

TRANSCRIPT OF PROCEEDINGS

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

8th SEPTEMBER 2020, 10.29 – 16.53

1 JUDGE BARAITSER: Yes, good morning.

2 COURT USHER: Mr Assange is on his way, madam.

3 JUDGE BARAITSER: Thank you. Thank you, Mr Assange, please sit down. No need to
4 formally identify you today. Mr Summers.

5 MR SUMMERS: Madam, firstly, thank you for your indulgence in sitting at 10.30 today.
6 We are leaning the mechanics of the visiting arrangements downstairs. We thought we
7 would have access to Mr Assange after the hearing, that is not going to be possible as we
8 understand it at any time, the result of which we rather suspect in order to have time with Mr
9 Assange as these proceedings continue is that we may be asking you to sit regularly at 10.30
10 to facilitate morning conferences. I will not trouble you with that now but that is I think
11 where we are headed.

12 The other issue is in relation to the witnesses. Following your ruling yesterday on
13 timing, we have sought to re-jig today's witnesses. It will be Mr Stafford Smith this
14 morning. We hope that we will fill the morning but there is a risk that as we develop our
15 plans as a result we might have periods I am afraid where that does not work but let us see
16 where we go.

17 JUDGE BARAITSER: All right.

18 MR SUMMERS: So, madam, may I call Mr Stafford Smith?

19 JUDGE BARAITSER: Yes, of course.

20 MR SUMMERS: It is your tab 64, madam.

21 JUDGE BARAITSER: I am working from a bundle saying "defence bundle O". Tab 17 is --
22 -

23 MR SUMMERS: That is 17, madam.

24 JUDGE BARAITSER: Thank you.

25 MR STAFFORD SMITH, Affirmed

26 Examined-in-chief by MR SUMMERS

27 JUDGE BARAITSER: Thank you very much indeed, Mr Stafford Smith. I will hand you
28 directly over to Mr Summers.

29 MR SUMMERS: Thank you.

30 Q. Mr Stafford Smith, are you a lawyer?

31 A. I am an American lawyer, yes.

32 Q. Thank you. Licensed to practice in the US?

33 A. In the state of Louisiana and a number of federal courts, yes.

34 Q. Thank you. And are you however based in London?

1 A. I am in Dorset actually.
2 Q. Sorry?
3 A. In Dorset in Bridport.
4 Q. OK.
5 A. The Reprieve which I founded is based in London, yes.
6 Q. Yes. Thank you. And Reprieve founded when?
7 A. 1999.
8 Q. And its functions or objectives please?
9 A. It was initially all about representing people facing the death penalty but then after
10 2001 we moved a lot into representing people in terrorism cases and so forth.
11 Q. And in relation to that, has Reprieve been actively involved in cases concerning secret
12 detention?
13 A. Yes, many of them.
14 Q. Rendition?
15 A. Yes.
16 Q. Kidnapping?
17 A. Um, well, rendition/kidnapping ---
18 JUDGE BARAITSER: Just pause for one moment. I see you have a bottle of water. Would
19 you like a cup to drink it from?
20 A. If it is possible that would be fantastic ---
21 JUDGE BARAITSER: Can you provide one please?
22 A. --- though it does not matter if you do not have it.
23 JUDGE BARAITSER: Can we provide one?
24 COURT USHER: Yes.
25 A. There is one right here if it is ---
26 JUDGE BARAITSER: You are welcome to use mine – is there one right there? Yes. Can
27 we hand that over please?
28 A. Thank you.
29 JUDGE BARAITSER: And take your time to settle yourself and to leave it just on your left.
30 A. Thank you so much. Thanks. I am capable of knocking them over too.
31 MR SUMMERS: Thank you.
32 JUDGE BARAITSER: Mr Summers.
33 Q. Renditions and the litigation surrounding conduct within conflicts such as
34 Afghanistan and Iraq.

- 1 A. Yes, in various ways.
- 2 Q. In relation to that work, has that brought you into contact with the WikiLeaks
3 disclosures?
- 4 A. Many, many times, yes.
- 5 Q. Thank you. And I just want, if I may, to begin to get a measure of what those
6 documents sometimes classified but released by WikiLeaks revealed of relevance to the work
7 you do. Have you provided a report in these proceedings?
- 8 A. I have. It is a copy here. I am sure you have got it.
- 9 Q. Thank you. Just by way of formality, is it accurate?
- 10 A. To the best of my ability, yes.
- 11 Q. Yes. Do you adopt it as your evidence in these proceedings?
- 12 A. I do.
- 13 Q. Thank you. Can you look at paragraph 84 for me? And you deal at 84 through to 93
14 with the issue of drone killings and evidence of them, that is to say US drone killings in
15 Pakistan as revealed by the WikiLeaks cables. Were you able to use those cables in
16 litigation?
- 17 A. The WikiLeaks cables and actually the leaks from JPEL, the Joint Prioritized Effects
18 List, yes, both of those were very important in litigation in Pakistan.
- 19 Q. Thank you. And is that the litigation you describe in those paragraphs?
- 20 A. Yes.
- 21 Q. And the result of that litigation was paragraph 91, the judgment of the Chief Justice, is
22 that right?
- 23 A. Well, that was one of the results. I think another result as a sea change in attitudes
24 towards assassination of people in Waziristan using drones.
- 25 Q. Yes. Were those actions in Pakistan condemned by the Pakistani courts as war crime?
- 26 A. They were.
- 27 Q. And I think you have mentioned at paragraph 93 another result was that they stopped?
- 28 A. Well, speaking as an American citizen, I find it incredibly important that they stopped
29 because I feel that my country's – or one of my country's reputation was seriously damaged
30 in the way that those what I think we have to term criminal offences were taking place.
- 31 Q. But that is certainly what they were described as by the Pakistan courts.
- 32 A. Right.
- 33 Q. Would that litigation have been possible without the evidence disclosed by
34 WikiLeaks?

1 A. It would have been very, very different and very difficult. I mean, some of the
2 disclosures, in particular the statements by the Prime Minister of the time, Gilani, were very
3 powerful in revealing what was sadly a hypocritical attitude by that government at the time.

4 Q. Is that paragraph 88, “We will protest in the National Assembly and then ignore it”?

5 A. Exactly.

6 Q. And that was disclosed by the cables was it?

7 A. It was, yes.

8 Q. You then go on at 94 through to 96 to give a little more information about some of the
9 contents of the cables and did they in addition disclose attempts by the US to block
10 investigations into renditions?

11 A. Well, they did and also block investigations and compensation and all sorts of other
12 aspects of what we were trying to do to reconcile with a very angry Pakistan population at the
13 time.

14 Q. And so far as investigation of rendition and torture is concerned, what does the
15 Convention on torture have to say about that?

16 A. Well, I am sure Her Honour is well familiar with it but obviously you know, under
17 article 9, we have an obligation to cooperate in investigations into torture and then there are
18 various other things, probably article 15 is the second most important one which is the use of
19 torture evidence. But you know, it speaks for itself, the Convention against Torture I
20 imagine.

21 Q. And we can see from 95 that the cables disclosed, for example, pressure on companies
22 not to execute international arrest warrants.

23 A. And not to cooperate in torture investigations which has been an ongoing problem
24 throughout the litigation I have done over the last almost 20 years.

25 Q. All right. Can I just briefly then turn to another issue that you highlight in relation to
26 the WikiLeaks materials? Paragraph 78 to 83. What you term the US assassination
27 programme. What in a sentence is that please?

28 A. Well, I mean, I am very much into this, it is going to be the subject of my next book
29 actually. And it is another area which sad to say the United States government has forgotten
30 many hundred years of the evolution of history that by the time of Emmerich de Vattel in
31 1758 had declared assassination essentially illegal and so had we as Americans in executive
32 orders in the seventies. And then the US took to doing this in various ways, actually one of
33 the early ones that I was very much involved in was the JPEL leak from WikiLeaks of the list
34 of targets in the Afghanistan and Pakistan area.

1 Q. And that included journalists?

2 A. Well, it included all sorts of people. I mean, it is a fascinating, fascinating document
3 that has actually received far too little attention in my view and I am certainly going to be
4 writing a lot more about it, but there were – in the copy of the list that I ended up receiving
5 there were 669 names if I am remembering rightly, and these were people who were being
6 targeted in different ways and they revealed various things. One was just an incredibly
7 puerile attitude to assassination where the targets were named after pornography stars and
8 things like that.

9 Also, they revealed names that clearly came from American allies because they were
10 very unique names particular to Britain or Australia or so forth, but in one way the most
11 diserving thing was that it revealed how the assassination programme of what we refer to as
12 terrorists leaked over into narcotics for two reasons; one was the US, the involvement of
13 different US agencies including the department – the DEA, and second, you know, they were
14 actually targeting people for what appears to be death based on their involvement in narcotics
15 on a rather threadbare notion that this was what was funding terrorism. So, it is a long thing,
16 I mean, I could go on for ages and I will not, but it was a really significant element of some
17 work I was doing on that, yes.

18 Q. And just perhaps to state the obvious, assassination programmes of the type disclosed
19 are lawful or unlawful?

20 A. Well, I mean, look there are people who pretend they are lawful. I think they are not
21 only unlawful but morally, utterly reprehensible and, you know, we are targeting people with
22 the same credibly loose applications sadly of fact in, you know, the case of Bilal Abdu
23 Kareem is one that I mention of an American national who is targeted and is a journalist, for
24 goodness sake, and we all know sadly, you know, we do know what our current President
25 thinks of some journalists, and the idea that he is being targeted for what is effectively being
26 a war correspondent is deeply worrying to First Amendment advocates.

27 Q. And just so we are not under any doubt, being “targeted” you mean targeted for
28 assassination?

29 A. Well, he has been targeted five times to date as best we can prove and we can prove it
30 was the United States who did it because it involved hellfire missiles from Predator drones
31 and the only people who had it at the time was the US, it is sad to say, but that litigation is
32 ongoing. We are in the DC Circuit Court of Appeals at the moment on whether the United
33 States has the right to assassinate its own nationals who are journalists around the world. I

1 find that deeply troubling. I think it is a monumental criminal offence and as a lawyer it is
2 my duty to do what I can to prevent him.

3 Q. Can I move to a different topic and that is to Guantanamo Bay, with which I
4 understand you have had some involvement over the past years.

5 A. I brought the first case along with two other lawyers on, I believe, February 19, 2002.

6 Q. That is the case that extended habeas to --

7 A. Eventually, after two and a half years, yes.

8 Q. That is your paragraph 19. Your work with those detained at that facility is set out in
9 some detail in your report. I would like to explore, if I may, two broad topics that you touch
10 upon. Firstly, beginning, it is paragraphs 7 to 10. The emergence of information that despite
11 first assurances actually those detained there had nothing at all to do with terrorism and had
12 been exchanged for bounties.

13 A. And I was surprised by that, frankly.

14 Q. I imagine.

15 A. When I first brought that litigation it was based on a principle which was that
16 everyone has the right to a fair trial and I felt that Guantanamo was doing us, as a nation,
17 damage, but, on the other hand, I thought by and large the government is probably going to
18 get it right and they would just make some mistakes, as the government always does, but
19 actually I was wrong, and to date we have freed over 95 per cent – actually it is 94.8 per cent,
20 I think, are freed, but another five have been cleared, over the prisoners, all of whom have
21 been cleared predicated on a finding by the six top US national security agents, these are not
22 by me, that they are no threat to the United States or its coalition allies, as opposed to being
23 the worst of the worst terrorists in the world.

24 Q. Right. You deal in your report at paragraphs 15, 18, et cetera, with the difficulties
25 that you have had in establishing that basic fact in relation to many who are detained there.
26 Where essentially have you been able to gather the evidence necessary in order to show what
27 you have just said?

28 A. Well, I should say first that it is difficult, it is very hostile sometimes, and this is one
29 of the cases where I have received death threats just for representing people, but it has been
30 all over the world and in various places. Now, you know, the best source actually of
31 information by and large was when we finally got access to the prisoners and were able to
32 talk to them, but your problem with that always is twofold. One is actually the prisoners in
33 Guantanamo do not know what they are charged with. I mean it just seems Orwellian, and I
34 have used the word “Orwellian” far too often in the last 19 years. But, second, you know,

1 unfortunately people never get to meet the prisoners in Guantanamo and cannot judge their
2 credibility as I hope at some level I can, and so proving what happened takes a lot more than
3 just having your clients say it, so it has involved travelling around the world and, of course, it
4 has involved documentary proof.

5 Q. Now, at paragraph 42, the documentary proof that you need has, I think you say,
6 come out of some surprising places and there you quote former President Musharraf's book
7 and proceed to give us a couple of examples of clients of yours who turned out, as a result, to
8 be entirely innocent. That type of evidence, did it come from other sources as well?

9 A. There were lots of it. I mean one of the things we have done over the years is, you
10 know, we get the assertions made by the US government in the habeas case that are all
11 classified, which we cannot share with the client, but then we have to investigate them and
12 that may include President Musharraf's book, which I do not encourage you to spend too
13 much time reading, frankly, but it also goes on to all sorts of other areas. You know, I have
14 travelled a lot of different countries and, you know, newspaper articles in Pakistan have
15 turned out to be incredibly important, even a map of Afghanistan has shown how little certain
16 agents, intelligence agents, understood about the geography of what was going on there. But
17 then there have been other documents and obviously one of those are the leaks that turned the
18 WikiLeaks.

19 Q. Can I then turn to those? Paragraphs 31 to 35. You deal with those documents and I
20 think there we are talking about the detainee assessment briefs. Is that right?

21 A. That is right. They are all on the New York Times Guantanamo docket on their
22 website.

23 Q. And it is fair to say that you are not terribly enamoured with those documents.

24 A. Well, I mean there are two sides to that. One is I am not enamoured as someone who
25 is interested in the truth because actually those leaks are the very worst that the US authorities
26 confect, and I use the word "confect" intentionally, about the prisoners I have represented.
27 But, on the other hand, they are really important because the world did not know the
28 allegations that were being made against my client. But to give you the best example I am
29 allowed to give you, because I can only talk to you about, you know, I have a security
30 clearance and I can only talk to you about things that are not secret under American law.
31 You know, I was frustrated when I first read those WikiLeaks documents because I thought
32 they had leaked what I get to see, which is in Yunis Shokuri's mentioned 4 times case, for
33 example, I think it was 1,811 pages of materials that I had assembled to disprove the
34 allegations that the US government had made against Yunis Shokuri, who I should say is now

1 safely home with his family in Morocco. But what was useful was you have got the 13 pages
2 that the US government alleges against Yunis Shokuri, which up to that point I could not
3 have discussed with anyone out in the wide world. And then finally I was able to declassify
4 what is called an amended factual return, which is our response to their assertions and prove
5 that each of those allegations was total nonsense.

6 Q. All right.

7 A. Which resulted in a lengthy hearing in Washington and while no one has been ordered
8 release by a judge in America, it certainly helped that we were able to disprove a lot of that.

9 Q. So far as the WikiLeaks' documents were concerned, they were the government
10 allegations.

11 A. Right, and indeed we made – we asked – I cannot say made, but we requested that the
12 New York Times put that little disclaimer ---

13 Q. Yes, paragraph 35.

14 A. 35, because while they were very useful for different people to analyse the sort of
15 evidence against people in Guantanamo Bay, they were nonetheless, look, I mean the only
16 term I can use, total drivel when it came to factual, accurate ---

17 Q. What do you say to the suggestion that they were a threat to national security, or their
18 disclosure was a threat?

19 A. No, honestly, and I am not saying this is true. I really do not know, but I really
20 thought that the US government had leaked them because this was the very worst case
21 scenario they could present against any of my clients.

22 Q. All right.

23 A. But I am not saying that is true obviously.

24 Q. You go on, however, to discuss this core group of informants that were being used to
25 justify the continued detention of a number of people, and that is something you deal with at
26 37 through to 41 of your report.

27 A. That is right.

28 Q. So far as that is concerned, were the WikiLeaks' disclosures of any value?

29 A. Well, they were. I mean this is the frustration I found. You know, when I was sitting
30 in the secure facility in Washington DC analysing all the classified evidence I get to see, what
31 I can say is I found it immensely frustrating that the world had no idea of the sort of
32 unreliability, shall we say kindly, of the evidence being alleged against my clients. The only
33 way I have been able to refute that to date is in the Shokuri case, but actually what others
34 have done in taking the WikiLeaks' documents from the New York Times website, and I

1 would credit here Andy Worthington, who has done a spectacularly good job and wrote a
2 book about this, is to analyse the number of times, for example, certain informants were the
3 main basis for detaining prisoners. And these are people, you know, we understand why they
4 did it, right? I mean they were trying to get out of Guantanamo too, but over the years we
5 have been able to get federal judges to find most of those – I think six people we list in
6 paragraph 37 – to be incredible.

7 Q. And am I right in understanding that the WikiLeaks' disclosures enabled people like
8 Mr Worthington to piece together that intelligence?

9 A. Yes, he could do it in the outside world. I had already done it in the secrecy of our
10 procedures there, but, you know, while it is important representing your client to do that, it
11 does not actually show the world what is really going on there. And our principle, if I can
12 just say very briefly, in all of our Guantanamo work has been that if we can open it up to
13 public inspection so that people can see what is really happening there, then they will close it
14 down because they will realise that it is just not what it is advertised as.

15 Q. We have looked briefly at innocence, if I can call it that, as a topic in relation to
16 Guantanamo. Can I turn to a different one and your paragraph 26 is probably as good an
17 introduction as any. You have been profoundly shocked, you say, by the crimes committed
18 against your clients.

