

**TRANSCRIPT OF PROCEEDINGS**

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Ref. U20200010

**IN THE CENTRAL CRIMINAL COURT**

The Old Bailey  
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**

**PROCEEDINGS**

**7<sup>th</sup> SEPTEMBER 2020, 10.18 – 16.13**

**REISSUE 1**

1 JUDGE BARAITSER: Yes, good morning.  
2 UNIDENTIFIED COUNSEL: Good morning, madam.  
3 JUDGE BARAITSER: Has Mr Assange been brought up?  
4 COURT USHER: He has been brought up, madam, yes.  
5 JUDGE BARAITSER: OK. Miss Dobbin, do you speak this morning on behalf of the  
6 Government or is Mr Lewis somewhere in the building?  
7 MS DOBBIN: Mr Lewis is here, he has just popped out for a moment.  
8 JUDGE BARAITSER: And Miss Dobbin, can you confirm that Mr Assange has now been  
9 arrested in relation to the new request?  
10 MS DOBBIN: He has. I understand following the arrest a witness statement has been  
11 circulated to the court.  
12 JUDGE BARAITSER: I see. I have not yet received it but thank you very much. I am just  
13 looking at section 72 now of the Extradition Act. To be clear then, a copy of the warrant  
14 must be given to Mr Assange. Can you confirm that has been done?  
15 MS DOBBIN: Yes, I understand that it has.  
16 JUDGE BARAITSER: Thank you. And I rather assume from the defence there will be no  
17 issues about him being brought before the court as soon as practicable? No. All right. Just  
18 Mr Summers, can you confirm obviously at the conclusion of the formalities, probably the  
19 conclusion of the day, I will have to consider the remand status in relation to the new request.  
20 I am going to remand him subject to anything you say for the same reasons as have been  
21 given to him before. Is there anything you want to say about that?  
22 MR SUMMERS: No. I suspect we will get to it a lot sooner than the end of the day but yes,  
23 once we start moving through the formalities of section 72, 78, we will but yes, that is our  
24 position, madam.  
25 (Judge Baraitser conferred with the Court Usher)  
26 JUDGE BARAITSER: I am just going to check the formalities in section 72 have been  
27 complied with. I have been assured that they have but I think I just need to check with Mr  
28 Assange and then you can manage consent. In relation to the withdrawal of the old request,  
29 Miss Dobbin, in relation to the withdrawal of the old request – good morning, Mr Lewis ---  
30 MR LEWIS: Good morning, madam.  
31 JUDGE BARAITSER: --- at what point are you intending to withdraw that?  
32 MR LEWIS: First thing, Madam, as soon as Mr Assange ---  
33 JUDGE BARAITSER: Thank you very much.  
34 MR LEWIS: --- as he is here.

1 JUDGE BARAITSER: Thank you, Mr Assange. As always, I am formally going to identify  
2 you. Please listen carefully.

3 DEFENDANT: OK.

4 COURT USHER: Would you confirm your full name please?

5 JUDGE BARAITSER: Just remain standing for this part please?

6 COURT USHER: Would you confirm your full name for the court please? You are Julian  
7 Paul Assange, yes?

8 DEFENDANT: Yes, that is right.

9 COURT USHER: And your date of birth please? 3 July 1971.

10 DEFENDANT: Yes, that is right.

11 JUDGE BARAITSER: You are very welcome to sit down. So, Mr Lewis, you straight away  
12 withdraw the old request, is that correct?

13 MR LEWIS: I do, madam, yes.

14 JUDGE BARAITSER: And we move on to section 72 to make sure the formalities are  
15 complied with. I understand, and I think Mr Summers has confirmed, that a copy of the  
16 warrant has already been provided to Mr Assange, is that correct?

17 MR SUMMERS: No, I have not confirmed. I want to take these formalities carefully if I  
18 may?

19 JUDGE BARAITSER: Yes, of course.

20 MR SUMMERS: I have been emailed a copy of an arrest statement. I have not seen a  
21 section 70 certificate. I have not seen a section 71. You know I have not had chance to speak  
22 to Mr Assange to ascertain what he has or has not been served with so ---

23 JUDGE BARAITSER: No, I was not aware of that. All right. No certificate? Can that be  
24 provided in short order?

25 MR LEWIS: It has been but according to the arrest certificate this morning, the officer  
26 provided Mr Assange with a warrant full of all the papers, accompanying certificate, upon  
27 receipt he made no reply. That was this morning. So, Mr Assange who is in the dock, he  
28 may now confirm that all those papers were served on him by the officer this morning.

29 JUDGE BARAITSER: Do you have a copy then of the arrest statement that you can  
30 provided to Mr Summers directly?

31 MR LEWIS: It has been emailed to Mr Summers. I do not have a hard copy, madam, yet as  
32 it was only just dealt with at 10 o'clock.

33 JUDGE BARAITSER: Mr Summers, do you have the emailed copy and is that good enough  
34 ---

1 MR SUMMERS: Yes.

2 JUDGE BARAITSER: --- for your purposes?

3 MR SUMMERS: Yes, yes, the arrest statement but it does not annex a section 70 certificate  
4 and forgive me for being pedantic but I have not seen a section 71 warrant. I am sure it exists  
5 but ---

6 JUDGE BARAITSER: So, you have evidence it has been served because you have got the  
7 arrest statement ---

8 MR SUMMERS: Yes.

9 JUDGE BARAITSER: --- but you have not seen the document itself?

10 MR SUMMERS: Yes.

11 JUDGE BARAITSER: All right.

12 MR SUMMERS: And I – thank you – I do understand that this is – I now have them both  
13 and thank you very much.

14 JUDGE BARAITSER: Would you like me to check directly with your client about whether  
15 he has received a copy of the warrant or can I take it from you?

16 MR SUMMERS: No, you can now take it from me, madam, because we have it.

17 JUDGE BARAITSER: Good. Now, you have already indicated he has clearly been brought  
18 before the court as soon as practicable, 72(3) has been complied with. I am therefore going  
19 to move to offer him the opportunity to consent. Do both of you agree that is the next stage  
20 in this process?

21 MR SUMMERS: Well, the next stage, madam, would be section 72(7)(a) which is  
22 summarising the content of this new request. I understand that Mr Lewis proposes to open  
23 the additional conduct that is ---

24 MR LEWIS: Madam, I do not. I told my learned friend that, Mr Fitzgerald that, it is all in  
25 writing. I do not intend to waste any time recording this.

26 JUDGE BARAITSER: Well, section 72(7) does say that the Judge must inform the  
27 requested person of the contents of the request for his extradition. Now, logistically, how  
28 would you like me to do that? It can be done by handing him a copy of the new request in  
29 writing or Mr Lewis can summarise it on the court's behalf? Mr Summers or Mr Fitzgerald?

30 MR FITZGERALD: Madam, I have just been able to see the defendant for the first time  
31 obviously in person for six months. He would be content for it to be confirmed that he has  
32 seen the material, madam.

33 JUDGE BARAITSER: Can you do that on his behalf?

1 MR FITZGERALD: Yes, I can. As you know, madam, my learned friend Mr Summers was  
2 not able to see my learned friend, he was here in court ---

3 JUDGE BARAITSER: I am going to give you time in just a moment. I just want to go  
4 through the first stages of these formalities now if I may?

5 MR FITZGERALD: Yes, absolutely madam, so the answer is we consent that.

6 JUDGE BARAITSER: All right. So, you are content that he has properly been informed of  
7 the contents of the new request. That is correct is it, Mr Fitzgerald?

8 MR FITZGERALD: It is.

9 JUDGE BARAITSER: In that case we will now give you an opportunity to consent with –  
10 some of you are on your feet?

11 MR SUMMERS: No, no, just to assist you with the remaining particulars.

12 JUDGE BARAITSER: In that case we will put consent. Thank you, Mr Todhunter.

13 COURT USHER: OK. Yes – do you want him to stand up or happy to sit down?

14 JUDGE BARAITSER: Very welcome to stay seated.

15 COURT USHER: Yes. Mr Assange, you appear before the court today as a result of a fresh  
16 extradition warrant issued on 4 August pursuant to extradition proceedings by the  
17 Government of the United States. I am going to ask you to if you will be prepared to consent  
18 to be extradited to the United States. If you do consent you cannot withdraw once you do  
19 that. Are you prepared to consent to be extradited?

20 DEFENDANT: I do not.

21 COURT USHER: Are you prepared to consent to be extradited or not?

22 DEFENDANT: No.

23 COURT USHER: No. OK, thank you.

24 JUDGE BARAITSER: Thank you, Mr Assange. That was the response I was anticipating.  
25 72(7)(c) then deals with the issue of the remand status and the defence have already accepted  
26 that he will remain in custody for the same reasons as have been given before. Do you  
27 require a formal adjudication or are you content to proceed in that way? All right. Well, that  
28 deals with section 72. Mr Summers, you are still on your feet assisting me. Where next  
29 please?

30 MR SUMMERS: 75. We need to fix the extradition hearing date.

31 JUDGE BARAITSER: All right. Well, I do so for today.

32 MR SUMMERS: Thank you.

33 JUDGE BARAITSER: Thank you very much.

1 MR SUMMERS: Madam, may I by way of case management therefore formally serve all  
2 our existing evidence as evidence under the new request?

3 JUDGE BARAITSER: Yes, thank you.

4 MR SUMMERS: And for our part we are content for you to adopt the opening submissions  
5 we made in February.

6 JUDGE BARAITSER: Thank you. I am grateful for that.

7 MR SUMMERS: 78(2)(a) madam.

8 JUDGE BARAITSER: Yes.

9 MR SUMMERS: You need to be satisfied that the documents sent to you by the Secretary of  
10 State include requesting the section 70 certificate.

11 JUDGE BARAITSER: I confirm that I have received certainly copies of both. Yes.

12 MR SUMMERS: Particulars of the person, I do not suggest that the request does not contain  
13 that, particulars of the American offences likewise, and particulars of the new American and  
14 Domestic Arrest Warrant I see are now included in the papers I have.

15 JUDGE BARAITSER: Thank you.

16 (Judge Baraitser conferred with the Court Usher)

17 JUDGE BARAITSER: Well, it might not be convenient or comfortable for the advocates to  
18 sit down. I know often they prefer to stand. Can we re-arrange the microphones so that  
19 everybody can hear?

20 MR SUMMERS: I think we will have to. I do not think a formal hearing without being able  
21 to stand is going to ---

22 JUDGE BARAITSER: Well, in a moment I am going to give the defence an opportunity to  
23 speak to their client and in my absence perhaps that can be looked at.

24 MR SUMMERS: Well, then lastly, madam, 78(4)(a) you need to determine identity, there is  
25 no issue. (b), extradition offence, we invite you to defer judgment on that until you have  
26 heard evidence and submissions. And (c), confirm that the documents sent to you by the  
27 Secretary of State have been served on us and I confirm they have. And that leaves, madam,  
28 just lastly, you will need I think to make a formal order for discharge under section 122 in  
29 relation to the previous request.

30 JUDGE BARAITSER: I am going to formally open the new proceedings. Thank you. That  
31 is done. And in relation to the previous request you are inviting me to discharge ---

32 MR LEWIS: I am, madam, yes.

33 JUDGE BARAITSER: --- it having been withdrawn and that is what I am doing. Thank you  
34 very much, Mr Summers, that was very helpful.

1 MR SUMMERS: Thank you.

2 JUDGE BARAITSER: Now, I wonder if perhaps we should do a little housekeeping before  
3 you speak to your client. Mr Summers, if you want to speak to your client straight away I am  
4 happy to delay that housekeeping until you come back. Would you like to speak to your  
5 client straight away?

6 MR SUMMERS: I am happy to deal with housekeeping now and then may I invite you to  
7 give us some time to continue discussions please?

8 JUDGE BARAITSER: All right. There are one or two issues regarding the remote hearing  
9 position which I just need to address. I hope I can be heard, I know this microphone is  
10 working, this one is not.

11 COURT USHER: If people can hear the Judge, can they send an email through to confirm  
12 that please?

13 JUDGE BARAITSER: All right. Well, I will continue. I know that a number of people are  
14 attending this hearing remotely and others are following these proceedings in an adjacent  
15 court room, it having been live-streamed to that room, and also to a press annex. I have  
16 allowed this to take place for needs of social distancing during this pandemic, and because of  
17 the reduced number of seats in the public gallery and this court room, and because technology  
18 enables those that wish to watch this remotely to do so.

19 However, as I have done before, I must remind everyone of those who attend  
20 remotely that they are still bound by the usual rules that apply to court hearings. In  
21 particular, as I have done before, I remind you that it is a criminal offence for anyone to  
22 record or broadcast any part of this hearing. This includes taking or allowing anyone else to  
23 take any screenshot or video capture either using the device the hearing is being viewed on or  
24 any other remote device including a mobile telephone.

25 As you know, I am aware that a photograph has previously been taken of Mr Assange  
26 from within the Woolwich crown court dock and broadcast on social media in clear breach of  
27 these rules. If this is repeated, then I will, of course, review the arrangements for allowing  
28 people to attend remotely.

