

First 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

9th SEPTEMBER 2020, 10.31 – 16.27

1 JUDGE BARAITSER: Thank you very much. Good morning.

2 MR FITZGERALD: Madam, I think we may be referring to condensed bundle M if you
3 have that ---

4 JUDGE BARAITSER: Thank you.

5 MR FITZGERALD: --- and it is at tab 40.

6 JUDGE BARAITSER: I am actually going to use the bundle with exhibits if that is all right?
7 I was going to use the O bundle. Do you want me to use a different bundle?

8 MR FITZGERALD: Yes, but some of the exhibits, some of the references to political
9 opinions are in the condensed bundle and ---

10 JUDGE BARAITSER: In that case I can go to my room and obtain it.

11 MR FITZGERALD: Yes. If you would not ---

12 JUDGE BARAITSER: I will do that. OK, thank you.

13 (Judge Baraitser conferred with the Court Usher)

14 (Short adjournment)

15 JUDGE BARAITSER: Yes, I have condensed bundle M.

16 MR FITZGERALD: Thank you, madam. And then there is the report which is at tab 40 of
17 the core volume. It is the report of 12 February 2020. Now, are we making contact with
18 Professor Rogers?

19 COURT USHER: Are you ready to call Professor Rogers?

20 MR FITZGERALD: Yes. I call the Professor.

21 PROFESSOR PAUL ROGERS, Affirmed

22 Examined-in-chief by MR FITZGERALD

23 Q. Are you Professor Paul Rogers?

24 A. I am.

25 Q. And is it right that you have made a statement for this court dated February 12, 2020
26 which the court has?

27 A. I have indeed, yes.

28 Q. And do you stand by the contents of that report?

29 A. I do.

30 Q. And just for your qualifications, is this right, you are an Emeritus Professor of Peace
31 Studies at Bradford University? Is that right?

32 A. Yes.

33 Q. You are the past Chair of the British International Studies Association, is that right?

34 A. I am, yes.

- 1 Q. The author of nine books on the war on terror?
- 2 A. Yes.
- 3 Q. And you have published extensively on the Afghan and Iraq wars. Is that right?
- 4 A. I have indeed, yes.
- 5 Q. And I think you have also given in-service courses for serving soldiers on issues of
6 war and peace, is that right?
- 7 A. Yes. For the past 15 years the department have had contact with the Ministry of
8 Defence to run such courses. I am also an Honorary Fellow of the Joint Service Command.
- 9 Q. And it would be right to describe you as a political scientist, specialising in issues on
10 war and peace?
- 11 A. Yes, specialising in international politics, particularly international security.
- 12 Q. Yes. Now, the issues that you address you have set out first at paragraph 10 of your
13 report where you say ---
- 14 A. Yes.
- 15 Q. --- that you have been asked to deal with the question of whether Mr Assange's
16 recorded views and work are examples that represent his political views, is that right?
- 17 A. That is correct, yes.
- 18 Q. And whether in fact he has political opinions for the statement, that issue for the
19 court? You have considered that?
- 20 A. Yes, very clearly he is somebody with quite strong political views.
- 21 Q. And you have dealt with that finally at paragraph 32 and 34 of your report reaching
22 the conclusion at paragraph 34 that he has expressed views, opinions and activities that
23 demonstrate very clearly political opinions, is that right?
- 24 A. That is correct, yes.
- 25 Q. And the clash of those opinions with those successive US administrations, but in
26 particular the present administration which has moved to prosecute him for publication,
27 suggest that he is regarded primarily as a political opponent, is that right?
- 28 A. That is correct. That is how I would see it, yes.
- 29 Q. Who must experience the full wrath of government, is that right?
- 30 A. Yes, I think that had become very clear particularly over the last two or three years
31 and essentially in the last six months or so, yes. No question.
- 32 Q. And so, first of all in your report, drawing on your experience of the Afghan and Iraq
33 wars, you deal with the significance of the revelations that WikiLeaks made from Chelsea

1 Manning and you have dealt with that at paragraphs 21 onwards with the significance of the
2 revelations about the Afghan conflict, is that right?

3 A. That is correct, yes. Essentially, if I could expand a little bit on that, in the case of
4 Afghanistan and particularly Iraq you had a very strong commitment by the United States to
5 going to war. One would say very much understandable in the case of Afghanistan after 9-11
6 and the belief was that their very early success in terminating the Taliban regime between
7 October and December 2001 after 9-11 was such that they have, or if you like, got back on
8 track as a state. And I think significantly President George W Bush gave his first State of
9 Union address at the end of January 2002 which in many ways was a sort of a celebratory
10 victory.

11 Q. Right. Now you ---

12 A. If I remember rightly – sorry, please.

13 Q. I am so sorry, just cutting in, because just concentrating on the WikiLeaks revelations
14 I think you deal ---

15 A. Right.

16 Q. --- at paragraph 25 with the significance of the fact that the WikiLeaks revelations
17 expose what you describe as the fiction of success in Afghanistan. Is that essentially the
18 significance?

19 A. That is correct. The reason I mentioned the beginning of the State of Union address
20 was that the United States really from then on was giving a very firm impression that
21 Afghanistan was under control, that victory had been achieved. There was some evidence
22 that that was not the case and that became rather more apparent over the following eight or
23 nine years, but what the WikiLeaks revelations did was to confirm the view of some analysts
24 that in fact the war had gone more or less wrong from the start. So, the impression which
25 was being given to the general public and the international community that this was a success
26 was clearly not the case and the WikiLeaks area – well, the evidence published by WikiLeaks
27 really confirmed that a degree of detail which was not otherwise available. So, to that extent
28 I think it was a very significant operation in many ways.

29 Q. And then turning to the revelations about Iraq which you deal with from paragraph 26
30 onwards, ---

31 A. Right.

32 Q. --- and then you draw your conclusions at paragraph 30 as to the significance of the
33 WikiLeaks revelations, can you just summarise the point that you are making at paragraph
34 30?

1 A. The point I making there is essentially from the start the United States believed that
 2 the war in Iraq was going to be a very significant success. In fact, within three weeks the
 3 statue in that Baghdad Square had come down and three weeks later President Bush gave his
 4 statement provisionally and his speech. The problem was that for some years the impression
 5 was given of success, that became less clear as time went on, but certainly the first year or
 6 two there was very clear evidence not available to the public that the war was going wrong.
 7 WikiLeaks was able to confirm much of that in 2011 in publication of the details and
 8 essentially it confirmed very strongly what had been apparent to some and that was I think
 9 significant in people re-appraising the whole of the Iraq war and why and how it had gone so
 10 badly wrong with the United States when the US itself felt that it was actually, or least given
 11 the impression that it was a success story almost from the start.

12 Q. And because we are under pressure of time I just want to summarise. You say there
 13 that it enabled a proper appreciation of the number of civilians had been killed in the Iraq
 14 conflict, the WikiLeaks revelations enabled that, is that right?

15 A. Maybe, possibly, but the most important part of the whole thing, the British NGO and
 16 other body counts have been doing very good work on this and they have been very precise in
 17 what they have found but WikiLeaks added hugely to that and if I remember rightly the
 18 information they provided from the various war logs was an additional 15,000 civilians killed
 19 in addition to those who had been carefully recorded by IBC. But in my view that is
 20 probably one of the most significant parts of the whole operation, bringing to the public
 21 domain an unfortunate and very distressing aspect of the whole war.

22 Q. And you have finally summarised that the shift in public knowledge at paragraph 31,
 23 last sentence has been brought about in significant part only be unauthorised exposures, of
 24 which whistleblowers and publications in particular, the Manning disclosures, have played an
 25 exceptionally important part, is that your view?

26 A. They have. I mean if you take the period from about 2011 more or less through to the
 27 present time there has been much greater caution among western countries, specifically the
 28 United States and the UK, in the willingness to go to war at an early stage. I think that is to a
 29 considerable extent due to WikiLeaks and what it added to what we knew and also as a kind
 30 of archive. One has to see WikiLeaks also as a type of archive, a record, and that had been
 31 very widely used by a wide variety of international relations and war scholars to fill in the
 32 detail, if you like.

33 Q. And we know that counts 4, 8 and 11 relate to the receiving and obtaining of the
 34 disclosures about Iraq, so that is the subject matter of this (inaudible.)

1 Q. Now ---

2 A. That certainly is, yes, and I mean that – sorry, after you.

3 Q. So if we can go then to paragraph 10 where you deal with the issue of whether he has
4 political opinions which have brought him into conflict with the US government, dealing with
5 the issue of his political opinions you have addressed examples of his views and actions from
6 paragraph 8 onwards. Is that right? Under ---

7 A. Yes, I have indeed.

8 Q. --- A, B and C. I am not going to take you through it all, but is this right? You have
9 set out there at C such matters as the 2008 publication of a UK military report about the war
10 in Iraq.

11 A. Yes.

12 Q. Then at Roman number iii, the publication of the Afghan and Iraq war logs, and then
13 his speech to the UN in Geneva at tab 352 in the condensed bundle.

14 JUDGE BARAITSER: Do you want me to turn it up or not?

15 MR FITZGERALD: Well, just to give you the reference. It is summarised there, but it is an
16 important speech to the UN.

17 Q. I mean when he gave that speech calling for investigation by the US abuses, was that
18 a speech in your view intended to influence action by the government?

19 A. Yes, indeed. I mean those are quite clear. It is worth saying in that speech that
20 Assange makes the strong point that he is not against the United States as a whole. He talks
21 about it not being the enemy to him, only that he points to a group of people in the United
22 States who hold different views.

23 Q. Yes.

24 A. And so it is really a view that the United States itself at a governmental level has been
25 found wanting in a very particular way.

26 Q. Yes, and then you refer to the fact that he was nominated for the Nobel Peace Prize by
27 Meredith Maguire, stating ---

28 A. Indeed, yes.

29 Q. --- that in 2009 he is stating Julian Assange and his colleagues in WikiLeaks have
30 shown on numerous occasions that they are one of the last outlets of true democracy in their
31 work for freedom and speech.

32 A. Indeed, yes.

33 Q. And you have referred to the Sydney Peace Medal and then just giving again, that is
34 2D and 2C madam. And then you refer at Roman vii to the speech he gave to the “Stop the

1 war” coalitions rally in Trafalgar Square in August of 2011. Madam, that is at 2B. But you
2 have set out the essential content there and just one sees there the reference to “the
3 information we have revealed showing the everyday squalor and barbarity of war,
4 information such as individual deaths of over 130,000 people in Iraq, individual deaths that
5 were kept secret.” And that the way wars come to be and that wars can come undone, an
6 understanding because peace can be started by truth. Is that what he said then?

7 A. That is indeed true, yes, and I think that forms part of his overall political views. I
8 can summarise that if you wish very briefly, but certainly ---

9 Q. Yes, that would be very helpful.

10 A. It is interesting – well, put it this way, he helped form the WikiLeaks party in 2012 to
11 fight a seat for the Australian senate. That very usefully really itemises where he and the
12 people with him were coming from. At the centre of this is his view of the necessity to put
13 far greater attention on human rights and that the key of it is this combination of transparency
14 and accountability. There are other elements, generation equality and all the rest, but at the
15 root of this is this is a libertarian view of the need for individuals and public groups to
16 produce a much greater degree of transparency and accountability. Interestingly, this is not
17 just of government. The group singled out corporations and, interestingly, trade unions and
18 non-government organisations, so it is a general thing, although inevitably because
19 WikiLeaks is so well known for work on Iraq and Afghanistan it is seen to be specifically
20 anti-American. It is a wider political view than that, which is interesting in its own right, but
21 the key thing is it is a very clear political position.

22 Q. Yes. And I am not going to go through it, but you have seen the condensed bundle M,
23 which sets out a selection of his speeches, his publications.

24 A. Yes.

25 Q. And commentaries on the Manning disclosures and the purpose of them. For
26 example, I think ---

27 A. Indeed.

28 Q. --- tab 500 is a reference to what he said, a statement about the Manning disclosures
29 and the need again, as you say, for transparency and accountability.

30 A. That seems to be at the root of much of his thinking. In fact, to sum it up, the
31 combination of transparency and accountability for what he sees as improved human rights
32 would be at the core of his beliefs, in my view, based on what he has been saying.

33 Q. And obviously opposed to war crimes and interested in the exposure and rendering
34 accountable for those.

1 A. Indeed, yes.

2 Q. So in answer to the question, “Does he have a particular political stance or political
3 opinion?” what is the answer?

4 A. The answer is he does clearly. The difficulty is it does not fit into conventional
5 politics. You cannot label him a conservative or a liberal, or a Marxist, a socialist. He is
6 coming to it from a much more libertarian standpoint, but it is very clear cut: it is a political
7 view, and interestingly it is probably the case that it is shared by rather more people than, say,
8 20 years ago.

9 Q. And if we look then at the question, “Have those opinions and beliefs prompted a
10 response from an incoming Trump administration from 2017 onwards?” what is the answer to
11 that?

12 A. I think the answer is very clear that Assange is opposed because of, talking very
13 bluntly, where he is coming from, and also the success of WikiLeaks in bringing many things
14 to public attention. So from the point of view of the Trump administration, this has
15 considerable dangers to them and I think while generally there are other factors involved in
16 the changes in the Trump administration, and we may have to say Obama, that essentially at
17 the root of it is this belief that Assange and what he stands for represents some kind of threat
18 to the normal political endeavour.

19 Q. And we have at paragraph 11 you deal with the philosophy and practice of exposing
20 government secrets provoke the response of government. It provoked the response under a
21 banner, of course, already, but ---

22 A. Yes, it did, yes, certainly, yes.

23 Q. But then you deal with the fact that a particular response, the incoming Trump
24 administration expressed an over-hostility to Mr Assange and a determination to revisit the
25 potential for prosecuting him. Is that right?

26 A. Yes, and this is after something like an eight year gap obviously.

27 Q. And then one sees at paragraph 12, “Thus, the opinions and views of Mr Assange
28 demonstrated in his words and actions can be seen as very clearly placing him in the
29 crosshairs of dispute with the philosophy of the Trump administration.” Is that fair?