19 A. Mmm.

20 Q. Can you summarise in a sentence what you are talking about there.

21 A. Well, I say this more in sadness than in anger, but I have got to say as of 2001 I would
22 never have believed, notwithstanding what we all know about Central America in the 70s, I
23 would never have believed that my government would do what it did, and, you know, we are
24 talking about criminal offences of torture, you know, kidnapping, renditions, holding people
25 without the rule of law, and, sad to say, murder. You know, the very first time I went to
26 Guantanamo, which was now 16 years ago, I debriefed one prisoner about a murder he had
27 witnessed and the US government thought it was OK for them to keep that secret.

28 Q. That is paragraph 21.

29 A. Yes, and they said that was a method or a means of interrogation, to murder people in
30 Bagram air force base. I mean that is just beyond my capacity to understand.

31 Q. And 75 to 76, "enhanced interrogation" is the phrase we all know and love in relation
32 to torture techniques, and 76, "secret prisons". Is that the kind of thing we are talking about?

33 A. But again I say this in despair. I have had a project of comparing the methodologies
34 that my government uses on my clients to what they were called by the Spanish Inquisition.

1 The best example of which is strappado, which is something that I believe Donald Rumsfeld
2 said was not a big deal, which is hanging people by their wrists and as their shoulders
3 gradually dislocate. And, you know, the first thing I do with most of my client when I meet
4 them is I apologise as an American citizen because you know, I feel that is probably the best
5 way to move towards reconciliation, but it is really shocking to me that we have done this.

6 Q. 61 to 74 you talk about Mr Binyam Mohamed.

7 A. Mmm.

8 Q. With whom we in this country are familiar because of the UK connections and the
9 litigation that occurred here, but is it right that he was subject of rendition torture by way of
10 razor blades to his genitals and detention and incarceration in prison?

11 A. Well actually it was worse than that. If you ask Binyam, and I represented him for
12 many years, he would say the psychological torture was worse than the razor blades. But the
13 only reason you are familiar with that is because we at Reprieve were behind with some very
14 fine British counsel bringing that litigation in the UK to try to enforce Britain's obligation
15 under the Convention Against Torture, which was to cooperate with what was then my efforts
16 in the US to hold a proper inquiry into the torture that had been inflicted on Binyam, and the
17 British had been involved in it, as was ultimately settled in the case -- where the details are
18 confidential -- where he prevailed in court here. We were trying to get the British
19 Government to comply with its duties under Article 9 and Article 15 of the Convention
20 Against Torture. It is one of those sadly fascinating issues really over the last several years as
21 to exactly who is the criminal here. While I am not trying to pretend that everyone I have
22 represented in my life is angelic, it is particularly worrying where, in that case, the British
23 Government actively sought to avoid their legal responsibilities. I suppose if you are
24 avoiding your legal responsibilities then it is illegal -- and that was a real problem in that
25 case. It carried on to where the authorities leaked a statement to the BBC when we secured
26 his release, which was the statement that I knew had been tortured out of him, and the only
27 reason we were able to prevent them from using that on national television to basically tar
28 Binyam Mohamed was because I was there and I knew about it. That again is illegal; it is not
29 just wrong.

30 JUDGE BARAITSER: I give you a five minute warning.

31 MR SUMMERS: Thank you. I do not know whether it is going to be suggested to you in
32 cross-examination on behalf of the US that type of thing is anything other than gross
33 criminality, but can you assist us with the role that the WikiLeaks disclosures have played in
34 evidencing torture, dark prisons, rendition flights and the like.

1 MR LEWIS: Can my learned friend help me where he is examining from on the statement?

2 MR SUMMERS: Sorry?

3 JUDGE BARAITSER: Where in the statement?

4 MR SUMMERS: In relation to Binyam Mohamed it was 61 to 74.

5 THE WITNESS: With all of the different issues, vis a vis my Guantanamo clients, as you go
6 through all the documentation that WikiLeaks leak, there are all sorts of things identified
7 through there about where people are taken, rendered to different places, and while normally
8 those documents do not actually name the country, it is very clear to those of us who are
9 representing the individual where they are talking about. That, as I recall, is present in
10 Binyam's statement.

11 MR SUMMERS: Lastly, can I look at 53 to 58 and Mr Rabbani, another person, as I
12 understand it, who was rendered into a dark prison and tortured, but remains at Guantanamo.

13 A. Yes.

14 Q. The reason I am interested in his particular case is primarily paragraphs 59 and 60 and
15 your referral of his case to the international criminal court.

16 A. Right, he is the public one. There are one or two who are not public who were fed to
17 the ICC, but Mr Rabbani has the courage to be public given that he is still in custody and that
18 poses a certain threat to him. We have brought that based, in part, on the documentation of
19 torture and abuse that came through WikiLeaks and that whole history, but also through Mr
20 Rabbani who has detailed his torture in great length.

21 Q. Finally, in response to those cases brought, based in part on what WikiLeaks
22 disclosed, what in summary has been the US response to the investigations of the ICC.

23 A. I have been researching this week how we can sue the Trump administration in the
24 US because to threaten, as indeed as of last week, impose sanctions against through members
25 of the US is totally contrary to law. I should say - I will give you fair warning as an
26 American lawyer - that what you are doing here today probably qualifies you under the
27 Executive Order because you are not an American national.

28 Q. You are OK; are you? I am looking at a US sanction, am I?

29 A. You are not.

30 Q. Why am I going to be sanctioned?

31 A. Because the investigation into torture, the executive order, says that everyone can be
32 sanctioned who is not an American national who is seeking to assist in an investigation
33 against American citizens that would go to the ICC, and certainly WikiLeaks has played a
34 part of that, and it is conspiracy. I am sorry, it is a silly thing, but it is legally outrageous.

1 Q. Just remind us, the ICC is now investigating renditions, war crimes?

2 A. War crimes in Afghanistan, yes.

3 Q. Committed by whom?

4 A. Committed by all parties in Afghanistan, but Afghanistan is a signatory to the ICC,
5 whereas the US has signed it, but not ratified it.

6 Q. By all parties do you include the US Government and the CIA?

7 A. US agents, yes.

8 Q. Thank you very much. If you would like to wait there, there may be some more
9 questions.

10 Cross-examined by MR LEWIS

11 Q. Good morning.

12 A. Good morning.

13 Q. You founded and have worked for Reprieve since 1999?

14 A. I do not work for Reprieve any more, but I did.

15 Q. Reading your statement, which is fairly lengthy, going to 97 paragraphs, there appears
16 to be no or little mention of WikiLeaks until paragraph 31 and 32, where you point out where
17 the publication of the WikiLeaks material was in the public interest; is that right?

18 A. If that is what it says, I am sure you are right, yes.

19 Q. The next mention of WikiLeaks I see is paragraphs 83 and 84. Again I think your
20 point is that you believe the publication was in the public interest?

21 A. I think in many ways it was, yes.

22 Q. Notwithstanding whether you think it ought to be, must be aware that the Official
23 Secrets Act 1989 in the United Kingdom, for example, there is no defence of publication in
24 the public interest?

25 A. I am not sure of that -- I know it is not the law in America.

26 Q. You mentioned the WikiLeaks cables at paragraph 88; I wonder if we can turn those
27 up. That seems to be the first proper time you are talking about WikiLeaks disclosure. You
28 specifically mentioned this when you were asked by Mr Summers. This is the cables to
29 illustrate the Government's stance towards drone strikes?

30 A. Yes.

31 Q. You have also mentioned specific cables at paragraphs 95, the three cables, A, B and
32 C, and another WikiLeaks evidence at 96?

33 A. Yes.

34 Q. Would it surprise you to know there are no charges against Mr Assange, or anyone

1 else, for publishing to others or publishing on the internet those cables you mention, or any of
2 the material you have mentioned in your statement?

3 A. That would not surprise me, no.

4 Q. Did the defence explain that to you?

5 A. By the defence do you mean ---

6 Q. I do, yes.

7 A. Sorry. I have not had discussions with them; they just asked me to respond to three
8 questions.

9 Q. Have you read the indictment in this case?

10 A. Yes, I have; although there is a new one I have not read apparently.

11 Q. If you will take it from me, it just materially alters the hacking charges, not the other
12 charges. You say at paragraph 95(a) of your statement that this cable was of particular
13 response, the cable 07-Berlin-242; yes?

14 A. Sure.

15 Q. That cable helped you do your work, is that right?

16 A. I think a lot of these things did, yes.

17 Q. But, in fact, that cable was published by the New York Times and the Washington
18 Post?

19 A. An awful lot of what the WikiLeaks leaked was published by those and the Guardian
20 and so forth, yes. As a result, I understand, of the leak.

21 Q. For example, the Washington Post published that very cable on 29 November 2010. I
22 am not sure of the first publication, but the New York Times updated and published that
23 cable on 19 June 2011. Would that sound about right?

24 A. Yes, it would, and it would illustrate the fact that certainly the two most important
25 papers in America felt this was in the public interest.

26 Q. But WikiLeaks did not carry out its dump of the 134,000 cables until the end of
27 August 2011?

28 A. OK.

29 Q. And the full 250,000 cables on 1 September 2011.

30 A. Sure.

31 Q. That is nearly a year later that these cables have been published and put in the public
32 domain by the New York Times and the Washington Post?

33 A. I take you at your word, and I am sure that is true, but I do not know exactly how the
34 New York Times and Washington Post got it. I had assumed it came from the WikiLeaks

1 dump.

2 Q. I think that is an assumption.

3 A. Maybe I am wrong.

4 Q. That is a fair assumption.

5 A. Fair enough.

6 Q. The point I am trying to make, perhaps ineloquently, is neither the New York Times
7 nor the Washington Post, nor Julian Assange, is being prosecuted for the publication of those
8 cables?

9 A. Sure.

10 Q. You understand that?

11 A. I understand that. It would be a first if the New York Times or the Washington Post
12 was prosecuted for anything under the First Amendment.

13 Q. What I am failing to understand, and it is probably me, is if the New York Times, nor
14 the Washington Post nor Mr Julian Assange is not being prosecuted for publishing those
15 cables which helped you, how is it relevant to this case?

16 A. I would think, if I may answer that question, there are all sorts of aspects that are
17 relevant to this case, and there are lots of things I have not talked about yet, which I am
18 happy to. Take, for example, JPEL - the Joint Prioritized Effects List - I do not know
19 whether that is part of the indictment, I do not recall.

20 Q. You told us a moment ago that you had read the indictment?

21 A. Yes, I have.

22 Q. You know what he has been ---

23 A. I read it ages ago.

24 Q. Let me give you some help.

25 A. Sure. If it will help you, counsel, I am happy to agree to what you represent.

26 Q. I will show it to you because then there is no doubt. Unfortunately, because you were
27 coming live we forgot to print an what copy of this bundle -- it is being printed at the
28 moment. If you would just bear with me. I will check with my learned friends -- unless they
29 would like to give their bundle. Mine is slightly marked.

30 A. I promise not to look at your marks.

31 Q. Thank you very much. If you take that. If we go to page 104 in that bundle and look
32 at paragraph 20, this is the declaration of one of the United States attorneys in the case, Mr
33 Kromberg. At 20: "The only instances in which the superseding indictment charges Assange
34 with distribution of national security information to the public are explicitly limited to its

1 distribution of documents classified up to “secret” containing the names of individuals in
 2 Afghanistan, Iraq and elsewhere around the world... safety and freedom by providing
 3 information to the United States...” The things he has encountered relate to ones where
 4 people’s names have been put into the public domain, which puts their lives at risk; do you
 5 understand?

6 A. I have a pretty extensive experience with American intelligence documents, having
 7 seen thousands and thousands of them in my work. If you look here at paragraph 20,
 8 Count 17, “unauthorised possession of State Department cables, classified up to the secret
 9 level containing the names of individuals” it is absolutely certain I would think -- I stand to
 10 be corrected, but I would be very surprised -- that anything, for example, that refers to Prime
 11 Minister Gilani would be totally secret. One of the things we face all the time in Guantanamo
 12 is a concerted effort never to discuss documents that relate to allies. It is one of the great
 13 frustrations in Binyam Mohamed’s case. They would never say that it was Morocco where
 14 they took him to torture and so forth.

15 Q. I do not think you are quite getting my point. The point is he is not being prosecuted
 16 for that.

17 A. I think he is just there, isn’t he?

18 Q. No. If we go on, for instance, to page 106, paragraph 25, these are the people who
 19 have been outed, as it were, by Wikileaks and that is the limit of the prosecution, so where –
 20 so, for instance, there is a person whose name was given, being an informant to the United
 21 States military and the publication of his name, for instance, in Afghanistan, in Iraq, put him
 22 in personal danger. You understand that.

23 A. I think you are very wrong on the way that American cases are prosecuted and I will
 24 tell you how.

25 Q. Before that, just answer my, answer the question because this is how it is, this is the
 26 sworn statement before this court of how it is being prosecuted and that is the only count in
 27 the indictment.

28 A. But what you are going to have in every American prosecution such as this is you are
 29 going to have an expert called at the beginning, who is going to be an expert in terrorism
 30 normally, who is going to go through the entire history of Al-Qaeda and everything else for
 31 several days, so it is just not the case that it is all going to be relevant in a case like this.
 32 Unfortunately, I have argued against that my entire life, but it will happen.

1 Q. I think you are wrong, completely wrong, Mr Stafford, because the government have
2 specifically said if we look at the indictment, if we look at, for instance, count 17 of the
3 indictment.

4 A. What page are we on?

5 Q. We will just pick that up.

6 MR LEWIS: 295.

7 MR SUMMERS: Now, it is not the passage I am thinking of, but it is not – I do not want to
8 get into an argument with you because you cannot tell this court how this case is going to be
9 prosecuted.

10 A. I can I think. Look, if you look at count 1, conspiracy to obtain and dispose national
11 defence information, that is a conspiracy charge and count 2 is going to result in exactly what
12 I am saying.

13 Q. Does it include any allegation of publishing information?

14 A. Oh, it will include pretty much everything ---

15 Q. Mr Stafford, you are making this up, are you not?

16 A. No.

17 Q. You show me in the indictment where count 1 includes the words ‘publishing to the
18 public.’ You show me.

19 MR LEWIS: Count 1 is page 277 for the witness’s benefit and it is subparagraphs 3 and 4
20 that deal with communication of the cables to the public.

21 WITNESS: I am looking at that. Counsel, with all due respect, I have tried a lot of cases in
22 America and I have done a lot of cases of national security and Guantanamo cases and it is,
23 what you are saying is just not how American cases are tried. Ask every witness who comes
24 here from the United States, and you know, I would not lecture you on how to do a British
25 case because I do not know, but I can tell you how American cases go.

26 MR SUMMERS: So, you are saying that the Assistant United States Attorney, who is an
27 experienced man, is lying in his evidence which he has sworn to that the only instance we
28 have read at paragraph 20 where the superseding indictment charges with Mr Assange with
29 the distribution of national security information will be limited to the names of individuals in
30 Iraq. Are you saying he is lying?

31 A. No, show me where he has sworn his statement because I do not, he is not lying, but I
32 do not – when we look at it, as I am loathe to ever call anyone a liar, but when we look at it, I
33 would pretty confident that it is not exclusive as to how American trials can go.

34 Q. Well, you will see that he has sworn it.

1 A. I wish you were right but you are not.

2 Q. Do you want to see that he is sworn it? You want to see that he has sworn it. It is
3 page 171.

4 A. Sir, no, but where it is that he says that we will not have evidence of an expert on this
5 case and on the conspiracy? Does he say that?

6 Q. Mr Stafford, you are not listening to the question. The question I have said is that it is
7 specifically said and it is the case of the government in this case that Mr Assange is not being
8 prosecuted for publishing those cables or anything other than the documents which contain
9 the names of informants which put their lives at risk.

10 A. Look, let me give you an example.

11 Q. Do you accept that?

12 A. I do not accept that that has any relevance to the evidence that is going to be included
13 in an American trial and I will give you an example. I represented a chap who had been on
14 death row and then we tried his case federally and he was charged with a conspiracy. He was
15 charged with a number of very specific counts and in the first several days we had some chap
16 from the FBI come in and give the whole history of the outlaw motorcycle club. That is what
17 happens in American cases and it is monumentally unfair, I agree with you. It should not
18 happen, but it will, and show me anything in this affidavit that says different.

19 Q. I have just shown you.

20 A. Where?

21 Q. Paragraph 20.

22 A. Paragraph 20.

23 Q. Page 104.

24 A. 104.

25 Q. Page 104, paragraph 20.

26 DEFENDANT: Your Honour, I think it is nonsense.

27 JUDGE BARAITSER: Sorry, Mr Assange, I am terribly sorry, but it is not for you to
28 interrupt these proceedings. If you do interrupt the proceedings, I am going to have to rise.
29 Mr Assange, do you understand your role in these proceedings, certainly for the time being, is
30 to remain silent whilst the witness is giving their account.

31 DEFENDANT: Apparently it involves for him to sit here and legitimise (inaudible).

32 JUDGE BARAITSER: Well, Mr Assange, there are a number of options available to me.

33 The first one is that you receive some advice from your lawyers and I think you should have
34 that now so that you understand what your position is. I am sure they will explain the

1 consequences going forward of interruptions of this kind. I think I am going to take five
2 minutes for that to happen.

3 Mr Stafford, you remain on oath. Obviously, you cannot speak to anyone whilst you
4 are on oath. You are welcome to leave the room, but please be somewhere where we can
5 access you quickly. I am going to give ten minutes to those that represent Mr Assange to
6 advise him of his position and we will come back at 11.30 and we will resume cross-
7 examination. Thank you very much.