29 There is a second issue I must deal with, again in relation to remote attendance. I  
30 have received an additional list of around 40 people who have expressed a wish to attend this  
31 hearing remotely using a Cloud video platform, or CVP. This is something I can consider,  
32 but only after an application has been received and the parties have had an opportunity to  
33 comment on the application and I will only do so having receiving this information if it  
34 discloses that it is in the interests of justice to allow remote attendance.

1           Thus far, having heard from both parties, I have granted a very limited number of  
2 CVP requests, but each of those related to a party in these proceedings, or to a lawyer who  
3 has acted for Mr Assange or WikiLeaks in closely related proceedings. I understand that,  
4 unfortunately and in error, the court administration sent out agreements to others to attend by  
5 CVP without obtaining my permission to do so. During this global pandemic there have been  
6 necessary and temporary changes to the way in which the general public have been permitted  
7 to access proceedings. I am, nevertheless, genuinely concerned, and remain concerned in this  
8 case, about my ability to maintain the integrity of the court if members of the public are  
9 allowed to attend the hearing remotely.

10           In normal circumstances, I would be able to see and hear everything that is going on  
11 in the courtroom. This enables me to ensure the usual rules are complied with and that the  
12 integrity and the dignity of the court is maintained. Where members of the public attend an  
13 adjacent room to watch proceedings, as happens here in court 9, or the press attend in the  
14 press annex, those who attend are within the court building and the court staff are present  
15 throughout. I have already said that a photograph has been taken and broadcast on social  
16 media. Once livestreaming or any other form of live transmission takes place the court  
17 cannot manage this kind of breach and can manage it even less when the person engaged in  
18 this conduct is outside this jurisdiction.

19           I want to make it clear that the limits to the public seating in the court and the  
20 overspill court, or the convenience of attending remotely, is not likely to meet any interests of  
21 justice test. In July the Government announced a list of countries and territories exempt from  
22 advice against “all but essentially international travel.” Travel to and from those countries  
23 will not be affected by the pandemic. There are also few restrictions on travel within this  
24 jurisdiction and those exceptions are set out in the government website.

25           If taking account of these reduced restrictions, those who have previously applied still  
26 believe that the COVID-19 pandemic prevents their attendance at court, then they may apply  
27 again setting out their reasons and I will apply the interests of justice test in each case.

28           So it is on that basis on the limited information I have been provided with thus far that  
29 I have regretfully refused the current remaining applications for CVP.

30           Thank you in relation to that issue. I would also like to deal now with how both sides  
31 intend to open their cases again. Mr Lewis, you have already opened the previous request. I  
32 am assuming that if need be you will provide a very broad summary of the current request  
33 and confine any particular opening statement to new information. Is that a fair assumption?

1 MR LEWIS: Madam, I had not intended to open at all. We have served an amended opening  
2 which has been made available to the press. We have served the short addendum note,  
3 madam, which you have in writing.

4 JUDGE BARAITSER: Yes.

5 MR LEWIS: And in those circumstances I do not intend to open at all.

6 JUDGE BARAITSER: Thank you. Regarding a defence opening. Again, you have  
7 submitted a very lengthy skeleton argument dealing with the issues, which again I assume has  
8 been made public. In addition, in February you have already outlined your *Zakrzewski*  
9 argument in some detail and I am assuming you also, if you are going to open at all, or set out  
10 your issues, will do so in very broad summary. Is that a fair ---

11 MR SUMMERS: It was not our intention to re-open anything in these proceedings. These  
12 proceedings are evidential so far as we anticipate.

13 JUDGE BARAITSER: In relation to the political offence issue, that has been fully argued by  
14 both sides and I suspect it will not be revisited during this hearing.

15 MR SUMMERS: Absolutely.

16 JUDGE BARAITSER: All right. The next issue is the timetable for witnesses. Very helpful  
17 provision of an order of witnesses.

18 MR SUMMERS: If we are moving through issues can I just pause ---

19 JUDGE BARAITSER: Yes.

20 MR SUMMERS: --- and go back to the CVP, et cetera?

21 JUDGE BARAITSER: You can, yes, please.

22 MR SUMMERS: You have told us that the court manager emailed out permissions in error.

23 JUDGE BARAITSER: Yes.

24 MR SUMMERS: Some of the persons to whom the court manager emailed were defence  
25 witnesses who, being experts, are desirous of following the proceedings. Were they among  
26 the category that you have revoked your consent to?

27 JUDGE BARAITSER: No. I received submissions from both sides and made a clear  
28 decision to grant CVP licences to a number of people.

29 MR SUMMERS: No, those were the lawyers, madam.

30 JUDGE BARAITSER: They remain welcome, yes. In error, additional people were emailed  
31 CVP consent from the court and it is to those people that it is revoked.

32 MR SUMMERS: Thank you. There is an issue I suspect between the parties about which  
33 witnesses are going to be permitted to follow these proceedings. Can I discuss that, please,  
34 with Mr Lewis and come back to you?

1 JUDGE BARAITSER: You can. There is also going to be some discussion about  
2 examination-in-chief.

3 MR SUMMERS: Yes.

4 JUDGE BARAITSER: I will hear what you have to say. I already know from submissions  
5 what Mr Lewis has to say and I will make a decision about how best for that evidence to be  
6 adduced before the court.

7 MR SUMMERS: Yes. I think Mr Fitzgerald will address you in relation to that issue, if that  
8 is the next issue to which you wish to turn.

9 JUDGE BARAITSER: Yes, please.

10 MR SUMMERS: May I sit down?

11 JUDGE BARAITSER: Thank you. Mr Fitzgerald.

12 MR FITZGERALD: Yes. Madam, we would ask that we be permitted to call the witnesses,  
13 both the experts and the factual witnesses, that they can refer to their statements, adopt them  
14 and we take them briefly through the key points.

15 JUDGE BARAITSER: It is that last comment which is going to cause some controversy,  
16 “take them briefly through their key points.”

17 MR FITZGERALD: Yes. Madam, yes, I have got something in writing if it would assist on  
18 this point, but as I understand it what my learned friend is saying is that they should either  
19 give their evidence without reference to any statement, or simply adopt their statement and be  
20 submitted for cross-examination. Can I deal with that firstly in relation to the expert  
21 witnesses, madam? Madam, we have dealt with that in the note in relation to the expert  
22 witnesses from paragraph 19 onwards. What we submit basically is that there is a well-  
23 established procedure of calling expert witnesses, of them adopting their statement and then  
24 being taken through that statement in summary. That established practice was established  
25 and followed in cases such as *Sakaya*, *Tollman*, The Rwanda case of *Brown* and in the  
26 *Podivici* case recently before District Judge Zani.

27 Madam, so that is the position and, as I understand it, my learned friend accepts that  
28 when it comes to the experts, that is to say the medical experts in particular, that that is an  
29 acceptable way of dealing with the witness. In other words, the adopt their statement and  
30 then they are taken to key passages. That is what happens in a diminished responsibility case  
31 in a criminal trial and it what we respectfully submit should happen in relation to the experts.  
32 There is a well-established procedure and we would invite the court to follow that procedure.

33 In relation to the factual witnesses, we submit that the position is laid down in rule 50,  
34 sub-rule 15 where a party wants to introduce evidence, the relevant part of these rules applies

1 with such adaptations as the court directs. That is in relation obviously to extradition  
2 proceedings. And again, madam, if one takes an example such as the *Brown* case, the  
3 Rwanda case, the factual witnesses adopted their statements and then were taken through key  
4 passages.

5 So, madam, that is what we would invite the court to do. It is a flexible approach. It  
6 recognises that these proceedings are, in fact, not civil proceedings and they are not typical  
7 criminal proceedings and the rules say at rule 50, sub-rule 15 that under the law that would  
8 apply if that hearing were a trial, with such adaptations as the court directs.

9 So, madam, that is ---

10 JUDGE BARAITSER: Can I ask, Mr Fitzgerald, what the benefit to the court is to adopting  
11 that course when I have their statement, I have read their statement, and I can assure you I  
12 have read each and every statement and I hope the witness will have read their statement  
13 prior to giving their account.

14 MR FITZGERALD: Yes.

15 JUDGE BARAITSER: To repeat evidence does not affect its weight and it adds no benefit to  
16 the court. Why would I adopt the course that you propose in relation to factual witnesses?

17 MR FITZGERALD: In relation to factual witnesses?

18 JUDGE BARAITSER: Yes.

19 MR FITZGERALD: Well, madam, the advantage of it in relation to factual witnesses is that  
20 it can focus on the key issues. It means that rather than going straight into cross-examination,  
21 the court has the key points focused on, and in relation to the conduct of the hearing in public,  
22 if justice is to be done it has to be seen to be done and in public, the person's evidence is then  
23 heard by the public just briefly summarised. Moreover, we say that in this case it is  
24 important for Mr Assange, who, you are aware of the circumstances in which he has been  
25 held for the last six months and I know that you have made every effort to try to ensure that  
26 we can have access to him, but sadly we have not been able to have physical one-to-one  
27 access with him at all. So it enables him to hear, summarised, the factual evidence before the  
28 cross-examination takes place, rather than just plunging into cross-examination.

29 So, from the point of view of the court, it highlights the key factors. From the point  
30 of view of the public, they know what the witness is saying broadly because they are taken to  
31 it, and it is focused on, and from the point of view of Mr Assange he hears it, rather than just  
32 saying, "Do you adopt your statement? Now cross-examination."

33 So we say we hope it will assist you. We respectfully submit it is the only way that is  
34 fair to Mr Assange and, finally, we say that it ensures that justice is done in public. You

1 remain, of course, I will call it Master, but that is only because that is the expression in the  
2 old common law case, Master of your own procedure. You are in charge of your ---

3 JUDGE BARAITSER: Mistress of my own procedure.

4 MR FITZGERALD: Mistress. I was staying the use of that, but you are in charge of your  
5 own procedure, madam, you are the mistress of your own procedure and therefore you can  
6 determine at what point the summary has strayed beyond just a summary. But I do  
7 respectfully submit that that is important that the witness be focused on the key paragraphs  
8 and give their evidence.

9 JUDGE BARAITSER: What I was trying to turn up but I do not have immediately to hand I  
10 can manage electronically, was your time proposals for examination-in-chief.

11 MR FITZGERALD: Yes.

12 JUDGE BARAITSER: I think the very first witness 1.75, I am assuming that is 1 hour and  
13 45 minutes.

14 MR FITZGERALD: Yes.

15 JUDGE BARAITSER: I am wondering how that can possibly be a brief summary of their  
16 account.

17 MR FITZGERALD: Well, madam, can I just deal with that with Mr Feldstein? The reasons  
18 for that is there are a number of, for example, in paragraph 9 of his report he deals with a  
19 number of sources for his history of the prosecution and it would, in our respectful  
20 submission, assist if he can be taken through those sources and asked to comment on that.  
21 And that enables it to be clear what he is basing his opinion on the history on. It can  
22 probably be done quite quickly, but we do respectfully submit that it is necessary for him to  
23 explain why he has reached those conclusions and he cites, I think it is about eight newspaper  
24 reports. There has been some suggestion it is just based on newspaper reports. We would  
25 wish him to at least be able to go through those reports and say those that he relies on and  
26 why.

27 So, madam, it is in order for there to be an orderly and rational exposition of his  
28 expert opinion that we ask that the normal course adopted in extradition proceedings be  
29 adopted. Of course, madam, in the final analysis, if you say we must do it quicker, we will  
30 do it quicker, but we are trying to give an idea of how long we think it will take in answer to  
31 your indication.

32 Madam, I think when it comes to the medical expert, my learned friend has no  
33 objection and accepts that that is the normal course that is taken. Indeed, in diminished

1 responsibility cases the jury actually has the report and you say, “Can I just take you to  
2 paragraph 13 and your conclusion there”

3 JUDGE BARAITSER: Mr Fitzgerald, can you just confirm that all the witnesses will be  
4 made available to the public, they will be released in the usual way?

5 MR FITZGERALD: Well, madam, I do not see any reason why they should not. Once the  
6 witness is called and adopts, yes, I think that would be, but the trouble is the simultaneity, if I  
7 can put it that way. If the first thing that is heard is the cross-examination rather than a  
8 summary of the evidence ---

9 JUDGE BARAITSER: Well, they are not making the decision though, are they not. It is me  
10 that needs to have read the statement in advance.

11 MR FITZGERALD: Of course.

12 JUDGE BARAITSER: I am sure you can see that.

13 MR FITZGERALD: Madam, of course, I appreciate that. You are the trier of fact, you are  
14 the decision-maker and I accept that. However, I do respectfully submit that just to locate  
15 them in time and place at the start to get them to summarise what their brief evidence will be  
16 will be of assistance to you. Some matters may not be pursued or may not be gone into, so  
17 then you know what the essential points are that they are being called to establish and, rather  
18 than a witness comes forward, adopts their statement and the first thing obviously that you  
19 hear, but the first thing that the world hears and the first thing that Mr Assange hears is cross-  
20 examination.

21 JUDGE BARAITSER: Okay.

22 MR FITZGERALD: And we respectfully submit that they should be permitted to be referred  
23 to their statement, to adopt it and then briefly summarise their evidence.