30 A. Yes, we have seen that in the statements of the Secretary of State Pompeo, we have
31 seen it in the statements of the former Attorney General, Mr Sessions, and the current one,
32 Mr Barr. It goes right across the administration. It is focused very much, I believe, on
33 President Trump and his perception of the risk from what he considers to be fake news, but it

1 does actually permeate other senior people within the administration. That has become very
2 clear in many statements over the last two or three years.

3 Q. So if one had to ask the question, looking at this prosecution, is it motivated by
4 genuine criminal justice concerns, or is it profoundly influenced by ulterior political
5 purposes? What would you say the answer is?

6 A. I would have to say that the evidence does support very strongly to the latter. This
7 does appear to be a political trial. For many other reasons, of course, quite apart from the
8 main one that the previous administration did consider this eight or nine years ago, but
9 decided it was not basically appropriate to take action, but in that gap you have, if you have a
10 transition return to political motivation at a pretty high level, in fact, an unusual level on
11 maybe the most western countries. So this is a particular style of recurrence of the United
12 States administration, which I would say is atypical of American and most European
13 administrations over many years.

14 Q. Yes, and so I think you have probably answered the question, but in your capacity as a
15 political scientist, can you comment on why he is being prosecuted under the Trump
16 administration starting with 2018?

17 A I think the most important issue obviously would be his concerns for transparency and
18 accountability which the administration regards as a threat to a greater extent than usual
19 administrations. But there are apparently, one has to say, other factors. One is that Mr
20 Trump appears to take considerable personal antipathy to President Obama and what he did
21 in his two periods in office. And that has come through repeatedly in his administration, but
22 to some extent Obama took this decision on Assange and I think it is reasonable to say that
23 that would be one reason, obviously a significant one, why President Trump will take a
24 different view. So essentially it is the combination of issues being the political point that
25 Assange is coming from, his position, and the perception of that as a threat to the current
26 administration, but not in recent years to the previous administration, and also some personal
27 elements, which one has to say do relate to the personality of President Trump himself.

28 Q. And we see you have referred to the comments of Pompeo, comment about
29 WikiLeaks being a hostile non-state agency that was opposed to America, but that is the kind
30 of comment you are referring to.

31 A. Yes, and indeed, the intimations from senior American politicians reporting Mr
32 Trump that Mr Assange should face very long periods of jail, indeed, even suggesting the
33 death penalty, though I gather that would not be allowable under the present system. But

1 even suggesting that gives you a feel that this is an administration and its participants that
2 really sees this I think from a political standpoint.

3 Q. And you have helped us about the fact that he has a very obvious political standpoint
4 and political opinions that put him in the crosshairs of the Trump administration. The
5 opinions that he has, would you say that they are clearly political opinions in the accepted
6 wording of that expression?

7 A. Yes, yes. I would say essentially he comes from a libertarian political stance and that
8 is clear in his writings, usefully in the statements of the WikiLeaks party, so it is a political
9 stance based on support for human rights from his perspective and feel very strongly on the
10 need to breaker for transparency and accountability, which in his view allows for greater and
11 more successful democratic processes.

12 Q. And that ---

13 A. His belief is very strongly the future of democracy.

14 Q. Yes, and is it in that sense the political opinions such as are protected under the
15 Refugee Conventions and the notion of you must not be prosecuted or persecuted on grounds
16 of race, religion, nationality or political opinion. That kind of – that concept?

17 A. I would certainly. I mean I am not an international lawyer, but if you go back to the
18 Refugee convention in 1951 and the environment in which it came from, remember that was
19 two years after the Geneva conventions, the fourth of which was specifically on agreement of
20 civilians, but the Refugee charter early convention is very clear that political opinions along,
21 if I remember rightly, with religious, nationality issues and others are very much part of it,
22 and the political opinion is a valid reason to seek refugee status.

23 Q. Yes.

24 A. I think there is no question that Mr Assange is motivated in large measure by his own
25 political stance, so political opinions if you will.

26 Q. And those political opinions have brought him into conflict with a government
27 committed to exposing, well, punishing leakers and upholding the American way of life, even
28 if it means by torture or war crimes.

29 A. Well, if the American way of life as this administration sees it, and, yes, one has to
30 say that, that it is a difficult time in that sense.

31 JUDGE BARAITSER: I am allowing leading, Mr Lewis, because what Mr Fitzgerald is
32 doing is taking him through a statement which is already written

33 MR LEWIS: I understand, madam, I have not made any formal objection.

34 JUDGE BARAITSER: And you have five minutes.

1 MR FITZGERALD: I am happy to say I have concluded within time.

2 Q. Professor Rogers, there is just perhaps one other thing I could take you to. You have
3 got condensed bundle M, have you not?

4 A. I have indeed, yes.

5 Q. And one sees just as an example there at – I do not know whether you have condensed
6 bundle M tab 500?

7 A. Yes.

8 Q. This is just to give a further example of the political opinion that may have caused
9 him trouble in this case. Do you see there there is a statement on the Bradley Manning case
10 dated 16 December 2011 and on the third page in ---

11 A. Yes.

12 Q. Can I just take you to the third page in?

13 A. I have it.

14 Q. And it deals with the treatment of Bradley Manning and then the second full
15 paragraph, it says, “Collateral murder, the Iraq war logs, the Afghanistan war diaries, cable-
16 gate, the GitMo files and the WikiLeaks’ spy files have dissected the anatomy of US power
17 relations in the world. The foreign ministers of the EU released a statement on December 8,
18 2011 in support of WikiLeaks and freedom of speech by contrast to the United States, the
19 Obama administration is purposely intimidating citizens who use constitutional protections to
20 support a pro-transparency pro-accountability publishing organisation.” So that is his view.

21 A. Yes.

22 Q. And we know that ---

23 A. That is very much his view.

24 Q. We know that his conduct was unpopular, if I can put it that way, and it condemned
25 under the Obama administration, but we also know historically that he was not prosecuted
26 until the Trump administration came in to 2017 to 2018. Do you see significance in that?

27 A. Yes.

28 Q. As a political scientist. I am not asking you as a lawyer, but as a political scientist.

29 A. As a political scientist, yes, I think so much of this cold case revolves much more
30 about politics and the changing political circumstances within the United States. We are in a
31 position where an administration has come in, elected in, which takes views on many subjects
32 which maybe are different from those of the previous administration. This is why I think the
33 views are particularly strong and they relate at least in part, I believe, to the political opinions
34 of Mr Trump himself and his concern about what he calls the fake press, fake news. He sees

1 us very much as an enemy, so we are in this position where, unusually, at least for a poly-
2 functioning democracy, you have one person right at the top who does believe very strongly
3 that he is beset by threats from the press, more generally the Fourth Estate and I think you see
4 from him and those around him that what you might call the network version of the Fourth
5 Estate which we are facing now is one which has particular problems with particular threats.

6 Now, we see from tab 500 that Mr Manning holds pretty strong views on this. They
7 are clear political views, that can be said, but from the point of view of the United States,
8 there is current administration. Those represent a direct danger to him, to the United States
9 and those who have not essentially seen the light of day and in that context, I think you do see
10 this change in political dimension which is very strong. I could explore that further, but
11 essentially, that probably gives you my overall view that there is a huge involvement of
12 political change in this entire process, which is unusual, I am bound to say.

13 Q. Yes. I think you said Mr Manning's views. I know you meant Mr Assange's views.

14 A. Sorry, Mr Assange. My mistake.

15 Q. I am very grateful. I have no further questions but my learned friend no doubt will.
16 Madam, I know my learned friend may take some time. The professor has indicated that it
17 would be helpful if we could have a break at 12 just for comfort reasons.

18 JUDGE BARAITSER: Yes, thank you. Just remind me if I do not remember myself. Mr
19 Lewis.

20 Cross-examined by Mr Lewis

21 Q. Professor, I am going to ask you some questions on behalf of the government. Can
22 you hear?

23 A. Alright. I can hear you well, Mr Lewis, yes, thank you.

24 Q. So, let us just start off with an easy question. What is a political opinion?

25 A. A political opinion is one which takes a particular view of the function of the political
26 process and can do so openly, but if you look at it in terms of broad history, throughout
27 history, in many forms of government and many forms of politics, people may hold particular
28 political opinions as to how politics should be organised and politics is about government and
29 society on a larger scale usually, but it can extend to quite small communities.

30 Essentially, over many years in different circumstances and different civilisations,
31 while political opinions would be there in the background, when you have citizens which are
32 primarily autocratic, you will actually have a circumstance in which – I suppose what you
33 would say is that opinions were there but were very largely hidden.

1 Now, that is not entirely true if you look at Greece and Rome and some of the other
2 civilisations of which we have knowledge, but more recently, if we take the case of United
3 Kingdom ---

4 Q. Professor, I am just going to stop you for a moment because the way we will best get
5 on is if we try and be much more concise and I am going to ask some short questions and if
6 you could give some shortish answers. I am not going to stop you, but it is not really an
7 opportunity to give a speech, do you understand?

8 A. It was ---

9 Q. It is probably my fault for opening ---

10 JUDGE BARAITSER: He has given his answer.

11 MR FITZGERALD: That was an explanation, not a speech.

12 JUDGE BARAITSER: Asking what is a political opinion could go on for many days or
13 weeks.

14 MR LEWIS: Yes, I am going to explain. I am going to explain. It is my fault, no doubt for
15 asking not a tight question. Let me ask you this then. The dictionary definition of “political”
16 is relating to the way government power is achieved and used in a country or society. Do you
17 agree with that?

18 A. Yes, that is good definition, yes. I mean, there are many, but that one is a pretty tight
19 one.

20 Q. Because a few moments ago, you said this is fairly strange because he has opinions on
21 corporations, non-government organisations and trade unions. Now, none of that would
22 normal fit within the normal definition of a political opinion, would it?

23 A. Not in the old way, but I think the nature of political opinion has changed a great deal
24 and essentially, the way in which societies are governed, which is the subject of the study of
25 politics, is these days considered much wider, the actual straight governmental processes and,
26 in particular, and you see this frequently in Mr Assange’s writings, he is concerned with what
27 he calls – well, I use the term of a transnational elite of joint governance. In other words,
28 governments themselves and very large corporations. So, in other words, the definition has
29 basically expanded, particularly in the last 50 years.

30 Q. In order to provide an opinion on whether Mr Assange’s opinions might be described
31 as political, you have been provided with a selection of things said by him, is that right?

32 A. I have indeed, yes.

1 Q. And you appear to identify in your statement that these broadly go to an objective that
2 governments everywhere should be more transparent. You say that in paragraph 11, or
3 perhaps more generally, that Mr Assange holds anti-war opinions. Would that be fair?

4 A. That is fair. I mean, the two are not directly connected, but those are two separate
5 statements, but yes, that does come through strongly in writing, yes.

6 Q. Is simply being a journalist a person who expresses political opinions?

7 A. I am sorry, how do you mean? Obviously, a journalist does not necessarily hold
8 strong, or express strong political opinions. Some do very much so, others do not, so it varies
9 very much on the nature of their work and where they are coming from personally in the
10 political sense.

11 Q. That is why I asked ---

12 A. I do not think I can give a straight answer to that.

13 Q. Well, professor, that is why I was very particular in the words I used. My words, is
14 simply being a journalist a person who expresses political opinions.

15 A. Not necessarily.

16 Q. And at page 3 of your witness statement, you say that Professor Benkler describes
17 WikiLeaks as part of the Fourth estate .

18 A. Yes.

19 Q. And I take it by that he means the media and the press. Is that right?

20 A. He does indeed and I think Professor Benkler it is a very interesting long account and
21 the conclusion is very pertinent. He basically says this is ---

22 Q. Well, I have not asked you about ---

23 A. --- extraordinary transition.

24 Q. Professor, I have not asked you about that.

25 A. Sorry.

26 Q. I have only asked you a question. We will get along much better if I ask the questions
27 and you answer them. Do you understand?

28 A. Right, yes, certainly. Yes.

29 Q. So, just being the owner or publisher of a media or press entity does not necessarily
30 mean you hold political opinions, does it?

31 A. Not necessarily, but if you look at the media, the press and the media, in very many
32 cases, they are ideas with a particular political opinions. Less so in public service
33 broadcasting. More so in the media.

34 Q. Let me try again, professor. I am going to do this in stages, but I want a clear answer.

1 A. Right.

2 Q. And I think it permits of only one answer. I will ask the question again. Just being
3 the owner or publisher of a media or press entity does not necessarily mean you hold political
4 opinions, does it?

5 A. Not necessarily, but usually. I hope that is brief enough.

6 Q. I mean, obviously, if you write a political editorial, it may well show your political
7 opinions, would it not?

8 A. Yes. You can also choose news to report and choose news not to report. There are
9 many ways in which political opinions can be expressed in the Fourth Estate.

10 Q. And what I'm struggling with, professor, is the objective that governments
11 everywhere should be more transparent is somewhat vague as political opinions go and can
12 you assist us with what these opinions ---

13 A. Yes.

14 Q. I have not finished. Please wait.

15 A. Sorry.

16 Q. So, can you assist us with what these opinions actually amount to? Is it, his political
17 opinion, is it transparency at any cost?

18 A. No, not at any cost.

19 Q. Is it that governments are not entitled to withhold information, any information from
20 the public?

21 A. I do not believe there is any sign from Mr Assange that he believes they must not hold
22 any, withhold anything, but he presses transparency and accountability very much further
23 than is the norm.

24 Q. On your wider expanded view of political opinions, do you say he holds the opinion
25 that transparency is okay even when it would be otherwise necessary to protect the safety of
26 individuals?

27 A. I do not see evidence of that. This is obviously a very contentious issue, but I gather
28 this is disputed very strongly by the defence, but I do not think you can draw that conclusion.

29 Q. And does he, on your wider view of political opinions, have the opinion that if
30 secrecy is for the wider protection of society, it should still be exposed?

31 A. Not necessarily. Again, it is very difficult to give straight yes and no answers to
32 complex questions. I would have to say not necessarily.

33 Q. Now, let us just have a look at one or two of the exhibits to understand how you say it
34 manifests his political opinions. If we look at the condensed bundle at tab 2E. I am just

1 going to pick one or two examples. This is a transcript of what Mr Assange said and if we go
2 over to the back page of that in 2E, he said, “The second World War and the German
3 invasion of Poland was the result of carefully constructed lies.” Do you see that?