8 MR SUMMERS: Thank you.

9 (Short adjournment)

10 JUDGE BARAITSER: Thank you. Mr Summers ---

11 MR SUMMERS: Thank you, madam.

12 JUDGE BARAITSER: --- have you had an opportunity to advise your client?

13 MR SUMMERS: Yes, I have.

14 JUDGE BARAITSER: Before we carry on, I am just going to give him my own warning I
15 think.

16 MR SUMMERS: OK.

17 JUDGE BARAITSER: Notwithstanding the advice you have given. Mr Assange, I hope and
18 I am informed that you have now been advised that a witness must be allowed to give their
19 evidence and free from interruptions. I understand of course that you will hear things, most
20 likely many things that you disagree with during the course of these proceedings and that you
21 would like to contradict and speak about these things yourself, but this is not your
22 opportunity to do so. Your remaining in court is something that I and no doubt those that
23 represent you certainly would wish for.

24 However, if you interrupt proceedings and disrupt a witness who is properly giving
25 their evidence then it is open to me to proceed without you in your absence. This is
26 obviously not something I would wish to do. I am therefore giving you a clear warning, you
27 must allow a witness to speak without interruption so that their evidence can be taken and I
28 hope I have made the consequences of impeding this process clear. Thank you. You are on
29 your feet, Mr Summers, something you wanted to say?

30 MR SUMMERS: Yes, at the conclusion of this cross-examination, can I ask please for five
31 minutes to confer with Mr Assange in order to ---

32 JUDGE BARAITSER: Yes.

33 MR SUMMERS: --- better construct my re-examination without any interruption to these
34 proceedings?

1 JUDGE BARAITSER: You can.

2 MR SUMMERS: Thank you.

3 MR LEWIS: Mr Stafford Smith, Let me have one more go.

4 A. Sure.

5 Q. But please listen very carefully to what I am saying because the indictment is split
6 into a number of different parts and the only part which deals with publishing, I will say this
7 very precisely, that no one, including Mr Assange, has been charged with or is being
8 prosecuted for the publication of the materials which you have identified in your witness
9 statement.

10 A. And that – it is true that he is not charged with it but let me just correct a few things
11 you said before if I may? First, Gordon Kromberg is not an assistant attorney general, he is
12 an assistant USA and ---

13 Q. Well, that is right, if I said attorney general I am wrong, he is obviously just an
14 AUSA.

15 A. Yes. He is. And if you were to ask him I can guarantee you, I mean, I would be
16 amazed if it was not 99.9 per cent that he is going to call a witness who is going to detail the
17 whole panoply of the alleged conspiracy that will include all sorts of things that are not
18 included in the indictment, that happens routinely in every American case.

19 Q. We can probably agree with that.

20 A. Yes, OK. So, it is going to touch on many, many things that are not in the indictment.
21 There are certain things it probably would not touch on, on direct examination, because they
22 are really embarrassing and that includes some of the things that I have detailed in my
23 declaration because obviously the cases I bring are ones where we have caught sad, sad, sad,
24 we have caught the United States with its pants down on criminal acts. And obviously, the
25 prosecution is not going to lead with its chin on the issues that are just criminality because
26 you know, no matter what you think the defences here in the UK are to national security, in
27 America it might be seen quite differently.

28 So, I am not disagreeing. They are not in the indictment but these things are going to
29 come up at trial definitely.

30 Q. So, we will move on very slightly from that and we look at paragraph 36 of your
31 witness statement. And you deal with you say, and you were examined-in-chief on this,
32 “little or nothing complained of by the authorities would seem to be material that truly
33 threatened national security.”. I just want to examine that in a little bit more detail.

34 A. Sure.

1 Q. Firstly, have you ever been in a position to classify information?

2 A. I have never – I do not do that job. I have had a huge amount of stuff that I have
3 submitted for classification then they have returned it to me and I have tried to challenge it
4 which is quite hard sometimes.

5 Q. It is right to say you are not a classification authority?

6 A. I am not a classification authority, no. You are right.

7 Q. Have you ever been in a position to determine the impact on national security of
8 releasing information?

9 A. I mean, look, I was just going through Mr Kromberg's affidavit which I wish I had
10 time to read carefully there because there are so many things in it with which I am familiar.
11 It is difficult. There are assertions made, for example, that the ICC conducting a proper legal
12 investigation into torture is somehow a threat to national security, the president of the United
13 States has just made that statement in an executive order, I think that is manifestly absurd and
14 indeed contrary to what would make America safe if we were to take the high ground both
15 morally and legally. So, the answer to your question is no, I have not sat down ---

16 Q. OK.

17 A. --- and issued a report on whether this ---

18 Q. Good, because I am just testing this because ---

19 A. Sure, absolutely.

20 Q. --- you are saying, it does not appear to be, to you to be a proper classification but ---

21 A. But I do have – I am sorry ---

22 Q. --- do you accept ---

23 A. Sorry.

24 Q. --- do you accept that whether the information constitutes national defence
25 information, will be litigated at trial, presented to the jury and determined by the jury?

26 A. I mean, that is a tricky question and you know, I would be going beyond my realm of
27 expertise. I have never done a federal trial where the issue of challenging a national security
28 classification. It is true, I have done lots of federal cases in Guantanamo or several – so,
29 look, I do not think I can really understand ---

30 Q. OK, well, can I just show you, if you turn to page 331 of that bundle?

31 A. Yep.

32 Q. This is another one of Mr Kromberg's ---

33 A. Sure.

34 Q. --- declarations.

1 A. Sure.

2 Q. He is an assistant United States Attorney.

3 A. Yes.

4 Q. And if we pick it up at the bottom there is a definition, you will see that there is a
5 section 3: Definition of National Defence Information. Paragraph 83, do you see that?

6 A. Yes.

7 Q. And what they have to prove are three things effectively. And the third one is
8 disclosure of the documents must be potentially damaging to the United States or potentially
9 useful to the enemy of the United States, go over the page ---

10 A. Sure.

11 Q. --- proving during instruction the prosecution must prove the information would be
12 potentially damaging to the United States or might be useful. So, it will be part of the trial
13 that the government must prove beyond reasonable doubt that the material they are saying Mr
14 Assange did disclose, not the stuff you are relying on, but other stuff, was damaging.

15 A. Right, OK.

16 Q. Yes. So, going back to your paragraph 36, when you simply say in 36, well, it
17 appears to you that little or nothing complained of by the authorities would seem to be
18 material that truly threatened national security, it is quite a sweeping statement you make is it
19 not?

20 A. It is and I – let me say why I say it. This is – and this again pains me to say this, but if
21 you look over the last 19 years of my government’s response to 9-11, to me, beyond torture,
22 beyond assassination, beyond all these awful things, the single most damaging thing to the
23 United States has been our over-classification of material by saying it is a threat to our
24 national security. This has harmed us more than anything else. And so, when I say certain
25 things, sound fairly sweepingly, I have seen hundreds and hundreds of pages that have been
26 classified secret and they have been classified secret on this basis and I will tell you just a
27 brief anecdote if I may to illustrate it?

28 When I first went to see a British national in Guantanamo Bay, Moazzam Begg, I
29 took a statement from him of 30 pages about how he had been tortured. And when I typed all
30 of that up in the secret facility every single page was classified under the theory that torturing
31 him was a threat to national security. Without going into details – now, I finally got that
32 declassified eventually, albeit by rather circuitous means but I can say this to you without
33 breaching my duty, that I see every time I go to the secure facility documents of my clients
34 being tortured that are classified, that the United States government’s position on why that is

1 a threat to national security is that if we reveal this, much as revealing Abu Ghraib, we are
2 going to really harm the United States because every time we reveal evidence of how we
3 tortured someone that is going to result in some mad men around the world doing something
4 to harm people.

5 And that is true and I carry that with me every day when I think about representing
6 people in those circumstances but that over-classification where we classify evidence of
7 torture is just profoundly wrong and it is going to be covered by that and they will present
8 evidence under paragraph ---

9 Q. I just want to bring back to your ---

10 A. Sorry.

11 Q. --- words in paragraph 36 ---

12 A. Fair enough.

13 Q. --- because have you looked at all the release documents the government is relying
14 upon that they say Mr Assange published?

15 A. No.

16 Q. Have you heard argument on the point?

17 A. No.

18 Q. So, I am just asking you this rationally ---

19 A. Sure.

20 Q. --- why any view of yours should trump or this court should prefer your view rather
21 than the considered view of a jury after an adversarial presentation of evidence on the point?

22 A. Look, I am never, ever going to say that my view is more important than anyone
23 else's.

24 Q. OK. But do you accept the identity of informants can be critically national security
25 information?

26 A. Well, it is strange that because I list six informants here by name which I would be
27 loathed to do and frankly if these reports are released I would rather they blacked out those
28 names, all of those have been released by the United States and I find that slightly weird since
29 they constantly say that we should not do that. Because, for example, this chap Balsader,
30 252, I will not say where he is living now, but he just published an article and I would hate,
31 even though I think what he did to a lot of my clients was very wrong, I would hate for the
32 poor guy to suffer as a result of that. So, why did the Americans reveal that? I do not know.

33 Q. So, you accept that it is not right to put ---

34 A. You should not do that, I would not ---

- 1 Q. --- informants in harm's way?
- 2 A. No, I think one should avoid that if you possibly can.
- 3 Q. Particularly when it is not necessary for you to do so.
- 4 A. I do agree with that, absolutely.
- 5 Q. Well, perhaps I could just say while we are in this bundle, if you go to page 335.
- 6 A. 335?
- 7 Q. 335. This is an extract from a book ---
- 8 A. I have only got 332 I am afraid.
- 9 Q. It is actually, if you go to 332 and then ---
- 10 A. OK.
- 11 Q. --- go on a couple of pages because it is ---
- 12 A. No, there is not.
- 13 Q. --- in the black part ---
- 14 A. There is nothing ---
- 15 Q. --- it is more difficult to see.
- 16 A. I am sorry. There is not another page.
- 17 MR SUMMERS: I do not think the bundle the witness has, has that section.
- 18 A. Sorry.
- 19 Q. I am sorry. We will get you another bundle. I will even open it for you at the right
- 20 page.
- 21 A. Thank you.
- 22 Q. So, if you give me that one back.
- 23 A. Right. OK.
- 24 Q. This is a book written by David Leigh, do you know David Leigh?
- 25 A. I do not know him personally, I have heard of him.
- 26 Q. But you know of him?
- 27 A. Yes.
- 28 Q. Well, let me just read you this passage in the book. This was when David Leigh was
- 29 dealing about the WikiLeaks exposure. Picking it up at the bottom it is book page 1110.
- 30 A. You mean, "The nuttiest problem"
- 31 Q. "The nuttiest problem is finding redactions. The papers planned only to publish a
- 32 relatively small number of significant stories and with them the text for a handful of the
- 33 relevant logs. WikiLeaks, on the other hand, intended simultaneously to unleash the lot, but
- 34 many of the entries, particularly the "threat reports" derived from intelligence, mention the

1 names of informants or those who have collaborated with the US troops. In the vicious
2 internecine politics of Afghanistan such people could be in danger.” Now, you would agree?
3 It is obvious.

4 A. Yes, I do not disagree with that.

5 Q. It is obvious. “I told David Leigh I was worried about the repercussions of publishing
6 these names, which could easily be killed by the Taliban or other militant groups if identified.
7 David agreed it was a concern and said he would raise the issue with Julian, but he, Julian,
8 did not seem concerned. That night we went to a Moorish restaurant Moro with two German
9 reporters. David broached the problem again with Julian. The response floored me. ‘Well,
10 they’re informants’, he said.” That is Julian Assange, “so if they get killed they’ve got it
11 coming to them; they deserve it.’ There was for a moment silence around the table. I think
12 everyone was struck by what a callous thing that was to say.” He then talks about the
13 American bases, how you could not possibly rely on the names. Then, at the bottom, “David
14 too was dismayed by the difficulty of persuading Assange to make redactions. At first he
15 simply didn’t get it that it’s not OK to publish stuff that will get people killed.” So, do you
16 agree with David Leigh’s approach or Mr Assange’s approach to redactions?

17 A. Look, I really would never judge someone by whatever is published in a book, so I do
18 not know. I agree with the principle that obviously you should not get people killed. It is
19 really a difficult thing that has confronted me throughout my career, and I find it horrifyingly
20 difficult when confronted with the issue of revealing American torture because I know what
21 is going to come. The problem, of course, is until Donald Trump says torture is not OK, we
22 are boxed in, but certainly I agree with the principle you should do what you can to avoid
23 that. I am not going to judge either Mr Leigh or Mr Assange based on page 111 of a book.

24 Q. Do you now see the point that out of the hundreds of thousands of documents
25 published, Mr Assange is not being prosecuted or charged with publication of those
26 documents, only the small, relatively small, number where the names of informants were
27 disclosed, putting them in real risk of grave harm, death and torture.

28 A. I mean if that is all that is introduced into his trial against him, I will eat my
29 proverbial hat. That may well be that that is what is charged in the indictment; that is not
30 going to be what this trial is going to be about.

31 Q. But he cannot be tried or punished for anything for which he is not charged, can he?

32 A. Do you know they could very potentially through their first witness introduce, sad to
33 say, “In the bunker” by David Leigh because the rules of hearsay, which we have developed

1 over hundreds of years to protect people, really have a massive lacunae in conspiracy cases.

2 So, you know, I wish I had your confidence in that process – I do not.

3 Q. Would you give me one moment, madam? Thank you very much.

4 A. Thank you.

5 JUDGE BARAITSER: All right, Mr Summers?

6 MR SUMMERS: Five minutes please, madam.

7 JUDGE BARAITSER: Yes. How long are you asking for?

8 MR SUMMERS: Five minutes.

9 JUDGE BARAITSER: Five minutes, all right. I will give you 10. Back at 12 noon.

10 MR SUMMERS: Thank you.

11 JUDGE BARAITSER: Mr Stafford Smith, exactly the same applies. Mr Summers just
12 wants to speak to Mr Assange before he considers what other questions to ask you. You
13 remain on oath. If you just wait patiently. 10 minutes. Back at 12 noon.

14 (Short adjournment)

15 JUDGE BARAITSER: Have we lost our witness?

16 WITNESS: No. I was waiting in the wings, madam.

17 JUDGE BARAITSER: Lovely. I am sure Mr Lewis will stop you if you stray in your re-
18 examination to issues not raised in cross-examination.

19 MR SUMMERS: I am sure he will. I showed I think – I will not say any more.

20 JUDGE BARAITSER: Thank you very much.

21 Re-examined by MR SUMMERS

22 Q. Mr Stafford Smith, you have described and told us that the WikiLeaks documents
23 and, in particular, the cables revealed evidence of renditions and torture, dark prisons, drone
24 killings, assassinations, and the like.

25 A. That is right, yes.

26 Q. Mr Lewis sought to label those disclosures in the public interest. How would you
27 label them?

28 A. Well, I mean it is in the public interest, but one of the enduring things in my
29 experience over the last many years is however the government, my government can claim
30 some sort of right to hide evidence of criminal activity by them. I mean I am in the middle of
31 this appeal right now where the government is claiming that they can murder my client who
32 is an American citizen and keep it all secret, and to me that is utterly, utterly mad.

33 Q. Dealing just with one chapter of those disclosures, the Pakistan Federal Court labelled
34 them war crimes, breaches of international law, absolutely illegal, uncondonable crime on the

1 part of the US authorities, including the CIA. That is paragraph 91 of your report. Is that
2 something with which you would concur or disagree?

3 A. Well, it is true, but it is also important to point out that Pakistan was an American
4 ally. It was not like we were doing that to an enemy, and that again is just extraordinary to
5 me.

6 Q. We know, because you have told us, that the ICC are investigating these actions as
7 war crimes. Is that an assessment, or a label, with which you would agree or disagree?

8 A. Well, of course, it is that and it is an investigation and we will not prejudge the
9 outcome, but there needs to be an investigation certainly.

10 Q. So is it fair, in your view, to term these disclosures as simply disclosures in the public
11 interest?

12 A. Well, you know, I do not want to always paint with a broad brush, but I think the
13 work that I have done predicated on WikiLeaks material, I believe, has been in the public
14 interest of everybody.

15 Q. It was ---

16 A. Can I just say I do not want to sound grandiose. I mean, it is just the work I do.

17 Q. Of course.

18 A. I do not mean to pretend it is a big deal, but that is just all.

19 Q. It was next suggested to you that whatever they disclose and however you label it,
20 there are no charges, it was said, in relation to publishing cables and then it was said, "Well,
21 if there are, they related only to the publishing of cables that disclosed names." And you
22 were taken to some bundles. Can I just ask you to look at the indictment through the eyes of
23 a US lawyer, please. So, the latest iteration of the indictment and the counts you will find at
24 277.

25 A. Mmm.

26 Q. Count 1, "conspiracy to obtain and disclose national defence information" breaks
27 down into four parts. The first is "obtaining", amongst other things, "the cables"; do you see
28 that?

29 A. Yes.

30 Q. The second is "receiving and obtaining the cables". Do you also see at (3) that Mr
31 Assange is charged with "conspiracy to wilfully communicate", amongst other things "the
32 cables"?

33 A. Sure, including the assessment of the Guantanamo prisons.

34 Q. Yes, I will come back to the Guantanamo point. I want to look at, if I may, what he

1 stands charged with. Those cables that you have just told us about, containing evidence of
2 war crimes: “wilfully communicating documents relating to national defence, namely
3 detainee assessment briefs, cables, Iraq rules of engagement and documents containing the
4 names”.

5 MR LEWIS: Could he read it properly because it says who is conditional to?

6 MR SUMMERS: “Wilfully communicating documents relating to the national defence -
7 namely, detainee assessment briefs;” (the Guantanamo Bay documents); yes?