24 JUDGE BARAITSER: Thank you, Mr Fitzgerald.

25 MR FITZGERALD: Madam, that is my respectful submission.

26 JUDGE BARAITSER: Mr Lewis.

27 MR LEWIS: Madam, we have a number of comments. We do object to the approach Mr  
28 Fitzgerald wants to do it. First of all, he says it is the normal approach. We do not accept  
29 that. Mr Fitzgerald knows the divisional court had deprecated the approach of calling a  
30 witness, adopting their report and then adducing expert evidence. Secondly, the majority of  
31 these witnesses are simply not experts. They claim to be experts. If we take the first one,  
32 Professor Feldstein, we do not for one moment accept that he is an expert. Expert evidence  
33 requires, as you know, madam, a body of knowledge on which the court cannot be expected  
34 to understand the evidence unaided save for the expert. That is set out in Blackstones,

1 paragraph F11.8.

2 It is a common position. Expert evidence is on material which the court cannot  
3 understand. However, what we have here is simply he is a professor of journalism. He does  
4 not give any expert evidence on journalism. What he does is he produces a lot of newspaper  
5 reports and says, “This is what I base my opinion on that this was a war on journalism by  
6 President Trump”. There is absolutely not one scintilla of necessity to have expert evidence  
7 on that, madam. We can all draw that opinion, in the same way as lawyers are called by my  
8 learned friend purporting to be experts on political beliefs.

9 JUDGE BARAITSER: Can I just interrupt you, Mr Lewis. Are you considering here the  
10 issue that I am deciding for the moment, which is examination in-chief ---

11 MR LEWIS: It is, madam.

12 JUDGE BARAITSER: --- and the time to be allocated or are you talking about  
13 admissibility?

14 MR LEWIS: I will explain why, because they are all factual witnesses other than the medical  
15 and, because they are all factual they are not experts, we fall into this position where they are  
16 factual evidence. They are lawyers who give evidence on prisoners. They are not giving  
17 expert evidence as an expert on prisoners. They are giving factual evidence of they visited a  
18 prison and this is what goes on. That is factual evidence. It is not expert evidence.  
19 Therefore, we fall into this. My learned friend, there is not a single witness he intends to  
20 spend less than half an hour in-chief on; some, two and a half hours, 175 is a common  
21 amount.

22 Madam, that just cannot be anything other than bringing up new material and, if it is  
23 new material, it is unfair to us. We would have to ask for an adjournment at the end of every  
24 witness in order to deal with the new material which has come up. If it is not new material, it  
25 is repetitious. Madam, you have the point. Then, for my learned friend to say it is unfair or  
26 unjust if it has to be done publicly, well, it would be very strange because the High Court  
27 adopt this method in every single case and it cannot possibly be said that that is not public  
28 justice and fair justice.

29 So, madam, to allow this, to simply allow experts because if what Mr Fitzgerald  
30 suggests, “Well, we will take them to a few newspaper reports and explain his comments”, it  
31 is bound to be new, it is bound to be the way he is dealing with it, and there may be things he  
32 says that we want to rebut. It is a never-ending position. We think we are being very  
33 generous in just simply saying, adopt your statements and you have got all that evidence in  
34 and my learned friend can make submissions on it, he can comment on it and the evidence is

1 before you. It is, in our respectful submission, an extremely fair way to do it.

2 JUDGE BARAITSER: All right, thank you. So, Mr Fitzgerald, I have given you every  
3 opportunity, is there anything else really you could possibly wish to say that you have not  
4 already said?

5 MR FITZGERALD: Well, madam, my learned friend is for the first time now taking a point  
6 about whether our witnesses are expert witnesses.

7 JUDGE BARAITSER: Right, he is taking that point in this context. He is not dealing with  
8 the admissibility of the evidence.

9 MR FITZGERALD: Well, madam, how am I supposed to deal with that without notice. If I  
10 can go through each of the witnesses, Professor Feldstein, for example, is a professor of  
11 journalism. He can deal with the practice of journalism which is perhaps ---

12 JUDGE BARAITSER: I am going to interrupt you, Mr Fitzgerald. There is no purpose in  
13 you going through each of your witnesses and for me to determine whether or not they are  
14 expert witnesses or factual witnesses. It does not assist in this context.

15 MR FITZGERALD: Well ---

16 MR LEWIS: If it helps, madam, as I explained to my learned friend, only the medical, we  
17 accept they are proper experts.

18 JUDGE BARAITSER: All right.

19 MR LEWIS: But none of the others we accept are experts.

20 JUDGE BARAITSER: I have made my decision in relation to adducing the evidence in-  
21 chief, so I am going to tell you what that is now.

22 MR FITZGERALD: Well, madam, I do ask that, in relation to the witnesses who give  
23 opinion evidence based on experience or study or learning, we be permitted to follow the  
24 normal course and that is to say that they adopt their statement and that they are taken  
25 through the key passages of it. When my learned friend says that you cannot go through the  
26 basis of your opinion, that is exactly what you do do with an expert. You say, "You have  
27 given this opinion, what is the basis of it, let us just summarise that".

28 JUDGE BARAITSER: All right, thank you.

29 MR FITZGERALD: And, madam, I do respectfully submit that that is crucial. Of course,  
30 madam, if you say that we have more time or less time in respect of each, of course, we have  
31 allowed for re-examination as well in the time that we have given. That we accept.

32 JUDGE BARAITSER: All right.

33 MR FITZGERALD: But, madam, we do invite the court to permit a flexible approach such  
34 as is the time-honoured approach in extradition proceedings. I do not know what divisional

1 court case my learned friend is commenting on, but it happened in *Sakaya*; it happened in  
 2 *Tollman*; it happened in *Podivici*; it happened in the Rwanda case that we adopted that  
 3 procedure, and none of the divisional court said why was this being done. So, madam, to  
 4 have this complete departure in this case where there are sensitive and novel issues going to  
 5 fundamental questions of human rights would be different.

6 Equally, the prison experts, I just do not see how my learned friend can say that they  
 7 do not have expertise. You can acquire expertise by study. You can acquire expertise by  
 8 experience, by actually going into a prison and by being a qualified professional. So we  
 9 respectfully submit that, of course, they are perfectly entitled to give their opinion as to what  
 10 rules and regulations apply, what the circumstances are in which you are subjected to SAMS  
 11 and as to the conditions in isolation in either pre-trial detention in Ad seng in Alexandria in  
 12 Virginia or in ADX Florence, Colorado and, just to plunge straight into cross-examination,  
 13 we respectfully submit would not assist yourself, would not be fair in public terms and would  
 14 not be fair to Mr Assange.

15 JUDGE BARAITSER: Thank you very much. Each witness has provided a statement or, in  
 16 some cases, a number of statements which they will each adopt in their evidence in-chief.  
 17 Each of those statements will be made public and offered to the public for them to read. Mr  
 18 Assange, I am assured, has been given a copy of each of those statements and the court has  
 19 been given copies and has read each and every statement provided in these proceedings.

20 In my view, there is no benefit whatsoever in counsel taking each of those witnesses  
 21 through their statements. I will have them in front of me as they go through their evidence.  
 22 They attend court, in my view, not to repeat their written evidence but to be tested and  
 23 challenged about what they have said. Nevertheless, I will give each witness an opportunity  
 24 to settle themselves and to be orientated, but in each case, Mr Fitzgerald, no more than 30  
 25 minutes. In some cases, there will be considerably less time needed for them to orientate  
 26 themselves in that way but I indicate no more than 30 minutes.

27 If there are supplemental questions relating to developments since those statements  
 28 have been served, then I will ask the defence to identify those areas the supplemental  
 29 questions relate to and seek leave to ask those questions. It does not need saying that re-  
 30 examination is exactly that. It must be confined to issues raised during cross-examination in  
 31 the usual way. Therefore, the proposed timings for the examination in-chief are likely to be  
 32 significantly shorter than those offered to the court and in each case I offer out a warning: no  
 33 more than 30 minutes, please.

34 That deals with that issue. In relation to the admissibility of evidence, I understand

1 there is an agreed position from the defence and the prosecution now, is that right?

2 MR SUMMERS: Yes, madam, for two reasons. Firstly, we have restarted these proceedings,  
3 so technically there have been no case management directions that we need to concern  
4 ourselves with before today. But, in any event, even if that had not happened, the parties  
5 have reached a quid pro quo agreement in relation to the admissibility of each other's  
6 evidence as served up until now.

7 JUDGE BARAITSER: Thank you, that is very helpful.

8 MR SUMMERS: We hope that assists the court.

9 JUDGE BARAITSER: And, in fact, all of the evidence will be before the court, as I  
10 understand it.

11 MR SUMMERS: Yes.

12 JUDGE BARAITSER: Those are the issues I wanted to deal with by way of housekeeping.  
13 What I intend now to do is rise for a period to enable you to speak to your clients.

14 MR SUMMERS: Yes.

15 JUDGE BARAITSER: How long are you asking for, Mr Summers?

16 MR SUMMERS: Well, madam, a number of things arise at this stage. I am still desirous of  
17 dealing with the witnesses' abilities to follow these proceedings via CVP. I am happy to park  
18 that issue and discuss it with my learned friend, but noting the issue between us as to whether  
19 Mr Feldstein, it will not apply to him, he is the first witness, but let us say Mr Tigar is an  
20 expert and that you would ordinarily expect experts to understand their duties and be  
21 permitted to sit in court while other experts give their evidence. Our understanding and our  
22 anticipation was that that would be the course followed in this case. It may be that I can  
23 reach some kind of agreement with the prosecution.

24 JUDGE BARAITSER: I hope so.

25 MR SUMMERS: But I may need to come back to you in relation to that because ---

26 JUDGE BARAITSER: It would be unattractive to go through each of the ---

27 MR SUMMERS: Oh, absolutely.

28 JUDGE BARAITSER: --- innumerable witnesses and make a decision about each.

29 MR SUMMERS: Yes.

30 JUDGE BARAITSER: In relation to whether they are experts or not.

31 MR SUMMERS: And some are genuinely difficult. Ms Robinson, for example, is a witness  
32 of fact and a lawyer in this case. Whether she should be permitted to attend court as a lawyer  
33 for three weeks before she gives her evidence is one that, one would hope there would be  
34 sensible compromise. But can I just park that issue and invite you perhaps to come back to it

1 later in the morning.

2 The shortening of the time estimates will have a knock-on for the timetable generally.  
3 It may assist, madam, if we take stock of what that means for the timetable and where that  
4 leaves us in relation to three weeks, four weeks and the timing of closing submissions. I  
5 think we would all appreciate a little time just to take stock of where that leaves us and  
6 whether we are going to be short on evidence some days and we may end up wasting court  
7 time if we do not rearrange things.

8 JUDGE BARAITSER: If that can be achieved overnight. You only have the one witness  
9 listed for this afternoon.

10 MR SUMMERS: Yes.

11 JUDGE BARAITSER: And we will hear from that witness and then perhaps overnight you  
12 can come to court with a revised timetable.

13 MR SUMMERS: So be it. The other issue that we invite your ruling on before any witness  
14 gives evidence is what we have termed “submission 8” and whether, despite the  
15 announcement of the new indictment and its production, the US are permitted to seek  
16 extradition in relation to the expanded conduct. It is a matter upon which we would seek to  
17 address you. We have in writing. I would seek to do so orally and we invite your ruling this  
18 morning, if preferable. I am happy to launch into it now or we can do it later in the morning,  
19 madam.

20 JUDGE BARAITSER: I think what ought to happen is you take the instructions that you  
21 need to, we will come back and I will deal with that issue then. How long are you asking for?

22 MR SUMMERS: I suspect it would take me 15 or 20 minutes to go through that and take  
23 you to the authorities of *Osunta* and *Dabas*.

24 JUDGE BARAITSER: No, sorry, I meant with your client.

25 MR SUMMERS: Oh, that is for others to answer. Can we ask for an hour, madam, in the  
26 first instance?

27 JUDGE BARRAITSER: My concern, of course, is not to jeopardise Mr Feldstein giving his  
28 account.

29 MR SUMMERS: Well, if he is going to be 30 minutes in chief, I think he will fit in the  
30 afternoon.

31 JUDGE BARRAITSER: 11 takes us to 12 noon and we deal with the outstanding issue in  
32 your submission 8 this morning and then perhaps at two o'clock start with Mr Feldstein.

33 MR SUMMERS: Yes, thank you.

1 JUDGE BARRAITSER: Nothing to say about an hour's break. No. Thank you, 12 noon  
2 then.

3 MR SUMMERS: Madam, before you rise, can I just mention the heat?

4 JUDGE BARRAITSER: You can.

5 MR SUMMERS: It is exceptionally hot in this room.

6 JUDGE BARRAITSER: It is.

7 MR SUMMERS: It may be that I am over sensitive to it but I cannot foresee being able to  
8 work for four weeks.

9 JUDGE BARRAITSER: Can I make a direction that anybody who wishes to remove their  
10 jackets is very welcome to do so and I am told the air conditioning is being looked into.