4 A. I am sorry, madam, my problem is that since I am doing this remotely, it is very
5 difficult to do this. I do not have the technical requirements to actually show that particular
6 tab on screen at the same time, so I am basically, I am very much in the hands of Mr
7 Lawrence and yourself on this, but essentially, I will take it as read that what you have said is
8 correct. I am sorry about that.

9 Q. Well, professor, I do not quite understand. You had no difficulty dealing with any of
10 these tabs when Mr Fitzgerald ---

11 MR FITZGERALD: I read them out.

12 MR LEWIS: Is it because you did not have them in front of you or what?

13 A. You are talking about these tabs now.

14 Q. You specifically mentioned tab 500 a few moments ago. Do you not have that?

15 A. Yes, because I actually have – I have about 1,000 pages of documents. That is one
16 that I had looked at because it seemed to me particularly significance. I have tried to go
17 through the entire amount, but it is worth saying that the latest bundle came yesterday with
18 368 pages to it, but it presents some difficulty.

19 Madam, if I may say, I really must apologise for not being able to appear in person. It
20 is because of family health circumstances and difficulties with potential health issues,
21 otherwise I would certainly want to appear.

22 JUDGE BARAITSER: There is no need for you to apologise, Professor Rogers, but we do
23 need to manage the situation so that you can see what Mr Lewis is referring you to. That is
24 the difficulty.

25 WITNESS: Right.

26 MR LEWIS: Because these are, in fact, your exhibits.

27 A. I am not sure ---

28 MR FITZGERALD: No.

29 MR LEWIS: Are they not?

30 MR FITZGERALD: This one is referred to in his, in, yes.

31 MR LEWIS: I think it is your exhibit.

32 MR FITZGERALD: He refers to it. He did not have it, but he just referred to it. It is the
33 speech.

34 MR LEWIS: You referred to it.

1 MR FITZGERALD: Yes, he refers to it.
2 MR LEWIS: In your statement and I am just reading out ---
3 A. Can you tell me where?
4 MR FITZGERALD: (vii).
5 MR LEWIS: (vii).
6 MR FITZGERALD: Under C, 8C, (vii), page 4.
7 JUDGE BARAITSER: Yes, 8th of August.
8 MR FITZGERALD: Yes.
9 JUDGE BARAITSER: So, it is quoted from quite extensively, in fact.
10 WITNESS: Thank you very much. I must apologise. I have that in front of me in quoted
11 form. Thank you.
12 MR LEWIS: So, I want the bit that says, “When Mr Assange claimed the second World War
13 and the German invasion of Poland was the result of carefully constructed lies. Do you have
14 that?
15 A. What? In my original submission?
16 Q. No, no, no. This is in the exhibit you are referring to, this is what it says.
17 A. And again, which exhibit is that?
18 Q. It is the one you mention saying, although you have not put in this particular passage
19 for whatever reason.
20 A. Exactly, yes.
21 Q. It is in paragraph 8C (vii) page 4 on the 8th of August 2011.
22 A. Right.
23 Q. You quoted.
24 A. That is the paragraph which starts, “And in awarding the City of Peace medal,” am I
25 correct?
26 JUDGE BARAITSER: No.
27 MR FITZGERALD: No.
28 MR LEWIS: It is seven, on the 8th of August 2011, it begins.
29 A. Oh yes, indeed. Yes. Yes, sorry. I am with you now.
30 Q. That is the exhibit.
31 A. Yes, I apologise for that. You are asking me to comment on that in particular.
32 Q. What he says in that, I am looking at the transcript, it says, “The second World War
33 and the German invasion of Poland was the result of carefully constructed lies.” That is what
34 Mr Assange claimed.

- 1 A. Right.
- 2 Q. Do you see that?
- 3 A. Yes. I do see that, yes.
- 4 Q. What political opinion does that evidence?
- 5 A. Basically, it is a political opinion from his point of view, his view of how the war
6 started. You could certainly say that that is a very strong opinion. It is one many people
7 might object to, but it comes from his own political dimension.
- 8 Q. If we drop down a few lines, “Journalists are war criminals”. What political opinion
9 does that evidence?
- 10 A. That evidences suspicion of some journalistic practices.
- 11 Q. If we stay in this bundle and we go to ---
- 12 A. Right.
- 13 MR LEWIS: --- 13B.
- 14 JUDGE BARAITSER: Well, we need to pause and consider how best to manage this.
15 Do you have access to these documents, Professor Rogers?
- 16 A. Yes but, as I say, I have about a thousand pages ---
- 17 Q. I see.
- 18 A. --- to hand and it is difficult to find them very quickly.
- 19 Q. I see.
- 20 A. I am sorry about that.
- 21 Q. That is all right. Take your time. As long as you can go to the relevant document,
22 that is what is important.
- 23 A. Can you give me the full details, please, Mr Lewis?
- 24 MR LEWIS: This is the nomination for the 2019 GUE NGL award for journalism,
25 whistleblowers and defenders of the right to information.
- 26 A. I will just have to leave this desk and see if I can find it very quickly. Would you
27 excuse me just a moment.
- 28 Q. Before you go, Professor, I just wondered ---
- 29 A. Sorry, yes, I am back.
- 30 Q. It would just be handy if you had the whole of volume M condensed, has that been
31 sent to you by your solicitor - by the defence solicitors?
- 32 A. Yes, it has but that arrived electronically yesterday and, as I say, I am not able to
33 display it on screen and I do not have the capability at home to print out several hundred
34 pages. This, I am afraid, is one of the problems that I am facing and, I am sorry, madam, that

1 you are facing too.

2 Q. Right. Well, perhaps I could just ---

3 A. What now ---

4 Q. If you can get hold of it quickly, that is fine; if you cannot, I will just read out the
5 passage to you.

6 A. In the circumstances, Mr Lewis, I am perfectly happy to accept what you are saying
7 and I will endeavour to answer the questions forthwith.

8 Q. So for the note it is tab 13B of condensed bundle M.

9 A. Right.

10 Q. And I am just going to read between the perforations, "The award is recommended for
11 Julian Assange, but the award is based on need and the need being that he has been arbitrarily
12 detained by" - he has been found to be - the assertion is that he has been found to be
13 arbitrarily detained, and that is in the United Kingdom, "by the UN human rights system".

14 A. Yes.

15 Q. "Which has repeatedly called for his release, most recently on 21 December 2018. He
16 is in dire circumstances, faces imminent termination of his asylum, the extradition and life in
17 a US prison for publishing the truth about US wars and has been gagged and isolated since
18 March 2018". I just want to understand, because some of the matters which have been relied
19 upon to support that he has got political opinions, this is relied upon simply because they
20 would like to see him released?

21 A. I am in difficulty as to understanding why you are connecting this with political
22 opinions. I have been very clear, as I see it, as to what the basis of Mr Assange's political
23 opinions are. It does not necessarily mean I agree with him. It certainly does not necessarily
24 mean that I agree with everything he says. I think some are objectionable.

25 Q. All right.

26 A. But the point is that he does hold very clear political opinions which, in my view,
27 have brought him into great difficulty with the current administration in the United States.

28 Q. OK. Well, I will just take you to one more because I know we have not got too many
29 of these.

30 A. OK.

31 Q. It is tab 1A, so we know where it is.

32 A. Right.

33 Q. It is, Julian Assange says this, because you base your opinion on his essays and
34 writings, Julian Assange says this, and I am reading between the bottom perforation, madam,

1 and I will read it out.

2 A. Right.

3 Q. "The more secretive" ---

4 A. Thank you very much.

5 Q. "The more secretive or unjust an organisation is, the more leaks-induced fear and
6 paranoia in its leadership and planning coterie. This must result in minimisation of efficient
7 internal communication mechanisms (and an increase in cognitive secrecy tax and subsequent
8 system-wide cognitive decline) resulting in decreased ability to hold on to power as the
9 environment demands action". So can you help us ---

10 A. Yes.

11 Q. --- because, presumably, you read that, what belief is he ---

12 A. I have, indeed.

13 Q. What belief is he espousing there?

14 A. Well, what he is saying, I mean essentially it is a very interesting assessment of how
15 very autocratic regimes work. So the intention to control more and more information, but in
16 doing so it is inevitable that more information does leak out because there is opposition
17 internally and I think, although it may go beyond what I can be sure of, he puts this in the
18 context of the many developments in the internet so that, in fact, there are all many different
19 ways in which this can be done now compared even with 30, 40 years ago. So what he is
20 saying, essentially, is that if you have a very autocratic state or a state which is moving
21 towards autocracy, which is hugely concerned with the secrecy of human endeavours, those
22 do leak out and the very fact of them leaking out means the state itself can become less
23 secure. So, in a nutshell, I think, if you like, he is saying that, in these circumstances, given
24 the era in which we are now, a particular autocratic state may be more likely to have the seeds
25 of its downfall or radical change within it as a result of these kind of processes. It is an
26 interesting concept. It is not perhaps traditionally political science, but it is one which is
27 certainly worth looking at, so I hope that helps.

28 Q. Well, I am not sure it did for me but it may for others, Professor. Anyway ---

29 A. Right. Well, can I help some more?

30 Q. I am just going to move to something else.

31 A. OK.

32 Q. And I want you to help how the allegations in this extradition request could be
33 regarded as a manifestation of any political belief, and I am going to take you to some
34 provisions. Now you should have been sent ---

- 1 A. Right.
- 2 Q. --- the pros - what is called the prosecution witness - prosecution witness bundle.
3 That is, in fact, the bundle which runs to 367 pages, which might be the one you said you got
4 yesterday, is that the one?
- 5 A. It is the one, I received that. That is the one and I spent three or four hours going
6 through it to get as much information as I could. I do not have it in print form for reasons
7 which I have explained. I gather there have been earlier iterations, but it does make it rather
8 difficult as an expert witness to come to this with only the latest version available at very
9 short notice but, nevertheless, sir, I will do my very best to respond to what you want to
10 consider.
- 11 Q. All right. Well, let us deal with you being an expert witness.
- 12 A. Right.
- 13 Q. You understand as an expert you are under a continuing duty to the court to be
14 unbiased.
- 15 A. I do my best, yes, certainly.
- 16 Q. And you understand it is an expert's duty to consider all the evidence and deal with
17 those matters which contradict or support an opposite opinion.
- 18 A. Within my spheres of expertise, of course.
- 19 Q. Right. So I am going to take you to some of those.
- 20 A. Right.
- 21 Q. I want to take you back to the early part of your statement. You say in your statement
22 ---
- 23 A. Yes.
- 24 Q. --- at paragraph 5, you had been given material of relevance including the prosecution
25 indictment and supporting evidence ---
- 26 A. Yes.
- 27 Q. --- is that right? So I want to take you through some of that supporting evidence.
- 28 A. Indeed, please do.
- 29 Q. Do you have all the five Gordon Kromberg declarations conveniently to hand? If you
30 do not have the prosecution witness bundle.
- 31 A. I have them - I had it in e-form the most recent one. I do not have it to hand literally,
32 but again I am perfectly content to be bound by what you say in this, Mr Lewis.
- 33 Q. Well, let us go to ---
- 34 A. It is probably the best - it is probably the best way I can help you in these unfortunate

1 circumstances.

2 Q. Well, you know from what you have read then in Gordon Kromberg's first declaration
3 that it is specifically refuted that this is a politically motivated prosecution. Rather, it is an
4 evidence ---

5 A. Indeed.

6 Q. Evidence based prosecution accusing Mr Assange of serious crimes.

7 A. Indeed, yes.

8 Q. So if we go to - madam, if I do it from our bundles and then I will try and give the
9 witness where it is. If we go to page 97 in the prosecution witness bundle, this is Mr
10 Kromberg's first declaration. You will have read this in some detail, will you not, Professor.

11 A. I will, indeed, in the past, yes.

12 Q. It is dated 17 January and was served before you made your statement.

13 A. Right.

14 Q. Why do you not mention any part of it in your expert report?

15 A. Essentially, because I was asked by the defence to deal with specific aspects of this
16 case but, as I have said repeatedly, there is abundant evidence to indicate that this is
17 motivated very strongly by political change in the United States.

18 Q. Well, what ---

19 A. And I am more than happy to expand on that if you wish.

20 Q. No, Professor, I want to test your expertise as a so-called expert, an unbiased expert,
21 because an unbiased expert ---

22 A. I am an expert in ---

23 Q. --- would have taken into account what the other side says about this not being
24 politically motivated and dealt with it, would he not?

25 A. I mean, I am happy to do that now, if you wish, and I have read the opinions of Mr
26 Kromberg.

27 Q. Well, why ---

28 A. I was asked specifically to deal with particular elements in my witness statement,
29 which I did.

30 Q. But you know your duty is not to the defence. Your duty is overridingly to the court.
31 You have read the rules on this, have you not?

32 A. I have, indeed, yes. I have read them carefully and I agree with you on that, but
33 essentially I was asked to speak particularly from my areas of expertise and those include
34 political science.

1 Q. Yes, but ---

2 A. They also include for conduct of war with wars of instability.

3 Q. But ---

4 A. As I repeat, I am not a criminal lawyer. I am not a criminal - a lawyer - not an expert
5 in law.

6 Q. But you have ---

7 A. And I was approaching this ---

8 Q. But you have adopted what you say as the defence witnesses have said, and I will take
9 you to him - you have adopted what Professor Noam Chomsky, Professor Mark Feldstein,
10 Jameel Jaffer, Emeritus Professor Michael Tigar, Carol Shenkman, Andy Worthington, US
11 legal experts Eric Lewis and Tom Durkin, but you - you have adopted all that but you have
12 not adopted one jot or iota of the evidence which is contrary to their opinion, can you explain
13 why as an expert you have not done that?

14 A. Yes, certainly. Essentially, I see the wider perspective of political change in the
15 United States as the one which is more important here. I take it as read that there are
16 legitimate views from other sides, as expressed very strongly by Mr Kromberg in his many
17 statements, but essentially what I am looking at is what is the wider issue as a political
18 science expert; in other words, what lies behind this.