8 A. Yes.

9 Q. “cables; rules of engagement; and documents containing the names of individuals”.

10 JUDGE BARAITSER: It is the next part that I think Mr Lewis wants you to read.

11 MR SUMMERS: “who risked individuals in Afghanistan, Iraq and elsewhere around the
12 world who risked their safety and freedom by providing information to the US and/or allies to
13 classify it up to secret level to persons not entitled to receive them.”

14 A. Right. I am used to a lot of these sorts of indictments. Obviously you have the cables
15 in there, but even that would include in that, I can guarantee this, that it would risk their
16 safety and freedom of Prime Minister Gilani for them to reveal what was revealed about him.
17 Then obviously going through all the other documents like the JPAL files and so forth.

18 Q. It has been suggested to you that the only cables that are the subject of publication
19 prosecution in this case are those that contained names; that your reading of Count 1?

20 A. No, it is not, but that is actually irrelevant in the sense that, I think, with all due
21 respect, counsel misunderstands the way American cases go and there is going to be a lot
22 more allowed into evidence as part of the conspiracy, that is just the nature of American
23 trials.

24 Q. I appreciate that point. Can I carry on examining where the cables appear in the
25 charges. Chapter 4 of Count 1 is: “The wilful communication of documents relating to
26 national defence, namely” and then there is a (1) which includes the cables, and then “(2)
27 documents containing names”.

28 A. Right.

29 Q. Count 3: “Charges obtaining the cables in toto.” Count 7: “Obtaining and receiving
30 the cables in toto”. Count 10: “Disclosure of the cables - aiding Manning to communicate
31 them to Mr Assange in toto”, so no mention of restriction by names.

32 MR LEWIS: My learned friend, if he is going to do this properly, should point out this is not
33 a publication count. This is the public unauthorised disclosure by Manning to Assange; it is
34 nothing to do with publication at all.

1 MR SUMMERS: If that is your case.

2 MR LEWIS: My learned friend is simply leading the witness.

3 JUDGE BARAITSER: Right.

4 MR SUMMERS: Count 13, the same. Count 17, there pure publication; there we do have
5 cables limited since June of this year for those containing names. That is how the cables are
6 pleaded in law. So far as the reality of the prospective prosecution, your point is what?

7 A. You are going to have I suspect - I do not know - witnesses who have a greater
8 experience than I do with conspiracy charges, but, frankly, you do need to understand the
9 distinction between the substantive straight up count and a conspiracy count under American
10 law. I do not know how it works in the UK, but Pandora's Box is pretty open at that point.

11 Q. So far as you have told us about the contents of the detainee assessment briefs, the
12 Guantanamo documents, are you aware that no one alleges that they contained any names or
13 sources?

14 A. The Guantanamo assessment briefs do contain some names.

15 Q. Yes, the names of detainees?

16 A. Detainees; but it does include informants.

17 Q. Detainees informing on other detainees?

18 A. On other detainees, yes. Those were published in the end, I thought surprisingly, by
19 the US government when they gave us a supposedly unclassified version of the Shokuri brief.

20 Q. Back, please, to the cables and the suggestion that they were released unredacted and
21 containing names. You were taken to this document that begins at page 333 in your volume
22 book by David Leigh and Luke Harding. Firstly, do you know who David Leigh is?

23 A. I do know who he is. I do not know if I have ever met him and I do not want to
24 offend him by saying I have not.

25 Q. He describes himself as page 333 as "one of Britain's best known investigative
26 journalists".

27 A. Sure, I see that; and Luke Harding also, who I do know.

28 Q. Are you aware of the role he played in the release of these cables in their unredacted
29 form to the public?

30 A. I do not know exactly. I am the godparent of one of the Guardian's deputy editors at
31 the time, so I did hear a lot of what was going on back then and some of the antipathy
32 between Mr Assange and some of the Guardian people, but all of that is gossip.

33 Q. I do not want to engage in gossip. Are there issues surrounding David Leigh and
34 whether his perspective might be totally objective?

1 A. I am not going to judge anyone in that sense.

2 Q. Do you know who Luke Harding is?

3 A. I do; I know Luke.

4 Q. Do you know that he was responsible for fabricating stories in the Press?

5 A. I am not going to comment on that; I really do not know.

6 Q. Do you know that amongst the awards that he refers to on page --

7 MR LEWIS: I cannot see how this arose out of cross-examination.

8 JUDGE BARAITSER: Not only that, but this is your witness. It really does rather sound like
9 you are cross-examining your own witness I have to say. Mr Harding was not mentioned in
10 cross-examination.

11 MR SUMMERS: Mr Harding's book was put to the witness.

12 JUDGE BARAITSER: Mr Leigh's book was put -- are they joint owners?

13 MR SUMMERS: It is a joint publication, Madam, you can see from 322. I will leave it.
14 Thank you very much. I have no further questions.

15 JUDGE BARAITSER: No questions from me. That means that your involvement in the case
16 has finished. Thank you very much indeed for attending to give your evidence. You are
17 more than welcome to leave.

18 (Witness withdrew)

19 JUDGE BARAITSER: It is 12.10 pm. Is there anything that we can usefully do before
20 1 o'clock, please?

21 MR SUMMERS: No, Madam.

22 JUDGE BARAITSER: At 2 o'clock it is anticipated which witness will be called?

23 MR SUMMERS: Feldstein again, please.

24 JUDGE BARAITSER: Thank you very much. I will rise until 2 o'clock.

25 (Luncheon adjournment)

26 JUDGE BARAITSER: Thank you. Mr Lewis, you wanted to say something.

27 MR LEWIS: Madam, yes. There is one point which I think it is my duty as prosecuting
28 counsel to make sure is clear to Mr Assange and in fairness to Mr Assange, it must be clear
29 what he is being charged with because there was a small muddying of the water by Mr
30 Summers.

31 We say it is absolutely clear. The position is exactly as I opened it in Woolwich. It is
32 exactly as the AUSAs have put in their evidence and if it just helps you, madam, in our recent
33 skeleton argument, if I just ask you to turn it up, it is the prosecution core bundle, not the
34 witness bundle, tab 14 and it is the government's skeleton argument.

1 JUDGE BARAITSER: I have a copy anyway. It is the skeleton argument not the opening
2 note.

3 MR LEWIS: It is, madam, yes.

4 JUDGE BARAITSER: Yes, and which paragraph?

5 MR LEWIS: Paragraph 29. Well, in fact, we say it at paragraph 3, 24 and 29. If I just take
6 you to 29, having given you those other two references. What Mr Assange is charged with at
7 29(i) is his “complicity in illegal acts to obtain or receive the databases, his agreements and
8 attempts to obtain classified information through computer hacking and publishing certain
9 classified documents that contained the unredacted names of innocent people”, so it is
10 absolutely clear it is that.

11 We go on and we go over the page, (iv) “the only instances in which the superseding
12 indictment charges Assange with the distribution of national security information to the
13 public are explicitly limited to his distribution of documents, classified up to the secret level
14 containing the names of individuals in Afghanistan, Iraq and elsewhere around the world,
15 who risk their safety and freedom by providing information to the United States.”

16 Now, if we just turn up the indictment because there was a slight misreading by Mr
17 Summers of the indictment and conveniently – I do not know where you have it, madam, but
18 if it is conveniently had in the prosecution witness bundle, I can take you to page 277, which
19 is count 1 of the second superseding indictment and what was drawn to Mr Stafford Smith’s
20 attention was paragraph 3 on page 278. Do you have that madam?

21 JUDGE BARAITSER: Yes, I do.

22 MR LEWIS: Can I just show you how it is properly read? To wilfully communicate
23 documents relating to the national defence. Now, you see a hyphen. In English grammar,
24 would probably put a parenthesis and the parenthesis goes right down to where the other
25 hyphen is, which comes after ‘secret level’ so that is the description of the documents, and
26 then it says, “From persons having lawful possession or access to such documents to persons
27 not entitled to receive them, contrary to 793(d).”

28 Now, Mr Assange never had lawful possession. He cannot, this cannot apply to him
29 whatsoever. For your reference, 793(d) is at page 91 of this bundle. It can only apply. This
30 is Chelsea Manning to Julian Assange because Chelsea Manning had lawful possession,
31 Julian Assange did not. That is three. It is nothing to do with the way it was read by Mr
32 Summers.

33 Four is different. Four which we see is 793(e) and I remember opening this at
34 Woolwich, comes in two sections. 4(i) is Manning to Assange and (ii) is Assange publishing,

1 but only the names of individuals in Afghanistan, Iraq and elsewhere around the world. It
2 does not include the Guantanamo Bay documents, etcetera, and of course, you will see there
3 at 4, after the end of what we would describe as the parenthesis, is from persons in
4 unauthorised possession, ie, Assange, to people not entitled to receive them, the public.

5 So, it is, we say, absolutely clear, as made clear in our opening, in our written
6 documents, in the affidavits of the AUSA and in the indictment. Mr Assange is not charged
7 with publishing any documents on the internet, other than those with the unredacted names
8 where those people would be in grave risk of harm. Full stop.

9 JUDGE BARAITSER: Thank you. Well, I do not know if that provided clarification for Mr
10 Summers or not.

11 MR SUMMERS: Not at all, thank you. It is a contentious issue. Our case is that that is
12 exactly what he is charged with and just because Mr Lewis reads documents he does in that
13 way does not make it true.

14 MR LEWIS: My Lady, I do not see how we can possibly do that. I am telling you what the
15 case is. It is the case you have to get. My learned friend cannot say, "That is not your case."
16 That is our case. What do I have to do? Give an undertaking on behalf of the United States
17 of America, that is our case. If necessary, I will do so. It is our case. Period.

18 JUDGE BARAITSER: It is not something that requires determination by me now.

19 MR LEWIS: No, of course not.

20 JUDGE BARAITSER: You are on your feet to provide clarification. I am very grateful for
21 it. Thank you. I think we will carry on with our witnesses.

22 MR LEWIS: But it is not a matter which is open to dispute. Period.

23 JUDGE BARAITSER: Well, if it is, no doubt it will be raised in due course. I hear what you
24 have to say, Mr Lewis, and we will call our next witness then, please. Are we able to do that
25 using the video link?

26 MR SUMMERS: I think there were problems with others occupying our video link and they
27 were being resolved when Mr Lewis asked for you to come into court, so I am not sure that
28 they are, I am afraid, ready.

29 JUDGE BARAITSER: Fine. Are they resolved now?

30 MR SUMMERS: I think rather than have you sit here whilst the process continues, it might
31 be more dignified, madam, for you to ---

32 JUDGE BARAITSER: It will take a few moments, will it?

33 COURT USHER: Hopefully. This happened once or twice in the past ten minute when we
34 were ready to come back.

1 JUDGE BARAITSER: Is it because there are too many people on this link? Is that the
2 difficulty or something else?

3 COURT USHER: I am not sure of the reason why but it manifested itself this afternoon.

4 JUDGE BARAITSER: Mr Todhunter, if you come and let me know as soon as the link is
5 operating, that would be very helpful, thank you.

6 (Short adjournment)

7 JUDGE BARAITSER: Thank you. Now, you are very welcome to sit down, Professor
8 Feldstein. Thank you very much for your patience. Would you like your witness sworn in
9 again, or are you content with him being sworn in yesterday?

10 MR SUMMERS: No, thank you. He is already sworn.

11 JUDGE BARAITSER: All right. And, of course, Mr Summers, you have about 10 minutes
12 of your 30.

13 MR SUMMERS: Thank you very much.

14 PROFESSOR MARK FELDSTEIN, On former affirmation

15 Examined-in-chief by MR SUMMERS (cont.)

16 Q. Professor, apologies for losing you yesterday. Can I pick up where we left off. We
17 had just looked at failed Presidential attempts to begin prosecutions of publishers of national
18 security information, your part 8. We were about to move on to a different topic, but before
19 we do, can I just ask you one additional question about Jack Anderson, President Nixon's
20 wish to have him prosecuted. Is that something that you have written more broadly about?

21 A. I have, I wrote a book about it, in fact.

22 Q. Is that "Poisoning the press" published in 2010?

23 A. Yes.

24 Q. And just help me with this. In addition to trying to have him prosecuted,
25 unsuccessfully, did the White House plot to do anything else to Jack Anderson?

26 A. Yes. Interestingly, the Attorney General, there was a session of prosecuting him
27 under the Espionage Act. His Attorney General John Mitchell told him that he could not do
28 that, that publishing classified documents was not a crime. They reverted to other extra-legal
29 ways to get revenge.

30 Q. Such as?

31 A. Such as leaking news that he was gay which were false, planting a spy in his office to
32 see what he was up to, forging incriminating documents to make him look bad, typing
33 something on White House letterhead with all the right numbers and stuff that they sent to
34 him whilst hoping he would run it and be discredited, although he verified and recognised it

1 was not true. And the ultimate sort of mind bending plot that the White House concocted was
2 to assassinate him.

3 Q. Thank you.

4 A. It was not carried out, but the principals involved who worked in the White House
5 confirmed it.

6 Q. And did that include poisoning him?

7 A. I think poisoning, yes. Two White House aides met with an ex-CIA operative and
8 they discussed various methods to murder him. One was to follow him from home on his
9 route and crash a car into his so that his car would flip over and burn and they actually, the
10 White House operatives actually tailed Anderson, as he referred to it. They also staked out
11 his home to see if they could break in and put some poison in his aspirin, in the medicine, but
12 they discovered that the home was multi-occupied and it would be difficult to do that without
13 being detected and that some innocent people might get hurt.

14 Q. All right. OK.

15 A. I believe there was (inaudible) on his steering wheel and finally one of the operatives
16 offered to knife and stab him to make it look like a mugging.

17 Q. All right. OK. Thank you very much for expanding on Nixon and Anderson. I was
18 about to move when we left off yesterday to your chapter 4, page 6, and the various criminal
19 acts that you list as having been disclosed by the WikiLeaks' materials, but I think we can
20 leave that to one side and other witnesses can assist us with that issue. Can I therefore move
21 to your section 9, and, in particular, page 20? Now, you know that one of the allegations
22 made in this case is ---

23 A. Sir?

24 Q. Sorry. Page 20, the section entitled, "Soliciting documents." You know that one of
25 the allegations made in this case is that Mr Assange, or WikiLeaks, solicited classified
26 documents through what has been called "The most wanted list", and it is said that that is
27 criminal activity. What, in broad terms, do you say to that?

28 A. Well, soliciting, you know, the government's indictment paints journalistic activities
29 in a very nefarious light, so soliciting information, gathering information gathered with the
30 standard thing that all journalists do, the standing operating procedure, and we teach it in
31 journalism schools, we have conferences, and, you know, the things that we discussed are in
32 newsbeats, they are all sort of routinized and the ideas is to share tips, show how to acquire
33 secret documents, secret information, and so that is actually standard. So, too, is asking our
34 sources for evidence, for documents to back up what they say, and in working with them to

1 find documents, directing them in a manner of speaking as to what it is we need as proof,
2 making suggestions of what they should look for and try to find out for us.

3 Q. Thank you very much.

4 A. Of routine (inaudible).

5 Q. No, sorry. I did not mean to interrupt you. Soliciting classified information, is this
6 something you have done before?

7 A. Yes, I received classified documents. Not a lot. Mostly (inaudible) national security,
8 but my entire career virtually was soliciting secret information and records.

9 Q. Your page 22, section 9D, "Protecting confidential sources". You know that another
10 allegation that is levelled in this case is that Mr Assange attempted to help crack a passcode
11 hash for the purpose, it is said, of making it more difficult to identify Chelsea Manning as the
12 source of these disclosures. What do you say generally to allegations that making it more
13 difficult to identify your source is somehow criminal?

14 A. Well, trying to help protect your source as a journalist is an obligation. Sources put
15 their necks out and take risks and our obligation is to protect them. Reporters have gone to
16 jail rather than reveal their sources. So we use all kinds of techniques to try to help them, you
17 know, from pay phones, to anonymity to code words, encryption, removing fingerprints,
18 digital or otherwise, from documents that might reveal them, misdirecting suspicion. These
19 are all things that I have done and invest - well, I have not done all of them, but the
20 investigative reporters do all the time to keep security.

21 Q. Are they things that you teach to aspiring investigative journalists?

22 A. Some and other professors teach them at journalism school or other journalism
23 schools. We are careful to stay within the bounds of the law, but it is essential for us to
24 protect our sources in these ways.

25 Q. All right. And then finally from me, Professor, your page 11, part 6, another
26 allegation made in this case is that WikiLeaks' publications were criminal because they
27 disclosed names of people and risked harm to those people. What do you say in general
28 terms about allegations like that, please?

29 A. You know, it is easy for the government to assert that there will be harm from
30 national security stories if they are published, and it is often impossible to refute. If you look
31 at this historically, you cannot take at face value the government's dire warnings, scepticism
32 is more uncertain. There was one academic study that found there is scant evidence that
33 national security has been harmed in a significant way by government disclosures. We talked
34 briefly about the rampant over-classification, which is also a kind of exaggeration, and the

1 Assistant Attorney General in the Bush administration (inaudible) our national security wrote
2 that: “The principal concern in the classifiers is not national security but government
3 embarrassment.” And so often we find that national security is used as a shield to hide
4 incompetence, misconduct and even political endeavours. May I elaborate?

