbusters.
26 Among them, a disturbing video tape of American soldiers firing on a crowd from a
27 helicopter above Baghdad killing at least 18 people. The soldiers laughed as they targeted
28 unarmed civilians including two Reuters’ journalists. US officials gathered often gruesome
29 evidence that approximately 100,000 civilians were killed after its invasion of Iraq.” And
30 then: “American forces in Iraq routinely turned a blind-eye when the US-backed government
31 there brutalised detainees, subjecting them to beatings, whippings, burnings, electric shock
32 and sodomy.”

33 And then: “After WikiLeaks published vivid accounts compiled by US diplomats of
34 rampant corruption by Tunisian President Zine Ben Ali and his family, ensuing street protests

1 forced the dictator to flee to Saudi Arabia. When the unrest in Tunisia spread to other Middle
2 East countries, WikiLeaks was widely hailed as a key catalyst for this Arab Spring.” And
3 finally: “In Afghanistan, the US deployed a secret black unit of special forces to hunt down
4 high-value Taliban leaders for kill or capture without trial.”

5 I will not go on to all the matters, but what we say is what Professor Feldstein has
6 helpfully set out is the sheer scale and significance of the revelations of US abuse of power
7 abroad throughout the world. And that naturally made him a target to the new ideologues of
8 the American First approach adopted by President Trump’s administration, and that is why
9 the denunciations then begin. And so, in April 2017, the prosecution begins to be advocated,
10 not on the basis that there have been new revelations but on the basis that it has now become
11 politically expedient and desirable.

12 I refer you to the following. Firstly, there is the statement of Mr Pompeo on 13 April
13 2017 as Director of the CIA denouncing Julian Assange and WikiLeaks as a “non-state
14 hostile intelligence agency.” Nothing can be clearer, we say, as encapsulating that this is a
15 political crime, describing it as a “non-state hostile intelligence agency.” And on the same
16 occasion, Pompeo also stated that “Julian Assange as a foreigner had no First Amendment
17 rights.” We will come to that. Then there was the political statement of Attorney General
18 Sessions on 20 April 2017 that the arrest of Julian Assange was now “a priority” and that, “If
19 a case can be made, we will seek to put some people in jail.”

20 Madam, the full scale of those denunciations are set out in the report of Professor
21 Feldstein at page 19. We say that those public denunciations indicate the political motivation
22 that fuelled the later prosecution. They violate the presumption of innocence. They prejudice
23 the prospects of a fair trial and they form the context in which Attorney General Sessions, a
24 political appointee with a political agenda, was directly responsible for the first indictment in
25 December 2017. As Professor Feldstein shows, pressure was then put on prosecutors by the
26 Attorney General and what he calls the “new leaders of the Justice Department” to bring an
27 indictment even in the face of vigorous debate from career professionals who were sceptical
28 about its legality and despite open objections from prosecutors directly involved in the case.
29 The source of that is the reports which he cites from the Washington Post in April 2017 and
30 the New York Times on 20 April 2017. Madam, of course, materials of that sort on the
31 Strutz principle are entirely admissible in these proceedings as the basis for an expert
32 opinion.

33 The criminal complaint then comes in December 2017, so on 21 December 2017 a
34 criminal complaint was made of computer misuse against Julian Assange and his extradition

1 on a provisional warrant was sought. Now, Madam, we say that the timing is significant. It
 2 coincided with the grant of diplomatic status by the Ecuadorean Government on the same
 3 day, 21 December 2017. So we know, and I will show you the evidence, that the US
 4 intelligence agencies were being provided with surveyor's evidence of what was being done
 5 and said in the Ecuadorean Embassy. They were monitoring conversations that Julian
 6 Assange had with his lawyers there, and that is the evidence of Witness 1 and Witness 2, and
 7 I will deal with that in detail.

8 But so they knew that on that day he had been granted diplomatic status and, lo and
 9 behold, on that day the criminal complaint is introduced and we see that the prosecution by
 10 then had become a political imperative. Madam, I am going for the moment to pass over the
 11 intervening period during which, of course, steps were taken to pressurise the Ecuadorean
 12 Government to expel him from the embassy, and he was eventually expelled from the
 13 embassy and charged with an offence in our courts.

14 But then in May 2019, the superseding indictment was proffered and, Madam, that
 15 superseding indictment, which is the basis of this prosecution, greatly ratchets up the charges.
 16 It goes from a simple offence of computer misuse, albeit characterised as espionage in itself,
 17 to a whole series - a multi-count indictment of espionage. Obviously, that dramatically
 18 ratcheted up the scale of the charges, the pressure on him and the potential penalties. Of
 19 course Mr Lewis is only dealing with the potential penalties, but he draws attention to the fact
 20 that Mr Assange faces up to 175 years in prison if he is convicted of all offences charged in
 21 the superseding indictment.

22 Madam, there is evidence that Attorney General Sessions issued new guidelines
 23 saying that you must be charged with the maximum offences you can and, as it were, putting
 24 it bluntly, that prosecutors from now on should throw the book at people. Moreover, we
 25 know that in the US system the threat of exaggerated or extreme sentences is used to compel
 26 pleas from people facing charge. We have the expert evidence in relation to that from Mr
 27 Durkin and from Mr Lewis. The decision to prosecute for the publication of state secrets as
 28 espionage was, we say, unprecedented. So they are now charging for the publication of state
 29 secrets. Madam, you made various observations this morning about the significance of
 30 publication. We say that that is unprecedented in the US and, Madam, we have the evidence
 31 of Professor Feldstein on that, of Carrie Shenkman on that, of Jameel Jaffer and Professor
 32 Michael Tigar.

33 Can I just briefly summarise what Professor Feldstein says: "The indictment breaks
 34 all legal precedents. No publisher has ever been prosecuted for disclosing national secrets

1 since the founding of the nation more than two centuries ago. The only previous attempts to
 2 do so ---” and that is attempts “--- were highly politicised efforts by presidents seeking to
 3 punish their enemies.” And then referring to the fact that this decision reversed the earlier
 4 decision in 2013, he says: “The belated decision to disregard this 230 year-old precedent and
 5 charge Assange criminally for espionage was not an evidentiary decision but a political one.”

6 And if I can just quote Jameel Jaffer too. He characterises the novel nature of the
 7 superseding indictment in equally troubling and dramatic terms. What he says is: “The
 8 Government’s indictment of a publisher under the Act crosses a new legal frontier.”

9 Again, Madam, the timing is significant, and this we have sought to deal with at 2.21.
 10 The timing was 23 May 2019. At that time, the Swedish prosecution had just made two
 11 significant statements. On 13 May 2019, so just 10 days before, they had announced that it
 12 was their intention to reopen the investigation of Julian Assange for sexual offences and on
 13 14 May 2019 they specifically announced that they intended to issue a European Arrest
 14 Warrant. The full facts are set out in our reply on abuse of process where the prosecution
 15 said, “Don’t be so silly. There was no question of Swedish charges being brought” and we
 16 had to point out to them these two events on 13 May 2019 and 14 May 2019. As made clear
 17 in the defence reply, the coincidence is just too great. Just nine and 10 days before this
 18 superseding indictment massively ratcheting up the charges to this 18-count indictment with
 19 its unprecedented charges of espionage come in, the Swedes are saying, “We might reopen this
 20 and we might seek an EAW.”

21 We say it leads to the inescapable inference that the US ratcheted up the charges so as
 22 to ensure that their extradition request would take precedence. It is not about criminal justice.
 23 It is about the manipulation of the system to ensure that the US was able to make an example
 24 of Julian Assange. And we say the whole history right from the start, from 2010 to 2013
 25 when the decision was taken not to prosecute, to the initial decision to prosecute only under
 26 misuse of computers after the Trump administration had denounced and targeted him, to this
 27 grossly inflated superseding indictment which breaks all legal precedents, the whole history
 28 is a history of political motivation rather than justice determining what is happening.