19 Q. But ---

20 A. And I am happy to explore that more now. In fact, I would very much like to do so.

21 MR LEWIS: We are going to go through - it is going to take a little while, Professor ---

22 MR FITZGERALD: Could I ask my learned friend, actually, to look at the words of
23 paragraph 10 where he says, "If the assessments of the defence experts are" ---

24 MR LEWIS: Yes, I am going to come to that. I am going to come to that.

25 MR FITZGERALD: I think, to be fair, he makes that clear.

26 JUDGE BARAITSER: Mr Lewis.

27 MR LEWIS: So we go to page 97, and this is paragraph, if you have it otherwise, you say
28 you have read it and you remember it very well, it is Gordon Kromberg's first declaration
29 dated 17 January and it is paragraph 6. He says, "The charges in the superseding indictment
30 are based on the evidence from the rule of law. Based on the evidence and applicable law, a
31 grand jury found probable cause to charge Julian Assange for violating the United States law.
32 An independent grand jury issued these charges based on evidence and the following actions
33 that Assange knowingly took in committing the charged criminal offences: 1. His complicity
34 in illegal acts to obtain or receive voluminous databases of classified information; 2. His

1 agreement and attempt to obtain classified information through computer hacking; and, 3.
2 His publishing certain classified documents that contained the unredacted names of innocent
3 people who risked their safety and freedom to provide information to the United States and its
4 allies, including local Afghans and Iraqis” ---

5 A. Yes.

6 Q. --- “journalists, religious leaders, human rights advocates and political dissidents from
7 oppressive regimes”. So ---

8 A. Yes.

9 Q. --- why did you not mention the fact that on the other side of the coin about it not
10 being a politically motivated prosecution that a grand jury had found sufficient evidence to
11 find probable cause?

12 A. I would be happy to do that now if you wish but why I did not mention it then was
13 because as I said I think Mr Fitzgerald made the point. I was looking at the views of others
14 and in the wider context I took the view that this appeared to have a very strong political
15 motive to it. Now, obviously if you are coming from that point of view if you are going to
16 make these assertions and this was after an eight year gap then you would want to basically
17 look at the way in which those assertions are being made now and not many years ago and
18 this seems to me to be to put it politely rather anomalous.

19 Q. Well, you specifically told this court about them when asked by Mr Fitzgerald, he
20 asked you the question, “Is this prosecution motivated by criminal justice concerns or is it
21 motivated by political persecution?” I may have spelt that wrong. You replied, ---

22 A. I do not think I used the term that ---

23 Q. Or political means. You replied in your sworn evidence, “The evidence very strongly
24 supports the latter.”. So, you had specifically been dealing with whether or not the
25 prosecution is motivated by criminal justice concerns, ie, punishing someone for committing
26 a crime, or whether it is for punishing or unfairly prosecuting them for political reasons. Do
27 you follow? That is the divide.

28 A. Yes.

29 Q. You gave an unequivocal answer. So, what I want to do now is understand why you
30 did not put in your report or explain the other side of the coin here that this prosecution is not
31 motivated in your view by criminal justice concerns. So, to do that I want to ask you about
32 the evidence. Have you seen the evidence indicting Mr Assange in this case?

33 A. Yes, I have. It is voluminous. I have endeavoured to get a hand on it as much as I
34 can but I would remind you that I am not the lawyer.

- 1 Q. I do not understand your answer to that. I am going to ask it very carefully again.
2 Have you seen the evidence underlying the charges against Mr Assange in this case?
- 3 A. Yes, I have.
- 4 Q. I put it to you that is just not true.
- 5 JUDGE BARAITSER: I think there might be a misunderstanding about what ---
- 6 A. In what way?
- 7 JUDGE BARAITSER: --- exactly you mean.
- 8 MR LEWIS: Oh right.
- 9 JUDGE BARAITSER: I think presumably he means the contents of the affidavits?
- 10 Q. I do not mean the Kromberg, I mean the evidence that shows he committed a crime.
11 That evidence is still under the grand jury seal. It has not been adduced in this court and it
12 has not been produced by any party. That is the evidence that he committed a crime.
- 13 A. I am sorry, Mr Lewis, I did misunderstand you there.
- 14 Q. Right.
- 15 A. You were talking earlier, you related this to the declarations of Mr Kromberg. I was
16 assuming that it was to that you were referring.
- 17 Q. OK.
- 18 A. But if I misled the court, I apologise for that.
- 19 Q. There is a misunderstanding. So, I will ask the question again. Have you seen the
20 evidence against Mr Assange?
- 21 A. Not the evidence that the United States is reserving for its own hearing, no. I have
22 seen the indictment.
- 23 Q. Yes, but you have not seen the evidence?
- 24 A. Well, you just told me that I cannot have seen it.
- 25 Q. You cannot have seen it.
- 26 A. Perhaps you could help me and then I can explain why.
- 27 Q. So, you do not know how strong it is do you?
- 28 A. I do not know how strong it is, no, but I mean, who does at the moment?
- 29 Q. Well, it is not the question. So, if the evidence is overwhelmingly strong, just
30 hypothetically, overwhelmingly strong about ---
- 31 A. Yes.
- 32 Q. --- a person having committed a crime, how can you say that the request is not
33 brought for criminal justice concerns but it is brought on a political basis. How do you make
34 that evaluation as an expert?

1 A. I would give you two responses to that. One is that essentially we are talking about a
2 change in political attitudes. I would have to come back repeatedly to the idea that this has
3 been brought very late in the day when a previous administration decided not to do so. Now,
4 if it was to turn out that there was overwhelming evidence and you used it then one can only
5 give that opinion when that evidence is in the public eye but it is not in the public eye as you
6 yourself have said. So, essentially I was going on what was available.

7 Q. Well, I ---

8 A. And although I know we cannot explore this, if what you demand of me is in terms of
9 short sentences, it is critically important that one understands the changes in politics within
10 the United States on which I can comment as a political scientist.

11 Q. Well, I am going to take you through to a summary of what Mr Kromberg says about
12 the case and I want you to ---

13 A. Thank you.

14 Q. --- see whether as a unbiased expert you are going to revise your opinion. So, we
15 started at page 97 which was ---

16 A. Right.

17 Q. --- paragraph 6 and 7 of Mr Kromberg's first declaration.

18 MR LEWIS: Can we go to bundle page 100, madam?

19 Q. What that says, paragraph 10, again you do not have this, Professor, is that right? Do
20 you want me to read it out?

21 A. I am afraid I do not have it immediately to hand, I am sorry for that.

22 Q. So, Professor, paragraph 10, "Assange has also alleged the charges against him are
23 politically motivated. Defence summary of issues: Prosecutors from the US Department of
24 Justice, ie federal prosecutors, however are required to act in a manner free from political
25 bias or motivation. This is true irrespective of any sentiments or statements made by
26 politicians from any political party." Do you disagree with that, Professor?

27 A. That is generally the case in practice - in theory. In practice it may differ and I think
28 you will find elsewhere in the defence case they take that view. So, you have to determine
29 what is in theory right and that is certainly stated but what may happen in practice. So, you
30 see that particularly in the United States where there is a rather long, rather larger proportion
31 of senior officials in any of the departments who are appointed from the centre. And it is
32 frankly rather difficult even if the advocates themselves, if the research of the law is within a
33 department and take a particular view, one has to say that there is a risk of a certain degree of
34 direction coming from above.

1 Q. What evidence do you have that the actual prosecutors in this case have prosecuted
2 him because of political bias rather than the strength of the evidence?

3 A. What do you mean by prosecuted? Are you talking about the people right at the top?
4 Because in that case ---

5 Q. No, they are not the pros ---

6 A. --- I am afraid there are many examples ---

7 Q. President Trump is not a prosecutor.

8 A. --- well, the problem is that the -- no, but the person who directs the Department of
9 Justice is essentially a political appointee.

10 Q. Let me read you 11. Let us see if you agree with this.

11 A. Right.

12 Q. "The superseding indictment here reflects no such political bias or motivation.
13 Similar to what I understand to be the code for Crown prosecutors in the United Kingdom,
14 the United States has publicly prom negated policies and practices to guide professional
15 decisions by federal prosecutors including whether to seek charges and what charges to seek.
16 You see, the so-called principles of federal prosecutions serve two important purposes, see
17 the Justices manual. The first important purpose is to ensure the fair and effective exercise
18 for prosecutorial discretion and responsibility. The second important purpose is to promote
19 confidence on the part of the public and the individual defendants, then important
20 prosecutorial decisions will be made rationally and objectively on the merits of each case.".
21 Do you say that the prosecutors are not following that code in this case?

22 A. I would expect the prosecutors to be following that code in this case and I would
23 expect them to be doing that work in good faith, but what I would also have to point out and I
24 am sorry we cannot explore this because it is an important part of the situation is what is the
25 motivation for those above them to order them to do this work or to require them to do this
26 work? And there we are getting into very difficult ground and I have to say again, we have
27 been in the position for more than eight years. Why is this prosecution being brought now? I
28 would like to explore that but I understand you would perhaps rather I did not.

29 Q. No, I will come to that because we will come to that in due course. But I am going to
30 read you through ---

31 A. OK.

32 Q. --- some of these and see whether you will accept this. And I am keen to know why
33 having read that you omitted to put it in an expert's report which is aimed at helping the

1 court? Why did you not say in your expert's report this is what it said but I do not believe
2 they are going to follow this? Why did you not do that in your report?

3 A. Well, let me say that if you take that view and I will apologise for that but let me say
4 that as I tried to say just now, the work in which diligent people within the Department of
5 Justice will pursue a particular case, one would hope and expect it will be above reproach and
6 will be sufficiently independent. My concern is at a higher level of that. Essentially, I will
7 take it as read that what you are giving me is a fair representative of what the ordinary staff in
8 the Department of Justice at a federal level will do to the best of their ability. What I am
9 saying repeatedly, I am sorry to come back to this, is that is within the wider context of
10 political change. Now, I will apologise if I should have made this clear in the statement but I
11 am more than happy to make that clear now.

12 Q. Let me read you the next paragraph 12. "The principles of federal prosecutions set
13 forth specific factors that federal prosecutors may not consider in determining whether to
14 commence or recommend prosecution or to take action against a person.". The reference is
15 given. "Amongst other impermissible factors federal prosecutors are forbidden from
16 considering a person's political association, activities, or beliefs, the prosecutor's own
17 personal feelings or the possible effect on the prosecutor's own personal or professional
18 circumstances.". So, there the prosecutor is forbidden from taking into account any political
19 opinions. Do you accept that that is part of the code?

20 A. I said that that is part of the code but who decides in the first place at a particular
21 point in time a prosecution will be even considered when for the previous eight years it has
22 not been considered in the same way. I mean, I have no problem, Mr Lewis, with what you
23 are saying. As I say, if you would have wished me to put this in detail in a report then I
24 would have recognised perhaps the need to do so but what I am doing is looking at this in a
25 wider sense over a history of basically about 10 or 15 years. And I am not talking about the
26 present day, I am talking about behind that. And so I think this is the problem that I have. I
27 am prepared to fully accept what you say about the duty of people within the Department of
28 Justice, but what I am concerned with is why is it from a political dimensions that these
29 charges are being brought now and not eight or nine years ago.

30 Q. We will come to that very important issue in a moment but I am just going to take you
31 through some of this more. Paragraph 13. "My colleagues and I" – so that is Mr Kromberg –
32 "take these responsibilities seriously and the superseding indictment reflects these
33 principles.". So, effectively your position is that Mr Kromberg is acting in bad faith with he

1 and his colleagues in prosecuting this because it is being prosecuted for political motives.

2 Have I summarised that correctly?

3 A. No, I am certainly not saying they are doing this in bad faith. They are doing their job
4 and I would hope and expect that they will be doing it competently and think so themselves.

5 I am not saying they are acting in bad faith. I am saying that at a different level a political
6 decision was taken to investigate this further after it had lapsed for eight years.

7 Q. What difference does that make if a ---

8 A. I cannot help you at all on the actual practice.

9 Q. What difference does that make if a crime has been committed? If there is evidence
10 of a crime and the crime has been committed by a person, notwithstanding someone says let
11 us have another look at that, would you say that that is a political decision and he should not
12 be prosecuted?

13 A. No, I am not saying that but if you have evidence of a crime for some time, specific
14 evidence, then why has that not been prosecuted then? Has the evidence changed? Has
15 much more come to light in the last few years to alter that as in the reconsideration of a cold
16 case normally? But no, I do not think that is the case and the point here is that it is still a
17 question of timing and there are ways of explaining that as I started to do in the examination
18 with Mr Fitzgerald but there is, of course, much more to say there.

19 Q. Let us just bring a little bit to life with some of your experience dealing with the
20 Army.

21 A. Right.

22 Q. Some soldiers who were given written statements they would not be prosecuted at the
23 time in 1972 and 1973 in Northern Ireland are now being prosecuted because a politician
24 asked for the Director of Public Prosecutions to review the files notwithstanding there was no
25 new evidence. You are aware of that happening are you not, Professor?

26 Notwithstanding there was no new evidence. You are aware of that happening, are you not,
27 Professor?

28 A. I am aware of that happening, yes.

29 Q. So would you say that those prosecutions are politically motivated?

30 A. It is very difficult to say that unless I have much wider evidence. What I would say is
31 that, as far as the soldiers concerned, and I have talked to my soldiers who served in Northern
32 Ireland, as far as the soldiers are concerned they would certainly view that as being done in
33 bad faith and the cause of that many particular problems if you are basically changing a
34 situation at a later stage, but that does not mean it should not - it cannot happen on some

1 occasions, but I acknowledge that this will be a real difficulty and a considerable difficulty
2 likely to cause political controversy for all those people involved.

3 Q. Well, let us just go on a little bit further. We have looked at what the prosecutor said
4 that he is acting in good faith, which you have accepted he is acting in good faith, and at
5 paragraph 19, page 103, it is explaining the prosecution against Mr Assange. Professor, do
6 you understand ---

7 A. Yes.

8 Q. Tell us what you understand the indictment is prosecuting Mr Assange for doing?

9 A. For - from the view of those prosecuting, breaking United States laws.

10 Q. Tell us precisely what the allegations are - not precisely, the factual allegations. Is he,
11 for instance, being prosecuted for publishing the collateral murder video?

12 A. I doubt that he is being prosecuted for that. This prosecution, as I understand it, and I
13 stand to be corrected, is more specific than that. But, essentially, one would argue that at the
14 high political level the publication of that particular video would be damaging politically to
15 the United States under its current administration and, indeed, possibly under past
16 administrations as well. But that does not necessarily mean that he is being indicted
17 specifically, but my understanding is these indictments are rather more specific relating to
18 primarily to the Espionage Act, but I stand to be corrected on that.