5 Q. Yes, yes, please do.

6 A. Moving on to papers, cases, particularly in these (inaudible), this is one of the few
7 cases of this kind where enough material has come out that we actually know what happened.
8 Most of these cases, the facts never fully come out. In the Pentagon papers (inaudible) New
9 York Times and The Washington Post published classified documents from the Pentagon
10 documenting the deceit and duplicity of numerous administrations and the Vietnam war. The
11 government went to court and it said that publishing these documents would expose military
12 plans and secret US eavesdropping, they would identify CIA agents and it would even
13 prolong the Vietnam war. The Solicitor General of the Justice Department told the Supreme
14 Court that it would cause immediate and irreparable harm to US security. He later admitted,
15 “I’ve never seen any trace of a threat to national security under that publication”, and it also
16 later turns out – again, this only came out later, that the Secretary of Defense told him that
17 only six per cent of the paragraphs in the whole thing were a little dangerous and they had
18 already been published.

19 Now, what was the motive? Well, within this group Richard Nixon tape recorded his
20 Oval office conversations. We actually know what the motive was. (a) The President tells
21 his Attorney General, “Do everything you can to destroy the New York Times because they
22 are our enemies.” He further instructs Nixon’s lawyer, “Use”, and this again is a quote, “Use
23 really high tone adjectives and strong language, ‘massive breach of security, risks (inaudible),
24 aid and comfort to the enemy. Cast it in the terms of the New York Times doing something
25 disloyal to the country.” He even called the reporter who wrote this story, – forgive my
26 language, this is a quote from the President, “A cocksucker and a left-wing sonofabitch.”

27 Q. OK. Thank you very much.

28 A. (Inaudible).

29 Q. If there is more, there is more, but I think we get the flavour. Madam, I have used 20
30 minutes. Mr Fitzgerald needs 10 to cover his issues. There is another question I would like
31 to ask and I know you said I could ask for permission to ask supplemental questions. Can I
32 explain what it is? It is not covered in the Professor’s report, but I would like to know what
33 he thinks about it. At paragraph 71 of Mr Kromberg’s first affidavit, we are put on notice

1 that whatever the Professor says about the First Amendment, the US are going to argue that it
2 does not apply to foreigners. I was proposing, with your permission, ---

3 WITNESS: (Inaudible).

4 MR SUMMERS: No, no. Just wait a minute. I am just asking for permission to ask you this
5 question, so please do not answer, Professor. I would like just to know in a sentence the
6 Professor's view about whether that is a tenable proposition ---

7 JUDGE BARAITSER: Yes, I am happy for you to ask that.

8 MR SUMMERS: --- that might happen in this case.

9 JUDGE BARAITSER: I am happy for him to ask that question, Mr Lewis.

10 MR LEWIS: Madam, save this caveat. I will be cross-examining and asking him whether he
11 is an expert in American law. If he is not a qualified American lawyer it is very difficult, but
12 I am more than happy ---

13 JUDGE BARAITSER: You can deal with it in re-examination, if you wish.

14 MR SUMMERS: Certainly. I am ---

15 MR LEWIS: If my learned friend wants to ask it, I am not going to object.

16 JUDGE BARAITSER: Let us do it that way. It is probably more sensible.

17 MR SUMMERS: Certainly.

18 JUDGE BARAITSER: Thank you. Mr Fitzgerald.

19 MR SUMMERS: I just did not want to be shut out in the event that Mr Lewis does not cover
20 it.

21 JUDGE BARAITSER: Well, he has said he will.

22 MR SUMMERS: Thank you.

23 Examinated-in-chief by MR FITZGERALD

24 Q. Professor, I just want you to go to part 9 of your report under the Assange
25 prosecution. OK? That is page 18.

26 A. All right.

27 Q. Are you there? You there deal with, first of all, the fact that there was no prosecution
28 under the Obama administration, although the conduct that is the basic subject of the
29 indictment took place in 2010 and 2011. Is that right?

30 A. That is right. Would you like me to elaborate?

31 Q. Yes. If you could just deal with the situation as you understand it about why there
32 was no prosecution under the Obama administration.

33 A. Well, according to the public accounts, the Obama administration were very eager to
34 file criminal charges against Assange. Then they conducted a very aggressive investigation,

1 but the justice department decided in 2013 that they could not do that because of the
2 precedents involved. No, there had never been a publisher charged and they were concerned
3 that under the First Amendment that would be unconstitutional and in the words of the former
4 Justice Department spokesman, the problem that the department has always had when an
5 investigation moves on is that there is no way to prosecute the public giving information
6 without the same theory being applied to journalists.

7 Q. That is a quote from Matthew Miller. Is that right?

8 A. Mathew Miller.

9 Q. Yes.

10 A. He also said it would be a dangerous precedent to prosecute Assange as something
11 reporters do all the time and it is not at all clear the charge named in the publishing classified
12 information can survive court scrutiny.

13 Q. And you have cited there an article in the Washington Post which you have at
14 footnote 82, is that right?

15 A. Yes. Terry Goddard was that article.

16 Q. Yes. And that ---

17 A. (Inaudible).

18 Q. Yes. And just if we summarise it, in that report, there is the quote from Matthew
19 Miller who was the former spokesman for the justice department, is that right?

20 A. That is correct.

21 Q. And then there is a number of citations of what justice officials had said.

22 A. Correct.

23 Q. And you regard that article and the account it gives as being liable and based on
24 reliable sources?

25 A. Yes. I do. I have known Terry Goddard for – from my days as a reporter to the
26 (inaudible) journalist, very well respected, as is the Washington Post and I, you know, also
27 know how things work and (inaudible) as well at times to be honest before he became
28 attorney general. An article like this, sourced like it is, appears to be an authorised article,
29 this is coming from top levels of the justice department is what I would infer. Journalists like
30 (inaudible) in the Post do not really go with a story as serious unless they have real
31 confirmation and trust at high levels.

32 Q. OK. I want you to go on then to you deal over the page with the fact that under the
33 Trump administration everything changed, is that right?

34 A. Yes, it did.

1 Q. And then you cite a number of matters that indicate the change in attitude. Can I just
2 summarise then and then I will ask you a comment? You refer to the ---

3 A. Sure.

4 Q. --- statement about putting a head on a pike as a message from the FBI director
5 talking to Trump and Trump saying that to put reporters in jail. You then refer to the public
6 statement of CIA director Mike Pompeo attacking WikiLeaks as a hostile intelligence
7 service. I think that is in April of 2017, is that right?

8 A. That is correct. The head on a pike being Trump putting reporters in jail was in
9 February, a month after Trump was inaugurated.

10 Q. February then.

11 A. In 2011.

12 Q. In April, we have Pompeo, and then a week later we have attorney general Jeff
13 Sessions saying that lives cannot be put at risk and that prosecuting Assange was a priority
14 for the new administration, is that right?

15 A. He did in fact say that, yes.

16 Q. Yes. And then you have also cited a report that pressure was then put by the new
17 leaders of the justice department on the prosecutors in Virginia to outline an array of potential
18 criminal charges, is that right?

19 A. That is correct.

20 Q. And you have cited the source for that which, madam, you have. That is 20 April
21 2017 and it is the New York Times, the report. Senior justice department officials had been
22 pressuring prosecutors in the eastern district of Virginia to outline an array of possible
23 charges, is that correct?

24 A. Yes.

25 Q. And then finally, is this right, you go on then to deal with the fact that he is charged in
26 2018 with the first indictment and then there is a superseding indictment in 2019 charging
27 him with espionage and you refer to the fact that two of the prosecutors argued against
28 charging him with espionage, and you cite James Trump and Daniel Grooms, is that right?

29 A. That is exactly what was reported in the news article, correct. Again, it was already
30 sourced in the Washington Post.

31 Q. Yes. It is very specific blaming the two individuals. It has never been denied has it?
32 That that was an inaccurate account?

33 A. Never been denied and naming the individuals is a degree of specificity that again
34 indicates that it is nailed down and perhaps only from people who objected to the (inaudible).

1 Q. Yes. That article is dated 24 May 2019 and, madam, you have it in the bundle of the
2 footnotes at tab 10. And is it right that that says that two prosecutors involved argued against
3 the justice department's decision of charging him with espionage because such charges posed
4 serious risks for the First Amendment protections?

5 A. Correct. And the article went on to say – yes.

6 Q. Go ahead, it went on to say what?

7 A. It, of course, had been (inaudible).

8 Q. And in the article that you cite, is this right, it says that part of the concern amongst
9 Justice Department veterans was that prosecutors had looked at the same evidence for years
10 during the Obama administration and determined that such charges were a bad idea in large
11 part because Assange's conduct was too similar to that of reporters that established news
12 organisations?

13 A. Correct.

14 Q. And, again, does that sound as if it is founded on genuine sources that they are
15 quoting from?

16 A. Yes. Again, this is a very significant story. There are three different reporters whose
17 by-lines are on it. Again, all well respected. It is just a team effort that these person put into
18 the story to bear upon it.

19 Q. Yes. And you having worked in the field of journalism and worked with the
20 Department of Justice officials, it has been said by Mr Kromberg, oh these are just newspaper
21 reports. What do you say? Do you say that they are reliable in the account that they give?

22 A. Yes. They have been more reliable. There are – often news accounts are more
23 reliable than the statements put out by the White House or other government agencies. In this
24 case, because much of (inaudible) but it is in the public record (inaudible) under the
25 circumstances.

26 Q. And you have cited in your 10 footnotes all the sources you have for this account of
27 what in fact happened when under the Obama administration it was decided not to prosecute
28 when straight after Trump came in there was pressure to prosecute, is that right?

29 A. That is correct.

30 Q. I think that is my time.

31 JUDGE BARAITSER: Thank you very much indeed. Thank you, Mr Fitzgerald. Mr
32 Lewis?

33 Cross-examined by MR LEWIS

34 Q. Now, Professor Feldstein, I hope you can hear me?

- 1 A. Yes, sir.
- 2 Q. I am going to ask you a few questions on behalf of the government.
- 3 A. Yes, sir. May I take just one ---
- 4 Q. Certainly.
- 5 A. My phone was going off. I wanted to shut it.
- 6 Q. Sure.
- 7 A. I apologise your Honour. All yours.
- 8 Q. Now, before I begin, Professor Feldstein, I am going to ask you to do us a favour.
- 9 And that is please give short answers and only answer my question. Please do not give a
- 10 speech. I noticed before one answer you gave went to a large number of minutes. So, the
- 11 Judge will confirm that you should only answer my questions and can we try and be concise?
- 12 And for my part, I will try and ask short questions, and for your part, could you just answer
- 13 those questions concisely? Is that OK?
- 14 A. Yes, sir.
- 15 Q. Good. Now, you have made two statements, Professor Feldstein. The 12 January and
- 16 5 July this year, is that right?
- 17 A. That is correct.
- 18 Q. And you describe yourself as an expert witness and believe your opinion is an
- 19 expert's opinion compliant with the Criminal Procedural Rules?
- 20 A. Yes.
- 21 Q. Now, you said that in your statement on page 1. Could you just help us with what
- 22 those Criminal Procedural Rules say in relation to experts?
- 23 A. Well, it is interesting actually. They are really different from the American rules.
- 24 They require objectivity to the court. That includes all you know, evidence and efforts
- 25 should be made to be as impartial and objective as possible and surrender in good faith most
- 26 of all. I do not have it in front of me for the quote.
- 27 Q. That is right. It has got to be unbiased evidence. So, what is your specific area of
- 28 expertise?
- 29 A. Now, let me read to you a statement if you like. I assume that as a foreign
- 30 investigative reporter and as a journalism historian I am here to talk about the journalistic
- 31 issues in this case ---
- 32 Q. OK, that is fine.
- 33 A. --- and continue ---
- 34 Q. But you are not - you do not have a legal qualification do you?

- 1 A. That is correct. And I have been careful not to offer a legal interpretation.
- 2 Q. And have you read the indictment and the extradition request and the supporting
3 affidavits?
- 4 A. Yes. I have not studied the most recent one that came down this summer, but yes.
- 5 Q. But you are going to give objective and unbiased opinion?
- 6 A. I will do my best.
- 7 Q. Right. Now, the first topic I want to deal with is the decision not to prosecute and
8 President Trump. You spent some time on that and my learned friend, Mr Fitzgerald, asked
9 you what you based it upon. And is it right to say that one of the planks of your opinion is
10 that there was a decision not to prosecute Mr Assange by the Obama administration in 2003?
11 MR FITZGERALD: 2013.
12 JUDGE BARAITSER: '13.
- 13 Q. 2013.
- 14 A. Yes.
- 15 Q. Yes. And you say in your July report that the reporting cited by the New York Times
16 and the Washington Post is to date the only public source of information about the behind the
17 scenes manoeuvring to prosecute. If you want to look at that, it is page 3 of your July report,
18 but do you stand by that?
- 19 A. That to date is right. That is correct.
- 20 Q. Now, is it not clear that the government's investigation into Mr Assange continued
21 right through the Obama administration into the Trump Administration and until Mr Assange
22 was out of the Ecuadorian Embassy and could be effectively indicted?
- 23 A. I understand that the grand jury was ongoing from having covered it as a recorder, not
24 as a lawyer, I know that that is often time an attempt to gather new evidence ---
- 25 Q. But ---
- 26 A. --- but I think the proof is in the ---
- 27 Q. But you ---
- 28 A. --- (inaudible) know why.
- 29 Q. Let me just try it again. Let me just try the question again because it may permit just
30 a simple binary answer.
- 31 A. Yes, sir.
- 32 Q. Is it clear the government's investigation continued right through the Obama
33 administration into the Trump administration and until he was arrested when he left the
34 Ecuadorian Embassy?

1 A. That appears to be the case, yes.

2 Q. Well, if that is the case, why, if you are an unbiased expert, did you not put that
3 position in your report?

4 A. I was – I do not know. That is a good question. There are undoubtedly things that I
5 would do differently if I went back but, as I say, the proof is in the pudding, they did in fact
6 not indict and it is said that there is no significant new evidence. When the indictment came
7 down and there was coming from prosecutors who were on the case.

8 Q. We do not need a speech, Professor. I will let you answer whatever you say ---

9 JUDGE BARAITSER: Mr Lewis, I do agree that if you ask the question, you do have to let
10 him answer it.

11 MR LEWIS: Do you want to say anything else, Professor?

12 A. No, sir.

13 Q. Thank you. You relied on the Washington Post article. We see that at page 18 of
14 your report, paragraph 9, footnote 82. Do you see that?

15 A. Yes.

16 Q. That is what you relied on. However, when you supplied your report and appendices,
17 which I have here, you did not put in, although you put it in other reports, you did not append
18 to your report that specific Washington Post article, although you did footnote it. Why did
19 you not put it in as an appendix to your report?

20 A. You are asking me about something I wrote back in December. I do not remember. I
21 do not claim to be (inaudible) if there is something wrong with the footnote.

22 Q. Let me help you, the reason that it might be that you did not include it in your report
23 was that it has an important section that you did not want anyone to read. Shall we have a
24 look at it? You have the bundle electronically, page 336.

25 JUDGE BARAITSER: Prosecution bundle?

26 MR LEWIS: Prosecution witness bundle, my Lady.

27 JUDGE BARAITSER: Does he have the report referred to?

28 MR FITZGERALD: He does. Madam, the bundle that you have, he also has with the
29 selected exhibits.

30 MR LEWIS: He also has this bundle which was sent through to him yesterday, I believe; it is
31 the same thing. Mine is marked. I would rather deal with it from the one I have marked. (To
32 the witness) Professor, yesterday a bundle was sent through to you and the defence told us
33 you needed time to look at it; do you remember that?

34 A. Yes.

1 Q. Do you have that bundle?

2 A. Yes, I have the bundle, but it was quite long and it was delivered last minute, so I was
3 not able to study it thoroughly; let me get to that page.

4 Q. Let us go to page 336, this is the report you were referring to that you did not append
5 to your original report; do you have it in front of you; November 25, 2013?

6 A. Yes, I have that.

7 Q. It would be helpful if you have the bundle because we are going to go to other parts of
8 it.

9 A. I understand. I have it up there.

10 Q. We do have it elsewhere. It is in the small clip of documents, footnote 82, which was
11 provided.

12 MR FITZGERALD: It is in the selected exhibits at footnote 82, item number 1?

13 A. Let me do the best I can with what I can see. I cannot find my hard copy.

14 JUDGE BARAITSER: Can I try and understand the problem? Do you have the digital
15 bundle that was sent to you yesterday?

16 A. Yes, I had trouble downloading it. (Discussion about the electronic bundle)

17 JUDGE BARAITSER: Professor, you have the electronic bundle that was sent to you
18 yesterday; are you able to scroll down to a particular Page Number 336? Is that causing you
19 trouble?

20 A. Yes, I can see the headline: "November 25, 2013"?

21 JUDGE BARAITSER: Yes, that is correct. You do have the report in front of you?

22 A. I am sorry.

23 JUDGE BARAITSER: Lovely.

24 A. My apologies.

25 JUDGE BARAITSER: There is no need to apologise at all, Professor.

26 MR LEWIS: What I would like your help with, Professor, in your report at paragraph 9,
27 page 18, you report and quote the middle two paragraphs on page 336. You quote: "From
28 the problem the department has always had investigating Julian Assange" down to "no way to
29 prosecute Assange", and then you describe it as a "New York problem"; that is what is in
30 your report?

31 A. I am sorry, I did not hear you, sir; can you repeat that?

32 Q. Certainly. In your report, the only paragraphs you report are the two middle
33 paragraphs on page 336. What you do not quote is the second paragraph in the page which
34 says: "The official stress to formal decision has not been made, and a grand jury investigating

1 WikiLeaks remains empanelled where they say there was little possibility of bringing a case
2 against Assange unless he is implicated in criminal activity other than releasing on-line
3 Military and diplomatic documents”. You do not quote that and you do not quote the third
4 paragraph from the bottom: “WikiLeaks spokesman, Kristinn Hrafnsson, last week said: ‘the
5 Anti-Secrecy Organisation is sceptical, short of an open official formal confirmation that the
6 US government is not going to prosecute WikiLeaks’.” Those two passages are against, in my
7 respectful submission, your opinion which you have given that the Obama administration
8 refused to bring charges. What I am interested in is why, as an unbiased expert, you did not
9 quote those two passages and why you did not include the actual report, the newspaper
10 article, in your report?