11 MR SUMMERS: I am very grateful, otherwise we will be coming in Hawaiian shirts  
12 tomorrow I think.

13 JUDGE BARRAITSER: 12 noon, please, come what may. Thank you very much.

14 (Short adjournment)

15 JUDGE BARAITSER: Presumably, Mr Assange is on his way in. Thank you, please sit  
16 down. Mr Summers.

17 MR SUMMERS: Madam, not having been opened before you today, there is a risk that the  
18 novel nature and extent and significance of the new allegations that have appeared within the  
19 last few weeks by way of this fresh request have perhaps faded from all our immediate  
20 recollections.

21 Madam, just to remind you, these are the new allegations that are dealt with at  
22 paragraphs 28 through to 45 of the prosecution's revised opening which you will have,  
23 madam, at tab 4 of the US core volume.

24 JUDGE BARAITSER: Now, I must just look at my own. Has a new volume been handed to  
25 me? I was looking at the original core volume but that has been taken over. I have my own  
26 copy in any event. Let me find the prosecution.

27 MR LEWIS: Madam, you should have a new core, prosecution core bundle and just to make  
28 sure – it is exactly that, madam, and what that has got is the entirety of the prosecution case  
29 and evidence and submissions.

30 JUDGE BARAITSER: Alright.

31 MR SUMMERS: Thank you. For our purposes, madam, just to orientate yourself, tab 1 is  
32 the old request. Of course, just by way of background, the criminal complaint in this matter  
33 was December 2017. We have a great deal to say about the timing of that, but that is a

1 different issue. The warrant was issued in the US on that day, then there was a provisional  
 2 warrant under section 73 issued by this court in December 2017, then the first indictment, and  
 3 you do not have any of these because they do not form part of the prosecution's papers, was  
 4 issued in March 2018, containing what was, what is now count 2. It was count 18, now count  
 5 2. That was the extent of the first indictment. Then there was a provisional request in  
 6 January of 2019 whilst Mr Assange was still in the embassy and that was executed on his  
 7 removal from the embassy in April 2019 and these proceedings started and madam, you will  
 8 recall, and this is tab 1, the full order request came two months in June of 2019. It contained  
 9 the new indictment, new then. It was the second indictment now containing 18 counts  
 10 including the espionage counts with which you are familiar and with which you have been  
 11 addressed in opening.

12 And so, these proceedings commenced and the evidence gathered to deal with the  
 13 issues that they raised. I hope I am stating the obvious, but madam, tab 2, tab 3, tab 7, tab 8  
 14 are all lengthy affidavits from the US, Mr Kromberg in particular dealing with the back and  
 15 forth of the evidence that was then going on before this court for a year and a half.

16 Madam, without warning, and that is an important point, without warning, on the 24<sup>th</sup>  
 17 of June 2020, this year, so six months after you had heard opening submissions, 18 months  
 18 after these proceedings had started and a matter of weeks before this hearing was listed, the  
 19 US announced the new indictment. It is a curiosity that the US in previous hearings had been  
 20 content for the extradition hearing to go ahead in February, in May, knowing presumably that  
 21 this was coming and not mentioning it to you and it is no exaggeration to say that it was out  
 22 of the blue by the end of June this year that the defence learnt about a new indictment and I  
 23 say learnt advisedly. We were not told about it by the CPS or the US government in this  
 24 case. There was a press release in America when the new indictment was announced and we  
 25 learnt it through that and we brought it, madam, as you will recall to your attention  
 26 immediately.

27 But your immediate reaction, you may also recall, was you cannot do anything with it  
 28 until it is served in these proceedings and it was not until the 29<sup>th</sup> of July, madam, that that  
 29 happened. Of course, we had had it for a month before then, but not knowing what to do with  
 30 it because until it is served in these proceedings, we do not know what use is supposed to be  
 31 made of it or how it is going to be deployed.

32 Madam, there then followed, and I want to make this point lightly if I may, a period of  
 33 confusion. I do not attribute blame for it, but it was not immediately obvious from the face of  
 34 the new indictment what had changed so far as the charges were concerned. Of course, there

1 is new conduct outlined in it, but so far as the charges are concerned, it was difficult to  
 2 discern what was going on and again, I do not want to labour this point, but understanding  
 3 what was going on was not assisted, you might think, by the service of documents by the US  
 4 saying that it does not add or remove any counts. It continues to charge the manning and it  
 5 differs in that it alleges additional general allegations and statements to the like.

6 But, madam, it became clear to everybody on the 21<sup>st</sup> of August, that is just over two  
 7 weeks ago, that whether or not we were justified in thinking that the charges remained the  
 8 same, that was not the case, but this material was expressly now not just background  
 9 narrative in the sense that we all know and love, but was being put before you as potential  
 10 standalone basis of criminality. That is to say it was being said and now is said that even if a  
 11 court, you or an American court, rejects in their entirety the existing manning allegations, it is  
 12 said that Mr Assange can now be extradited and potentially convicted in relation to this  
 13 conduct, potentially on its own and that is, we hope it is no exaggeration to say, a resounding  
 14 and important new development in this case.

15 The reason I am on my feet, of course, is because of the timing of this new  
 16 development, so, madam, just coming back, please, to the prosecution's revised opening note  
 17 and reading it now with the knowledge that what is set out at paragraph – in fact, it is 28  
 18 through to 45 – is put forward as a potentially separate distinct and new basis for extradition.  
 19 You will see that it traverses issues such as paragraph 28, stealing data from a bank; asking  
 20 somebody to intrude and steal information from a government of another country. I think we  
 21 now know that is Iceland. Purportedly paragraph 30, for tracking police vehicles. 31,  
 22 directing somebody to hack the computer of an individual. 34, some cyber security company  
 23 and we go on.

24 There are passing references to US state government computers and presumably, they  
 25 are for classified information of the sort that we thought we were dealing with, but 36 is  
 26 retaliating against a television documentary. 40, US state police association computers and  
 27 then, finally, paragraphs 44 and 45 in June 2013 – and the dates are going to be important –  
 28 assisting a whistle blower, then in Hong Kong, attempting, it is said, to evade arrest. How  
 29 that is said to be criminal is anybody's guess, but in fact, with respect, how much of this is  
 30 said to be criminal activity is anybody's guess and even if it is the subject of a coherent  
 31 showing on that front, how it satisfies dual criminality is even more difficult to ascertain. A  
 32 non-US national acting outside the US to encourage somebody to intrude into the computers  
 33 of Iceland is, with respect, a little difficult to see how it could survive any kind of sensible  
 34 transposition exercise.

1 But just by way of introduction, that is all the new conduct that has landed in the past  
 2 six weeks. We venture to suggest, madam, that you would not ordinarily even consider  
 3 listing an extradition hearing in a part 2 case six to eight weeks after the arrival of a request  
 4 like that and you would not do that, even for somebody who is on bail, who is able to receive  
 5 documents and is able to communicate freely with their lawyers. It would be extraordinary in  
 6 the part 2 context for this court to be beginning an extradition hearing in relation to  
 7 allegations like that within weeks of their announcement, without warning, and even more  
 8 extraordinary to do so in circumstances where the defendant is in custody and subject to all of  
 9 the ongoing restrictions that inhibit his contact with his lawyers, with witnesses and the like.

10 We have, in the short amount of time, madam, sought to give you a flavour of the type  
 11 of issues that would need to be ventilated in relation to what is essentially a fresh extradition  
 12 request in the event that we had time to do it. I have already commented on dual criminality,  
 13 it would be an obviously live issue hacking into the parliament of Iceland by a non-UK  
 14 national outside the UK, it would be, I venture to suggest, rather difficult to fit into any  
 15 English criminal offence for dual criminality purposes. But there are in any event chapters of  
 16 these new allegations that are not even remotely criminal at all.

17 There are issues surrounding the source of all of these new allegations and just exactly  
 18 how Sabu came to be cooperating with the FBI. You are not told in the request, that is the  
 19 new request that we have today, nor the opening, nor anywhere from the US that Sabu,  
 20 Topiary, Callier and others said to be involved with LulzSec were in fact tried for all of that  
 21 at Southwark a decade ago, despite the US indictment, in short Forum, that would be a very  
 22 live issue for your consideration of these separate allegations.

23 There are issues, and we have sought to summarise them, this is submission eight,  
 24 madam, in our skeleton argument that begins at paragraph 252 to 267, we have sought to  
 25 summarise the issues that surround Mr Hammond, also already prosecuted for the conduct  
 26 now set out in this surprise document, given the maximum sentence and then the subject of  
 27 summons before the Grand Jury to attempt to give evidence against Mr Assange. You know,  
 28 madam, that similar issues surrounding Miss Manning are live in this case.

29 And finally, there is the whole background, madam, to the person called “Teenager”  
 30 in the new request. He is in fact “Iceland 1” in the first request in respect of whom the US is  
 31 then counselling caution in your treatment of him but now apparently caution has gone and  
 32 the US are prepared to deploy the allegations that you have summarised in the prosecution’s  
 33 opening in respect of him. What you do not know of course is that he is convicted of fraud,  
 34 theft, impersonating Mr Assange, selling WikiLeaks material, stealing LPP materials, and the

1 FBI themselves were kicked out of Iceland by the Icelandic authorities because it was thought  
2 at the time that they were attempting to use Teenager to “frame Mr Assange”. That kind of  
3 bizarre prosecutorial behaviour would obviously be something that we would wish to litigate  
4 before you.

5         There is of course also the timing of these allegations and I do not mean the timing of  
6 their arrival, I mean the dates when they are said to have occurred. So, you will know that  
7 the majority of them attach themselves to computer intrusion allegations, that is what is now  
8 count 2, what was count 18. That has a limitation period, madam, of eight years. The vast  
9 majority of the conduct that is included in this request is manifestly out of time so far as that  
10 is concerned but it is bolstered by what you might think are a series of make-weight  
11 allegations. Designed commentators have pointedly observed obviously in order to bring all  
12 of this back within the limitation period.

13         There are article 10 issues that would surround these fresh allegations, speeches about  
14 liberating information from the CIA or encouraging people to join them are manifestly not  
15 criminal in the sense that they are protected by the first amendment and would be protected  
16 by article 10. But madam, those are just a flavour of the issues that you ought to be  
17 considering in relation to this new batch of conduct but which you cannot, and you cannot  
18 because they arrived so desperately late. Even without the problems inherent in contacting  
19 Mr Assange, even without the problems inherent in getting to him by post all of these  
20 materials, it would be an impossible ask for the defence to deal with these fresh allegations in  
21 any meaningful way in the time that has been afforded to them and that time is a matter of  
22 weeks, and in respect of which you are provided absolutely no explanation for the late arrival  
23 of these materials.

24         Madam, the solution as we see it and as we invite you to adopt is to proceed with  
25 these proceedings, Mr Assange does not want to adjourn, it is fundamentally unfair to ask  
26 him to, he is ready for these proceedings on the case that he understood, and we understood  
27 that we were here to meet. He is in custody and it is as I say, fundamentally unfair to ask him  
28 to remain in custody for the time it would take to deal with these issues at this stage.

29         The solution is to excise from your consideration of this case the new conduct. It is,  
30 despite the prosecution’s attempts to submit otherwise, obvious and clear that you have  
31 jurisdiction and power to excise conduct from your consideration of the case and ultimately  
32 from any order you do or do not make in due course. It is a power that has been exercised on  
33 numerous occasions by this court, approved by the High Court, and in fact by the House of  
34 Lords.

1 So, madam, *Pinochet* and *Dabas* both approved under different regimes, *Dabas* being  
2 our regime, that the excision of conduct, *Dabas*, paragraph 51, Lord Hope deals with it in  
3 terms in order to restrict charges on a temporal basis to the time in which they may satisfy  
4 dual criminality, *Osunta*, and you should have a small clip of these additional authorities that  
5 we have referred to, madam, in submission ---

6 JUDGE BARAITSER: Yes, I do.

7 MR SUMMERS: --- number eight. I am grateful, madam, so *Osunta* is tab 2 of that small  
8 clip and paragraphs 22 to 29 deal with the legality of excising conduct from your  
9 consideration of the case and from any order that you may make and of course what *Osunta*  
10 tells us is that excision and your power to do so is not confined to temporal conduct, it can  
11 extend and did extend in that case to excision of conduct to remove conduct for other reasons.

12 So, madam, what happened in *Osunta* was that dual criminality was in issue, there  
13 was some conduct in the UK which on its face prevented the requesting state from  
14 establishing dual criminality, this court and the High Court in due course thought it  
15 fundamentally unfair that the whole case should fall just because some of the conduct is  
16 offensive, and therefore authorised the solution arrived at by this court, that is to say to excise  
17 from his consideration of the case all of the conduct that had occurred in the UK and confine  
18 both his consideration of the case and his order to the remaining conduct. And doing so of  
19 course in the knowledge that once that happened, specialty prevents prosecution for it later  
20 down the line.