29 Madam, there are, in addition, the accompanying abuses of the rule of law. There is
 30 first of all the fact that whilst he was in the Ecuadorean Embassy his conversations with his
 31 lawyers were being monitored and recorded by private security agents acting on behalf of the
 32 US. Then he was evicted from the embassy after the intervention of the US with the
 33 Ecuadoreans. And then, finally, his confidential papers were illegally taken from him at the

1 request of the US. That much is confirmed by the second statement of Gareth Pierce at tab
2 21, paragraphs 12(v) and (vi).

3 Madam, if I can just pause there for a moment. The evidence of illegal monitoring
4 and intrusion is set out in detail in the particulars of abuse at tab 5 of the submissions bundle
5 and it is at paragraphs 36 to 39. Can I just take you to that briefly, Madam? Madam, you can
6 see there the reference to the direct collusion of the US intelligence services in the illegal
7 surveynance of Mr Assange’s confidential legal discussions inside the embassy and the
8 extensive intrusion into the privacy of those visiting him. In around July 2016, Morales, the
9 owner of private security firm Undercover Global, holder of the contract to provide security
10 at the embassy, returned from a Las Vegas security sector trade fair with a contract to provide
11 security services to American casino magnate Sheldon Adelson, a leading financial backer of
12 Donald Trump.

13 The agreement was purportedly for the provision of private security for Adelson’s
14 yacht, even though the yacht had its own sophisticated security detail. But, in fact, Morales
15 had entered into a side agreement to provide information gathered about Mr Assange to the
16 “dark side”, in other words US intelligence service. Madam, I know you will have read what
17 Witness 2 says.

18 JUDGE BARAITSER: I have.

19 MR FITZGERALD: Witness 2 is, in fact, a whistle blower who was engaged in this business
20 and, together with Witness 1, has now provided evidence of a criminal complaint to these
21 Spanish Judicial Authorities. What they say is that Morales said, “We are going to be
22 providing evidence for our friends in the United States”, by which he undoubtedly meant and
23 was understood to mean the US intelligence. And therefore, intensive and sophisticated
24 surveillance was introduced by UC Global to secure covert sound and video recording across
25 the embassy. An attempt was made to install live streaming devices to allow realtime access
26 to Morales for his friends in the United States, by which witness 2 said it was clear that it was
27 the US intelligence services. And window stickers were used to permit surveillance from
28 outside, via laser microphones, in an attempt to override Mr Assange’s own attempts to
29 ensure his privacy. US intelligence provided Morales with the technical instructions to do it
30 all.

31 Madam, I will not read out everything that witness 2 says. Obviously we will be
32 applying for his evidence to be heard by this court. But what he has said and what he has told
33 the Spanish judicial authorities is that Mr Assange’s lawyers were priority targets to whom
34 special attention was paid. So despite specific assurances to the contrary, the meetings of

1 Assange and his lawyers were being listened into. And he is clear, witness 2, that the close
2 monitoring of the lawyers, including named lawyers - and some of it is captured on tape, we
3 can actually see the lawyer in there, being surveyed on the evidence provided by witness 2 -
4 some of it was at the direct request of the US intelligence services.

5 The results of this unlawful surveillance of Mr Assange were provided to the US
6 government through two methods. First, data collected from visitors was uploaded daily by
7 security personnel on to a server, to which the US had remote access and which, to the direct
8 knowledge of witness 2, was accessed from the US. And secondly, original recordings from
9 the security cameras, including sound and from separate microphones, were collected by
10 witness 2 every 14 days and then taken personally to the US.

11 Madam, the final point we would make is that witness 2 says that there were
12 conversations about whether there should be more extreme measures adopted, such as
13 kidnapping or poisoning Julian Assange in the embassy. We say that the monitoring
14 extended to meetings between Mr Assange and Ecuadorian counsel, Fidel Narvaez. The
15 monitoring, because it was in realtime, the fact that he was being given diplomatic status on
16 21st December was known to the US, which means it is not such a coincidence that it was on
17 that day that the provisional arrest of Mr Assange was sought.

18 Madam, if you go over the page there, you have the evidence of pressure being
19 successively put by administration officials on Ecuador to withdraw the diplomatic asylum,
20 the asylum that had been granted to him, to protect him from deportation or extradition to the
21 US; a succession of visits to Ecuador and meetings between US high up diplomats and
22 Ecuador, resulting eventually, after a large sum of money was provided for what was called
23 “capacity building assistance”, to Ecuador being persuaded to expel him from its London
24 embassy. And you have the evidence about the further violations of legal professional
25 privilege after he was removed from the embassy. His papers were all seized; and though his
26 solicitor, Gareth Peirce, has attempted to retrieve them, she has not succeeded in doing so,
27 and it appears that those materials were required by the US. They were provided at the US’s
28 request, or they were seized at the US’s request.

29 And we say that it is simply not good enough to say: oh well, if we did that, we won’t
30 use it. It is evidence of a series of abuses of power which infect the whole history of events
31 leading up to the bringing of this extradition request.

32 Madam, the other matter which relates to the abuse of power is the evidence of the
33 pardon offer which I have dealt with at 3.7, madam; and the further evidence of the bad faith
34 and abuse of power at the heart of this prosecution is evidenced by the approach to

1 Mr Assange by Republican congressman Dana Rohrabacher in August 2017.
2 Mr Rohrabacher visited Julian Assange and discussed a pre-emptive pardon, in exchange for
3 personal assistance to President Trump in the inquiry then ongoing, concerning Russian
4 involvement in the hacking and leaking of the Democratic National Committee.

5 And you have admitted the statement of Jennifer Robinson which is at tab 42, madam;
6 and that statement sets out clearly the history. Madam, if I can just take you to tab 42.

7 JUDGE BARAITSER: Just in relation to whether it is admitted or not. To be clear, as you
8 are well aware, last week you applied for it to be adduced out of time.

9 MR FITZGERALD: Yes.

10 JUDGE BARAITSER: I made no decision about its admissibility, merely that you could
11 adduce it out of time.

12 MR FITZGERALD: I am very grateful, madam, for that; but we obviously submit that it is
13 admissible and subject to any arguments, because it goes to this point of abuse of power.

14 JUDGE BARAITSER: I do not know if it is issue, but I just wanted to be absolutely clear
15 that that was the position.

16 MR FITZGERALD: I understand, madam, yes.

17 Madam, if I can just take you to tab 42, you will see she introduces herself as
18 a barrister practising at Doughty Street Chambers and as having represented Julian Assange
19 as a solicitor in relation to WikiLeaks in 2010. She deals with the meeting with him at his
20 request, in the embassy of Ecuador, and arriving and Mr Assange informing her that a US
21 congressman had requested the meeting with Mr Assange and that she was asked to attend to
22 observe. And at that stage, of course, there was no indictment, that is made clear in
23 paragraph 3. This is at paragraph 4:

24 “Congressman Dana Rohrabacher attended the embassy, accompanied by
25 Charles Johnson. Prior to that meeting, I had no notice that Mr Johnson would attend the
26 meeting and I did not know who he was. Mr Johnson explained that he was assisting the
27 congressman. During the course of the meeting, Congressman Rohrabacher and Mr Johnson
28 made clear that they wanted us to believe that they were acting on behalf of the President.
29 They stated that President Trump was aware of, and had approved of them coming to meet
30 with Mr Assange to discuss a proposal and that they would have an audience of the President
31 to discuss the matter on their return.”