11 A. It did not occur to me. The newspaper report is in the captions, I footnoted it. From
12 the sources I made editorial decisions about what to include and what not and despite
13 reporting in 2013 that it would remain open, and what I wrote in my report, did not state
14 (inaudible); it stated that the Justice Department decided not to bring criminal charges against
15 Mr Assange, and it may have been open in some fashion after 2013 up to the indictment that
16 is released in 2017. The administration said at the time, and then the proof was in the
17 pudding, they did not know.

18 Q. He was in the Ecuador Embassy at the time, was he not?

19 A. I believe that is right.

20 Q. Why not include parts which are against your view in your expert opinion?

21 A. It was hard to discern what the state of the grand jury investigation was, and again
22 (inaudible). We now know no charges were brought, and that was the point in my report that
23 they ultimately decided not to bring charges, and they said because of the person and
24 considerations and that the prosecutors involved in 2017 said that there was no significant
25 new information that the Justice Department had obtained that was not added in there earlier.

26 Q. Professor, there were other materials against your opinion which were available in
27 public, were there not?

28 A. There is a lot of information.

29 Q. Let us look at one of them. If you have that electronic bundle, could you go to
30 page 187; do you have that?

31 A. Yes.

32 Q. It is in fact the declaration of Gordon Kromberg, who is an AUSA. Paragraph 8:
33 “For the purposes of these extradition proceedings, Assange has placed heavy emphasis on
34 news reports claiming a decision was made not to prosecute him in 2013.” Please go back to

1 page 186, paragraph 6: “Assange’s arguments were contradicted by judicial findings made in
2 the US.” We drop down a few lines: “On March 4, 2015, United States District Judge
3 Barbara Rothstein wrote she was persuaded there is an ongoing criminal investigation.” That
4 is a judicial finding in the public domain that there was an ongoing investigation. Why did
5 you not mention that in your report? Did you know about it?

6 A. You know, I have never said there was not an ongoing investigation. I said the
7 Obama administration made a decision not to prosecute Assange based on First Amendment
8 grounds and that the prosecutors who were involved argued, and it would have been the
9 (inaudible) prosecutors, the professionals (inaudible).

10 Q. But professor, as an unbiased expert ---

11 A. (Inaudible).

12 Q. As an unbiased expert, would it not have been fair to put in your report the other side
13 of the coin, that there is a judicial finding by the district court that there was an ongoing
14 criminal investigation. Would that not have been fair?

15 A. I do not think that the (inaudible). Maybe I was ---

16 Q. Okay, let us just go down in 6, paragraph 6, because there is another one, there is
17 another finding on May the 17th 2016 where District Judge Amit Mehta found ---

18 JUDGE BARAITSER: Professor Feldstein, I would ask you to turn your telephone off. We
19 are in the middle of a ---

20 WITNESS: Apologies.

21 JUDGE BARAITSER: Is the phone off now, please? We will not get disrupted by it again,
22 is that correct?

23 WITNESS: I am sorry?

24 JUDGE BARAITSER: Is your telephone now switched off so that we are not interrupted by
25 it again?

26 WITNESS: Yes. I will put it out of the room just to be certain. Okay, please.

27 MR LEWIS: So, District Judge Mehta found no reason to doubt there was an ongoing
28 investigation of individuals other than Chelsea Manning. Again, would it not have been fair
29 in an unbiased report to put that in?

30 A. I am sorry, what was your question?

31 Q. I will try it again. Would it not have been fair with an unbiased report to put that in?

32 A. It could have been included, but do not forget, this was, according to this, 2015 and
33 2016.

34 Q. Okay, and if we go back ---

1 A. Before ---

2 JUDGE BARAITSER: Mr Lewis, you must let him finish. Please just finish what you were
3 saying, Mr Feldstein.

4 WITNESS: Thank you. Before the indictment was issued and the reports came out that there
5 was no new information, is not new information in it.

6 MR LEWIS: And if we go over the page to page 187, paragraph 8, the bit I was going to put
7 to you, I just want to do it chronologically, Barry J Pollack, between the two perforations, do
8 you know who he is?

9 A. Yes.

10 Q. He is Mr Assange's lawyer. That is right?

11 A. Correct.

12 Q. He says, "They have declined to do so. They have not informed us in any way they
13 are closing the investigation or have made a decision not to bring charges against Mr
14 Assange." Do you see those words?

15 A. Yes.

16 Q. Question again, would it not have been fair to put in your unbiased report what Mr
17 Assange's own lawyer thought?

18 A. There are a lot of things that could be put in or kept out. Again, I just get back to the
19 fact that the, you know, I am not sure that Assange lawyers would ever, or Assange himself,
20 would ever be convinced that they had dropped the charges and as I say, I know that grand
21 juries often continue their investigation and they evidently were doing so at this time but in
22 2017, we know from the prosecutor's side that there was no significant new evidence.

23 Q. Well, let us just ---

24 A. As you can see at the bottom of the report.

25 Q. Let us go to the tweet. It is mentioned on page 188, paragraph 9, this is Mr Assange
26 himself. He tweets, "If Obama grants Manning clemency." Sorry, it is not Mr Assange
27 himself. WikiLeaks tweet saying, it is the WikiLeaks official tweet. "If Obama grants
28 Manning clemency, Assange will agree to US prison in exchange." Do you see that? Does
29 that indicate to you a belief by Mr Assange that the Obama administration closed and decided
30 not to bring charges?

31 A. No, and again, I never said the Obama administration closed the case, ended the grand
32 jury, anything like that. I said that the Obama administration made a decision not to
33 prosecute based on First Amendment grounds.

1 Q. Because this is September the 15th 2016. Which administration was in power on
2 September the 15th 2016?

3 A. Excuse me.

4 Q. Let me help you. It was the Obama administration.

5 A. Right. I was looking at the proof below it, but yes. Yes, well Obama was (inaudible)
6 from the evidence calling for people to try to get pardons during his administration.

7 Q. If we look at paragraph 10, moreover on January the 12th 2017, eight days before the
8 transition to the current administration, WikiLeaks tweeted that an exchange from a then
9 administration's agreement to grant clemency to Manning, Assange would agree to
10 extradition to the United States. Here is the tweet. "If Obama granted Manning clemency,
11 Assange will agree to US extradition, despite its clear unconstitutionality, a DOJ case." Does
12 any of that indicate any genuine belief in Mr Assange or his defence lawyers that the Obama
13 administration had decided not to press charges against me?

14 A. Clearly Assange was worried and felt that we always would want so no, it ---

15 Q. But did you see, have you seen those tweets before?

16 A. I saw them last night.

17 Q. But not before.

18 A. I do not remember them. They did not make much of an impression. It did not seem
19 relevant.

20 Q. Well, because you would accept, would you not, that if you were filing an unbiased
21 report, you would have a duty to put those type of materials in there for the consideration of
22 the court.

23 A. I do not – no, I disagree respectfully. I do not see how these tweets about what
24 Assange did or did not think or WikiLeaks did or did not think about the state of the grand
25 jury and its investigation (inaudible). I think what matters and is more credible is the people
26 who are close to it and engaged in it.

27 Q. And then just finally on this point, professor, if we look at paragraph 11, attached to
28 the tweets was a letter from Barry Pollack which we have set out at 189.

29 A. Yeah, it is very fine type so I cannot really see it.

30 Q. And it finishes just before the three asterisks, the first three asterisks, "Despite the fact
31 the department has continually publicly confirmed through court filings and statements to the
32 press, that it is conducting an ongoing criminal investigation of Mr Assange, the department
33 is provided with no substantive information whatsoever about the status."

1 So, again, is that not a document that in fairness should have been put before the
2 court?

3 A. I do not think so. I do not see the relevance. I do not think that the defence lawyer or
4 the defendant would not really have much insight into what the status was of the
5 investigation.

6 Q. Right, well let us just move on a little bit. Help us with this. If there was a decision
7 not to prosecute as you suggest, why would there be a continuing investigation?

8 A. Again, I am not a lawyer, but as a reporter, when I cover these things, it would be kept
9 open for various reasons. Among them, looking for co-conspirators, they made a decision
10 not to indict in principle, but mostly, I think, in the hope that new evidence would come in. I
11 mean, I am not arguing that the, I never said the administration, Obama administration liked
12 Assange. In fact, quite the opposite. They wanted to prosecute him. It was the First
13 Amendment that they found it upon.

14 Q. Now, you have mentioned not prosecuted for First Amendment reasons a number of
15 times. Would it be fair to say this, from your point of view? The most you can say is there
16 was an intimation he would not be prosecuted for the publication of passively received
17 information that did not name informants, but not where he has conspired with Chelsea ---

18 A. I am having trouble hearing you.

19 Q. I am sorry, it is probably my fault. I will say it again. Would it be fair that the most
20 you can say is that there was an intimation that he would not be prosecuted for the
21 publication of passively received information, but not where he has conspired with Chelsea
22 Manning to obtain that information by hacking?

23 A. I would not necessarily infer that.

24 Q. I mean, could anyone on the defence team in good faith, now you have seen those
25 documents, say to a court there was a decision not to prosecute Julian Assange in 2013?

26 A. I do not know what defence counsel would want to say ---

27 Q. Well, I can tell you that. Their submissions at paragraph 2.13 say that in terms.

28 A. May I ---

29 Q. Certainly.

30 A. I know that they are trying to protect their clients and they are concerned and
31 protective of anything that might come back.

32 Q. Because would this be right? Am I right in understanding this, professor, because if
33 there was no decision not to prosecute and the investigation continued into the Trump

1 administration, the – and forgive me, I will use the word diatribe against President Trump,
2 becomes otiose, does it not?

3 A. I am sorry, could you repeat that?

4 Q. Certainly. If there was no decision not to prosecute and the investigation continued
5 into the Trump administration, all your diatribe against President Trump becomes otiose.

6 A. That is a very confusing question. I do not know to answer it.

7 Q. Okay. Well, I will leave it there. But anyway, let us go to the second pillar. So, your
8 first pillar, which you agreed at the beginning, was that there was no decision, the decision
9 not to prosecute in Obama and Trump had caused there to be a decision. The second pillar is
10 what you have described as the New York ---

11 A. I am sorry, you are going too fast for me, apologies.

12 Q. I am sorry, I will go slowly. We have dealt with what I described as the first pillar
13 which was, as put to you by the defence, and you described it in your report, the decision not
14 to prosecute. The second pillar, you describe it as the New York Times problem. Now, you
15 spell this out at page 18, paragraph 9 of your first witness statement. You say in terms, these
16 are your words, “If it indicted Assange for publishing the documents Manning leaked, it
17 would also have to indict the New York Times for doing the same.” Can you see that?

18 A. That was a quote from Matthew Miller if I recall. What page did you say this was on?

19 Q. Page 18, section 9.

20 A. Right.

21 Q. It does not look like it is a quote because the quote seems to have ended. It looks like
22 your words. Are they your words or are you ---

23 A. What I see on the bottom of page 18 is a quote from Matthew Miller, “(inaudible) in
24 investigating Julian Assange because if there is no way to prosecute him for publishing
25 information without the same theory being applied to journalists”, said Matthew Miller,
26 former spokesman for the Obama Justice Department.

27 Q. Well, ---

28 A. So, it is the last sentence there. That is my paraphrasing of my understanding.

29 Q. OK.

30 A. What (inaudible).

31 Q. So, what I want to concentrate on for the next few minutes is this comment here: “If
32 it indicted Assange for publishing the documents Manning leaked, it would also have to
33 indict the New York Times for doing the same.”. Do you see that?

34 A. Yes.

- 1 Q. Do you agree with that or not?
- 2 A. I am not a lawyer, sir. There will be constitutional experts who can better answer that
3 question.
- 4 Q. Well, let us just say there are some – can I point out some factual differences? There
5 are two main factual differences. Now, the first difference for the New York Times is the
6 New York Times did not ask, encourage, aid or abet a serving soldier to break the law by
7 disclosing classified information. Anything the New York Times received, it received
8 passively. Do you agree with that?
- 9 A. I mean, ---
- 10 Q. Is it a difficult question, Professor?
- 11 A. Was the New York Times passive in its dealings with Assange (inaudible), is that
12 what you are asking me?
- 13 Q. Well, I am going to come to it but let me just explain the difference. If you simply
14 receive documents and do not commit a crime in getting the documents, the prosecutorial
15 discretion under the First Amendment has always been used to prevent you being prosecuted.
16 However, if a journalist breaks the law he is not immune from the law. Do you agree with
17 that?
- 18 A. Yes, journalists are not above the law.
- 19 Q. Yes.
- 20 A. It does become a slippery slope as to what constitutes- sorry, the answer is yes or no.
21 I agree with it.
- 22 Q. Thank you. So, you would agree a journalist has no immunity from committing a
23 crime simply because it wants material to publish?
- 24 A. Journalists are not above the law, no.
- 25 Q. Thank you.
- 26 A. I would agree, yes.
- 27 Q. So, just to bring that to life, you would agree a journalist has no defence to a burglary
28 charge, or a theft charge, simply because he wants to publish the information he intends to
29 steal?
- 30 A. I cannot give you a legal answer but, no, it is not immunity that journalists get –
31 intelligent journalists for what they do.
- 32 Q. Let me help you, Professor. Can we turn to bundle page 98?
- 33 A. Is it possible for me to go to the bathroom?
- 34 Q. Of course. Certainly. Shall we have a 10 minute ---

1 JUDGE BARAITSER: Shall we have a break for everyone then? It's 25 to, so back at
2 quarter to 4, well, our time quarter to 4. 10 minutes then please.

3 Q. 10 minutes, Professor.

4 JUDGE BARAITSER: 10 minutes.

5 A. I am sorry?

6 Q. 10 minutes, Professor.

7 A. 10 minutes. OK.

8 JUDGE BARAITSER: Professor, can I just make it clear that you are under oath and you
9 must not speak to anybody about these proceedings for the next 10 minutes. Do you
10 understand that?

11 A. Absolutely.

12 JUDGE BARAITSER: Lovely. Thank you. 10 minutes.

13 (Short adjournment)

14 JUDGE BARAITSER: Thank you, Professor. We will carry on where we left off.

15 MR LEWIS: Professor, we were dealing with what you described as the New York Times
16 problem, and I was saying there were two fundamental factual differences between the New
17 York Times and the prosecution of Mr Assange. I was first dealing with "reporters are not
18 above the law". If we go to page 98 of the bundle, paragraph 7; do you have that?

19 A. No, but let me get it. I have what is marked as "98".

20 Q. If we look at paragraph 7: "Contrary to the claims of Carrie Shenkman and others,
21 such acts are illegal, are not protected by the US Constitution. There is a well-established
22 line of decisions holding that generally applicable laws do not offend the First Amendment
23 simply because their enforcement against the press has incidental effects on its ability to
24 gather and report news carried. Regardless of whether one considers Assange to be a
25 journalist, it is well settled that journalists do not have a First Amendment right to steal or
26 otherwise unlawfully obtain information." You are a professor of journalism; do you agree
27 with those words "it is well settled that journalists do not have a First Amendment right to
28 steal or otherwise unlawfully obtain information"?

29 A. Yes, I agree.

30 Q. Thank you. A number of cases I need not trouble you with, that set out in
31 *Barnborough v Hayes*, *Zamam v Musk*, *United States v Liverman* where the authorities
32 supporting that position you have accepted, as set out. What I would now like to turn to is
33 computer hacking. Is a journalist entitled to hack into computers to get newsworthy material
34 for political purposes?

1 A. No.

2 Q. Thank you. You may remember in the United Kingdom the celebrated cases of the
3 journalists who had been imprisoned for hacking into telephones -- that must have come to
4 your notice; the News of the World?

5 A. Yes.

6 Q. We can agree as a matter of law both in the United States of America and the United
7 Kingdom, a journalist cannot commit a crime to obtain newsworthy information. Did
8 Bradley Manning commit a crime in divulging to Mr Assange classified information?

9 A. Apparently (inaudible).

10 Q. Do you concede that government employees have been prosecuted for leaking
11 national security information?

12 A. Yes.

13 Q. If you look at paragraph 8 of your witness statement, you set that out "since World
14 War I". Between us there is no dispute that Government insiders can be prosecuted for
15 leaking inside information? No dispute between us, is there?

16 A. Yes.

17 Q. If Mr Assange aided and abetted, counselled or procured with Bradley Manning, has
18 he not also committed a crime? I am not saying he has; if he has?

19 A. Yes, right. It depends on the details.

20 Q. It is difficult enough dealing with it over the internet rather than you being here in
21 person so I want to take stock. You have agreed in the US courts have upheld such
22 prosecutions, and I think you have agreed third parties are not allowed to help Government
23 employees break the law in obtaining classified information; is that correct?

24 A. Can you break that down into single questions?

25 Q. Certainly. Third parties, and that would include journalists, are not allowed to help
26 Government employees break the law in obtaining classified information?

27 A. Break the law, no; "help" is where we start to get into swishy areas about what
28 exactly was done.

29 Q. Let us take this back to where this started, the New York Times problem. It is fair to
30 say there is no allegation that the New York Times hacked into computers, or aided and
31 abetted, or entered into a conspiracy with Bradley Manning; is there?