21 In short, all of these authorities, and there are more, madam, you also have *Trocher*.  
22 *Trocher* is another dual criminality case. *Zada* is a case in which the court contemplated but  
23 ultimately did not need to excise conduct to remove conduct that offended double jeopardy.  
24 But the power is abundantly clear and it is a wide-ranging power but it is a power ultimately  
25 that exists to enable you, madam, to do fairness. Fairness to the prosecution in *Osunta* to  
26 enable them to achieve extradition rather than have their entire case thrown out because of  
27 the constraints of section 64 and fairness to the defence.

28 And we invite you to invoke this power in order to do fundamental fairness to the  
29 defence. It is fundamentally unfair to announce what is in law a separate request for  
30 prosecution on separate conduct entirely novel without warning, without explanation, and in  
31 circumstances the defence simply cannot respond to it in an evidential and sensible way. And  
32 we cannot inform you by evidence in the time and under the constraints under which we act  
33 of the issues and facts that you would need to fairly determine that aspect of the case.

1 So, madam, I apologise for expanding on the submissions I have made already at  
 2 paragraph 252 to 271. We invite you to adopt them in their entirety. What is happening here  
 3 is abnormal, unfair, and liable to create real injustice if allowed to continue. And you can see  
 4 that, madam, if you turn for example, and finally, to the prosecution's skeleton argument  
 5 which you will have behind tab 14 of the prosecution core bundle. And just to give you some  
 6 flavour of how it is intended it seems to deploy against Mr Assange these new allegations, so  
 7 paragraph 91. In a section that deals with article 10 and the prosecution's contention that  
 8 article 10 does not protect complicity in the underlying criminality of (inaudible), you will  
 9 see that at least one of the chapters that the US rely on in order to make good that submission  
 10 is the new allegations.

11 You see the same thing, madam, at paragraph 281. Again, in the context of article 10,  
 12 here in relation to the issue of necessity and whether it was necessary for Miss Manning, Mr  
 13 Assange, to make public evidence about ongoing war crimes, torture and alike. One of the  
 14 responses to that evidence and those submissions it seems, madam, you can see from sub-  
 15 paragraph 3, is well, there is no necessity hacking into a bank in Iceland or the parliamentary  
 16 phone call audio recordings for Iceland or a cyber security convention.

17 So, in addition to being stand-alone alleged criminality in its own right, they also  
 18 being used it seems in order to bolster the US position on the existing issues that are before  
 19 this court. And again, it is fundamentally unfair. Those are submissions that we cannot  
 20 respond to because we have not had the time. And you do not have the necessary evidence  
 21 that you would require in order to understand that conduct and the allegations.

22 Madam, in all the circumstances we do respectfully submit this is a very clear case of  
 23 fundamental unfairness being visited by the defence by the unannounced arrival of fresh  
 24 allegations at the eleventh hour and the appropriate response of this court ought to be to  
 25 exercise its well-established powers to excise this new conduct. This case should proceed, of  
 26 course, under the guise of the new request, but it should proceed confined to that which the  
 27 American government had seen fit to allege in the 18 months during which you have had  
 28 conduct of these proceedings and during which we have been engaged in evidence gathering  
 29 and assisting you with the evidence necessary to understand and deal with it. Madam, unless  
 30 I can assist further.

31 JUDGE BARAITSER: Thank you very much, Mr Summers.

32 MR SMITH: Madam, in short, the defence submissions on this point must fail because,  
 33 firstly, they run plain contrary to the statutory scheme and, secondly, the jurisdiction to excise  
 34 which is raised by the defendant does not exist in the shape or form which the defence claim.

1 In fact, the defence argument takes that jurisdiction far beyond that which it has ever been  
2 used for or anything in respect of which the courts have ever sanctioned its use.

3 By way of background, this issue was addressed in the addendum opening note,  
4 paragraph 3, and indeed in the skeleton argument of the prosecution at paragraph 17 to 21.  
5 The position is that the indictment was served on the defence on 2 July along with  
6 correspondence inviting the views of the defence as to the most appropriate course of action;  
7 that is to say, whether the indictment should have been incorporated in any request or  
8 whether the defence took the view, pursuant to their obligations under the Criminal Procedure  
9 Rules, that it would be better encompassed within further information.

10 We received no adequate response to that. The indictment is now received under  
11 cover of a new request. Well, that has a knock-on effect. By way of first principles, and we  
12 dealt with these in the skeleton argument at paragraphs 17 to 21, if there is nothing abusive or  
13 improper about the reinstatement of an extradition request after a failed request, which there is  
14 not - see *Geze, Kamaras* - then, for the stronger, there is nothing improper about the reservice  
15 or the new service of a superseding indictment under cover of a further request before  
16 consideration has taken place as to the merits of the request and as a consequence of  
17 continued and further investigation in the requesting territory. That is our skeleton argument,  
18 paragraph 21.

19 Perhaps most importantly, the impact of the fact that this court is now seized of a new  
20 request is that the statutory scheme is engaged. It is mandatory and the approach urged by  
21 the defence runs plain contrary to that which this court is mandated to do by statute. Madam,  
22 by virtue of section 78(4) of the 2003 Act, this court must decide whether the person  
23 appearing before him or her is the person in respect of whom extradition is requested, but  
24 must also decide if the offences specified in the request are extradition offences by reference  
25 to section 137(7A), references to the conduct for the purposes of considering extradition  
26 offences are to the conduct specified in the request for the person's extradition.

27 So the statute uses mandatory language: this court must consider extradition offences  
28 and must do so by reference to the conduct set out in the defence. What the defence approach  
29 urges this court to do is, before even analysing the conduct, before even considering the  
30 statutory scheme, take a knife to the request and excise conduct which you are required to  
31 consider.

32 So the first point is that this approach runs plain contrary to the statute. The second,  
33 which is interlinked is that the jurisdiction to excise identified by the defence does not allow  
34 for the excision of requests before you have considered the statutory scheme. That

1 jurisdiction does not run contrary to the statutory scheme. In fact, it only applies after the  
 2 court has considered the issue of extradition offences and/or compliance with the statutory  
 3 scheme. All authorities cited by the defence relate to excision of conduct after that  
 4 consideration.

5 Madam, I am going to take you, if I may, to the authorities because consideration of  
 6 the case law makes that point plain. The route of the jurisdiction is *Dabas*. Madam, that is  
 7 the bundle we have been given at tab 1 and the key paragraph is paragraph 51 of Lord Hope’s  
 8 ruling. So Lord Hope drew on *Pinochet* in which there had been that temporal excision  
 9 exercise and, in fact, sorry to labour the point but I am going to go through the paragraph in  
 10 totem:

11 “The second observation, which I make”, the key words, “with reference to the test of  
 12 dual criminality in section 64(3) is this. A judge may conclude that this test is not satisfied  
 13 because part of the conduct which is said to constitute the offence mentioned in the part 1  
 14 warrant occurred before it constituted an offence under the law of the relevant part of the  
 15 United Kingdom if it occurred there. The question is whether in that situation he has no  
 16 alternative other than to order the person’s discharge under section 10(3)”.

17 So, point 1, *Dabas* is considering a position not in which the court is allowed to excise  
 18 parts of conduct before even considering it, but the position in which the court has considered  
 19 that conduct and has come to the conclusion part of the conduct falls fall of the dual  
 20 criminality exercise and part of it does not. There is a problem. Is the court required  
 21 discharge wholesale having considered the conduct within the statutory scheme? The answer  
 22 comes in paragraph 51:

23 “In my opinion it would be open to the judge in such circumstances”, still tied to the  
 24 dual criminality exercise, “to ask that the scope of the warrant be limited to a period that  
 25 would enable the test of dual criminality to be satisfied. If that is not practicable, it would be  
 26 open to him to make this clear in the order that he issues when answering the question in  
 27 section 10(2) in the affirmative”. It was the exercise that was undertaken in *Pinochet*. And  
 28 then the final sentence, madam, of that paragraph:

29 “It can be assumed that the Part 1 procedure was intended to be at least as adaptable in  
 30 that respect as that which it has replaced”. So, madam, paragraph 51 of *Dabas*, firstly,  
 31 envisages excision only after consideration of the conduct itself; secondly, only within the  
 32 context of dual criminality, that is explicit from paragraph 51; and, thirdly, only where the  
 33 court has determined that conduct falls partially foul of the dual criminality exercise and that  
 34 is to avoid the mischief or the risk of having to discharge wholesale. That is what *Dabas* is

1 aimed at. So it simply does not create a jurisdiction to excise conduct prior to its  
2 consideration.

3 Well, *Dabas* was followed in *Osunta*. Forgive me, madam, if I may take you to one  
4 other line in paragraph 51 of *Dabas*, which is important. It is the penultimate line in which  
5 Lord Hope adopts *Pinochet*: “*Pinochet* shows how far it was possible to go under the pre-  
6 existing procedure”, the key words, “to avoid the result of having to order the person’s  
7 discharge in a case where part of the conduct relied on took place ...” et cetera. So the  
8 purpose of this jurisdiction is to avoid having to discharge wholesale where, after  
9 consideration, you have a partial falling foul of the statutory scheme.

10 Well, that is adopted in *Osunta*, madam, which is tab 2 of our bundle and, in *Osunta*,  
11 the problem was not temporal, it was territorial. So in *Osunta* the fact that some of the  
12 conduct took place in the United Kingdom meant that the conduct fell partially foul of the  
13 dual criminality provisions. The district judge in that case excised the conduct that took place  
14 in the United Kingdom in order to be able to order extradition for that which did not. It  
15 hardly needs to be said but yet again, as per *Dabas*, this is a case of excision after  
16 consideration of the conduct itself. It is not a case in which the court was urged to excise  
17 conduct before even considering the statutory scheme.

18 Madam, the key paragraphs in *Osunta* are 21 onwards but in particular paragraph 22  
19 onwards. So, 21, paragraph 51 of *Dabas* which we have just gone to is adopted; 22,  
20 particular emphasis on the sentences that we have concentrated on only a few minutes ago,  
21 and then this: “It seems to me that the argument that effect should be given to extradition  
22 arrangements and that the court should seek to avoid discharging a warrant where serious  
23 offences are alleged is a powerful one, as is the need to trust the judicial arrangements in  
24 other jurisdictions. If excision is necessary to achieve justice in those circumstances then I  
25 find it hard to understand how an excision relating to temporal matters should be acceptable  
26 whereas one relating to matters of geography should be unacceptable”.

27 So, again, the key, what triggers the excision is the mischief, the prospect of conduct  
28 falling partially foul of the dual criminality exercise, partially not. The courts can see that it  
29 would be a mischief to have to discharge wholesale and so extended the doctrine of excision  
30 to include territory as well as time, but still confined within extradition offences after  
31 consideration of their conduct. So that, madam, is *Osunta*. Thereafter, there is nothing in the  
32 case law cited by the defence to indicate that that narrow jurisdiction can be taken any  
33 further.

34 *Trocher* and *Zada* did not even involve excision. *Trocher* is a conviction case in

1 which some of the conduct which was sentenced by way of an aggregated sentence fell foul  
 2 of dual criminality. So the court was wrestling with the *Brodziak* point where a number of  
 3 offences had been committed. They all attract one sentence cumulatively. Some of those  
 4 offences fail the dual criminality exercise. What is the remedy in those circumstances, and  
 5 the court noted in passing paragraph 35: “This is not an accusation warrant so it is not a case  
 6 of excising the relevant conduct from the particulars”. That is the extent to which *Osunta* or  
 7 the excision discretion is raised in *Trocher*. It is not a conviction case if you cannot do any  
 8 excision. It does not take it any further.

9 *Zada* is a double jeopardy case in which the issuing judicial authority made a  
 10 submission that were the court to find that any of the conduct fell foul of the double jeopardy  
 11 rule then the process of excision would be open to the court. Now the court did not sanction  
 12 any such process. The key paragraph is paragraph 67: “It is instructive to consider *Osunta v*  
 13 *Germany* in which a district judge excised from the EAW conduct which did not amount to  
 14 an extradition offence. Here, the written submission was made on behalf of a judicial  
 15 authority”, and they repeat what I have just outlined:

16 “Whatever be the merits of that submission”, said the court, “the suggested approach  
 17 raises the question of whether any specific conduct covered by the Italian EAW could be  
 18 identified as offending the rule against double jeopardy and, therefore, be excised. In my  
 19 judgment, for the reasons already given, it is not possible to identify any such conduct”.

20 So in *Zada* we have a double jeopardy case. The court seems to be urging caution as  
 21 to whether excision could take place in double jeopardy, whatever be the merits of that  
 22 submission. It certainly did not sanction it, but the issue never arose because there was no  
 23 conduct offending the double jeopardy rule. So *Zada* also is irrelevant.

24 So, in terms of the confined jurisdiction to excise, we are left with *Dabas* and *Osunta*  
 25 and all *Dabas* and *Osunta* say is that, after you have considered the conduct within the  
 26 context of a dual criminality exercise and in order to effect extradition, it is open to the court  
 27 to excise part of the conduct to allow extradition on the rest and that is very different from  
 28 what is being urged in this case which is, before any consideration of the conduct, any  
 29 consideration of whether it falls foul or is compliant with the statutory regime, you should  
 30 simply take it out at the beginning before you have even considered it.