19 Q. They are very specific, Professor. I am just reading your paragraph 14 because you
20 talk about the collateral murder video. Now if this was a political prosecution, would you not
21 expect him to be prosecuted for publishing on the internet that, given that you say ---

22 A. I do not, with respect.

23 Q. All right. I will take it in stages, Professor, because you do not have the documents in
24 front of you.

25 A. Thank you.

26 Q. I am going to read out paragraph 19.

27 A. Indeed (inaudible).

28 Q. At page 103, madam. "Rather, the charges against Assange focus on his complicity in
29 Manning's theft and unlawful disclosure of national defense information, his knowing and
30 intentional receipt of national defense information from Manning (counts 6 to 8), his
31 agreement with Manning to engage in conspiracy to commit computer hacking and his
32 attempt to crack a password hash to a classified US Department of Defense account (counts 5
33 and 18). The only instance" - so, pausing there, that has got nothing to do with publication on
34 the internet, has it?

1 A. Not directly. I understand, incidentally, that what you have said will be contested by
 2 others, including Mr Assange, but I take it correctly that this is part of an indictment and,
 3 from the point of view of the people drawing up that indictment, the people within the
 4 Department of Justice, they are acting in good faith on that. But we come back, I am sorry,
 5 and maybe I am out of order on this, but we come back repeatedly to the wider political
 6 dimension of why this is being done in the first place. I have no doubt that the way that it is
 7 being done in terms of actuality is very diligent and done very diligently by the Department
 8 of Justice staff, but that I think is not the point and the conclusion that I drew having looked
 9 at the situation over the best part of 20 years was that there was a strong political motivation
 10 in bringing this particular prosecution at this stage.

11 Q. Let us just - I want to carry on on this, Professor. Paragraph 20, "The only instances
 12 in which the superseding indictment charges Assange with the distribution of national
 13 security information to the public are explicitly limited to his distribution of documents
 14 classified up to a secret level containing the names of individuals in Afghan, Iraq or
 15 elsewhere around the world who risked their safety and freedom by providing information to
 16 the United States and our allies to the public". So the publication, the charge against Mr
 17 Assange is narrowly limited only to the publication where those publications included the
 18 unredacted names of informants or sources where they would be put in risk of great harm, do
 19 you understand that?

20 A. I understand that is what the prosecution is claiming, yes, certainly.

21 Q. Well, that is not what the prosecution say, that is the case against him. Why - who has
 22 told you it is any different?

23 A. Well, that is the case ---

24 Q. Who has told you the case is any different?

25 A. Well, that is the case that - that is the case made against him and we stand to hear that
 26 if it ever does come to court. But the point I am making, and I am sorry to come back to this,
 27 but it is a question at a higher level than this. I have no doubt that what this is being
 28 presented is done in all good faith and they may have cases to answer, but what I come back
 29 to repeatedly, and I was asked to do this from the point of view of a political scientist, was to
 30 consider why this was being brought now. So, essentially, I have no issue with the way that it
 31 is being done and I have confidence that this is being done at the professional level within the
 32 Department of Justice. My concern is to have taken an overview of why this is happening
 33 now and, I am sorry, but you can only understand this if you look at the actual history of the
 34 war over the last 20 years and it is just not narrowed down to a particular period.

1 MR LEWIS: Well, it is five to 12. I will turn to the chronology of the matter but it might be
2 a proper time to take 10 minutes, madam.

3 JUDGE BARAITSER: A 12.00 noon, break, is that the short break, Mr Fitzgerald, that is
4 being asked for?

5 MR FITZGERALD: Well, yes, it was a comfort break. Professor, would 10 minutes or 15
6 minutes be OK?

7 WITNESS: 10 minutes will be fine for me, yes, that is appreciated, yes, certainly, thank you.

8 JUDGE BARAITSER: It is five to 12 now, so if we come back at five past 12, we will
9 reconvene then, thank you very much.

10 WITNESS: Thank you.

11 (Short adjournment)

12 JUDGE BARAITSER: Thank you. Everybody is now here, so I am going to hand back to
13 Mr Lewis who will carry on his questions. As long as Mr Fitzgerald is here I think we can
14 manage.

15 MR LEWIS: Sorry, who? Oh, Mr Summers? Yes, madam, I am sure he will not object.

16 JUDGE BARAITSER: Yes. No. Mr Lewis.

17 MR LEWIS: Thank you. Professor, I am just going to see if we can consolidate our position
18 on your evidence. And tell me if I have got this right. Your position is you do not think the
19 Department of Justice prosecutors are acting in bad faith. Is that correct?

20 A. I would hope not and I do not see the evidence for it at that level of professional
21 prosecutors within the Department of Justice.

22 Q. Thank you. You said a moment ago you do not doubt, or you are not in a position to
23 say otherwise, that there is not sufficient evidence to convict Mr Assange on the charges for
24 which he is accused.

25 A. Well, since we have not heard the evidence I cannot give a definitive answer to that,
26 but I would hope that the professionals within the Department of Justice are presenting this
27 case in good faith and that they believe there is a case to be made, but beyond that one cannot
28 go without knowing the full evidence.

29 Q. Right. And your position is that at a high level, a political level, there has been a
30 decision to look at prosecuting Mr Assange again. That is your overall position.

31 A. Yes, and that is in a major context and I can only explain that position if I am allowed
32 at least a tiny bit of time to demonstrate that. It is not something which should be answered
33 in yes/no questions, I am sorry to say, but maybe that is just because academics like to talk,
34 but I do feel that it would be very helpful if I could explore this slightly more. Why is it, for

1 example, that the Obama administration took the decision not to prosecute Mr Assange and
2 the Trump administration has done otherwise? And that goes back very much to the major
3 changes in politics in the United States, not at the time of 2011 but between about 2007 and
4 2010. I am happy to explore those, but you may not feel it is appropriate. I certainly would
5 hope that it is.

6 Q. I agree with you; it is appropriate and we are going to ---

7 A. I would agree if I could ---

8 Q. Well, look at that exact question. You said, “Why the Obama administration took the
9 decision not to prosecute but the Trump took the decision to prosecute?” Now you will have
10 read ---

11 A. Right.

12 Q. --- what Mr Kromberg says about that, will not you?

13 A. Yes.

14 Q. And what does he say?

15 A. Well, you will have to remind me because I do not have the thing in front of me, but
16 he basically disputes that.

17 Q. Right.

18 A. I can tell you why the evidence more generally supports the view that this is a
19 political prosecution. I would be happy to do so.

20 Q. Well, let us just look at the evidence you say you have considered, but you have not
21 put in your report. Let us just look at ---

22 A. Right.

23 Q. --- Gordon Kromberg. Well, first of all, we will look at the Washington Post article,
24 which is one of the articles I think you mention, or certainly the other defence experts
25 mention. Let us just look at that. We have that Washington Post article at our page 336,
26 madam. Now, that Washington Post article is November 25, 2013 by Sari Horwitz. You
27 have looked at that, have you, Professor?

28 A. I have in the past, yes. I recall that and also the York Times article at about the same
29 time.

30 Q. Yes.

31 A. I have not actually mentioned it in my evidence, but other defence and witnesses may
32 well have done. I am really not sure on that.

1 Q. Well, let us read that because it goes to exactly your point about whether or not there
2 was a decision in the Obama administration not to prosecute and whether that decision was
3 changed by President Trump.

4 A. All right.

5 Q. In 2013, the Washington Post reported officials stress the formal decision of not being
6 made and a grand jury investigating WikiLeaks remains empanelled. They said there was
7 little possibility of bringing a case against Assange unless he is implicated in criminal activity
8 other than releasing top secret military and diplomatic documents, which is this case.

9 A. Right.

10 Q. So in 2013 there is no support, would you agree, for saying there was a decision not to
11 prosecute on these charges which he is now facing?

12 A. Well, that obviously is the view of the Washington Post at the time, but I would have
13 to insist that you can understand that and the position of the administration at that time only
14 in the context of what had happened before. If I can elaborate that as briefly as possible, I
15 will take just a couple of minutes.

16 Q. Professor, I will ---

17 A. The point is ---

18 Q. I will give ---

19 A. I think that is ---

20 Q. I will give you an opportunity to do that, but if you could just bear with me because I
21 am going to take you through ---

22 A. Right.

23 Q. --- some specific points which were about your argument that there is evidence that
24 the Obama administration decided not to prosecute and that the Trump decided to prosecute,
25 and when we finish going through all those piece of evidence I will let you say whatever you
26 want contrary to it. Do you understand?

27 A. Indeed, thank you.

28 Q. So let us just go through that. So we are still looking at that newspaper article. It
29 says, "WikiLeaks spokesman, Kristin Hrafnsson, said last week that the anti-secrecy
30 organisation is sceptical and short of an open official formal confirmation the US government
31 is not going to prosecute WikiLeaks." Does that support the fact that the Obama
32 administration decided not to prosecute? Does that?

33 A. No, it does not support.

34 Q. It does not. Right. Now, let us just look at ---

- 1 A. It does not support it.
- 2 Q. Let us look ---
- 3 A. But, please, you know ---
- 4 Q. I just want to take you, otherwise we will never finish this, Professor. I just want to
5 take you through this and then you can explain. You are welcome to make comments on
6 each one as we make them, but any general comments keep to the end. Is that all right?
- 7 A. Well, let me make a brief comment on that particular decision then.
- 8 Q. Well, now, that is fine.
- 9 A. That response from that associate of WikiLeaks is what you would expect when they
10 were not sure about what would happen in the United States. It does not mean that they knew
11 what would happen or not. It is what you would expect exactly from that organisation at that
12 time.
- 13 Q. Do you accept there has been an ongoing investigation into Mr Assange since 2013?
- 14 A. So we are told and, yes, I have no reason not to believe that. The intensity of that
15 discussion, the intensity of the investigation is unclear, but certainly if we are told that that
16 continued in what form, whether as hot, lukewarm or cold, then obviously one would accept
17 that, but we do not know the intensity of that further work and the diligence of it.
- 18 Q. You have seen, have you not, the decisions of federal judges in 2013 and 2015 to say
19 that the investigation continues? 2015.
- 20 A. Indeed, and that does not obviate the point I made at what intensity was this
21 continuing, and that will be decided more broadly, no doubt, at political levels.
- 22 Q. So are you changing your position ---
- 23 A. (Inaudible) aware of that
- 24 Q. Are you changing your position from there was no decision to prosecute, or they were
25 just investigating at a lukewarm pace? Is that now your evidence?
- 26 A. We certainly do not know, but the point is that there was no decision made to
27 prosecute and that is what I am saying. There was not a decision made to prosecute in that
28 whole period.
- 29 Q. How do you know that?
- 30 A. Well, because it was not announced. It did not happen.
- 31 Q. Where was Mr Assange ---
- 32 A. Are you telling me that it happened and we are unaware of it?
- 33 Q. Was it possible to arrest Mr Assange had there been a decision to prosecute him in
34 that period?

1 A. Pardon me. Here again I am straining beyond my expertise into the areas of law, but
2 is it necessary to actually be in a position to arrest before you decide to prosecute somebody?
3 I am not aware of that.

4 Q. If someone is hiding ---

5 A. I would have thought ---

6 Q. --- in the Ecuadorian embassy what would be the point of indicting him while he was
7 not available for trial?

8 A. Well, because you do not know when he might become available for trial. It would
9 certainly put a great deal of pressure on him and the organisation. In other words, if you felt
10 from your own political stance, and this would be within the Obama administration over that
11 period, that you wanted to put further pressure on him with a view to bringing him to justice,
12 I would probably take issue with you on that point. I would suggest that it would make very
13 good sense to actually initiate that process because, once it had been initiated, presumably it
14 would have been a standing attempt to do this to Mr Assange.

15 Q. I am going to take you to page 187 in the prosecution witness bundle in the second
16 declaration of Gordon Kromberg and I am going to read it out to you.

17 A. Thank you.

18 Q. “For the purposes of these extradition proceedings Assange has placed heavy
19 emphasis on news reports claiming that a decision was made not to prosecute him in 2013.
20 At the time, however, Assange’s representative expressed scepticism of those news reports
21 noting Assange was never notified of any decision not to prosecute.” See the article we have
22 looked at. And a comment we have also looked at. “Mr Barry Pollack”, do you know who
23 he is?

24 A. Not offhand. I probably have referred to him at some stage. I cannot place him
25 immediately, but that is ---

26 Q. He is the Washington attorney for – he is Mr Assange’s attorney.

27 A. Right.

28 Q. And he said, “They declined to do so, they had not informed us in any way they are
29 closing the investigation or have made a decision not to bring charges against Mr Assange.”
30 So it is fair to say, is it not, that his own lawyers did not believe there had been a decision not
31 to prosecute him.

32 A. I am not actually saying that there was a decision of not to prosecute, we do not have
33 evidence of that, but at two levels: firstly, his lawyer in Washington, that is precisely what I

1 would have expected him to say unless there had been a clear decision not to prosecute. It
2 certainly remained open.

3 Q. Professor ---

4 A. But the issue is why was that decision taken?

5 Q. Professor ---

6 A. Why ---

7 Q. --- a few moments ---

8 A. --- was there no prosecution prepared at that time?

9 Q. You have just said on oath to this court you are not saying there was a decision not to
10 prosecute, but less than seven or eight ---

11 A. I am saying we do not know.

12 Q. Please let me finish. Less than seven or eight minutes ago when I tried to summarise,
13 you said, "The real issue here is when Obama took the decision not to prosecute and Trump
14 took the decision to do otherwise", why have you just changed your evidence on that point?

15 A. Well, perhaps I should rephrase that slightly by saying, during his term in office,
16 Obama did not take the decision to prosecute. I should have put it as a positive not a negative
17 but, as far as we knew, no decision was taken to prosecute and, yes, it is true that a decision
18 to not prosecute was not formally taken. So, yes, I will correct myself on that by saying that
19 at that time the Obama administration did not take the decision to prosecute. They did not
20 withdraw the possibility of prosecuting, but they did not take the decision to prosecute,
21 whereas when the Obama administration did, that was the change.