32 So it is “they”; it is both Mr Rohrabacher and Mr Johnson.

33

1 “Congressman Rohrabacher explained that he wanted to resolve
2 the ongoing speculation about Russian involvement in the
3 Democratic National Committee leaks to WikiLeaks, which
4 were published by WikiLeaks and other media organisations in
5 2016. He said that he regarded the ongoing speculation as
6 damaging to US-Russian relations as reviving old Cold War
7 politics and it would be in the best interests of the US if the
8 matter could be resolved. He and Mr Johnson also explained
9 that information from Mr Assange about the source of the DNC
10 leaks would be of interest, value and assistance to
11 President Trump.”

12
13 And then just to take you to the actual offer, one sees:

14 “We discussed ...”

15 At paragraph 9:

16
17 “We discussed the free speech implications of any US
18 indictment and extradition request for Mr Assange. We also
19 discussed the fact that the alleged source for the publication,
20 Chelsea Manning, had already had her sentence commuted.
21 Mr Assange and I both attempted to make the case for them to
22 raise this with President Trump, to persuade him Mr Assange
23 should not face prosecution on First Amendment grounds.”

24
25 And paragraph 10:

26
27 “Congressman Rohrabacher raised and acknowledged the risk of
28 Mr Assange’s exposure to US prosecution and explained that he
29 had come to London to meet with Mr Assange to talk about
30 what might be necessary to get him out. He presented what he
31 described as a win-win solution, which could allow Mr Assange
32 to leave the embassy and get on with his life, without fear of
33 a US indictment and extradition request. The proposal put
34 forward by Congressman Rohrabacher was that Mr Assange
35 identify the source of the 2016 election publications, in return
36 for some form of pardon, assurance or agreement which would
37 both benefit President Trump politically and prevent US
38 indictment and extradition.”

39
40 Then the conclusion of that:

41
42 “12. Mr Assange did not provide any source information to the

1 congressman and after the meeting, both Congressman
2 Rohrabacher and Mr Johnson spoke to the media. Their
3 reported statements to the media confirmed that the specific
4 proposal was that Mr Assange would not face US criminal
5 prosecution if he provided information about the source of the
6 DNC publication to allow President Trump to put a stop to the
7 Mueller investigation.”

8
9 Madam, of course, we know, because there has been some publicity given to this
10 matter, that Mr Rohrabacher has subsequently, and I put this down at 3.8, publicly stated in
11 the last few days that he and Charles Johnson did meet with Julian Assange, that he did make
12 the proposal about a pardon, but he denies that it was at the direction or with the approval of
13 President Trump. President Trump himself denies everything. But madam, we say: well, he
14 would, wouldn't he? And there might yet be further developments in relation to this
15 particular aspect of the case, as a result of the public reporting of the allegation last week.

16 But madam, what we say is that this whole pardon incident shows that, just as the
17 prosecution was initiated in December 2017, so after this meeting, for political purposes, so
18 too the Trump administration had been prepared to use the threat of prosecution as a means of
19 extortion to obtain personal political advantage from Mr Assange.

20 Madam, if one again looks at the history. It starts with President Trump's accession
21 to power and his attacks on the media. It goes on through April 2017 with Attorney
22 General Sessions and CIA director Mike Pompeo denouncing Julian Assange; and then the
23 eventual prosecution in December, just on the day he has been granted diplomatic status, the
24 criminal complaint is made.

25 There is this strange interlude where President Trump, if it is correct that they were,
26 as they said, acting on his approval, appears to be using the threat of prosecution as a way of
27 extracting cooperation and assistance from Mr Assange. And that shows, in our respectful
28 submission, that again it is marred by political motivation, marred by abuse of power; the
29 whole history of this prosecution. And there is specific authority that the use of the threat of
30 prosecution to obtain advantages amounts to an abuse of process. Well, it is perhaps hardly
31 surprising that there is such authority. But in the Russian cases, this is often happening,
32 where a prosecution is started, as in the Gusinsky case, in order to extract some benefit from
33 the defendant; and this just shows, in our respectful submission, how in this case the dividing
34 line between the executive, the high executive, the political executive and justice is being
35 blurred, as has happened in many other examples recently.

36 And so we say, madam, and this is at part 4, that the whole history provides the

1 clearest evidence that this extradition request is an abuse of process by reason of bad faith
2 and abuse of power.

3 The prosecution required us to identify the particulars of abuse and we did so in the
4 particulars of abuse document, and I know, madam, you have seen the particulars of abuse.
5 I mean, if I could take you to a very short summary of it, we have 12 particulars of abuse
6 which we have set out and I am ready tomorrow, if necessary, to set out why we say those
7 particulars of abuse would, if accepted, amount to a clear abuse of power, clear evidence
8 taken cumulatively of bad faith. But madam, if one just looks at the summary, can I just take
9 you to the short summary at the end, at paragraph 87? The prosecution and extradition
10 request are at paragraph 87 of the abuse particulars, madam, which is at tab 5.

11 So madam, the prosecution and extradition request were initiated and influenced by
12 ulterior extraneous considerations, rather than purely criminal justice reasons.

13 Secondly, the prosecution and the extradition were pursued for political reasons and
14 have been accompanied by prejudicial denunciations of Mr Assange by senior political
15 figures, in breach of the rule of law and the presumption of innocence.

16 Thirdly, the superseding indictment, with its additional allegations of espionage, was
17 introduced for ulterior and improper purposes, so as to trump the competing criminal
18 allegations in Sweden, make a political example of Julian Assange and expose him to
19 massive further pressures.

20 (4) The prosecution and request are for political offences and to seek extradition for
21 political offences violates the express provisions of article 4.1 of the Anglo-US Treaty.

22 (5) There have been a series of deliberate violations of Mr Assange's right to legal
23 professional privilege by agents of the US acting in this country. These constitute an affront
24 to justice and a violation of the principles of comity that the courts of this country cannot
25 ignore, and which we say justify the staying of the extradition request in their own right.

26 (6) The course of conduct which led to his facing extradition additionally involved
27 a violation of the sanctity of diplomatic asylum in this country; that is to say by the intrusion
28 into the premises and into the discussions there, and a denial of the protections accorded to
29 embassies in international law.

30 (7) The whole history involving the resurrection of allegations which dates back as
31 far as 2010 and which were deliberately not pursued at the time of Chelsea Manning's trial in
32 2013 engage the section 82 bar, but also speak loudly to bad faith and abuse.

33 Madam, that is a short summary. Paragraph 87, sorry. So madam, what we say is
34 that those are capable of amounting to abuse and they come fully within the tests laid down in

1 the successive cases of *Birmingham, Symeou and Fuller v Attorney General of Belize*.

2 Madam, you yourself questioned on Thursday the point of the exercise required by the
3 prosecution, because any ruling at this stage would actually fail to exclude any significant
4 factual issue. Madam, as I understand it, your reasoning, which we totally agree with,
5 is: well, what is the point of having this exercise of having elaborate argument and ruling on
6 whether the particulars of abuse, Tollman abuse, are capable of amounting to abuse if, in fact,
7 the evidence that supports that allegation has got to be heard in relation to the other bars? To
8 which I am going to turn and explain how they are relevant to those.

9 And we respectfully agree, but I am ready, if necessary, to argue the point in detail, if
10 you would wish me to do so.

11 But can I first, because it actually is relevant, summarise the statutory bars briefly,
12 because obviously the evidence overlaps. And then madam, on Zakrzewski abuse, if I can
13 just deal with Zakrzewski abuse before breaking. My learned friend Mr Mark Summers is
14 going to deal with that in detail tomorrow, but you will see that the evidence that we have
15 prepared for the court on the Zakrzewski abuse is as follows.