31 You simply do not have the jurisdiction to do that and the reason you do not have the  
 32 jurisdiction to do that is because the statute mandates you to consider that conduct. But the  
 33 real remedy here is one that the defendant has not sought. If time is needed, the defendant  
 34 can seek time. He has not. But that does not mean that this court should accede to the

1 exercise of a jurisdiction which, frankly, does not exist.

2 JUDGE BARAITSER: Thank you very much, Mr Smith.

3 MR SUMMERS: So, wrong, wrong and wrong. Firstly, madam, the chronology. Just to put  
4 it into its fairer context, we told this court on 24 June what was going on in the press. We  
5 asked the CPS to please enlighten us and on 2 July we were served with a copy of the new  
6 indictment and, as you can see, madam, from paragraph 3 of the note that later accompanied  
7 the opening note, we received it with a letter from the CPS saying, “Well, what do you think  
8 we should do with this?” I have got to say we rather scratched our heads about why the CPS  
9 were asking us what to do with their new indictment, but there you are. We answered on 21  
10 July (see paragraph 4) along the lines of, “Well, please explain to us why this is happening  
11 and then we will try and assist you.” By then, of course, it was too late because you know  
12 that on 14 July the new request was already in motion. So the notion that we have  
13 precipitated the need for a new request, if that was the point being made, I am afraid is simply  
14 wrong.

15 But, more importantly, madam, jurisdiction. The first submission that we understand  
16 to have been made to you is that there exists jurisdiction to make repeated extradition  
17 requests (see *Geze* and *Ossins* and the like) and therefore we can do this, say the US. Well, to  
18 an extent that is right. Of course, there is jurisdiction to make repeated extradition requests  
19 and I know, madam, you are familiar with this whole issue. The *Henderson* principle applies.  
20 It requires a balance of public interests, but that is, with respect, to miss the point. We are not  
21 saying that you can never do this, we are not saying you cannot ever serve a new indictment  
22 during the currency of the proceedings. What we are saying is it is unfair to do it six weeks  
23 before the extradition hearing is listed and there is not any case from amongst all of those  
24 abuse cases that contemplates or deals with the issue that arises here. If you are going to do it  
25 you have to do it in a manner that is fair to all of the parties and the defence and the court,  
26 and the problem here is one of timing. It simply arrives too late.

27 The next legal submission that we understand to have just been made is one that  
28 centres on section 137. I will not take you to it. I do not know if you have a copy of the Act  
29 to hand?

30 JUDGE BARAITSER: I do. Yes, thank you.

31 MR SUMMERS: Section 137 had inserted into it, madam, in 2014 section 137(7A):  
32 “References in this section to “conduct” (except the expression “equivalent conduct”) are to  
33 the conduct specified in the request.” And as to that, Mr Smith says, “Aha, you are obliged”,  
34 he says, “to look at everything we have put in the request and you have no power to do

1 otherwise.” With genuine respect, that is to completely misread what subsection (7A) is  
 2 aimed at. Subsection (7A) is a *Shlesinger* point. It is to put on statutory footing the point  
 3 made by the high court in *Shlesinger*, which is you cannot look at defence evidence when  
 4 considering the issue of dual criminality. That is what this means.

5 What it does not mean and does not say, and neither is there any authority to support  
 6 this, it does not say you have no power to excise or control the scope of the request. It is to,  
 7 with respect, read subsection (7A) backwards to suggest that it does and you are provided  
 8 with no authority to that. What you have instead is a line of unbroken authorities that deal  
 9 with your power to excise, many of which postdate the introduction of subsection (7A) and  
 10 deal with the circumstances in which that power might be appropriate to be exercised. Well,  
 11 Mr Smith says because the context of the cases in (inaudible), *Dabas*, *Osunta* and *Trocher*  
 12 are all dual criminality, well that must be the limit of jurisdiction. That is, again with great  
 13 respect, to make the same kind of error, (inaudible) error that undermines his section 137  
 14 submission. The fact that that is the context of some of the cases does not indicate that it is  
 15 the limit of the jurisdiction that you have.

16 The only limit that you will find anywhere in the authorities is *Trocher*. It is a  
 17 jurisdiction that does not extend to conviction cases. Accusation cases only says *Trocher*.  
 18 Confining it to dual criminality problems does not explain *Zada*, or court expressly  
 19 contemplated removal of conduct in order to get round double jeopardy problem, and no  
 20 authority anywhere says that this is a jurisdiction that is limited to doing fairness to the  
 21 prosecution because that is what Mr Smith says. He says look at these authorities, they are  
 22 all about doing fairness to the prosecution. That must be the limit of the jurisdiction.

23 There is nothing that has been, or can be, put before you to support that legal  
 24 proposition. It is simply wrong. It must be wrong as a matter of common sense. The  
 25 jurisdiction exists to address unfairness. It must exist to address unfairness in all its context.  
 26 And the end point of all of this is Mr Smith says, “Ha, ha, this is what we are doing and you  
 27 cannot stop us.” That is the input of his submissions. No matter how unfair we are acting,  
 28 we do not even have to explain ourselves, and he has made no attempt to explain to you why  
 29 you are presented with all of this at the eleventh hour. You have had no apology from the US  
 30 and absolutely no explanation for it. We have our own. We believe, of course, that the US  
 31 saw the strength of the defence case, thought they would lose and so have in desperation had  
 32 to rely on people like Hammond, but that is a jury point and we can move on.

33 The true position is that you have the jurisdiction to do something about this, that you  
 34 are entitled to an explanation; without it you ought to exercise that jurisdiction. But if Mr

1 Smith is right and he can say, “Ha, ha, we are doing it and there is nothing you can do about  
2 it”, well then, you do have two nuclear options available to you. You can say to the US,  
3 “Well, if you are determined to smuggle this into charge number 2, I am just not going to  
4 consider charge number 2 at all.” And that is one nuclear way in which you could deal with  
5 the unfairness that is being visited by the US in this case. The other way, of course, is to  
6 adjourn, but that would involve keeping Mr Assange in custody in difficult circumstances for  
7 a great deal of time and it is something that we would resist for that reason. It is equally  
8 unfair to what is being proposed.

9 So, madam, the jurisdiction we say undoubtedly exists and we are inviting you to  
10 exercise is a nuanced one. It is one that can direct itself to the genuine problem here and  
11 would not require the nuclear options of derailing these proceedings completely for  
12 Mr Assange or telling the US that they cannot have count 2 at all, but if we are forced on to  
13 those, then so be it.

14 Madam, those are our submissions.

15 JUDGE BARAITSER: All right. I will give you my decision now.

16 I had previously been asked to exercise case management powers to refuse to allow  
17 the government to rely upon new evidence that appears in the request. Then I considered that  
18 case management powers did not assist on the basis that the conduct complained of formed  
19 part of and was included in the request itself. I am now being asked as a preliminary issue,  
20 before even considering the request, to excise those parts of the new request which relate to  
21 the conduct not previously included.

22 I am told by Mr Summers that in a part 2 context it would be extraordinary for a court  
23 to commence a hearing within weeks of a fresh extradition request of this kind being made  
24 and Mr Summers identifies the kinds of issues that he might have wanted to litigate in light of  
25 the new request, including, he gives examples of the statute of limitations, which would  
26 render, he says, some of these allegations out of time and article 10 issues, to name a few.

27 Taking account of the defence position, back in August and in order to address  
28 exactly that issue, the issue of fairness to the defence, I offered the defence an opportunity to  
29 apply to adjourn this case. This would have given them time, further time, the time that they  
30 say they needed to make their preparations. I appreciated, of course, that Mr Assange is in  
31 custody and that this would not be an attractive option. However, if they had considered  
32 themselves disadvantaged by the new request in the sense that it is, in Mr Summers’ words,  
33 “fundamentally unfair” for the government to have proceeded in this way, then they had an  
34 opportunity to seek to remedy this by asking for the time they needed to meet any unfairness.

1 The position that Mr Summers puts is that “We cannot respond to the allegations  
2 because we have not had the time” could have been cured by asking for this time and they  
3 declined to do so.

4 In my view, if it is to be argued that some parts of the request must be excluded from  
5 consideration, then this must be done in the context of an extradition bar, or an issue raised,  
6 that is, within that statutory scheme. For example, when dual criminality is argued, as it will  
7 be in this case, and as it was done with *Dabas* and other cases, it is open to the court to decide  
8 in that context the part of the conduct that should and can be relied upon by the requesting  
9 state, and, if it is appropriate, to curtail its scope.

10 Equally, it can be raised as part of an abuse of process argument, either as part of a  
11 *Zakrzewski* type abuse argument, as has possibly been suggested by Mr Summers, on the  
12 basis that bringing this new request and the recommencement of proceedings on the basis of  
13 new conduct could not possibly be relied upon because of its misleading nature and is in itself  
14 an abuse of the court’s process. That argument is still available to the defence. But these are  
15 issues which must take place in the context of considering the request and not before it.  
16 There is no requirement for me to determine the scope of the request outside of the issues  
17 raised.

18 For these reasons I refuse the defence’s invitation to excise some, or any, of the  
19 conduct at this stage from the request and invite the defence to raise the issue, if they wish,  
20 within the context of the statutory scheme.

21 Thank you very much. That takes us to 1 o’clock. I am hoping that at 2 o’clock the  
22 first defence witness will be available to give his evidence over the CVP. 2 o’clock then,  
23 please, everybody.

24 MR LEWIS: Madam, I am sorry.

25 JUDGE BARAITSER: Yes, of course.

26 MR LEWIS: A housekeeping matter.

27 JUDGE BARAITSER: Yes.

28 MR LEWIS: I apologise in advance for the avalanche of paper, but there is in fact and this is,  
29 madam, your copy. We have produced a bundle which we will be seeking to ask the  
30 witnesses to comment upon. It is, in fact, the prosecution main bundle which you have, but  
31 with the submissions extracted and paginated so it is easy for the witness to find. So, I have  
32 sent a copy to my learned friends. It can be sent by email or by link to the witness and there  
33 is a copy there, madam. So, it is simply a paginated bundle and it contains the request and  
34 Mr Kromberg’s declarations and a few newspaper reports.

1 JUDGE BARAITSER: Thank you very much.

2 MR LEWIS: Can I just hand that up? But I simply mention it now so we do not have a  
3 delay.

4 MR FITZGERALD: So there is additional material?

5 MR LEWIS: There are materials which have been extracted from other parts of the defence  
6 evidence, such as the WikiLeaks ---

7 JUDGE BARAITSER: I think the point is, Mr Lewis, there is nothing new.

8 MR LEWIS: Madam, there is one thing that may be new, although it was mentioned. I will  
9 show my learned friend that. It is just a different part of the book he relied upon in opening,  
10 the book which they produced extracts from which was ---

11 JUDGE BARAITSER: This is David Lees' books.

12 MR LEWIS: David Lees' book. I have just taken another page from that and put it in the  
13 bundle.

14 JUDGE BARAITSER: All right. Thank you.

15 The issue about whether someone is an expert or not, has that been resolved between  
16 the parties?

17 MR LEWIS: Not quite, madam. To this extent: our position is as follows, that ---

18 JUDGE BARAITSER: Well, Mr Lewis, rather than tell me what your position is, I am going  
19 to leave it to the two of you to continue your negotiations and at 2 o'clock you can let me  
20 know the position.

21 MR LEWIS: Thank you.

22 JUDGE BARAITSER: Thank you very much. 2 of course.

23 (Luncheon adjournment)

24 MR SUMMERS: Thank you, madam. We are largely in shirt sleeves because I am afraid the  
25 hearing has not resolved itself, but we live in hope.

26 JUDGE BARAITSER: Well, hopefully there are some court staff who are still working on it.

27 MR SUMMERS: I am sure they are.

28 JUDGE BARAITSER: Mr Assange is not in the dock.

29 MR SUMMERS: No. I have asked you to come in, madam, before he does because I would  
30 respectfully ask at this stage for 30 minutes of your time for two reasons. Firstly, in order to  
31 discuss further with him the implications of the ruling you have just given and what that  
32 means for adjournment generally and, secondly, for Professor Feldstein to have a moment to  
33 cast his eye ---

34 JUDGE BARAITSER: Just pause, Mr Summers, your client is coming into the dock now.

1 MR SUMMERS: Thank you.

2 JUDGE BARAITSER: Just have a seat, Mr Assange, please.

3 MR SUMMERS: Sorry. For Mr Assange's benefit, I am asking, madam, for 30 minutes of  
4 your time, firstly to be able to discuss issues with Mr Assange and, secondly, for Professor  
5 Feldstein, who is our first witness, to have a chance to cast his eye over the materials that  
6 were being discussed at the very end, just by way of context. There is a prosecution bundle  
7 which is, in essence, a reduce version of the prosecution bundle that we have all had, but  
8 which contains about 30 pages at the end of materials that the witnesses need to see and it is  
9 now only 9am in America. He had not had the opportunity to do so any earlier.