32 A. Not that I know of.

33 Q. In short, there is no allegation that the New York Times committed a crime?

34 A. Not involving hacking.

1 Q. Would you agree with me that that is a material difference between the New York
2 Times and Mr Assange's indictment?

3 A. There is certainly a big difference between the New York Times and Julian Assange,
4 yes.

5 Q. Thank you. Let us look at the second difference. You said you have read the
6 indictment. Will you agree or accept it from me that only Counts 15, 16 and 17 deal with Mr
7 Assange himself publishing on the internet classified information. The other counts relate to
8 obtaining from Bradley Manning?

9 A. As I understand it, yes, there are three counts that were purely for publishing.

10 Q. Exactly. If we look at those counts, do you understand that those counts are limited to
11 publishing where the names of individuals would be put at risk of serious harm if their names
12 were published?

13 A. I understand that is what the indictment says, yes.

14 Q. Thank you. If we go to bundle page 349 and 350 we will see what the New York
15 Times and the Guardian had to say. Do you have that?

16 A. Yes, I do.

17 Q. Friday 2 September 2017, that is the day, or the day after WikiLeaks complete
18 publication. What the journalist there said: "WikiLeaks has published its full archive of
19 251,000 secret US diplomatic cables without redactions, potentially exposing thousands of
20 individuals named in the documents to detention, harm or putting their lives in danger. The
21 move has been strongly condemned by the five previous media partners, the Guardian, the
22 New York Times, El Pais, Der Spiegel and Le Monde who have worked with WikiLeaks
23 publishing carefully selected and redacted documents." Go to page 350: "We deplore the
24 decision of WikiLeaks to publish the unredacted State Department cables which may put
25 sources at risk, the organisations said in a joint statement. Our previous dealings with
26 WikiLeaks were with a clear basis that we would only publish cables which had been
27 subjected to a thorough joint edited and clearance process. We will continue to defend our
28 previous collaborative publishing endeavour. We cannot defend the needless publication of
29 the complete data. Indeed, we are united in condemning it." Do you see that?

30 A. Yes.

31 Q. Do you agree with those sentiments?

32 A. I do not know what happens. There are conflicting accounts of how that release was
33 made; I am not a fact witness, so I cannot say what actually happened.

34 Q. Let me make it easier for you, Professor, do you think all the material should have

1 been published unredacted?

2 A. No.

3 Q. Do you accept that there is a quantitative difference between the New York Times
4 problem and what Mr Assange has been charged with?

5 A. Absolutely.

6 Q. I am just going to show you in the bundle, if you to run back to page 335. This is
7 where I am going to call upon you as your experience as a journalist, Professor. At page 335
8 there is an extract from a book by David Lee; do you know David Lee?

9 A. No.

10 Q. If you go to page 334, it explains who David Leigh is; he is one of Britain's best-
11 known investigative reporters. He is the science reporter at the School of Journalism, City
12 University. He was the investigations editor at the Guardian. He is one of the founder
13 members of the international consortium of investigative journalists; this is his book.

14 A. I am well aware of who he is. You asked me if I knew him.

15 Q. I am sorry; you know who he is; he is a respected journalist. If we go over to
16 page 335 and look at the extract from his book and what he wrote, page 110: "The knottiest
17 problems surrounding redactions. The papers plan only to publish a relatively small number
18 of significant stories and with them the text of a handful of relevant logs. WikiLeaks, on the
19 other hand, intended simultaneously to unleash the lot, but many of the entries, particularly
20 the threat reports derived from intelligence mention the names of informants and those who
21 have collaborated with US troops. In the efficacious internecine politics of Afghanistan, such
22 people could be in danger. I told David Leigh I was worried about the repercussions of
23 publishing these names who could be easily be killed by the Taliban or other military groups
24 identified." Just pausing there, publishing their names creates an obvious risk to their safety
25 in Afghanistan, does it not?

26 A. I would not contest that.

27 Q. "David agreed it was a concern and said he had raised the issue with Julian, but he
28 did not seem concerned. That night, we went to a Moorish restaurant, Moro, with two
29 German reporters. David broached the problem again with Julian who flawed me, the
30 response flawed me. 'Well, they are informants,' he said, 'so if they get killed, they have got
31 it coming to them. They deserve it.' There was for a moment silence around the table. I
32 think everyone was struck by what a callous thing it was to say." So, do you agree with
33 David Leigh that the matters should have been redacted or do you agree with Julian Assange
34 that they should just be published in any event?

1 A. They should not have been published.

2 Q. Thank you. Now, harm. Let me ask you a hypothetical question, professor. It is a
3 hypothetical. Would a journalist publish the name of a third party where it is unnecessary as
4 part of a publication to publish that name while knowing to publish the unredacted story
5 would put that person's life and the lives of their family in danger?

6 A. Not knowing what – I could tell you about a couple of cases where journalists have
7 written about informants, revealed their names, if you wish, but ...

8 Q. Well, let me ask you as a professor of journalism, would a responsible journalist
9 publish unredacted names of an informant, knowing that might put him in deadly danger
10 when it was unnecessary to do so for the purposes of the story?

11 A. No.

12 Q. Thank you. Now, I am conscious of the time. I am just going to move on a little bit.
13 Would you just give me a moment, madam? I will see if there is some I can cut out. I am
14 just going to go on to a comment that you made in your report about solicitation of classified
15 materials.

16 When you talk about confidential material, are you talking about material which
17 results in the breach of a civil information or information that it is a crime for a person to
18 solicit?

19 A. What page are you referring to, sir?

20 Q. I am sorry, let me just help you. It is page 20. What you say between the two
21 perforations is, "These actions are," leave that to one side. "Encouraging sources to focus on
22 valued information of political, diplomatic or ethical significance in order to disclose it to the
23 public are not only consistent with standard journalistic practice, they are its life bud."

24 Now, you have said in your evidence in chief, which is not in your report, but you told
25 this court on oath that you would advocate only within the bounds of the law. Is that right?

26 A. Correct.

27 Q. Thank you.

28 A. Correct.

29 Q. And do you agree that there are information that it is proper for the United States
30 government or any government to be able to keep secret?

31 A. Yes.

32 Q. There are a myriad of examples, whether it is troop movements in times of war, the
33 US nuclear codes or where people might be put in obvious harm. Those are the type of
34 things where it is entitled to keep the matter secret.

- 1 A. Is there a question there?
- 2 Q. Yes, it is more – yes, I will rephrase it. Are these examples of where you would agree
3 that it is permitted for the government to keep matters secret, for example, troop movements
4 in time of war, nuclear codes and where it would cause a grave risk of harm to an individual?
- 5 A. Yes, I would agree with that.
- 6 Q. Thank you. And is not most of this really a matter of fact and degree, when one is
7 talking about harm, is a fair way to determine harm for it to be left to a jury who can hear
8 argument on both sides?
- 9 A. I am sorry, I did not really understand that question. Perhaps you can rephrase it.
- 10 Q. It is my fault. The government in order to secure a conviction of Mr Assange must
11 prove harm or damage to the United States government and I am just going to show you that.
12 Would you forgive me one moment? It is page 331 of the bundle.
- 13 A. It says (inaudible) wording you are referring to?
- 14 Q. Yes.
- 15 A. (Inaudible).
- 16 Q. It is page 331 of the bundle. It is paragraph 83 of the fifth declaration of Gordon
17 Kromberg and paragraph 83 in the third section, which is headed, “Definition of national
18 defence information.” Do you see that?
- 19 A. Correct.
- 20 Q. And one of the things the government must prove is that the disclosure must be
21 damaging to the United States or potentially useful to an enemy. If we go over the page,
22 “The prosecution must prove beyond a reasonable doubt the information will be damaging to
23 the United States.” So, would you agree that that is a pretty good safeguard to make sure that
24 simple matters such as things which are embarrassing are vetted by a jury?
- 25 A. I am just reading the section.
- 26 Q. I am sorry, I will split it down. In order to convict Mr Assange, the government must
27 prove that the disclosures were damaging to the United States. Now, in your evidence in
28 chief, you said, you talked about national security was used as a shield to cover
29 embarrassment and national security classifications were used as a shield to cover
30 government embarrassment. You said that an hour or so ago, do you remember?
- 31 A. Yes, yes, obviously not always.
- 32 Q. So, what I am pointing out here is that, in fact, for Mr Assange to be convicted, there
33 is a positive requirement to prove harm, not embarrassment or anything like that, but harm

1 and would you agree that that is a fair way or a fair hurdle that the government must leap in
2 order to secure a conviction under national security?

3 A. The problem I have with the yes or no answer is that the indictment is one under the
4 Espionage Act, and you will have constitutionists who will testify to it, but if I understand, if
5 I read the statute, which is now at section E, it does not mention harm per se. It says if you
6 have reason to believe it could be used to the injury of the United States, not that it actually
7 did anything, but it could, (inaudible) about that.

8 Q. Thank you. Well, time is pressing on. I am going to move on to my final topic which
9 is you say in your report that this is a politically motivated prosecution.

10 A. That was my conclusion.

11 Q. Now, what I want to ask, have you read the affidavits and the requests and would you
12 agree there is an evidentiary and factual basis for making the charges in this case?

13 A. I am not in a position to judge the evidentiary or factual allegations in the indictment.

14 Q. Okay, but you will accept that a grand jury has found probable cause.

15 A. Yes, that is right in the definition of (inaudible), but I do not know whether it is true.

16 Q. And can you help us with who makes the charging decision?

17 A. Again, I am not an expert in – I am not an expert in the Justice Department and
18 (inaudible) the White House, it marries (inaudible).

19 Q. I understand this, but it goes, this goes to your assertion that it is politically motivated.
20 I wonder if we could turn to bundle page 101, please. Do you have that?

21 A. Yes.

22 Q. Paragraph 11. This is the first declaration of Gordon Kromberg. “The superseding
23 indictment reflects no such political bias or motivation. Similar to what I understand to be
24 the code of Crown prosecutors, the United States has publicly promulgated properties and
25 practice to guides prosecution decisions by federal prosecutors.

26 These are the principles of federal prosecutions.” Dropping down a few lines, “The
27 first important purpose is to ensure the fair and effective exercise of prosecutorial discretion
28 and responsibility. The second important purpose is to promote confidence on the part of the
29 public and the individual defendants that important prosecutorial decisions will be made
30 rationally and objectively on the merits of each case.

31 The principles of federal prosecution set forth specific factors that federal prosecutors
32 may not consider in determining whether to commence or recommend prosecution or take
33 other action. Amongst other impermissible factors, federal prosecutors are forbidden from
34 considering a person’s political association, activities or belief, the prosecutor’s own personal

1 feelings or the possible effect on the prosecutor's own personal or professional
2 circumstances. My colleagues and I take these responsibilities seriously and the
3 superseding indictment reflects these principles." So, what we have, professor, is an
4 indictment based upon facts charging Mr Assange with a crime, brought by independent
5 federal prosecutors who have a code. Does that not undermine your argument, that
6 somehow, you pick out of the ether, "Well, this must be a politically motivated prosecution?"

7 A. No. As I understand what you just quoted, it basically says that it is not allowed to be
8 motivated by politics. It would be naïve to think that that is always the case and if I might
9 explain why I think it is political, I can tell you why.

10 Q. Well, can I just split it down a little? I will obviously let you answer the question,
11 Professor, do you accept that to obtain the indictments against Mr Assange, the federal
12 prosecutors had to present evidence to a grand jury and the grand jury had to find probable
13 cause for Mr Assange committed the crimes?

14 A. Correct.

15 Q. Now, you made great store for instance of President Roosevelt pressuring the attorney
16 general to prosecute the publisher of the Chicago Tribune. That is your witness statement,
17 paragraph 8.

18 A. Right.

19 Q. But in fact, even though President Roosevelt pressurised the attorney general to
20 prosecute, the grand jury refused to return an indictment, did it not?

21 A. The grand jury did not return an indictment, that is correct. In fact, there has never
22 been an indictment for a publisher before who had done this.

23 Q. So, if there was no crime, if this was politically motivated, the grand jury act as a
24 strong boar against any political motivation because they have seen the evidence.

25 A. Is that the question? Can you repeat that?

26 Q. Well, let me ask this question, have you seen all the evidence?

27 A. No. It is – unfortunately, whatever, fortunately or unfortunately, the way these things
28 work is that the evidence will come out slowly, usually after administrations are over, people
29 write memoirs back when they are supposed to be classified, that is how (inaudible) and also
30 in the Franklin Roosevelt case.

31 Q. So, when you talk of political migration, do you mean there is no evidence but it is a
32 politically motivated charge trumped up, forgive the pun? Or, there is proper evidence to try
33 him and we would also quite like to see him tried. Do you see the difference?

34 A. I am not sure I do. I am not sure I understand the question.

1 Q. Right. Are you saying President Trump directed or the attorney general directed
2 irrespective of evidence this charge against Mr Assange?

3 A. We will not know that until history (inaudible) ---

4 Q. So ---

5 A. I would be happy to talk about the President's motives if you want, or actions I should
6 say, regarding the press.

7 Q. So, you do not know do you?

8 A. I was not there. I am not a (inaudible) but I can tell you why I think it is politically
9 motivated but if you want.

10 Q. So, the most you can is you speculate or suspect it might be politically motivated but
11 you have got no evidence that it is?

12 A. Given the unprecedented nature of this prosecution, given the fact that this was
13 rejected in this particular case by the Obama administration, the framing of the indictment
14 when the charges could have been formed much more narrowly, and given Trump's
15 poisonous vitriol when it comes to the press which I would like to elaborate on, I think this is
16 rife with political motive.

17 Q. Well, you talk about President Trump's poisonous approach to WikiLeaks. Let me
18 just put this ---

19 MR SUMMERS: The press. The press. The press.

20 Q. --- to the press, let me just put this theory to you and see whether you agree with it. I
21 am just going to put a theory to you. "The theory is that WikiLeaks and Mr Assange pose a
22 threat to the legitimacy of President Trump's election campaign." - Madam, I am sorry. I
23 thought I had turned it off.

24 JUDGE BARAITSER: Professor Feldstein, you are clearly not the only one ---

25 MR LEWIS: I am not the only one.

26 JUDGE BARAITSER: --- to have their mobile phone switched on.

27 MR LEWIS: I am sorry.

28 JUDGE BARAITSER: Yes.

29 Q. Just reading from that, I will start again. "WikiLeaks and Mr Assange pose a threat
30 to the legitimacy of President Trump's election campaign that he is desperate to squash by
31 diverting attention and imprisoning Mr Assange. WikiLeaks is a vulnerability for President
32 Trump because of the evidentiary links between his campaign and WikiLeaks. In October
33 2016, WikiLeaks published DNC emails to the undoubted benefit of Trump. Trump
34 regularly applauded WikiLeaks during his campaign, remarking "I love WikiLeaks". And

1 that the prosecution of Julian Assange is part of President Trump's effort to distract attention
2 from the help that WikiLeaks gave him and to focus attention on the earlier leaks which are
3 more politically potent for him. He wants to put Mr Assange in jail and keep him quiet."

4 Now, do you think that is a possible explanation for what you say is a politically motivated
5 prosecution? Now, you are going to ask me to repeat it are you not?

6 A. No, no, I am definitely aware what you are recalling, what you are reciting.

7 Q. Well, I do not want to tell you where I am citing it from first, I just want to see
8 whether you agree with it or not? I will tell you afterwards where it has come from.

9 A. I am having trouble hearing you, sir, who said this?

10 Q. I am not going to tell you yet who said it, I want to see whether you agree with it. So,
11 the theory is that President Trump because he was helped by Mr Assange, he wants to keep
12 him quiet by giving him a public trial and putting him in jail. Do you think that is a credible
13 thing?

14 A. I would not say that, no. I think that would be sheer speculation in a way that the
15 issues about political dimensions of this case are not ---

16 Q. Thank you very much. I will tell you who it was, it was the statement of Eric Lewis, a
17 defence witness in his third statement, paragraphs 33 to 36. Could you just give me a
18 moment please? Yes, thank you very much, Professor.

19 JUDGE BARAITSER: Now, Mr Summers, I would like to finish the witness today, even if it
20 means ---

21 MR SUMMERS: Thank you.

22 JUDGE BARAITSER: --- sitting perhaps later than usual. Do you need to speak to your
23 client first?

24 MR SUMMERS: No.

25 JUDGE BARAITSER: OK.

26 Re-examined by MR SUMMERS

27 Q. Professor, can I come back to you please on one or two issues and I am going to start
28 with the First Amendment. It has been suggested to you that the New York Times was not,
29 but Julian Assange, was complicit in Manning's obtaining of classified information. The
30 theory that was advanced to you appears to be this, that as a soldier, Manning commits a
31 crime by the mere act of disclosing classified information and therefore it seems to be
32 suggested that any act encouraging, asking, assisting, that criminal act is itself criminal. That
33 is the suggestion that was put to you. Your response was that it depends on the details, that

1 we are getting into squishy areas of what exactly was done. Is that your understanding of
2 how the First Amendment has worked for the past 200 years?

3 A. Is what my understanding?

4 Q. That any act at all that encourages, that asks, that assists, a government official in the
5 act of disclosing classified information is itself criminal and prosecutable.

6 A. Not at all.

7 Q. No. Now, you are a Professor of journalism with long experience of every day
8 journalistic practices. Is it within your experience and knowledge that journalists do ask
9 government employees for classified information?

10 A. Absolutely. It is routine for journalists whoever that be to try to get information from
11 sources, including (inaudible).

12 Q. Is it within your knowledge and experience that journalists solicit that kind of
13 information from government employees?