16 Patrick Eller, the former US Army investigator and expert in digital forensics, dealing
17 with this question of the hash password.

18 John Goetz, an international investigative journalist who worked with Der Spiegel in
19 collaboration with WikiLeaks in 2010 and 2011; and shows that the suggestion of some
20 reckless disregard for the danger of naming people is far, far from the truth; and that, in fact,
21 it was other media outlets, indeed some of those who have been quoted as condemning him,
22 who made the first revelations themselves.

23 Thirdly, Jakob Augustine an experienced journalist who worked at Der Freitag at the
24 relevant time.

25 Fourthly, Andy Worthington who deals with the importance of the Guantanamo
26 detainee assessment briefs.

27 Fifthly, and sixthly, this is Emily Dische-Becker and Sami Ben Gharbia, both two
28 journalists who can confirm the efforts that were made to ensure redaction and the lack of any
29 knowledge on their part of evidence of persons physically harmed as a result of the
30 publications.

31 Moreover, Professor Christian Grothoff, a professor of computer science, confirms in
32 his evidence, on the basis of a review, that at the time when the WikiLeaks site republished
33 the unredacted cables, the information was already easily available to any technically
34 competent person.

1 So it is not the case at all that no attempt was made at redaction. On the contrary,
2 every attempt was made at redaction. It is not the case that the first outlet that published
3 unredacted information was WikiLeaks; but in fact, other media outlets, and Grothoff sets out
4 who they were. And that makes it clear, we respectfully submit, that the allegation which my
5 learned friend has pursued by citing and reading from the New York Times, saying: well,
6 look at what the New York Times said about this. In fact, he has quoted very selectively
7 from the New York Times, if this is a proper basis to bring a prosecution, that this is what the
8 New York Times said and I will read you a passage from it; and therefore you can conclude
9 this. But what they actually said was:

10 “WikiLeaks was roundly criticised for its seeming indifference to the safety of these
11 informants. In its subsequent ... it has largely followed the example of news organisations
12 and redacted materials that could get people jailed or killed. Assange described it as harm
13 minimisation. In the case of the Iraq war documents, WikiLeaks applied a kind of
14 robo-reactionary redaction software that stripped away names and rendered the documents
15 almost illegible. With the embassy cables, WikiLeaks posted mostly documents that had
16 already been redacted by The Times and its fellow news organisations. And there were
17 incidents in which WikiLeaks volunteers suggested measures to enhance the protection of
18 innocents.”

19 So even he, who my learned friend cites as the touchstone of the recklessness of
20 WikiLeaks, accepts that attempts were made to redact, to the point that they were taking out
21 any names at all.

22 And then if one goes to what he says at page 15 of 16, he says:

23 “While I do not regard Assange as a partner and I would hesitate to describe what
24 WikiLeaks does as journalism, it is chilling to contemplate the possible government
25 prosecution of WikiLeaks for making secrets public, let alone the passage of new laws to
26 punish the dissemination of classified information as some have advocated.”

27 So my learned friend’s great witness as to the irresponsibility of WikiLeaks himself
28 provides evidence of their responsibility and himself describes it as “chilling to contemplate
29 the possible government prosecution of WikiLeaks for making secrets public”.

30 Madam, we do say that that is part of a whole overall process of selectivity and that
31 when one reads, and in due course we hope you hear the evidence of Grothoff, the evidence
32 of John Goetz, the evidence of Emily Dische-Becker and Sami Ben Gharbia, the account
33 given in the prosecution by faceless individuals who will never face cross-examination is
34 exposed as completely false.

1 And so we say, as to Zakrzewski abuse at 4.7, the facts have been presented in
2 a misleading way so as to attempt to bring this case within the ambit of an extradition crime
3 and we say the following.

4 Firstly, the prosecution misrepresented the position by suggesting that Julian Assange
5 caused Chelsea Manning to obtain and upload the classified documents to WikiLeaks.
6 Chelsea Manning's own evidence refutes this.

7 Secondly, the allegation that Julian Assange assisted Chelsea Manning in decoding
8 the hash value is simply incorrect and, in any event, a complete red herring; and that is based
9 on the evidence of the court martial itself and the expert opinion of Patrick Eller explaining
10 that evidence; and my learned friend Mr Summers is going to deal with that in due course, no
11 doubt tomorrow.

12 Finally, we would say it is completely misleading to suggest that it was Julian
13 Assange and WikiLeaks that were responsible for the disclosure of unredacted names. In
14 fact, he took every step to prevent the disclosure of unredacted names and WikiLeaks only
15 published the unredacted materials after they had been published in full by others who
16 themselves have never faced legal action. Those points are established by the evidence of
17 John Goetz, Professor Grothoff and other key participants in the events relating to publication
18 that I have mentioned. Madam, we have summarised that in the skeleton argument at
19 paragraphs 54 to 85.

20 The only witness who the prosecution appear to have objected to in particular is
21 Patrick Eller. My learned friend is obviously going to deal with that tomorrow, if the
22 prosecution persist in objecting to that.

23 Madam, what I would propose next to do, very shortly, is to go through the statutory
24 bars and show, firstly, how the evidence in any event overlaps, but also just to summarise the
25 case overall. Madam, I think I will only need 45 minutes. Would it be appropriate to have
26 a five minute break?

27 JUDGE BARAITSER: It would be. You are very welcome to summarise your case; but in
28 terms of the overlap, my understanding is that that has been agreed, save for the witness
29 statement of Mr Patrick Eller.

30 MR FITZGERALD: Yes, yes. I think my learned friend has fairly accepted there is
31 an overlap, yes.

32 JUDGE BARAITSER: So I am not sure there is any need for you to go through that.

33 MR FITZGERALD: Well, madam, if I can just then - what I would wish to do is just to
34 summarise each of the successive statutory bars in brief.

1 JUDGE BARAITSER: You are welcome to.

2 MR FITZGERALD: Madam, I am in your hands, but perhaps if we could have a five minute
3 break.

4 JUDGE BARAITSER: I am very happy for that to happen. What I would like to know from
5 both of you is what you would expect rulings on this week from me, and what you are
6 content to wait for, until the conclusion of proceedings. You do not have to tell me now, but
7 before the end of the day.

8 MR FITZGERALD: Yes.

9 JUDGE BARAITSER: Can I put you both on notice that by the end of the week, I would
10 like a clear and detailed timetable for the hearing in May. I would like the witnesses'
11 availability to be known by the end of the week and I would like times to be allocated to
12 witnesses for examination-in-chief and cross-examination by the hour, please, so that I have
13 a clear and detailed timetable before May.

14 MR FITZGERALD: Madam, if we can do that before Friday, because obviously we are
15 engaged in the - there is the treaty point, of course, to deal with.

16 JUDGE BARAITSER: Yes, yes, by the end of the week.

17 MR FITZGERALD: And as I understand it, there is the argument about Patrick Eller too.

18 JUDGE BARAITSER: How long would you like? Ten minutes?

19 MR FITZGERALD: Yes, thank you, madam.

20 JUDGE BARAITSER: So 25 past. In fact, I will give you until 3.30. I will come back and
21 hear your statutory bar summary; and I would like you to deal with both of the points I have
22 just raised perhaps then.

23 MR FITZGERALD: Yes.

24 JUDGE BARAITSER: Thank you very much.

25 (The court rose at 15.15)

26 (The court reconvened at 15.31)

27 JUDGE BARAITSER: So just before you close, then; are you able to provide a detailed
28 timetable by the end of the week?