10 JUDGE BARAITSER: No observations for 30 minutes. No, yes, thank you very much.

11 MR LEWIS: It's a matter for you, madam.

12 JUDGE BARAITSER: Half an hour it is.

13 MR SUMMERS: Thank you, madam.

14 JUDGE BARAITSER: Come back at 25 to and no later.

15 MR SUMMERS: Thank you.

16 JUDGE BARAITSER: Thank you.

17 (Short adjournment)

18 JUDGE BARAITSER: Yes.

19 MR SUMMERS: Thank you, madam. Madam, I have an application to make and it is  
20 probably one that ought to be made in the presence of Mr Assange. I hope he is on his way  
21 up. Thank you.

22 JUDGE BARAITSER: Yes, please sit down. Mr Summers?

23 MR SUMMERS: Madam, the application I make now is not made lightly, not least of all  
24 because Mr Assange will be the one who bears the brunt of its consequences, but, madam, in  
25 light of your ruling on excision of conduct, we do apply to adjourn these proceedings in order  
26 to enable us, madam, to gather the evidence necessary to deal with the fresh allegations that  
27 have now emerged.

28 So, madam, for example, Forum. Of course, it is right that you will, when you go  
29 through the scheme of the statute, address your mind to Forum, but as matters presently  
30 stand, you would be doing it without the assistance of any defence evidence on the issue.  
31 The same with Zakrzewski abuse and whether the request is misleading and abuse of process  
32 and the other issues to which you have referred.

33 In short, madam, whilst, of course, you will consider those issues, as matters presently  
34 stand, you will be doing so without the assistance of defence evidence and will arrive at only

1 one conclusion as a result. We are simply not in a position to gather the evidence necessary  
2 and respond to a case that has emerged only in the past few weeks and that is only made  
3 worse by the conditions under which we all have to work at the moment, with limited access  
4 to our client and, of course, on issues such as those that are set out in the new charge 2, he is  
5 the person in sole possession of the information necessary to enable those enquiries and  
6 evidence gathering to begin.

7 I can say without fear of contradiction, madam, that no one who represents Mr  
8 Assange today has ever been in a case of his magnitude, faced with those issues, dealing with  
9 evidence gathering at this late stage of the process. Now, madam, in those circumstances and  
10 in light of your ruling, our only option as we see it to ensure that you are properly appraised  
11 of the evidence that you need to be on each of those issues is to adjourn.

12 We, of course, appreciate that you gave us the opportunity to make that application on  
13 the 14<sup>th</sup> of August when the case was last before you and we communicated to you on the 21<sup>st</sup>  
14 that we had decided not to. Can I say a number of things about that process?

15 Firstly, that throughout that period, as I think Ms Iveson mentioned, Mr Assange had  
16 not seen the new request. I have mentioned more than once that the only way he gets to see  
17 documents is by physically posting them into Belmarsh and we had not had the ability to  
18 consult with him or obtain his considered instructions and unfortunately, with hindsight, the  
19 seven days that then elapsed proved equally ineffective.

20 He still has not received, for example, the revised opening note and the documents  
21 that accompanied it in prison and it was that document for good or bad, that made pellucidly  
22 clear that we were dealing with conduct that was not mere narrative as we had believed it to  
23 be, but was standalone criminality capable of sustaining a conviction if accepted in its own  
24 right.

25 Instruction taking from Mr Assange on that understanding can only have and did only  
26 commence from the 21<sup>st</sup> of August. That is last week, madam, and we took the view that we  
27 were entitled first to apply to you to exclude the offensive conduct. You have, in your  
28 judgment, and we recognise your judgment, recognised that the solution if there is one is  
29 adjournment and, madam, it is that for which we apply at this stage. I am not sure there is  
30 much else I can add to the application. I could of course appraise you more fully of the  
31 difficulties in which the defence team has been operating over the past months but I rather  
32 suspect, madam, you have the flavour of it.

1 JUDGE BARAITSER: I do, Mr Summers, but I know you have not physically seen your  
2 client. Is it a correct understanding that you nevertheless, the team at least, have spoken to  
3 him by telephone?

4 MR SUMMERS: Yes, we are able to and have been able to conduct short telephone calls  
5 when he is permitted to make short telephone calls but they are, as I hope I have made clear,  
6 and have been over the past two weeks in the absence of the documentation that enables him  
7 to make informed decisions.

8 JUDGE BARAITSER: And how frequent – do not disclose anything you feel uncomfortable  
9 disclosing – but how frequently do you make contact with him by telephone?

10 (Counsel conferred)

11 MR SUMMERS: Mr Fitzgerald bears the brunt of that task and he tells me twice during the  
12 period that we are talking about for short periods.

13 JUDGE BARAITSER: And is there video link contact?

14 MR SUMMERS: No, there is not.

15 (Counsel conferred)

16 MR SUMMERS: So, madam, I would not want you to think that these are coherent or easy  
17 conversations, even when we are able to do it. He phones in on the payphone to somebody's  
18 mobile telephone who then puts that onto speaker phone and everybody else has to strain to  
19 listen from wherever they are phoning in to Mr Assange. It is certainly my experience  
20 frequently that he cannot hear, we cannot hear him, and the conversation is almost impossible  
21 to follow. Madam, I do not want to labour the difficulties that we have had in  
22 communicating with a client in that way over the past two weeks but they are a very  
23 significant factor in the decision making that went on in the critical period, madam, that you  
24 are mindful of, namely the week between 14 and 21 August. He was in essence over that  
25 unsatisfactory medium having to take in information from us in relation to what are on any  
26 view complex and detailed documents and then make decisions as a result of it.

27 JUDGE BARAITSER: One other question. This will be an adjournment application under  
28 the usual criminal procedural rules of which there is a recent practice direction. As part of  
29 that practice direction it is always asked, before the court makes any decision one way or the  
30 other, how long the adjournment is likely to be if there is to be one, and that is an enquiry I  
31 make. I am going to hear from Mr Lewis in a moment ---

32 MR SUMMERS: Yes.

33 JUDGE BARAITSER: --- but it is an enquiry I make as part of ---

34 MR SUMMERS: Of course.

1 JUDGE BARAITSER: --- the process and before I make any decisions.

2 MR SUMMERS: And the answer to it, it has to be informed by two different things, firstly,  
3 the length of time it will take to gather the evidence necessary to deal with this late change in  
4 US case, and secondly, the earliest time that the court and the parties can re-assemble in order  
5 to conduct this hearing. I, for my part, rather suspect that they both lead to exactly the same  
6 place and that is January.

7 JUDGE BARAITSER: Right. Thank you very much indeed. Nothing else, Mr Lewis?

8 MR SUMMERS: No.

9 JUDGE BARAITSER: Sorry, Mr Summers. Mr Lewis?

10 MR LEWIS: Madam, we would never oppose the defence being given time if there is a  
11 legitimate need which the defence can persuade the court that such time is needed. But it is  
12 difficult in these circumstances to see the need, particularly in the rather unsatisfactory  
13 position where a defendant has said he does not want an adjournment, makes an application  
14 which he loses, and then decides well, I will make an adjournment application because I have  
15 lost.

16 It does need real scrutiny as to the genuineness of the claim that more time is needed.  
17 They have already had two months. The amendment to count 2 is a pure criminal offence of  
18 computer hacking. We do not see for our part how it could possibly engage anything else on  
19 article 10. We do not see how it can affect political opinion, we do not see how it can affect  
20 health, and we do not see how it can affect any fair trial issue. My learned friend has said  
21 Forum, I do not know about that, but that might be one issue it might affect.

22 In particular, for example, we would be cross-examining Professor Feldstein this  
23 afternoon. It is difficult to see in any way how his examination, his witness statement, all his  
24 cross-examination, could be affected by one jolt of the expansion of count 2 into computer  
25 hacking with other people pre-dating the release. So, madam, we are here, we are ready to  
26 go. It is of course a matter of making sure that the hearing is fair but you are the arbiter of  
27 that, madam. I am not sure I can assist further than that but at the moment it is difficult to see  
28 how adjourning to January will be necessary and with the history of this case we will just be  
29 served with a slay of further material which has no bearing whatsoever on the small  
30 expansion to count 2. Subject to that, madam, I am not sure we can really help very much  
31 more.

32 JUDGE BARAITSER: Thank you. I am just going to take 10 minutes I think to consider  
33 this. Back at 10 past.

34 (Short adjournment)

1 JUDGE BARAITSER: Thank you. Please sit down. There is no need for you to stand, Mr  
2 Summers but, you can, of course, if you wish to. This is my ruling in relation to the defence  
3 application to adjourn. As previously indicated, on 14 August, earlier this year, the defence  
4 invited me to use my case management powers to excise information in the new request.

5 On that occasion, for reasons already given, I did not think it an appropriate use of my  
6 case management powers. However, with fairness firmly in mind, I offered the defence the  
7 opportunity to apply to adjourn the case, but I allowed them a full seven days to consider  
8 their position. On the seventh day, 21 August, I received an email from Ms Iverson, who sits  
9 behind Mr Summers, on behalf of the defence team confirming that they would not be  
10 seeking an adjournment of the hearing in September.

11 The response was not that the defence had not had sufficient time or opportunity to  
12 take instructions, it was confirmation that no adjournment would be sought. Since that date,  
13 21 August, an additional 19 days have now elapsed. The defence have had ample time to  
14 return to court to explain that they had insufficient time within the seven days given to them  
15 to consider their position and to seek to apply to adjourn the case out of time. They did not  
16 do so.

17 Even today, with time made available for further instructions this morning, they did  
18 not request an adjournment but allowed the usual timekeeping and other housekeeping  
19 arrangements to be made on the obvious basis that they had no intention of applying to  
20 adjourn. This morning, I ruled that the request could not be excised on a preliminary basis. I  
21 ruled that the issues regarding the content of the request could be raised but that this must be  
22 done within the statutory regime.

23 This cannot have come as a surprise to the defence. They cannot have relied on this  
24 ruling going in their favour as regards the preparation of the case. Rather, it is clear that they  
25 have proceeded and approached today's hearing on the basis that no further time was to be  
26 requested.

27 It might be that one of the main reasons for this was Mr Assange's incarceration in  
28 custody, but these factors have not changed. They remain as they were when they declined  
29 the court's invitation to apply to adjourn. These proceedings have now been going on for 18  
30 months and to have adjourned again they are likely to be relisted in the New Year, causing  
31 yet further and significant delay.

32 This court, the arbiter of fairness, is able to keep matters under review throughout the  
33 proceedings. If it becomes apparent at a later time that they must be looked at again, the  
34 issue of fairness must be looked at again, they can do so. For now, this application is refused.

1 Now it is 20 past 3, I think we should at the very least try and start Professor Feldstein.  
2 Whether or not we conclude is a different issue.  
3 MR SUMMERS: Thank you.  
4 JUDGE BARAITSER: Is he on stand-by to appear?  
5 MR SUMMERS: Sorry.  
6 JUDGE BARAITSER: Is he awaiting to appear?  
7 MR SUMMERS: I assume so.  
8 JUDGE BARAITSER: He has dropped out. Well, we will wait whilst we make contact.  
9 Obviously, the court will continue to make contact with Professor Feldstein, but if the  
10 defence team are themselves in contact with him I wonder if they could send him an email  
11 and explain the current position.  
12 COURT USHER: Can you hear us Professor, Feldstein?  
13 WITNESS: I can almost hear you.  
14 COURT USHER: But not very well, I am thinking.  
15 WITNESS: I am having a hard time hearing you, sorry.  
16 MR SUMMERS: Mr Feldstein, can you hear me?  
17 WITNESS: That is much better, thank you.  
18 MR SUMMERS: Wonderful.  
19 JUDGE BARAITSER: Can we just pause. Is there a reason why there is no visual picture?  
20 MR SUMMERS: There is, he is just down in the corner.  
21 JUDGE BARAITSER: Ah, can we enlarge that. I see, all right. Thank you very much - I  
22 beg your pardon - Professor Feldstein, for attending today's hearing. I understand you can  
23 see the court and hear the court, is that correct?  
24 WITNESS: Yes, I can hear you.  
25 JUDGE BARAITSER: Thank you. In that case, I am going to hand you directly over to Mr  
26 Summers, who acts on behalf of Ms Assange.  
27 MR SUMMERS: Madam, if his picture does not get bigger as he starts talking, I am going to  
28 ask you to stop and sort that out.  
29 JUDGE BARAITSER: Yes.  
30 MR SUMMERS: Because it is important that ---  
31 COURT USHER: He is going to have to be sworn in first.  
32 MR SUMMERS: Yes, thank you.  
33 PROFESSOR MARK FELDSTEIN, Affirmed  
34 JUDGE BARAITSER: Just pause. Simon, the picture is still small, can we do something

1 about that now, please?

2 COURT USHER: Yes, madam.

3 MR SUMMERS: Madam, whilst that is being sorted out, can I just warn you of this. There  
4 are a small number of witnesses whom we will be calling whose evidence straddles the issues  
5 that we have split between ourselves. Professor Feldstein is one of them and so I will begin  
6 in-chief and Mr Fitzgerald will complete in-chief.