14 A. Yes. More than solicit.

15 Q. Have you ever come across that conduct being described as criminal before?

16 A. I am sorry, I am having trouble hearing you.

17 Q. No, no. It is my fault. Have you ever come across that ---

18 MR LEWIS: Well, I would rather my friend did not lead quite so much. He is leading an
19 awful lot, madam. These answers, I mean, in re-examination he is not allowed to lead he
20 knows that.

21 MR SUMMERS: I think every one of those questions ---

22 JUDGE BARAITSER: Well, they are supposed to be open questions.

23 MR SUMMERS: They were.

24 JUDGE BARAITSER: Have you ever come across a situation rather invites an answer but it
25 is on the edge of leading. It is just a question of keeping it open enough.

26 Q. Are you aware, Professor, of any prior prosecution for that kind of conduct?

27 A. Absolutely not, no. To my knowledge and belief and research and (inaudible) there
28 has been no previous such prosecution for the act of publishing.

29 Q. As a Professor of journalism, could you have predicted the suggestion that that
30 activity is criminal before this case?

31 JUDGE BARAITSER: Which activity, sorry?

32 A. No.

33 MR SUMMERS: Soliciting. Asking for classified information.

1 A. No, and then sir, it is a very chilling prospect to criminalise that because to
2 criminalise news gathering, to criminalise publishing, is essentially criminalise journalism
3 itself.

4 Q. All right. I want to know if we can take this a little further. Can I go back to the
5 Pentagon papers? What did the New York Times do by way of assisting Mr Ellsberg in
6 relation to his whistle blowing?

7 A. Well, they worked closely with him to get the documents in the first place and you
8 know, much like, perhaps like the Assange case, there was sort of tensions there but they
9 were you know, very active in obtaining those records.

10 Q. How active please, Professor?

11 MR LEWIS: Well, madam, this certainly did not rise anything out of cross-examination ---

12 MR SUMMERS: Of course it did.

13 MR LEWIS: --- we have not spoken to the Pentagon papers or to Mr Ellsberg ---

14 JUDGE BARAITSER: But it goes to the issue which you did quite extensively deal with
15 which is the extent to which it is a crime ---

16 MR LEWIS: Well, so be it.

17 MR SUMMERS: Thank you.

18 Q. How active please were the New York Times in assisting Mr Ellsberg to get the
19 Pentagon papers out?

20 A. I think they were very active. I believe at one point I believe Neil Sheehan, a reporter,
21 had a key to the room where the documents were and looked at them, perhaps copied them,
22 but you should ask Mr Ellsberg, he is a better primary source. Clearly, the Times played a
23 very active, not passive, role in that case. As in most journalistic endeavours that is what
24 journalists do. We are not passive stenographers. To suggest (inaudible) is the only way, to
25 receive it anonymously in the mail is the only way that a journalist is okay is wrong and I
26 have seen ---

27 Q. Did you tell us that you think the New York Times even physically copied the report
28 for Mr Ellsberg?

29 A. That is my memory, yes.

30 Q. And no charges there, is that right?

31 A. Not against the New York Times, no.

32 Q. What about newspapers paying sources for this type of information? Does that go on?

33 A. There are tabloid newspapers that pay sources for information; it is generally frowned
34 upon by the mainstream news media. Sometimes there are other ways, yes, I guess that ---

- 1 Q. Are you aware ---
- 2 A. --- that does happen.
- 3 Q. Are you aware of any attempts being made to prosecute that conduct as criminal
- 4 based on the theory that is being expounded in this case?
- 5 A. No, no.
- 6 Q. OK. Different, or slightly related topic then. You have agreed that reporters are,
- 7 nonetheless, not above the law.
- 8 A. Correct.
- 9 Q. Yes. They must act within the bounds of the law.
- 10 A. That is correct,.
- 11 Q. So they cannot burgle, for example, they cannot commit separate criminal offences in
- 12 order to obtain materials. That is your understanding as a journalistic professional. Yes?
- 13 A. Yes.
- 14 Q. And based on that you were asked some questions about hacking. Yes?
- 15 A. Yes.
- 16 Q. It was suggested to you that conspiring to obtain information by hacking, or using
- 17 hacking to get to the material, was the kind of criminality that the First Amendment does not
- 18 protect, and I think you agreed with that.
- 19 A. I am sorry?
- 20 Q. It is obviously not easy to hear. I think you agreed with that proposition.
- 21 A. Which proposition?
- 22 Q. That hacking to get material is not protected by the First Amendment.
- 23 A. Is not protected by the First Amendment, correct.
- 24 Q. What if the purpose of the hacking was not to obtain the information. What if
- 25 properly put he purpose of the hacking was to make it more difficult to identify the source?
- 26 A. Protecting sources, as I mentioned, is considered a moral obligation.
- 27 Q. Have you ---
- 28 A. (Inaudible)
- 29 Q. --- had the chance – sorry, Professor, I do not ---
- 30 A. I am sorry, I am having trouble hearing.
- 31 Q. No, no. I think that is evident. Have you had the chance to look at Mr Kromberg’s
- 32 fourth affidavit in this case?
- 33 A. I believe so. When was that submitted?
- 34 Q. 12 March of this year.

1 A. Yes.

2 Q. And I have in mind, in particular, at paragraphs 11 to 14 where Mr Kromberg clarifies
3 the alleged purpose of that alleged conduct, and if he is right and the alleged purpose is to
4 make it more difficult to identify the source.

5 A. I think someone else's microphone besides yours is on. I am getting an awful lot of
6 paper shuffling noises.

7 Q. All right. Yes, we have identified the culprit. All right. If the questions put to you
8 ought to have been along these lines: conspiracy to crack a passcode hash in order to make it
9 more difficult to identify the source of the disclosures, what would your response have been
10 to that?

11 A. Well, conspiracy, it depends on the feature because conspiracy is a very scary term, so
12 is recruiting, which I believe was used in the indictment. You know, you recruit terrorists.
13 Journalists, if you will, inspire sources every day. They work with their sources, they cajole
14 their sources, they direct them to what information they need. They will send them back
15 sometimes to get more information if the information they have is not sufficient. So if that
16 becomes criminalised, if that becomes conspiring, then most of what journalists do,
17 investigative journalists on national securities, would be criminal.

18 Q. And focusing, Professor, on the protection of sources, the journalistic practice of
19 protecting sources, how robustly does the First Amendment regard or protect that conduct?

20 A. Pretty robustly, but it is not absolute. Some states have enacted shield laws to
21 increase that, but it is an absolute journalistic vow to protect sources to ---

22 Q. Final topic from me, please. Alleged harm and the naming of people in cables. Now,
23 you were asked a number of questions about the scope of the charges in this case. You are
24 not a lawyer, are you?

25 A. No, I am not.

26 Q. No. All right. Well, I am not going to return to them and I am going to proceed on
27 the assumption, the unaccepted assumption, that this prosecution is limited to cables which
28 disclosed names.

29 A. The what that disclosed names?

30 Q. Cables, the cables, the diplomatic cables, Professor.

31 A. Cables, yes.

32 Q. Firstly, you told us previously, and this is section 6 of your report, that you have
33 concerns about assertions of potential harm. Is that still the case, or do you ---

1 A. Oh yes, I mean I was getting a lot of hypotheticals from the other side, but, absolutely,
2 I think the government's track record at exaggerating national security removes the benefit of
3 doubt, that they would otherwise (inaudible) and has to do with scepticism.

4 Q. And can I ask this? We know, because Mr Kromberg tells us in his first affidavit, that
5 there is, in fact, a specific criminal offence in America that is aimed at the naming of
6 intelligence sources. Are you aware of that?

7 A. Yes, and that is the IIPA, Intelligence Identities Protected Act, which you are
8 referring to?

9 Q. Yes, I am. What, if anything, do you have to say about the absence of any charges
10 under that specific Act?

11 A. You know, I think that it is interesting and telling actually it would have been a much
12 more mirror statute to target Assange with that more appropriately fits what the government
13 alleges he did, exposing sources, and the fact that instead the government indicted him for 17
14 counts of spying, espionage, suggests that he was trying to bribe them, trying to create a
15 precedent that could be used against the rest of the press. And I quote from an Assistant
16 Attorney General in the Bush administration, "It was obviously trained to mirror" – this is the
17 espionage indictment, "was obviously trained to mirror what journalists do." I do not think it
18 is an (inaudible). I think the government indictment has the interests of the media squarely in
19 their sights.

20 Q. Thank you. Just two final topics then. You were asked some questions about 2
21 September WikiLeaks' publication of unredacted cables and you agreed that should not have
22 happened. Were you aware, either generally or when you were asked that question, that those
23 materials were, in fact, already in the public domain?

24 A. I know that that is an issue of contention, a fact contention, and that is why I was
25 hoping to offer interpretation of what actually happened then.

26 Q. Well, I am not sure it is actually in dispute, but we will find out. But if it were the
27 case that as of 2 September the unredacted cables were already on the internet, would that
28 change your assessment or the answers that you gave to Mr Lewis?

29 A. I do not think anything I have said to Mr Lewis was predicated on an assumption that
30 the government's allegations were true. If it was published, released before WikiLeaks
31 released it. That could be a mitigating circumstance, but it depends on the details.

32 Q. Thank you. And then, finally, you were asked some questions about what Mr Leigh
33 says in his book about what might have been said at a dinner in a restaurant called Moro and
34 what you thought about all of that. Were you at that restaurant?

1 A. I am sorry?

2 Q. Were you at the restaurant? Did you hear what was said?

3 A. No, no, I had no first-hand knowledge ---

4 Q. Thank you.

5 A. --- of what actually took place at that restaurant.

6 Q. Thank you very much. I think Mr Fitzgerald would just like to ask you one or two
7 questions in relation to his topics.

8 Re-examined by MR FITZGERALD

9 Q. You were asked about what happened under the Obama administration and you said
10 on a number of occasions to my learned friend, “Well, the proof of the pudding”, I think you
11 meant, “is in the eating.” Is that right? That is the expression you were referring to, “The
12 proof of the pudding.”

13 A. The proof of the pudding is the fact that the Obama administration made a decision
14 not to indict us on present day concerns about the First Amendment.

15 Q. Yes, and the proof of the pudding was that, in fact, he was not prosecuted right
16 through the Obama administration until January 2017, but there is no question of any
17 prosecution then. Is that right?

18 A. Correct.

19 Q. And also that when Chelsea Manning was convicted in 2013, there clearly was a
20 decision not to prosecute him then because he was not prosecuted then, was he?

21 A. No.

22 Q. And then I think you also referred to the fact that Manning was pardoned, of course,
23 at the end of the Obama administration.

24 A. If I said “pardoned”, I misspoke. It was a more limited form of clemency.

25 Q. Yes. Fair enough. So those were the actions that were taken, or not taken, under the
26 Obama administration. And then my learned friend suggested that you should have put the
27 full article in The Washington Post and he put to you certain points in that article which
28 referred to what was said by Mr Assange’s lawyers at the time, but can I just invite you to
29 comment on this? After the reference to what was said by Mr Assange’s lawyers, the article
30 actually goes on. Can I just quote it to you and invite your comment? “There have been
31 persistent rumours that the grand jury investigation of Assange and WikiLeaks has secretly
32 led to charges.” And then it says, “Officials told The Post last week that there was no sealed
33 indictment.” OK? So that is officials, that is obviously reliable sources saying there is no
34 sealed indictment. And other officials, which presumably is other reliable sources, have

1 come forward since to say, as one senior US official put it, that the department had, (I quote)
2 “All but concluded that it will not bring a case against Assange.” So that is what, if the full
3 article had been there, they would have had that as the conclusion. “All but concluded that
4 they will not bring a charge.”

5 A. Yes, that is correct. You know, correct.

6 Q. And then it goes on to cite what Eric Holder, the Attorney General, had said about a
7 distinction being made between prosecuting Snowden, but not prosecuting the journalist,
8 Glenn Greenwald, who had received the documents?

9 A. Correct.

10 Q. Then we have “justice officials said that the same distinction between leaker and
11 journalist or publisher is being made between Manning and Assange.”

12 A. Correct.

13 Q. If that full article had been put in, rather than quoted, it would have confirmed that
14 officials had all but concluded that they were adopting the same approach to the Assange case
15 as had been adopted to the Greenwald and Snowden case; is that correct?

16 A. Yes.

17 Q. When one has these references to “justice officials” and closely juxtaposed to what
18 Eric Holder has said on the record; do we draw any inferences from that?

19 A. No. What he said on the record I believe was a month earlier in an interview was a
20 story like that would not have appeared if it had a source from the very top levels there,
21 which I do not want to speculate.

22 Q. My learned friend asked you some questions and you said in answer to them “the
23 prosecutors after 2017 said that no new evidence had come to light”; do you remember
24 saying that to my learned friend?

25 A. If I paraphrase it, people were significant --

26 Q. I want to take you to the source of it, it is footnote 89, tab 10, the article of May 24,
27 2019, that you are referring to; do you have that, the Washington Post. I want to make sure
28 that this is what you were referring to. It says there: “Part of the concern amongst Justice
29 Department veterans” and we have already had reference to James Trump, a responsible
30 prosecutor (nothing to do with Donald Trump), and Grooves had been advocating against the
31 superseding indictment, and part of a concern against Justice Department veterans was that
32 prosecutors had looked at the same evidence for years during the Obama administration and
33 determined such charges were a bad idea in large part because Assange’s conduct was too
34 similar to that of reporters. It goes on, I think this must be the passage that you were

1 referring to: “People familiar with the Assange case said that the Justice Department did not
2 have significant evidence or facts beyond what the Obama era officials had when they were
3 reviewing the case.” Was that what you were referring to?

4 A. Yes, sir. I suppose I could be criticised for not including that part as an attachment, or
5 not putting in some of those quotes, but I tried to edit the most relevant materials.

6 Q. It rather supports what you said, does it not?

7 A. Yes, it does.

8 Q. You were asked about the fact that things were brought by independent federal
9 prosecutors, you realised there was obviously a dispute between some prosecutors and others,
10 but you gave us a quote about pressure being applied to prosecutors to indict Assange; tab 9:
11 “The officials speaking on the condition of anonymity said senior justice department officials
12 had been pressuring prosecutors”.

13 JUDGE BARAITSER: My tabs do not correspond to yours.

14 MR FITZGERALD: 88.

15 JUDGE BARAITSER: Notwithstanding they should.

16 MR FITZGERALD: “Justice Department waives charges against Julian Assange”, New York
17 Times, April 20, 2017. Madam, I can hand it up.

18 JUDGE BARAITSER: At some point someone has to find those exhibits, but I am looking at
19 Defence Bundle 1, Professor Feldstein and his statement and exhibits; unless there is
20 something else?

21 MR FITZGERALD: It is the second one.

22 JUDGE BARAITSER: I need it for general use; we now have it. It is the second bundle.

23 MR FITZGERALD: You see there is a reference there to senior department officials
24 pressuring prosecutors there?

25 A. Yes, that is correct.

26 Q. In your chronology that comes after the statement by the politicians, Mr Pompeo, and
27 the attorney general as to pressure being put?

28 A. Those came right after the indictment.

29 Q. Then my learned friend said “the grand jury”, that great bull-work against intrusion
30 into liberty stood in the way of it. Have you ever heard the expression that “a grand jury
31 would indict a ham sandwich if asked to”?

32 A. Yes, it is a common expression because grand just are so malleable and almost always
33 do what prosecutors want. There has been a lot of scholarship on that point.

34 Q. We may be hearing that later. Finally, you were asked by my learned friend what was

1 it that led you to the conclusion that it was politically motivated? Can I check that I heard it
2 right. You said “the unprecedented nature of the charge”, that is the first one; secondly, that
3 it was “rejected by Obama”; thirdly, the frame of the superseding indictment with the 18
4 charges; and then I think you said “given Trump’s known vitriol towards the press”. Were
5 those the reasons you gave why one should conclude that it is politically motivated?

6 A. Yes, and under “unprecedented”, I would just add that only other nefarious attempts
7 to try to prosecute a publisher or journalist were also highly politicised by the press seeking
8 to publish their anonymity.

9 Q. I have no further questions. Thank you very much.

10 JUDGE BARAITSER: Thank you very much, Professor Feldstein. You will be delighted to
11 know that draws your involvement in these proceedings to an end. You are very welcome to
12 log out if you wish to. Thank you very much indeed.

13 (Witness withdrawn).

14 JUDGE BARAITSER: Can you inform me which witnesses are going to be called tomorrow,
15 please?

16 MR SUMMERS: Professor Rogers and Mr Tim.

17 JUDGE BARAITSER: Just those two witnesses?

18 MR SUMMERS: Yes. Can I ask you to sit at 10.30 am tomorrow morning?

19 JUDGE BARAITSER: Any issues in relation to that, Mr Lewis?

20 MR LEWIS: No.

21 MR FITZGERALD: Madam, Professor Rogers is going to be giving evidence by video.

22 JUDGE BARAITSER: Notwithstanding that he is a UK based witness?

23 MR FITZGERALD: He is UK.

24 JUDGE BARAITSER: There is no difficulty with that. Anything else?

25 MR FITZGERALD: No.

26 MR SUMMERS: Madam, it might be the case that if we think we can squeeze him in, Mr
27 Elsberg will also be invited to come as well.

28 JUDGE BARAITSER: That is helpful.

29 MR SUMMERS: It is a question of timing.

30 JUDGE BARAITSER: No doubt Mr Lewis has noted that. Thank you very much.

31 Mr Assange, tonight you will be in custody for the same reasons you have been
32 given and you will be produced tomorrow morning to continue with this hearing. Thank you
33 very much, everybody.

34

ADJOURNED AT 16.53 UNTIL WEDNESDAY, 9th SEPTEMBER 2020

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