29 MR FITZGERALD: We will do the - oh. Madam, my learned friend Mr Summers suggests
30 that could we do it by Monday, because obviously we are focused on the issues before you.

31 I can say, having discussed it with my learned friend, I think the issues on the witnesses - the
32 issues on which we will be inviting you to give a definitive ruling are very limited.

33 JUDGE BARAITSER: Thank you.

34 MR FITZGERALD: That is just to say that the only issues will be the evidence, the

1 admissibility of the evidence of Mr Eller and on the anonymous witnesses, it may well be that
2 we can work out a formula, whereby at least their identities are not disclosed.

3 JUDGE BARAITSER: You are not being heard.

4 MR FITZGERALD: I am so sorry, OK. The only witnesses in relation to whom
5 admissibility issues are likely to arise, after discussing it with my learned friend, are the
6 admissibility of Patrick Eller; and as I said, the issue of the anonymous witnesses, there may
7 be a formula that we can work out, whereby their names are not disclosed to the public, but
8 are disclosed to this court. Madam, the only difficulty is that the Spanish court has issued
9 an order protecting their anonymity, so we would obviously have to get their permission. But
10 madam, I am sure, I think it is very likely that some formula can be worked out.

11 JUDGE BARAITSER: In relation to the timetable for Monday, can that be on an agreed
12 basis, as far as it is possible, please? I am very happy for it to be Monday, but it needs to be
13 a joint timetable.

14 MR FITZGERALD: Yes. Madam, yes. Thank you, madam.

15 JUDGE BARAITSER: I am going to come back to Mr Eller after you have concluded.
16 There are just a few observations I would like to make, before I hear any arguments relating
17 to the admissibility of his statement.

18 MR FITZGERALD: Yes, madam. I appreciate that.

19 Well, madam, so I had dealt with the particulars that are capable of amounting to
20 abuse at part 4, and then just summarising the statutory bars.

21 First of all, this is at part 5, at the top of page 15. We submit that Mr Assange's
22 extradition is now being sought on the basis of a prosecution for espionage, because of his
23 alleged act of publishing state secrets in 2010; and for the reasons that we set out at 5.2, we
24 say that this has all the hallmarks of a politically motivated prosecution.

25 Madam, just very briefly summarising them, because I have been through them in the
26 chronology.

27 JUDGE BARAITSER: Can I just interrupt you one more time and I will not interrupt you
28 again.

29 MR FITZGERALD: Of course, madam.

30 JUDGE BARAITSER: Is your client intending to give evidence in these proceedings or are
31 you not prepared to say at this stage?

32 MR FITZGERALD: Madam, it is very unlikely that he will be.

33 JUDGE BARAITSER: All right. Thank you.

34 MR FITZGERALD: Madam, 5.2. So the prosecution constitutes a complete reversal of the

1 decision taken under the Obama administration. Secondly, it is unprecedented. Thirdly, it is
2 the culmination of an escalating public war on free speech by the Trump administration.
3 Fourthly, it was preceded and accompanied by public denunciations of Julian Assange by
4 senior figures in the Trump administration. And finally, the means adopted to monitor and
5 target Julian Assange and to strip him of his protections in the Ecuadorian embassy were the
6 actions of a lawless state, bent on adopting any means necessary to bring him down.

7 Madam, I did not read out the full evidence of witness 2, but he is quite clear in his
8 evidence that discussions were made, I can just refer you very briefly to what he says in the
9 context of the breach of the rule of law. It is at item 12 of the bundle that he refers to, and
10 this is at page 7, madam:

11 “I recall that on one occasion in Jerez de la Frontera, David said the Americans were
12 desperate and that they had even suggested that more extreme measures should be employed
13 against a guest to put the end to the situation of Assange’s permanence in the embassy.
14 Specifically the suggestion that the door of the embassy could be left open which would
15 allow the argument that this had been an accidental mistake which would allow persons to
16 enter from outside the embassy and kidnap the asylee; even the possibility of poisoning
17 Mr Assange was discussed. All of these suggestions, Morales said, were under consideration
18 during his dealings with his contacts in the United States. Obviously we employees were
19 shocked at these suggestions and commented amongst ourselves that the course that Morales
20 had embarked on was beginning to become dangerous.”

21 So madam, that is just an indication, we respectfully submit, of the scale of the threat
22 to the rule of law and, of course, in this respect, we submit that the state is indivisible. You
23 cannot say: oh well, it was another organ of the state that was doing this. The reason to fear
24 political motivation under 81(a) is relevant and it goes also to the question of the real risk of
25 what would happen to him, if he is extradited, if we are dealing with a state that is prepared to
26 contemplate those extreme measures.

27 Madam, on the question of political opinions, which of course we have to deal with
28 under section 81(a), I next have to deal with the question of how he satisfies that test. The
29 essence of his political opinions, which have provoked this prosecution, are summarised in
30 the reports of Professor Feldstein, Professor Rogers, Professor Noam Chomsky and indeed in
31 Professor Kopelman’s report.

32 And essentially I put it this way. He is a leading proponent of an open society and of
33 freedom of expression. He is anti-war and anti-imperialism. He is a world-renowned
34 champion of political transparency and of the public’s right to access information on issues of

1 importance, issues such as political corruption, war crimes, torture and the mistreatment of
 2 Guantanamo detainees. Those beliefs and those actions inevitably bring him into conflict
 3 with powerful states, including the current US administration, for political reasons, which
 4 explains why he has been denounced as a terrorist and why President Trump, before he was
 5 president, I admit, has in the past called for the death penalty.

6 But I should add, his revelations are far from confined to the wrongdoings of the US.
 7 He has exposed surveillance by Russia, published exposés of Mr Assad in Syria and it is said
 8 that WikiLeaks revelations about corruption in Tunisia and torture in Egypt, were the catalyst
 9 for the Arab Spring itself.

10 Now, the US say: well, he is no journalist. But you will see a full record of his work
 11 in bundle M. He has been a member of the Australian journalists union since 2009. He is
 12 a member of the NUJ and the European Federation of Journalists. He has won numerous
 13 media awards, including being honoured with the highest award for Australian journalists.
 14 His work has been recognised by The Economist, Amnesty International and the Council of
 15 Europe. He is the winner of the Martha Gellhorn Prize and he has been repeatedly nominated
 16 for the Nobel Peace Prize, including both last year and this year. You can see from the
 17 materials in bundle M that he has written books, articles and documentaries. He has had
 18 articles published in the Guardian, the New York Times, the Washington Post, and the
 19 New Statesman, just to name a few. So some of the very publications for which his
 20 extradition is being sought have been referred to, the materials and relied upon in courts
 21 throughout the world, including the UK's Supreme Court and the European Court of Human
 22 Rights. That is to say that the raw materials disclosed, for example, the Chagos Islanders
 23 case was reopened as a result of revelations made by WikiLeaks. In short, he has
 24 championed the cause of transparency and freedom of information throughout the world.

25 Professor Noam Chomsky puts it like this: in courageously upholding political beliefs
 26 that most of us profess to share, he has performed a enormous service to all those in the world
 27 who treasure the values of freedom and democracy and who therefore demand the right to
 28 know what their elected representatives are doing. So Julian Assange's positive impact on
 29 the world, we say, is undeniable. So, too, is the hostility that it has provoked from the Trump
 30 administration, equally undeniable.

31 And madam, just turning to the test for legal opinions. I am sure you are aware of it,
 32 but indeed there is the case of *Azlatar* which is in the bundle, tab 11. I will not take you to it,
 33 unless you want me to, but it clearly establishes, indeed my learned friend Mr Lewis was in
 34 that case and made the concession that such a wide approach to political opinions should be

1 adopted, that is to say you should not narrowly say: “Well, which party do you support?” but
2 look at political opinions in the widest sense. And that will clearly cover Julian Assange’s
3 ideological positions.