22 MR FITZGERALD: When Trump.

23 MR LEWIS: I think you mean Trump.

24 A. Trump, sorry, yes. Freudian slip there.

25 Q. Yes. Because - but you have accepted, and I will just take you to the evidence on this,
26 this is page 186, paragraph 6, District Judge Barbara Rothstein on March the 4th 2015 was
27 persuaded, and this is in the public domain because her judgment was published, she was
28 persuaded there was an ongoing criminal investigation. On May 17th 2016, District Judge
29 Mehta said he found no reason to doubt there was an ongoing investigation of individuals
30 other than Chelsea Manning. So, in the public domain, it is abundantly clear there was an
31 ongoing criminal investigation into Mr Assange?

32 MR FITZGERALD: Well, hang on, it does not say that, does it.

33 MR LEWIS: Do you agree?

34 A. I would agree that the evidence suggests there was an ongoing level. We do not know

1 what that was, but that does not negate the fact that no decision was taken in that entire period
2 to prosecute Mr Assange and, essentially, there was a major change with the new
3 administration. But I am not saying for a minute that the decision was taken not to prosecute
4 and I admit that I put that badly when you asked me recently.

5 Q. Right.

6 A. The point is that over the whole of the Obama period, over that period really for the
7 best part of eight years, there was no decision taken to prosecute Mr Assange and that
8 changed.

9 Q. Right.

10 A. And what I am saying is that it is evidence from the broader spectrum that at the
11 highest level there were very strong politics involved in that. That is what I am saying.

12 Q. Thank you, Professor. And just so it is pellucidly clear, you are now saying that it
13 was not a decision - you are not saying there was a decision in the Obama administration not
14 to prosecute, but you are saying that there was no decision to prosecute during the Obama
15 administration?

16 A. From what we know in the public domain, it is the latter, there was no decision to
17 prosecute ---

18 Q. Well ---

19 A. --- in the entire period of the Obama administration and that has changed.

20 Q. And if we look at page 188 of the prosecution bundle, it is dealing with a tweet from
21 WikiLeaks where it says, "September the 15th 2016", now in whose administration was that?

22 A. September the 16th 2016 was right at the end of the Obama administration and it was,
23 what, about five weeks before the 2016 presidential election, that was Mr Trump was elected.

24 Q. And WikiLeaks say, "If Obama grants Manning clemency, Assange will agree to US
25 prison in exchange". So it is clear from that there was no thought in whoever wrote that
26 tweet at WikiLeaks that there had been a decision not to prosecute, would you agree?

27 A. No, as I have said, I mean from the point of view of people within WikiLeaks and Mr
28 Assange's lawyer, that is what you would expect them to say. They would obviously be very
29 cautious because there was still the possibility but, as I say, the decision was not taken
30 throughout that time. But, from their perspective, if one could get inside their thinking, they
31 cannot be sure that as long as there is not a formal decision not to prosecute they cannot be
32 absolutely sure, so you would accept that that is what they would actually say in those
33 circumstances. It is perfectly reasonable.

34 Q. So, Professor, we have moved from, in your evidence, a decision not to prosecute to

1 no decision to prosecute, that is where we have got to, is it not?

2 A. That is where we have got to and I acknowledge that the choice of the phrase, “no
3 decision” - “a decision not to prosecute” was incorrect, but the decision was that it was - the
4 situation was that no decision was taken to prosecute and what appears to have been a low
5 level leak, according to what is in the public domain, there was some activity still in that area
6 within the Department of Justice.

7 Q. Right. Would you just give me one moment, please.

8 A. Certainly.

9 Q. Now I think it was rightly pointed out by Mr Fitzgerald, your opinion is predicated on
10 the defence expert, the second part of your opinion is predicated on the second - on the
11 defence experts being correct, is that right?

12 A. Broadly speaking, yes.

13 Q. And, if those experts are not correct or the court preferred the evidence of the
14 Government, your opinion would change?

15 A. It might change. That will depend very much on the circumstances of the new
16 evidence or the new opinions. It is certainly possible that it could change. Things are not
17 completely set in stone but, at the same time, to assume they will change and my opinions
18 will change, that is also not set in stone.

19 MR LEWIS: Right, thank you very much. Would you forgive me, madam.

20 JUDGE BARAITSER: Yes, of course.

21 MR LEWIS: I do apologise. Just one small point.

22 A. Yes.

23 Q. You read the evidence of Mr Eric Lewis, who is a defence witness. I just want to take
24 you to one passage in his third witness statement. It is the statement dated the same day, in
25 fact, as your statement that, I presume, you have subsequently read, would that be right?

26 A. That would be right, yes, back in February.

27 Q. So I just want to read you what he says and see whether you agree with it or how it
28 affects your opinion and this is what he says is President Trump’s motivation for wanting to
29 see Mr Assange prosecuted, OK.

30 A. Yes.

31 Q. And what he says is, “WikiLeaks and Mr Assange poses a threat to the legitimacy of
32 Trump’s election campaign” - well, it says “campaign”, I think he means election, “...
33 campaign that he is desperate to squash by diverting attention and imprisoning Mr Assange.
34 WikiLeaks is a vulnerability for Trump because of the evidentiary links between his

1 campaign and WikiLeaks. In October 2016, WikiLeaks published DNC emails to the
2 undoubted benefit of Trump”. Then he goes on to say, at 35, “Trump regularly applauded
3 WikiLeaks during his campaign remarking, ‘I love WikiLeaks’.” And, at 36, “The
4 prosecution of Julian Assange is part of Trump’s efforts to distract attention from the help
5 that WikiLeaks gave and to focus attention on the earlier leaks which are much more
6 politically potent for him. He wants to put Mr Assange in jail and keep him quiet”. Do you
7 agree that that is the political motivation for ---

8 A. No, it may be one motivation but it is certainly not the only motivation. And it could
9 certainly be one and, of course, that was written back in January probably, maybe early
10 February, and at that time that was the case which could be made, but it is certainly not the
11 only reason by a long shot and, as I said repeatedly, the change with Obama through to
12 Trump has to be seen in a wider context. I am not denying there may be some specific view
13 that can be held on that and that you may be right to express that view ---

14 Q. Well ---

15 A. --- but it is not the motivation for Mr Trump. I think there are more.

16 Q. Well, let us examine whether he could be right. Help us with this, Professor. From
17 what he says, can you help us with why this would be a politically motivated prosecution of
18 someone who helped him get elected?

19 A. Essentially, I would guess - I mean, you would have to ask the person concerned who
20 wrote that, but from an outside view I would suggest that the concern was that that would
21 suggest there was some illegitimacy in his original presidential election. In other words, that
22 could cast doubt on the legitimacy of his presidency. Now that seem to me seems like a very
23 serious matter for Mr Trump, so in a sense I am reading into what is said in that evidence. I
24 suggest you might ask - want to ask the person concerned on that. I would not want to go
25 further than that at this stage.

26 Q. Well, you have said you rely, you were going to rely on what defence witnesses say.
27 Help us with this then. How does giving Mr Assange a public trial in the United States and
28 exposing all this to public scrutiny help keep it quiet?

29 A. Well, the point is that the fear I think on the administration’s side is many, many other
30 people come out as well. This is why, in answer to your previous question, I said that may
31 well be a motive. I do not see it as the prime motive. There are others which I think are more
32 important. So the point is that many other things would come out in court which I think from
33 Mr Trump’s point of view would be - would have been good for him. Of course, the delay
34 through Covid has prevented that. But the point is that, as I think has been made clear in

1 many cases, there is a very strong mood in the United States, particularly those who support
2 Trump, to consider Mr Assange utterly beyond the pale, so a major trial of somebody who is
3 viewed virtually as a public enemy might well have been seen to be of value to Mr Trump,
4 President Trump. Now I am not sure he is saying that is the case. I am suggesting that that
5 may also have been a factor. But what I will insist on is the views given by the other defence
6 experts there were not necessarily the only ones by a long shot that explained the change in
7 the Trump administration, but I would also point out that this also relates to why the Obama
8 administration did not choose to actually prosecute Mr Assange and that too is a very
9 important.

10 Q. Come on, come on Professor.

11 A. And, hopefully, we are going to get on to that before we finish.

12 Q. Come on, Professor, can you not admit that is just a nonsense explanation and the
13 only reason you are supporting it is because ---

14 A. What do you mean?

15 Q. --- you are giving a biased opinion in favour of Mr Assange?

16 A. I am not supporting that. I have just said, I thought I made it quite clear, that may be
17 one motive but I do not regard it as the primary motive. I think it is secondary. I may well
18 disagree with him on that.

19 Q. Yes.

20 A. I am not supporting him, no.

21 Q. Thank you very much.

22 A. Please. I am, you are almost putting - that is an interpretation which I do not accept.
23 MR LEWIS: Thank you.

24 JUDGE BARAITSER: Thank you. Mr Fitzgerald.

25 Re-examined by MR FITZGERALD

26 Q. Yes, Professor, I just want to go back to the start and various speeches were put to
27 you, and one of them selectively, do you have the Stop the War Coalition rally speech which
28 my learned friend put to you in part?

29 A. Bear with me, I can just get it in one moment. Apologies for that, yes, I have it with
30 me.

31 Q. Yes. Just my learned friend put to you a short passage in which it is said, on the
32 second page, "The Iraq war famously is a result of lies". That is obviously the reference to
33 the weapons of mass destruction thing. "Wars in Somalia are a result of lies". And then my
34 learned friend put to you, "The Second World War and the German invasion of Poland was

1 the result of carefully constructed lies”. That is the Nazi lies about Poland posing a threat, is
2 it not? That is clearly what he is ---

3 MR LEWIS: I am sorry, madam, that is properly leading.

4 MR FITZGERALD: That is clearly what ---

5 A. No, madam, certainly, I would assume that.

6 JUDGE BARAITSER: Mr Fitzgerald, what you are doing is suggesting to him ---

7 MR FITZGERALD: Well, all right.

8 JUDGE BARAITSER: --- what the meaning of that phrase is rather than asking him.

9 MR FITZGERALD: I am so sorry. OK. Well, I do not know why my learned friend put that
10 to you but when he is describing the fact that lies or disinformation have led to the invasion
11 of Poland, whose lies and disinformation led to the invasion of Poland by the Nazis?

12 A. Those were the lies which were put out by the Hitler government, the Hitler regime,
13 as to the way in which Poland were pursuant to present a threat.

14 Q. Yes. And would you regard that as a perfectly fair point to make?

15 A. It seems to me a reasonable point to make. It is a pity that he was not able to make it
16 more fully but as a point it was reasonable to make.

17 Q. And the overall context you see there of lies as a source of was repeatedly, is that a
18 political opinion that he has consistently taken?

19 A. It is a political opinion which has been consistent. Whether you agree with it or not is
20 the key point. I am certainly not agreeing with that although in many cases there may be
21 accuracy in it.

22 Q. Yes.

23 A. But the point is these are political views held by him persistently and that is part of his
24 wider political perspective from which he comes.

25 Q. Yes.

26 JUDGE BARAITSER: Mr Fitzgerald, I do caution you. I gave you significant leeway in
27 examination-in-chief for the reasons I gave earlier but in re-examination you really must ask
28 open questions. This is your witness.

29 MR FITZGERALD: Fair enough.

30 Q. My learned friend asked you questions about the issue of the prosecution coming
31 about in the Trump time and you said that there was the risk of a direction coming from
32 above. Can you just help us on that? The risk of the ---

33 A. Yes. What I mean there is that since the Trump administration came in there has been
34 a very strong impetus from Mr Trump – sorry, President Trump himself and Secretary of

1 State Pompeo and people in the Department of Justice at the top, particularly Mr Sessions and
2 others, that this basically should be proceeded with.

3 And this contrasts very strongly with the position under President Obama and I think
4 that in turn has to be understood in a way which is remarkably pertinent to this case. The
5 point here is that Mr Assange and the WikiLeaks team were doing their work in 2010/2011
6 and it relates to the previous 10 years.

7 Now, the Bush administration was absolutely convinced that it was necessary to go to
8 war with Iraq. By the tail end of that administration that had changed within the American
9 body of politics and in fact President Obama felt able to run the 2008 election campaign on
10 essentially a withdrawal from Iraq stand-points. There was a risk in that it did fit in with the
11 removal of the United States in this long war and essentially Obama took the view initially
12 that Afghanistan had to be continued with.

13 In fact, he was even concerned with expanding the troops to another 30,000 as indeed
14 Mr McCain, his opponent, had recommended. But his view was that would be to bring the
15 war to an end. By 2013/14 the Obama administration was of the view that essentially that
16 war could not be won. This is why since then the United States have been trying to withdraw
17 from Afghanistan, unsuccessfully so far.

18 The point about this is the Obama administration accepted that neither war could be
19 won but in the case of Afghanistan the WikiLeaks Afghan war leaks were actually pertinent
20 to that because that confirmed what many people had said that behind the scenes the military
21 themselves knew this was a very difficult situation. So, I would have to say that the whole
22 tenor of the Obama administration was to move on and I have no doubt that that was
23 something which related to the idea that they would not prosecute Mr Assange at that stage.
24 That did not mean the decision was taken never to prosecute him and I will stand corrected in
25 what I earlier said.

26 Q. Well ---

27 A. But the point about all of this – sorry.

28 Q. No, go ahead, go ahead. The point about it all of this is?

29 A. The point about all of this was that this explains why American politics if you like had
30 moved on by 2015/2016. Although I accept, as Mr Lewis said, that there was something
31 ongoing, we do not know at what level. There was no indication that this was a particularly
32 high level but it was when Mr Trump came in, President Trump was elected, that there was if
33 you like a sea change. And by what I said earlier on, and this I would probably disagree
34 somewhat with other evidence given, about having this part and parcel of this real concern

1 Mr Trump has about the nature of the press and particularly the nature of the Fourth Estate as
2 it had been modified in the internet age.

3 That I think to the administration is seen as a potential danger. For that reason we
4 now have the administration wish, I will put it no stronger than that, to prosecute Mr
5 Assange. There may be other factors but I think that is key but what one has to understand is
6 why there was not the prosecution under Mr Obama and that can only be understood in the
7 wider political context.