7 JUDGE BARAITSER: All right, thank you.

8 MR SUMMERS: Thank you.

9 JUDGE BARAITSER: Now what progress in relation to the picture, please? All right, but  
10 can we solve the problem.

11 MR SUMMERS: Mr Feldstein, we are just trying to deal with a technical issue at our end.  
12 Please bear with us.

13 WITNESS: Understood.

14 MR FITZGERALD: You do have the bundle of exhibits, do you?

15 JUDGE BARAITSER: I do. In fact, I have ---

16 MR FITZGERALD: Those are the footnotes that he may be referring to.

17 JUDGE BARAITSER: Thank you. I have two copies.

18 MR FITZGERALD: Thanks.

19 JUDGE BARAITSER: Simon, is there something at his end that they can help us with, is  
20 there? Professor Feldstein, can you assist us by just saying some words to see if anything  
21 happens. It does not really matter what.

22 WITNESS: "Congress shall be meeting at 1.00". Is that enough?

23 JUDGE BARAITSER: I am just going to ask ---

24 WITNESS: One, two, three, four, five, six.

25 JUDGE BARAITSER: Thank you very much. It did not help, but thank you. Do you want  
26 to give me an update as to where you are at in this?

27 Do you want to give me an update as to where you are at in this? Is there a prospect  
28 of it succeeding any time soon, do you think? Do you want me to rise and give you some  
29 time to do this? Do you have a telephone number that you can use? Lovely. All right. Let  
30 me give you 10 minutes to work this out. It is 20 to four. What views do you have about this  
31 afternoon?

32 MR SUMMERS: I have a number of views. Firstly, that it is undesirable to go part-heard  
33 with a witness from America, in particular, because they come to join us in the morning. I  
34 know the Professor is able to be with us today because it is Labour Day and therefore he does

1 not have teaching commitments. I do not know what they are going forward. Equally, you  
2 have to see him and that is doctor's orders.

3 JUDGE BARAITSER: Shall I rise and Simon can see what progress can be made and you  
4 can perhaps communicate with your witness in relation to tomorrow's availability.

5 MR SUMMERS: Thank you.

6 JUDGE BARAITSER: Quarter to.

7 (Short adjournment)

8 JUDGE BARAITSER: Thank you.

9 MR SUMMERS: Thank you, madam. The court has kindly sorted out the visual problem.

10 JUDGE BARAITSER: Yes.

11 MR SUMMERS: We have confirmed with Professor Feldstein that he is available tomorrow  
12 afternoon, so our plan would be to start now and then adjourn him, interpose morning  
13 witnesses who do not have a time difference issue and then return to Professor Feldstein  
14 tomorrow afternoon.

15 JUDGE BARAITSER: Yes. I am very happy with that.

16 MR SUMMERS: And rescheduling Mr Ellsberg I suspect as a result.

17 JUDGE BARAITSER: Thank you, and at the outset I will just remind you it is 3.50 and 30  
18 minutes is available to you.

19 MR SUMMERS: Thank you, madam.

20 Examined-in-chief by MR SUMMERS

21 Q. Professor Feldstein.

22 A. Yes, sir.

23 Q. You have in these proceedings produced for us two reports. Is that right?

24 A. That is correct.

25 Q. Madam, your core volume tab 18 dated 12 January of this year, and core volume 57  
26 dated 5 July of this year. Do you have both of those reports, Professor?

27 A. Yes, I'm finding it. This is scrambling a little.

28 JUDGE BARAITSER: Miss Iveson, just for the avoidance of doubt, can you email them to  
29 him so he has them to hand?

30 A. If you give me a minute I can print out the stuff from memo.

31 MR SUMMERS: I will see how I do. I rather suspect I will not need the second report in  
32 any detail, but you recall what you wrote in the second report, do you?

33 A. Pretty much, yes.

- 1 Q. Thank you. Can I just get the formal bit out of the way. Are both of those reports  
2 accurate?
- 3 A. Yes.
- 4 Q. Yes. And do you adopt them as your evidence in these proceedings, please?
- 5 A. Yes.
- 6 Q. Thank you. Now, the first and principal report, madam, your tab 18, section 1 you set  
7 out your background and qualifications. I am going to take this rather quickly, but with no  
8 disrespect. Did you graduate from Harvard in 1979?
- 9 A. Yes.
- 10 Q. And did you then spend two decades as an investigative reporter?
- 11 A. Yes.
- 12 Q. Were you involved in national security reporting?
- 13 A. A little bit, but mostly not.
- 14 Q. OK. Thank you. And then in 2002 you gained your PhD in what might I ask?
- 15 A. Journalism and mass communication.
- 16 Q. And have you been at the University of Maryland since then?
- 17 A. No. After graduating with my PhD I first taught at George Washington university in  
18 Washington DC and then joined the University of Maryland back in 2011.
- 19 Q. Thank you very much. And there you are the chair of broadcast journalism and you  
20 teach as a professor.
- 21 A. That is correct.
- 22 Q. Thank you.
- 23 A. That is right.
- 24 Q. And your specialist area is what, please?
- 25 A. Well, journalism history and particularly (inaudible) reporting both contemporary and  
26 historical. There are a number of other areas also that I deal with in the report. Do you want  
27 me to name those?
- 28 Q. No, no, that is quite all right. I do not have a huge amount of time, but you have  
29 lectured and testified on the topics that you give evidence about in your report. Is that right?
- 30 A. Yes, sir.
- 31 Q. And they are within your purview of expertise. Can I take your ---
- 32 A. (Inaudible)
- 33 Q. Sorry?
- 34 A. No. I have testified in courts in criminal and civil cases and before Congress.

1 Q. Thank you. Can I re-order slightly the report and I want to start on page 15, please,  
2 with the practice in the US of leaking classified information. It is the topic you deal with in  
3 section 7 of your report.

4 A. Right.

5 Q. Just before I do that, one further question on your background. Are you being paid to  
6 give evidence in this case?

7 A. No, I am doing this per bono.

8 Q. Thank you very much. Now, chapter 7 leaking of classified information in the US. Is  
9 it something you are aware of?

10 A. Yes.

11 Q. You state in section 7 that it happens with abandon and government officials are up to  
12 it when it serves their needs. Is that a conclusion that you stand by?

13 A. Yes, and that is from studying it as an historian and an academic and observing it in  
14 Washington for both sides, the academic and the profession.

15 Q. And the examples you give are the 2003 New York Times articles on Saddam  
16 Hussein weapons of mass destruction and 2011 ---

17 A. Yes.

18 Q. They are all examples, are they?

19 A. Yes.

20 Q. Of national security ---

21 A. There are other examples. Yes, there are so many of them: thousands upon  
22 thousands according to one academic study. It is routine. Every government study in the last  
23 60 years has said that it is widespread, you know, and it means they shed light on decision-  
24 making by the government and inform the public policy, but they also expose government  
25 deceit, corruption, illegality, abuse of power.

26 Q. Thank you.

27 A. And they go back to the George Washington presidency.

28 Q. Yes. OK. We will come to that shortly. Are there even reporters in Washington who  
29 have made a career out of receiving that type of leak?

30 A. Yes, there are specialists in national security in journalism, Pulitzer prize winners,  
31 some of the most respected journalists in the nation.

32 Q. Thank you. Now, you have mentioned journalists. We are talking in section 7 about  
33 the practice of leaking. Presumably the majority of those leaks are to the media, is that right?

34 A. The majority of leaks are what?

1 Q. To the media.

2 A. To the media?

3 Q. Yes.

4 A. Yes. There are also sometimes leaks to Congress. Usually a whistle-blower starts in  
5 a government agency, either their own or when they get no response that is usually when they  
6 go outside to Congress and to the media.

7 Q. OK. Let us focus then, please, on the media and move to page 8 of your report and  
8 section 5. When in receipt of leaks, or whistle-blowing, in relation to classified information  
9 in the US, are you aware of examples of the press proceeding to publish that material?

10 A. Yes, yes. As I have said, the government will use them on a daily occurrence,  
11 thousands upon thousands would be by one academic study and they go back to (inaudible).  
12 You can Google them if you want, some of them, but the highlights I listed them in my  
13 report. They use them to inform the public about policy and (inaudible).

14 Q. Just to be clear, on page 8 of your report you give some highlights. Are they  
15 highlights, or is that all there is?

16 A. No, I believe they are highlights. The historical method is a bit sketchy for going  
17 back certainly to the 1800s, but of the modern ones there are many, many more I did not list.  
18 I would be happy to (inaudible) the ones I did list, if you want?

19 Q. No, no, that is quite all right. Perhaps another time, but for now we have covered the  
20 practice of whistle-blowing. We have looked at the correlative practice of publishing that  
21 material and just roughly how frequently are we talking about?

22 A. I would say on a daily basis.

23 Q. OK. If this were happening on a daily basis and were criminal, would you expect  
24 publishers to be prosecuted for this criminal conduct?

25 A. Well, no.

26 Q. Why not?

27 A. Because the First Amendment protects the free press and it is vital that the press  
28 expose rather than ignore the report on the inner workings of government, not because  
29 journalists are somehow privileged but because the citizenry has a right to know what is  
30 going on.

31 Q. And are you aware of any publisher of leaked classified information ever having been  
32 indicted in the US in US history?

33 A. No. I looked into that in some depth and that has never happened. There has always  
34 been a divide, what academics cover the source/distributor divide. The government has

1 charged whistle-blowers, or sources who leak classified information, government employees  
2 or contractors for security, for instance, but because of First Amendment concerns they have  
3 never charged a publisher going back, a journalistic or other news outlet because of the fear  
4 of running afoul of a free press clause in the Constitution.

5 Q. Is there any precedent that you can point to for the prosecution of a publisher for  
6 publishing leaked classified documents?

7 A. Not really. There were a few efforts to try to prosecute journalists and those were ---

8 Q. So, this is page – I do not mean to interrupt, but you have moved to section 8 of your  
9 report. Madam, page 16.

10 A. Yes. I'm moving around too much probably.

11 Q. No, that is quite all right.

12 A. So, and those are actually very telling about demonstrating both how rare it is for this  
13 to even be considered, but also how even in those instances there were extraordinarily  
14 political efforts to punish presidential enemies and I would be happy to explain if you would  
15 like.

16 Q. No. Well, for present purposes we have, and we are grateful for it, the details that you  
17 set out in section 8, three instances of what you have just described precedents going after  
18 journalists but never to the point of a grand jury returning charges. Is that right?

19 A. That is correct.

20 Q. And you can answer any other questions that anybody would want to ask in relation to  
21 that issue of precedent, I assume.

22 JUDGE BARAITSER: Simon.

23 A. I will do my best.

24 MR SUMMERS: Thank you. Can I therefore move to section 4 of your report, page 6?

25 JUDGE BARAITSER: We are just going to carry on, Mr Summers, notwithstanding the  
26 screen.

27 MR SUMMERS: Yes.

28 Q. You have had the opportunity - the clock has stopped, madam.

29 JUDGE BARAITSER: I appreciate that.

30 (Video connection lost)

31 MR SUMMERS: Madam, it is entirely a matter for you but sitting here waiting for  
32 something that might not happen is not entirely – it might be that the preferable course is to  
33 draw stumps and return to Professor Feldstein tomorrow afternoon when we know he is  
34 available.

1 JUDGE BARAITSER: Can I leave it to you to look at the witness list? I can see tomorrow  
2 looks relatively busy.

3 MR SUMMERS: Yes.

4 JUDGE BARAITSER: You might want to move Mr Cockburn to a different day, et cetera, et  
5 cetera.

6 MR SUMMERS: Yes, the difficulty is the time zones.

7 JUDGE BARAITSER: Mr Cockburn's a UK witness.

8 MR SUMMERS: Yes. So, they essentially all have to occupy the mornings and the  
9 American witnesses the afternoons. So, I think it is Mr Ellsberg who might get shunted but  
10 we will manage it and we will ensure that Mr Lewis is kept abreast of who is coming the next  
11 day.

12 JUDGE BARAITSER: That is very helpful. Thank you very much. Anything else from  
13 you, Mr Lewis?

14 MR LEWIS: No, madam.

15 JUDGE BARAITSER: No? 10 o'clock tomorrow morning then.

16 MR SUMMERS: Thank you.

17 JUDGE BARAITSER: Thank you. I adjourn the case to tomorrow morning. Thank you  
18 very much.

19 MR SUMMERS: Madam, just before you do rise, can I raise one issue? Can we ask that Mr  
20 Assange be kept in the building for at least half an hour so we can discuss with him? And,  
21 secondly, I do not believe he has had a face mask or hand sanitizer available to him.

22 COURT USHER: I asked him to keep it on.

23 MR SUMMERS: Sorry?

24 COURT USHER: I asked him to keep it on but he took it off.

25 MR SUMMERS: Thank you. Thank you. It has been sorted then. I am very grateful.

26 JUDGE BARAITSER: There is no difficulty with Mr Assange remaining in the building for  
27 at least half an hour is there jailers?

28 PRISON OFFICER: No.

29 JUDGE BARAITSER: Lovely. Thank you very much.

30 MR SUMMERS: Thank you.

31 JUDGE BARAITSER: Good.

32 MR SUMMERS: Thank you, madam.

33 JUDGE BARAITSER: Thank you very much.

ADJOURNED AT 16.13 UNTIL TUESDAY, 8<sup>th</sup> SEPTEMBER 2020

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