4 Moreover, we also rely on cases such as *Amelia Gomez v the Secretary of State*,
5 which is at tab 43 of the political offence bundle. These show that the concept of political
6 opinions extends to the political opinions imputed to the individual citizen by the state which
7 prosecutes him. And it is for that reason that the characterisation of Julian Assange and
8 WikiLeaks as a non-state hostile intelligence agency by Mr Pompeo makes clear that he has
9 been targeted for his imputed political opinions. All the experts whose reports you have
10 before you show that Julian Assange has been targeted because of the political position
11 imputed to him by the Trump administration as an enemy of America who must be brought
12 down.

13 Madam, just then, I have to deal briefly with 81(b); that is to say, the risk of prejudice
14 at trial or sentence or the way he is detained, as a result of political opinion; or indeed his
15 status as a foreigner. And turning to 81(b). We submit that Julian Assange will be exposed
16 to prejudice and discrimination, both at trial and on sentence and in any subsequent detention
17 by reason of his political opinions and indeed, in addition, because of his foreign status.

18 Madam, I have just listed them there. Can I just briefly run through them? Firstly, he
19 has been publicly denounced by the most high ranking public officials, including the
20 President, the Secretary of State and the Attorney General, because of his political opinions.
21 That is what they complain about. Those overtly and intemperate denunciations have
22 irretrievably prejudiced the presumption of innocence and his prospects of a fair trial. That is
23 highly relevant to 81(b).

24 Furthermore, the US are taking the position that he has no First Amendment rights as
25 a foreigner. That is clear from the statement of Mr Pompeo, reported in the Guardian on
26 21st April 2017, and I quote: “Julian Assange has no First Amendment freedoms because he
27 is not a US citizen.”

28 Even the prosecution attorney, Mr Kromberg, indicates or reserves the right to argue
29 that, I quote: “Foreign nationals are not entitled to protections under the First Amendment.”

30 Thirdly, his political status will also result in him being held in especially harsh prison
31 conditions. He is likely to be placed in isolation, both pre-trial and post-trial, and may well
32 be held under the excessively restrictive regime of SAMs, special administrative measures.
33 That is established by the evidence of the US lawyer, Yancey Ellis, at tab 15, and
34 Joel Sickler, the renowned expert on the US prison system at tab 20. US Attorney Kromberg

1 himself accepts the real possibility that Mr Assange will be put in administrative segregation
2 because of his notoriety; that is paragraph 84 of his first declaration.

3 And finally, his trial, sentence and any subsequent detention will all take place in the
4 context of a criminal justice system that lends itself to political manipulation in cases such as
5 this. All this, at a time when President Trump is blatantly demonstrating his readiness to
6 interfere in the criminal justice system to harm its enemies and favour his supporters, such as,
7 of course, Roger Stone which I think it is commented on in Mr Lewis's.

8 This is an example of how, again and again, the administration is interfering with the
9 due administration of criminal justice for political ends; and resulting in the resignation of
10 career prosecutors who indeed protested about the superseding indictment in this case.

11 The flagrant denial of justice in article 6, the evidence of a number of experts supports
12 the view that there is a real risk that Julian Assange will be exposed to a flagrant denial of
13 justice under article 6, both at trial and at the sentencing stage. Madam, the witnesses we rely
14 on there are Eric Lewis, the practising lawyer in the US who deals with issues both at trial
15 and sentence, Barry Pollack, Julian Assange's own lawyer in the US, Robert Boyle, an expert
16 on grand juries who deals with the Chelsea Manning contempt proceedings, and
17 Thomas Durkin, a former federal prosecutor who will deal with the history of this
18 prosecution and also fair trial issues.

19 The US federal system, we say, operates to secure pleas through coercive plea
20 bargaining powers, swingeing sentences and overloaded indictments designed to increase
21 sentence exposure. You have that in Eric Lewis' declaration, and in Durkin's declaration.
22 There is endless literature about the vanishing jury trial, because people are so pressured into
23 pleading guilty by the threat of exorbitant sentences. Those pressures are coupled, in cases
24 such as this, with the effects of pre-trial detention in solitary confinement in, I quote, a cage
25 the size of a parking space, deprived of any meaningful human contact. That is Mr Lewis'
26 evidence. The result is a system in which the plea rate is over 97 per cent, higher than any
27 other country, including Russia, and that is confirmed by the evidence of Eric Lewis in his
28 statement at tab 3, paragraph 40, and the statement of Thomas Durkin, the former federal
29 prosecutor at tab 16, paragraph 18.

30 But also the system will be skewed further against him, because he will be tried in
31 Alexandria, Virginia, from which a jury pool composed almost entirely of government
32 employees and/or government contractors is guaranteed. Mr Pollack deals with that in his
33 evidence at paragraphs 10 to 11. And then he will then be deprived, we submit, of the
34 supporting evidence of Chelsea Manning, because of the coercion of Chelsea Manning in the

1 contempt proceedings, which is described by the grand jury expert, Robert Boyle.

2 In addition, we submit that his trial will be prejudiced irretrievably by the very fact of
3 the public denunciations made of him. The European Court has said time and time again that
4 public officials, particularly high up public officials, should exercise restraint before
5 commenting on cases, pending cases or actual cases. The conduct of the US administration
6 in relation to Julian Assange is completely contrary to all those principles and norms and
7 contrary to the principles established in the case of Alenai Deridmond and numerous cases
8 that followed it.

9 Moreover, this is just to turn to the sentencing procedure. Thomas Durkin explains
10 that he could be acquitted of a series of counts and yet the judge could sentence him on the
11 basis that he is guilty of them, and that is under the special procedure in which relevant
12 conduct can be taken into account and Thomas Durkin deals with that procedure.

13 The prosecution say, “Oh, that is all right, it has been said that that is okay because in
14 the case of *Welch v Fresher* it was declared that it was not contrary to the principles of
15 speciality,” although the judges did say that any English judge would find it a very strange
16 system. It may be consistent with the principle of speciality, but that does not mean that it is
17 not a flagrant denial of justice to be sentenced on the basis that you are guilty of
18 something you have just been acquitted of. We say that that indicates the very specific risks
19 in this case.

20 As to Article 10 and Article 7, we deal with those at part 8. We submit, in short
21 summary, this is at page 21, that this unprecedented prosecution of a journalist for publication
22 of state secrets clearly violates Article 10 and we will seek to make that good by reference to
23 the expert reports of Professor Feldstein, Jameel Jaffer, Professor Chomsky and Professor
24 Russell.

25 Professor Feldstein sums up the threat to Article 10 rights posed by this profession
26 and its request in this way, “Julian Assange faces lifetime imprisonment for publishing
27 truthful information about governmental criminality and abuse of power, precisely what the
28 First Amendment was written to protect. In the end, however, this case is about more than
29 Assange or journalism. It is about the right of citizens to have the information they need to
30 participate in a democracy”. He then quotes a US congressman when WikiLeaks first began
31 publishing the documents saying, “In a society where truth becomes treason, we are in
32 trouble”.

33 Jameel Jaffer similarly concludes this prosecution is “a deliberate effort on the part of
34 the Trump administration to deter journalism that is vital to American democracy”. Now my

1 learned friend says “no problem, it is not about journalists”, but he actually accepted that the
2 receipt of materials might be contrary to his concept of an offence under the Official Secrets
3 Act. You pointed out to him, “Well, so that would cover journalists too”. My learned friend
4 said yes.