8 Q. Thank you. And my learned friend put to you parts of the Washington Post article.
9 You had not actually referred to it yourself but you had obviously ---

10 A. No, I had not.

11 Q. --- were aware of it ---

12 A. True.

13 Q. --- but since he has taken you to it and quoted you a part of it, do you have it available
14 to you? Or can I ---

15 A. I am afraid I do not with me, no. It is online.

16 Q. Right. Well, it just, if I can assist you, my learned friend quoted you a bit about from
17 where the – this is at page 2K5, madam – he quoted to you a bit from what Mr Barry Pollack
18 said on behalf of WikiLeaks, but can I just quote you the next paragraph so that we can have
19 the context? The next paragraph says, “There has been persistent rumours that the grand jury
20 investigation of Assange and WikiLeaks had secretly led to charges. Officials” – and it is
21 clearly the Department of Justice officials that are being referred to – “told the Post last week
22 that there was no sealed indictment and other officials have since come forward to say as one
23 senior US official put it, that the Department had all but concluded that it will not bring a
24 case against Assange.”. So, just help on this. You have said that there was no decision to
25 prosecute. In the light of that, is that fact that there was no decision to prosecute a significant
26 one at the time?

27 A. I think what comes through from that, if it is accurate, and the Washington Post
28 normally has a good reputation for accuracy in these matters, then it does indicate that the
29 Obama administration might have been on the point of saying there should be no prosecution.

30 Q. Yes.

31 A. We cannot be sure of that but it does lend credence to the idea that you had an
32 administration which believed that it was not appropriate to prosecute but did not announce
33 this, and I certainly accept that, compared to an administration which decided from a number

1 of motives, and I have been through some of them, that there was a very clear reason and
2 motivation for a prosecution.

3 Q. Right.

4 A. And that I think is a contrast between the Obama administration and to the Trump
5 administration.

6 Q. All right. Now, since you have been asked about why you relied on or took into
7 account what was said by the other defence experts on this issue, I just want to also put to you
8 another report from the Washington Post that they all relied on and you talked about the
9 question of whether there had been direction from above, has the report dated May 24 2019,
10 after the decision to charge him with 18 charges of espionage, I just want to put that to you.

11 It says, “When it came to Assange” – and then it refers to two senior prosecutors in
12 the Department of Justice – “James Trump” – that is the prosecutor, not any relation of
13 Donald Trump – “was concerned about pursuing a prosecution that was so susceptible to First
14 Amendment and other complicated legal and factual challenges to people familiar with the
15 matter said. Another prosecutor, Daniel Grooves, also disagreed.”.

16 At the time, he served as Criminal Chief in the US Attorney’s office that was handling
17 the case. And then we hear that Grooves left the Justice Department last month. Then we
18 have part of the concern among Justice Department veterans was that prosecutors had looked
19 at the same evidence for years during the Obama administration and determined such charges
20 were a bad idea in large part because Assange’s conduct was too similar to that of reporters at
21 established news organisations. People familiar with the Assange case said the Justice
22 Department did not have significant evidence or facts beyond what the Obama era officials
23 had when they reviewed the case.

24 Now, my learned friend was putting to you well, you should not have relied on what
25 the other experts said or taken it into account because of the passage he quoted from the
26 Washington Post. So, does that further quote from the Washington Post assist you in any
27 way?

28 A. Well, it does assist me because there have been indications both from that and I
29 believe from other areas that there was – there were substantial differences of opinion with
30 the Department of Justice. Now, the issue here goes back to what your learned friend was
31 saying earlier on and that is requirement for the staff in the Department of Justice to behave
32 with complete probity and to avoid political pressure. The problem I think here, and it comes
33 through fairly clearly there. is that that one would certainly say would hope to be true but

1 there seems to be within the Department of Justice differences of opinion at quite a high
2 level.

3 Q. Right.

4 A. Now, that may be at the professional level rather than the political level but it relates
5 specifically to the political level. So, to that extent it may be close to whoever lies on the
6 change between the Obama administration and the Trump administration but it does support
7 the view that was a very strong element of politics in what has happened. It is not purely a
8 matter of law.

9 Q. Right. And then of course you are not a lawyer and do not pretend to be and you are
10 not an expert ---

11 A. Exactly.

12 Q. --- in the Department of Justice but you said in answer to my learned friend's
13 questions you do not think, you hope not, that there was any acting in bad faith. You are not
14 giving your view on the inner workings of the Justice Department as a definitive view, you
15 are just saying you hope that there was no bad faith. Is that right?

16 A. Absolutely. I mean, I would not presume to have a definitive view on that.

17 Q. Yes, but the one thing you did say in answer to my learned friend was that you were
18 concerned that there had been direction from above. Is that right?

19 A. Well, could I use the term "strong influence" rather than direction?

20 Q. Yes.

21 A. Because it depends on what level you get direction.

22 Q. Yes.

23 A. You may well say that President Trump did directions to his own political appointees.
24 Whether that was basically directly given to the professional staff in the Justice Department I
25 cannot say but certainly the influence from the President Trump downwards at a political
26 level was the desire for a prosecution.

27 Q. Yes.

28 A. And that as I said earlier on is in contrast with the view of the Obama administration
29 but it takes us back even so to basically before the Obama administration, the changing nature
30 and perception of the Iraq war in the United States.

31 Q. Yes. Now, you also helped us on this issue. My learned friend put to you the case of
32 the soldiers who had not been prosecuted many years ago and then because it was requested
33 to look at the same evidence again and decide whether to prosecute them or maybe look at

1 new evidence I do not know, and you said you were aware of that and that many of them felt
2 they had been very unfairly dealt with.

3 A. Many of them did from their perspective, yes.

4 Q. But can I just, since this comparison has been made, ask you this? Was there any
5 suggestion that the reason why they were being prosecuted in the later stage was because they
6 had expressed political opinions that were unfavourable to the government in power?

7 A. From my knowledge certainly not that they had expressed them.

8 Q. No.

9 A. No. To my knowledge, certainly not.

10 Q. So ---

11 A. I could be wrong on that, but I doubt it.

12 Q. So, that is a totally different situation than the one we are in now, is it not?

13 A. Yes. I would say so, yes.

14 Q. And, finally, my learned friend said did you rely on Mr Eric Lewis and he quoted one
15 passage from his third statement and put that to you. Can I just - you had read Mr Lewis'
16 statement I take it? It was prepared in ---

17 A. I had earlier in the year, yes.

18 Q. Yes. Well, just let me just put this to you. Paragraph 14 of the same statement my
19 learned friend referred to you, he said, "As noted, Mr Assange was not indicted in 2010 for
20 the leaks that occurred that year and for which Manning was prosecuted and sentenced at the
21 time. Rather, he was criminally charged in April 2018 after the Obama administration took
22 the decision to commute Chelsea Manning's sentence in 2017. The Obama administration
23 reviewed his conduct and termed it could not, consistent with First Amendment, prosecute
24 him and then, it goes on to deal with the situation about Glenn Greenwald and Snowden and
25 Eric Holder saying, "We prosecute the leakers but not the publishers." And so, was that part
26 of what you relied on in reaching your conclusion?

27 A. Yes and, in a sense, I think I maybe should have raised it in an answer to a question
28 from your learned friend that I think the commuting of the Chelsea Manning period by
29 President Obama just before he left office was something which I think the Obama
30 administration was very unhappy about and I would think that it is reasonable to suggest, I
31 will not put stronger than that, that that ought to be one of the factors in the decision of the
32 Trump administration to proceed with bringing Mr Assange to court.

33 Essentially, as I understand it, and as I say, I am not a specialist in American law, still
34 less British law, as I understand it, if a President commutes a sentence so that the person is

1 released, that is not something which can be turned around by a subsequent administration,
2 but it does mean that a subsequent administration could act in a particular way in light of that.

3 Q. And just continuing this because my learned friend has suggested that you should not
4 have been replying on what Mr Eric Lewis said, at paragraph 22 of the same statement, he
5 looks at – he says there is no real question that President Trump associated Assange and
6 WikiLeaks with other leakers in his mind as a result of their campaign for press freedom and
7 support of whistleblowing. In your view, is that a fair point?

8 A. It is a fair point. What I would say is that when I said in answer to Mr Lewis’
9 question that I did not necessarily agree with the view as it was put in that evidence, that does
10 not mean that I regard the evidence as a whole as something which is unacceptable. In that
11 particular area, I myself would have put it in a rather different way if I had been asked on that
12 specific question.

13 Q. And then it goes on at paragraph 23, “The Trump administration resurrected
14 WikiLeaks’ association with Manning and thereafter, used it to spearhead a campaign against
15 Assange as a threat to national security,” and then it sites Mike Pompeo and his statement
16 condemning Assange before he was prosecuted and saying that the First Amendment did not
17 apply to foreigners and is that something that you think is fairly taken into account in
18 deciding whether there are political factors behind this prosecution?

19 A. I think it is reasonable to take that into account. I think this is the problem in a sense
20 in that when President Trump believed that it was necessary from his own motives to go for
21 Mr Assange, it is clear that there were other members of the administration who were very
22 quick to go along with that, to some extent, the kind of public mood was developed or
23 encouraged, at least, I will not say developed, encouraged in the United States to say that this
24 was the necessary step forward from the point of view of the President and his supports.

25 Q. Right. just one final point. Again, this statement which my learned friend said you
26 should not be relying on, paragraph ---

27 MR LEWIS: I did only put paragraph 35.

28 MR FITZGERALD: I know, but the suggestion was that Mr Lewis was some eccentric
29 person and that to rely on anything he said would be misconceived. I think I am entitled,
30 since this witness has said that he did look at those statements, to put the reasonable things
31 that Mr Lewis said.

32 JUDGE BARAITSER: I think that is fair.

33 MR FITZGERALD: Thank you, there is just one more. Paragraph 38, “Barr took office on
34 February 14th, 2019. Four months after Barr took office, prosecutors filed a superseding

1 indictment, racking up the charges against Mr Assange from one count of violating the
2 Computer Fraud and Abuse Act, attracting a total of ten years' imprisonment to 17 additional
3 counts of violations of the Espionage Act totalling 175 years. These charges were added over
4 the strong objections of career federal prosecutors, including the criminal chief of the US
5 Attorney's Office (inaudible) and a prosecutor who had charged a CIA officer with leaking
6 classified information to a journalist in 2015. Again, is that something that regarded as
7 reasonable to rely on in forming your opinion, your political science opinion, as to whether
8 political factors are at work here.

9 A. It is reasonable to rely on that as one of many factors and if political factors are at
10 work, I am sorry to come back to this, you do have to see them in the wider context, but
11 within the Trump administration, I think that is a reasonably clear example of evidence to
12 suggest that there was a strong political motive here, particularly, I think, the extra
13 indictments coming on. The misperceptions had originally been favoured by Mr Trump. He
14 then basically lost faith and was replaced by Mr Barr and then you had that soon afterwards.

15 Now, you cannot say whether there was a direct connection with that, but one can at
16 least imply that there was that change and note that change from one basically potential
17 charge to a large number of additions which carry very much longer sentences.

18 Q. And as to your view that pressure has been put on prosecutors, is there anything in
19 that history that suggested that?

20 A. Well, it suggests certainly, I mean, this is a difficult one because it adds to the
21 evidence which has emerged that in fact there was pressure on the prosecutors, but that is not
22 for me to say that because of that, the actual professional prosecutors within the Department
23 of Justice veered from what they thought was accurate and right and proper. I cannot say
24 that, but what I can say is that it is further evidence at the political level, the high level, of
25 pressure being put on the system. Let me put it more widely, the system rather than specific
26 individuals and I think there is pretty certain evidence of that, sadly, in this particular case.

27 Q. Thank you very much, professor, I have got no further questions.

28 JUDGE BARAITSER: Thank you very much Professor Rogers. You will be pleased to
29 know that concludes your involvement in this case and you are very welcome to leave. I
30 think we will sever this link now. Thank you very much.

31 It is now one o'clock, we will come back at two.

32 WITNESS: Thank you.

33 JUDGE BARAITSER: Thank you very much. We will come back at two o'clock and the
34 next witness to be called will be Mr Timm, is that correct?

1 MR FITZGERALD: Yes, I think that is right.
2 JUDGE BARAITSER: He is over the link, is he? He is from America.
3 MR FITZGERALD: He is, madam, yes.
4 JUDGE BARAITSER: Lovely.
5 MR FITZGERALD: Thank you very much.
6 JUDGE BARAITSER: Will I need anything else for his ---
7 MR FITZGERALD: Can I just check for a moment?
8 JUDGE BARAITSER: Please.
9 MR FITZGERALD: Yes, I think it is just his statement. I do not think there are voluminous
10 exhibits. Thank you.
11 JUDGE BARAITSER: Thank you very much, two o'clock then, please.
12 (Luncheon adjournment)
13 JUDGE BARAITSER: Yes. Everyone can sit down.
14 MR SUMMERS: Thank you, madam. Madam, the next witness is Mr Trevor Timm. He is
15 the Executive Director of the Freedom of the Press Foundation. His report is at tab 65.
16 Madam, it came in volume O. If you are working from volume O, madam, you might find
17 the bundle on top of the blue box on your desk of more use.
18 JUDGE BARAITSER: Ah, so you would rather I used that one.
19 MR SUMMERS: I think it might assist us more today because the exhibits did not flow
20 terribly well. They were not identified individually and I think the witness statement in its
21 final signed form had paragraph numbering that was different by one.
22 JUDGE BARAITSER: All right. So are we able to make contact with Mr Timm?
23 COURT USHER: We seem to be experiencing some 2 o'clock problems.
24 JUDGE BARAITSER: Ah. Is there anything we can do to help with that? Now I assuming
25 we have not yet made contact, is that right? Can you see and hear the court, Mr Timm?
26 COURT USHER: Can you hear us all right?
27 MR SUMMERS: Apparently not. Mr Timm, can you hear me?
28 WITNESS: I cannot hear you if you are talking to me. Can you hear me?
29 MR SUMMERS: Yes.
30 COURT USHER: OK, can you hear me, Mr Timm?
31 JUDGE BARAITSER: Apparently not.
32 WITNESS: Yes, it looks like people are gesturing towards my way but I cannot hear
33 anything.
34 COURT USHER: You cannot hear anything.

1 WITNESS: Can you hear me? Can you put your thumbs up if you can hear me. OK. So I
2 do not have audio coming into my ear. I can hear the system is giving me feedback, but
3 nothing from the courtroom.