5 But there has never been a prosecution in this country for simple receipt of
6 information, I think I am right in saying. I think there might have been the one example
7 where the case was chucked out and it was held that the Official Secrets Act should be
8 pensioned off and that was when Jonathan Aitken revealed stuff about the Nigerian Civil War
9 in 1968

10 JUDGE BARAITSER: Nevertheless, it is current law, 1989, the Act which enables
11 prosecution for those in receipt of that information.

12 MR FITZGERALD: Yes. But, madam, that is the Article 10 issue. Madam, in relation to
13 that, that is relevant because we say that one would have to read the Official Secrets Act as
14 subject to Article 10 and that it has never been applied to prosecute a journalist for receiving
15 leaked documents and publishing them. That goes to counts 15, 16 and 17.

16 Madam, the final point there is Article 7 and the uncertainty of the law. In addition,
17 we say the interference with freedom of expression posed by this prosecution comes as a
18 result of the arbitrary and unpredictable application of the law. All the US First Amendment
19 experts make this point. The very fact that there was this decision that he cannot be
20 prosecuted and should not be prosecuted under the Obama administration and then the
21 reversal under the Trump administration indicates we are dealing with an area where the law
22 is very uncertain. We say, therefore, looking at Article 7 and the need for any interference
23 with freedom of expression to be prescribed by law, that is to say foreseeable in accordance
24 with principles of legal certainty, we say that there would be a violation of Article 10 and
25 Article 7.

26 Madam, then I deal with Article 3. In relation to Article 3, we say there is a real risk
27 Julian Assange will be exposed to inhuman treatment whilst detained in the United States.
28 We rely on the evidence of Eric Lewis on the issue of sentencing; Yancey Ellis, an
29 experienced lawyer who practises in the very area of Virginia in which Mr Assange’s trial
30 and pre-trial detention will take place; and Joel Sickler, an expert on prison conditions in the
31 federal system.

32 Madam, of course, I firstly stress that we are dealing with an individual who is likely
33 to be singled out for special conditions of administrative segregation both at the pre-trial
34 stage and the post-trial stage because of his political profile. At the pre-trial stage, the risk of

1 detention in administrative segregation and the yet more oppressive SAMS regime is
 2 confirmed by the evidence of Yancey Ellis and the evidence of Sickler too. Indeed, Mr
 3 Kromberg fairly recognises the possibility that Julian Assange would be subject to SAMS.
 4 That is at paragraph 95.

5 As to the post-trial stage, there is then the real risk of detention under conditions of
 6 special segregation in either a communications management unit. That has an Orwellian ring
 7 to it. It is effectively solitary confinement but it is called a communications management
 8 unit, CMU, or worse still the notorious ADX Colorado. Again, Mr Kromberg does not rule
 9 out that Mr Assange would be detained in ADX Colorado. The reality is that this would
 10 involve conditions tantamount to solitary confinement for prolonged periods without proper
 11 review and without proper consideration of his mental condition. The evidence is clear that
 12 such a regime precipitates mental breakdowns and heightens the risk of suicide even for
 13 mentally stable prisoners. Mr Sickler deals with that.

14 But, of course, it is all the more dangerous for someone who suffers from clinical
 15 depression or some other form of mental illness. Madam, I do just draw the court's attention
 16 to the fact that the English High Court and the European High Court have had things to say
 17 about their concerns about inhumanity of conditions in so-called administrative segregation
 18 in the US prison system.

19 In the case of *Abu Hamza*, Lord Judge stated, "Like Judge Workman, we too are
 20 troubled about what we have read about the conditions in some of the supermax prisons in the
 21 United States. Confinement for years and years in what effectively amounts to isolation may
 22 well be held to be if not torture then ill-treatment which contravenes Article 3. This problem
 23 may fall to be addressed in a different case". And maybe this is this. "Moreover, in the case
 24 of *Aswat v United Kingdom*, the European Court refused extradition of an accused terrorist
 25 because they were not satisfied there was sufficient provision in the US prison system for the
 26 appropriate treatment of a mentally ill prisoner in high security conditions".

27 Now both of those requested persons were eventually extradited, but only by giving
 28 assurances or indications which were not, in fact, honoured. We respectfully submit that that
 29 does not give one much confidence in the position if he faces the real risk of detention in
 30 ADX Colorado or in administrative segregation. Those cases are significant because here we
 31 are dealing with an extremely vulnerable person with a long history of clinical depression and
 32 an established risk of suicide.

33 Detention in such conditions for Julian Assange would be the height of inhumanity.
 34 The High Court and the European Court have refused extradition in circumstances where the

1 combination of a longstanding mental illness with the appalling conditions in pre-trial
2 detention in the US have resulted in the real risk of Article 3 inhumanity. I refer to the cases
3 of *Aswat* and *Lauri Love*. But it does not even end there because, added to that, there is a real
4 risk of a sentence that effectively amounts to a life sentence without any realistic possibility
5 of review or parole. We do rely there on the evidence of Eric Lewis as to how the sentence
6 could mount up to a sentence which is effectively so long that it amounts to a life sentence.

7 Of course, in the case of *Trabelsi v Belgium*, the European Court held that life without
8 parole in the federal system, to extradite to such a system would be a breach of Article 3.
9 Madam, section 91, we say it would be unjust and oppressive to extradite by reason of Julian
10 Assange's medical condition. Section 91 affords the protection from extradition where
11 extradition would be rendered unjust or oppressive by reason of physical or mental disorder.

12 In this context, we rely upon the evidence of expert psychiatrists and psychologists
13 who will deal with Mr Assange's history of clinical depression and trauma and the risk of
14 suicide if he is extradited to the US. They are, in turn, Professor Copleman, a distinguished
15 forensic psychiatrist whose report you have at tab 6; Dr Sondra Crosby, who saw him in the
16 Ecuadorian Embassy and her report is at tab 7; and Professor Mullen, who was his treating
17 psychiatrist in Australia and who has prepared a report on his current condition following a
18 recent visit, and his evidence is at tab 8. So we rely on section 91.

19 Madam, obviously, this is a sensitive issue but I have to go into it because it is
20 relevant and of itself entitles him to discharge. We say this is a classic case for invoking the
21 jurisdiction exercised by the High Court in the case of *Lauri Love*. That case provides this
22 court with a precedent for protecting a person suffering from mental illness from the high risk
23 of suicide posed by extradition to and detention in the oppressive conditions of the US prison
24 system.

25 There is no doubt, we submit, that Julian Assange suffers from a long history of
26 serious clinical depression that dates back many years. In this case, madam, it is aggravated
27 by his experience as the object of death threats and in wholly abnormal conditions over the
28 years when he was confined to the Ecuadorian Embassy. It is further aggravated by his
29 knowledge that, throughout his time in the Embassy, he and his family were being surveilled
30 and recorded and he himself was being targeted for extradition or some even worse fate than
31 that. You will have seen that reference in Witness 2's evidence to those extreme measures.

32 As a result, we submit, Julian Assange is now in a situation where the very thought of
33 extradition to the US understandably fills him with overwhelming dread, dread that he will
34 not be able to defend himself, that he would not get a fair trial, that he will receive an

1 excessive sentence and that he will be the victim of a trumped up charge in a politically
2 motivated prosecution and detained thereafter in conditions of long-term solitary
3 confinement.

4 You have the report of Professor Copleman. Madam, he spells out the fatal
5 consequences if Julian Assange is taken away from this country where he has the support of
6 his own family unit and is then exposed to the brutal isolation of the US prison system. The
7 European Court in *Aswat* attached significance to the separation of a mentally ill person from
8 all family support in the alien and hostile prison system of the US. So too did the English
9 High Court in *Love*.

10 Madam, both Professor Copleman and Professor Mullen refer to the high risk of
11 suicide if he is extradited. Professor Copleman puts it in this way, “Mr Assange shows
12 virtually all the risk factors which researchers from Oxford have described in prisoners who
13 either suicide or make lethal attempts. I am as confident as a psychiatrist can ever be that, if
14 extradition to the United States were to become imminent, Mr Assange would find a way of
15 suiciding”. That is not some blackmail or threat. It is based on the assessment of his clinical
16 depression and the effect that that would have on him.

17 Sondra Crosby puts it in this way, “It is my strong medical opinion that extradition of
18 Mr Assange to the United States will further damage his current fragile state of health and
19 very likely cause his death. This opinion is not given lightly.” So, madam, in dealing with
20 the question of oppression the court is entitled on section 91 grounds to look at all factors,
21 including the nature of the charges, which are to say the very least highly controversial.

22 You have the point about nothing was done in 2010, nothing was done in 2013 and
23 now we face this prosecution. You can have regard to all those matters. You can have regard
24 to the delay. You can have regard to his mental condition and then to the high risk of suicide.
25 We would say that on those bases there is a case already and when you have heard the
26 evidence we hope you will conclude that in any event it would be oppressive by reason of his
27 clinical depression.

28 Madam, just the one final point is the section 82 point. I did indicate to my learned
29 friend that I would be taking this point although I accept it was not in the list of issues. But,
30 madam, the points we make are perhaps self-evident, that it would be unjust and oppressive
31 by reason of the passage of time, which is the ground for refusing extradition under section
32 82. And I know you will be fully aware of all the authorities on that issue. Firstly, we say
33 there has clearly been a long passage of time and no explanation has been given by the US for

1 bringing the charges as late as December 2017, just some rather coy reference to we do not
2 want to waive, prosecute aureole confidentiality.

3 Secondly, there has been an earlier considered decision not to prosecute in 2013 and
4 the fact of an earlier inconsistent decision was one of the reasons why the House of Lords in
5 the case of *Khakis* found that it was unjust an oppressive after I think a lapse of some five
6 years to extradite.

7 Thirdly, there is a real risk of prejudice given the great difficulties in re-constructing
8 the events of 2010 and 2011, but it will be necessary in any trial to rebut the US's misleading
9 allegations as to recklessness to the causation of harm. Gareth Pierce, in her most recent
10 affidavit, having seen Mr Kromberg's detailed allegations of all these alleged risks, explains
11 the grave problems in now attempting to re-construct and prove the sequence of events in
12 2011 which led to the eventual publication of unredacted materials after publication by
13 others. And she further – if the style of prosecution is going to be waving the New York
14 Times article around and saying well, look, they did not approve of some things although
15 they approved of others, then how is he to deal with that? How is he to deal with it at the
16 sentencing stage too? It would simply be grossly unfair.

17 And she further explains at paragraphs 15 to 17 the difficulties of rebutting the
18 allegations that individuals in various countries were exposed to danger as a result of the
19 revelations. This gives rise to a real risk of prejudice at any forthcoming trial.

20 Fourthly, during the intervening period, the long delay, the long period in which they
21 were saying they were not going to prosecute, Julian Assange's mental state has deteriorated
22 such that there is a real risk he could not effectively participate in his trial. And that is in no
23 small part due to the prolonged period of uncertainty caused by the original decision not to
24 prosecute followed by repeated calls for prosecution in 2017 and then the ratcheting up of
25 charges in 2019.

26 And finally, we submit it would be oppressive to seek his extradition now after that
27 well publicised 2013 decision.

28 Madam, I have just sought to try to summarise what the issues are and what the
29 witnesses are that go to those various issues. Of course, some of the issues go way beyond
30 political motivation and the risk of prejudice. Some of the evidence which goes to Article 6
31 for example also crosses over with points that were taken in the abuse matter.

32 Madam, those are our respectful submissions. I have sought to try to summarise for
33 the court the range of issues, the successive bars that we rely on to extradition to say that it
34 would be now unjust and oppressive and why we say it would be an abuse of process.

1 Madam, the other point is I am obviously there to deal with the abuse of process if we
2 have to, the, what we call, the toll man abuse, and my learned friend Mr Summers will be
3 dealing with *Zakrzewski* abuse because that is obviously relevant also.

4 As to the rulings madam that you invited us to identify if there were any, I think I can fairly
5 say having discussed it with my learned friend, that the only rulings that we would require are
6 – well, if my learned friend is pursuing the objection to Patrick Eller, we would submit that
7 his evidence is admissible to *Zakrzewski* abuse and secondly ---

8 JUDGE BARAITSER: Can I just clarify that? I understand his evidence goes both to
9 *Zakrzewski* but also your general bad faith – perhaps, you are calling it the toll man abuse – is
10 that correct?

11 MR FITZGERALD: Yes. That is right, yes.

12 JUDGE BARAITSER: Can I just speak to Mr Lewis about that?

13 MR FITZGERALD: Yes, of course.

14 JUDGE BARAITSER: Mr Lewis, I make no ruling now and if you wish to pursue it then of
15 course I will make a ruling in due course, as I have already previously indicated my preferred
16 course in relation to that witness, and it only applies to that single witness, is even on a de
17 bene esse basis, to hear his evidence because it goes not only to *Zakrzewski* but also to bad
18 faith, if having heard the evidence you still wish to make the application that I ought not to
19 take it into account I am very happy to hear it. That is my preferred course.

20 If however, you wish it to be dealt with as a preliminary ruling, this week, then of
21 course I will do so. But I have already indicated what I would rather happen. Do you want to
22 think about it overnight or tell me now?

23 MR LEWIS: Let me think about that overnight madam ---

24 JUDGE BARAITSER: Yes.

25 MR LEWIS: --- and I will deal with it in the morning.

26 JUDGE BARAITSER: Thank you. Is there anything else anybody wants to say before we
27 conclude for today?

28 MR LEWIS: No. Can I just confirm we are not doing political offence until Wednesday, is
29 that right?

30 MR FITZGERALD: Yes, I ---

31 MR LEWIS: It is just which books I take home tonight or not?

32 MR FITZGERALD: Yes. Madam, as I – yes, I think it, I think we are going to finish
33 comfortably this week. I know that you did not for example have all the authorities today,
34 quite understandably, but when the time comes for us to do the treaty point, it would

1 obviously be helpful – well, we will all have to have the bundles of political offence
2 authorities ---

3 JUDGE BARAITSER: They have been provided to me now.

4 MR FITZGERALD: Oh I see.

5 MR LEWIS: Are we doing it on Wednesday?

6 MR FITZGERALD: Could we do it on Wednesday madam? Because then we can deal with
7 *Zakrzewski* abuse and extradition crime if there is any detailed argument on that tomorrow. If
8 we have an early day, it may not be prejudicial because it will mean that we are better able to
9 summarise the points on treaty on Wednesday.

10 JUDGE BARAITSER: Mr Lewis, are you happy with that?

11 MR LEWIS: I am more than happy.

12 JUDGE BARAITSER: Happy? 10 o'clock tomorrow then please. Thank you very much.

13 Let me just formally adjourn the case, sorry. Mr Assange, perhaps I should formally adjourn
14 the case until tomorrow. Please just stand up for that part of this hearing. As I say, I am
15 adjourning the case until tomorrow. You will be produced first thing tomorrow and you will
16 remain in custody for the same reasons as you have been given previously. Thank you. That
17 formally adjourns the case until tomorrow. Thank you very much.

ADJOURNED UNTIL 10.00, TUESDAY 24th FEBRUARY 2020

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.