4 MR SUMMERS: Madam, can we invite you to rise while we try and resolve this.

5 JUDGE BARAITSER: All right, yes, thank you.

6 MR SUMMERS: But it does rather sound like a problem at Mr Timm's end.

7 JUDGE BARAITSER: All right. Can you come and get me as soon as it is resolved.

8 COURT USHER: Yes.

9 JUDGE BARAITSER: Thank you.

10 (Short adjournment)

11 JUDGE BARAITSER: Thank you.

12 MR SUMMERS: Thank you for your patience. We think we have done it. He may look
13 small, but at least we have him.

14 TREVOR TIMM, Affirmed

15 Examined-in-chief by MR SUMMERS

16 Q. Thank you, Mr Timm. Can you hear me?

17 A. I can, yes.

18 Q. Great. Are you the co-founder and executive director of the Freedom of the Press
19 Foundation based in San Francisco?

20 A. I am, yes.

21 Q. Thank you. And have you provided a witness statement in these proceedings dated 17
22 July of this year. Madam, your tab 65.

23 A. I have, yes.

24 Q. And just formally, is it accurate?

25 A. It is accurate, yes.

26 Q. And do you adopt it as your evidence in these proceedings, please?

27 A. I do, yes.

28 Q. Thank you. Right.

29 JUDGE BARAITSER: Just to be clear then, you say tab 65, but in the bundle that you have
30 given me it is the first tab.

31 MR SUMMERS: It is, yes. That has been drawn out as a separate - it is tab 65 of the core
32 bundle.

33 JUDGE BARAITSER: Thank you.

1 MR SUMMERS: Can you briefly, please, explain to us what the foundation exists to do,
2 Mr Timm?

3 A. Sure. So Freedom of the Press Foundation is about eight years old. Our mission is to
4 protect and defend public interest journalism in the 21st century and so we build secure
5 communication tools for journalists to communicate with whistleblowers. We teach
6 journalists how to improve their digital security to protect themselves online. We
7 systematically track the press free violations in the US with a project called the US Press
8 Freedom Tracker, and we generally advocate for strong press credence in the United States.

9 Q. Thank you. Does it follow from that that you are familiar with the activities of
10 investigative journalists in America?

11 A. Yes, absolutely.

12 Q. And are you familiar with how those activities interact with US law?

13 A. Yes.

14 Q. And, in particular, the First Amendment.

15 A. Yes. I graduated law school in 2011 and have been writing about the press freedom,
16 the First Amendment and how they interact with each other for about 10 years.

17 Q. Thank you very much. I want to ask you today, please, about the work of national
18 security investigation and journalism and, in particular, the practice of obtaining, receiving,
19 publishing classified or secret documents. Is that something with which you are familiar?

20 A. Yes, absolutely.

21 Q. Is it something that has some history in the US?

22 A. Absolutely. There is a rich history of reporters of all stripes from major newspapers
23 all over the country reporting on sensitive national security of foreign policy issues, which
24 the government considers classified. And there is extensive legal history about this as well,
25 most notably the Pentagon Papers case from 1971 in which the Nixon administration
26 attempted to censor the New York Times using the Espionage Act for its publication of a
27 secret history of the Vietnam war.

28 Q. And ---

29 A. And, in fact, I would direct the court – go ahead.

30 Q. No, no, you please do. I interrupted you.

31 A. I would just direct the court to exhibit number 18 in my written testimony. This was a
32 deposition that Max Frankel, who was the Washington bureau chief at the time filed with the
33 district court in the famous Pentagon Papers case and he said, “Without the use of secrets
34 there could be no adequate diplomatic, military, political reporting of any kind, the kind that

1 people take for granted, either abroad or in Washington, and there could be no mature system
2 of communication between the government and the people.” This was written more than 40
3 years ago but could not be truer today.

4 Q. OK.

5 A. We are truly – now every important story that has been published in the US
6 newspapers that contained classified information.

7 Q. All right. And just remind us, did the Supreme Court allow the Espionage Act to be
8 used to silence the New York Times in that case?

9 A. No. The landmark decision in 1971 of the Supreme Court roundly ruled that the
10 government could not censor the New York Times from publishing this information.

11 Q. This is, I think, your paragraphs 33 to 35 of your report. You also produce as exhibit
12 19 an article by one of your reporters, Peter Stern, from 2017 which I think traces the history
13 of threats made to various publishers down the years to use the Espionage Act in that way.
14 Are you familiar with this article?

15 A Yes, I am.

16 Q. So it begins, madam, in the bottom right-hand corner there is pagination, so it begins
17 pages 1, 2 and 3 concern the Pentagon Papers case, and in addition to the prosecution of the
18 whistleblower in that case, Daniel Ellsberg, your reported also tells us about the failed
19 attempt to prosecute the New York Times’ reporter, Neil Sheehan. Is that right?

20 A. Yes, that is correct. The article actually details what happened in earlier times, the
21 past half-century, where various administrations have either threatened to use the Espionage
22 Act against reporters, or attempted to do so. In that case, in the Pentagon Papers, a grand jury
23 was empanelled to indict Neil Sheehan, the reporter from the New York Times. Thankfully,
24 the grand jury never came back with an indictment, but it was the first of many instances
25 where the government considered using the Espionage Act against reporters, but in each and
26 every case the government ultimately concluded, or was forced to conclude, that such a
27 prosecution would be unconstitutional, including, I might add, most recently with the Obama
28 administration in this very case, the Obama administration as the court I believe has heard
29 already, had been investigating Mr Assange and WikiLeaks for many years and ultimately
30 declined to prosecute them for the very reason that they were worried about the extreme
31 constitutional issues in this case and the fact that any precedent set in this case could be used
32 against reporters at papers like the New York Times and the Washington Post.

33 Q. OK. Thank you. Just coming back to exhibit 19, the half dozen or so examples that
34 you give include in 1975 President Ford’s administration threatened to prosecute the Times

1 and never did – bottom of page 3, top of page 4. Same thing in 1981 in relation to the author
2 James Camford, disclosing criminal activities by the NSA. Then there is, I think, Mr
3 Morrison’s case; he was a whistleblower. He was not the press, was he?

4 A. Correct. And then also during the Bush, George W Bush, administration in 2000’s,
5 the attorney general at the time, Alberto Gonzales, seemed to threaten publicly to use the
6 Espionage Act against New York Times’ reporters James Risen and Eric Lichtblau for their
7 reporting on (inaudible) happening going on at the NSA and other stories about national
8 security issues that were of public importance.

9 Q. OK. Is that the AIPAC case you talk about on page 6?

10 A. No, that is actually a different case.

11 Q. OK.

12 A. The case I was referring to involved two Pulitzer Prize winning journalists who the
13 Bush administration threatened, but ultimately chose not, to prosecute, likely because they
14 knew of the constitutional perils that they would have to overcome and the fact that it would
15 violate the First Amendment.

16 Q. All right. Now, the theory of criminality being postulated in this case runs as follows:
17 Miss Manning commits a crime in whistleblowing, therefore any act, it is said, that
18 encourages or solicits or assists her in doing so is itself criminal, even if its purpose was
19 journalistic. Is that in your experience a coherent view or theory of how criminal works
20 under the Espionage Act?

21 A. Absolutely not. There is a long history, of course, talking about the process of news
22 gathering. You know, I talked about in my declaration about the fact that materials that
23 journalists often write about in print do not often magically land on their desk. They are
24 often talking with sources, potentially asking them for documents. Once they get documents,
25 they are asking for clarification and potentially more information. This is not out of the
26 ordinary at all. In fact, it is standard practice when we are talking about how journalists
27 operate. If they were not allowed to ask questions or ask for more information it would be
28 hard for them to learn anything at all and what particularly concerns me about this case is that
29 many of the counts in the indictment essentially would criminalise this behaviour, but it
30 would not just criminalise this behaviour. It would criminalise the mere act of having this
31 material with you, the charges that relate to 793(c) of the Espionage Act. Just the mere
32 thought of appealing these documents, the US government is saying is potentially criminal
33 and so, this would criminalise every single reporter who has ever received any document,
34 whether they asked for it or not, from a source that potentially broke the law.

1 Q. And that opinion, is it one that you alone hold or are you aware that others are of the
2 same view?

3 A. This is almost a consensus opinion among First Amendment experts, media law
4 lawyers, anybody who has studied the issue extensively. It is why virtually every newspaper
5 in the United States has vehemently condemned the charges before the court today as a
6 potential clear and present danger to press freedoms in the United States. Many of these
7 papers I might add have partially criticised Mr Assange and WikiLeaks in the past, but they
8 nevertheless see the extreme dangers in the case that a journalist would face if this case was
9 to go forward.

10 Q. Now, your exhibit 19 referred at page 6 to the AIPAC case, the failed attempt to
11 prosecute journalists from the American/Israeli public affairs committee, in particular, James
12 Rosen, an attempt that was dropped.

13 A. Yes, this was the only time in modern history that the federal government attempted
14 to use the Espionage Act against somebody who was not a government employee and this
15 was a case where these gentlemen were receiving information and potentially passing them
16 on to other journalists.

17 Journalists at the time were incredibly worried about this case, that it could open up
18 prosecutions to them under the Espionage Act, but as you mentioned, the case quickly fell
19 apart due to the judge's ruling in the case and the government ultimately dropped the case
20 without ever getting to a decision.

21 Q. Thank you, and the article that you have included as your exhibit 3, I think you
22 include as an explanation for why that case collapsed and why the theory of criminal liability
23 based on soliciting leakers, whistleblowers is untenable. At page 1034 of exhibit 3, I think
24 the point is made that if it were a tenable theory of criminality, it would have criminalised a
25 great many of the world's ground-breaking public interest reporting. Are you familiar with
26 that aspect of this particular discussion?

27 A. Absolutely. I would encourage the court to read this paper in full. I believe it is
28 actually the best explanation that I have read in detail of (inaudible) law in the United States
29 and how it affects the press. This paper makes the assuringly important point towards the end
30 of the facts that many journalists who the public has known well for many years likely would
31 have been found in violation of the law if this idea that they can conspire with a source to
32 break a law was actually in effect. So, for example, the two most famous reporters in the US
33 history, Bob Woodward and Carl Bernstein, could have all been charged in the wake of
34 persistently asking and receiving information from the FBI Deputy Director, Mark Felt, better

1 known as ‘Deep Throat’ during the Watergate investigation. There are many more examples,
2 San Francisco Chronicle reporters could have been charged with a conspiracy to violate the
3 federal rules of criminal procedure when they reported on the BALCO steroid scandal in
4 baseball which they won a Pulitzer Prize for.

5 MR SUMMERS: Thank you. I do not want to interrupt you, but these are the examples that
6 are gone through at pages 1034 and 1035 of the article that you commend to us and we can
7 read them.

8 A. Absolutely.

9 Q. I am pushing on because time is relatively short. I want to, with all that in mind, to
10 look at some of those journalistic activities that are said in this case to be criminal or to
11 suggest criminal complicity in the act of whistleblowing and, first, can I look at the provision
12 to a whistleblower or a secure submission system, Dropbox? You deal with this firstly at
13 paragraphs 8 to 10 of your report. The indictment in our case terms this criminal complicity
14 in assisting Manning in her whistleblowing activities. What do you say about that kind of
15 journalistic activity?

16 A. Yes. From my reading, the indictment seems to make it seem like having a
17 submission system that whistleblowers can drop information or documents to is some sort of
18 malicious anomaly or the fact that WikiLeaks was publicly asking potential sources to send
19 them information when in fact this is common journalist practice, especially in 2020. In fact,
20 at the Freedom of the Press Foundation, we build a tool, it is called SecureDrop, which is
21 essentially an open source version of a whistleblower’s submission system. This SecureDrop
22 system is used at over 80 major news organisations worldwide, including many of the biggest
23 in the United States. That includes the Guardian, the Washington Post, the New York Times,
24 the Wall Street Journal, USA Today going on down the list. On each of these news
25 organisations’ websites, they have instructions for how sources can submit information in to
26 them. As I say in my statement, some use rather legalistic language, but others explicitly say,
27 “Leaked documents,” to us. You can look at, for example, icij.org, an international
28 consortium for investigating journalists.

29 Q. Your exhibit 7, madam.

30 A. Which famously published the Panama Papers investigation which was based off of a
31 leak from an unidentified source, but an organisation by an organisation that is very well
32 respected around the world.

33 They are explicitly saying on their page, “Leak to us.”

1 Q. Okay, so let just look very briefly at your exhibits. Exhibit 1 is the WikiLeaks
2 submissions page about which complaint is apparently made. Exhibit 2 you refer to at
3 paragraph 10 confirming that other news outlets developed, as a result, their own SecureDrop
4 systems. Is that right?

5 A. That is correct.

6 Q. And then, you return to the issue at paragraphs 14 to 17, so look briefly at exhibit 4,
7 your own foundation launches SecureDrop as a secure platform for whistleblowers in 2013, I
8 think. Is that what you were just talking about?

9 A. Yes, absolutely. We have been developing a SecureDrop system for about six years
10 now and like I say, it is being used in over 80 news outlets.

11 Q. If one were to flick through exhibit 5, we have some of the examples of well-known
12 news outlets soliciting leaks through SecureDrop facilities, is that right?

13 A. That is correct and, in fact, I have also included an exhibit of one of the most well-
14 known reporters in the United States, David Fahrenthold from the Washington Post who
15 recently won a Pulitzer prize for reporting on the Trump organisations. In every email that he
16 sends to peddle a source, he includes a link to the Washington Post SecureDrop.

17 Q. That is your exhibit 9, I think it is a tongue in cheek report on what you have just
18 described. Exhibit 6 is part of your website, explaining how news agencies should do it. We
19 have looked at exhibit 7 and is it right that news organisations even go so far as to advertise
20 the existence of these drop boxes in order to target whistleblowers?

21 A. Yes, that is correct, so, for example, they may advertise it in their social media posts,
22 so, for example, the New York Times, there is a link to theirs in their bio page and their
23 Twitter page, but news organisations have even taken out advertisements targeting potential
24 whistleblowers to tell them about their system so the example that I gave was a Wall Street
25 Journal story about the popular news site, Gizmodo, sending as online and I think potentially
26 even billboards in person. I am not sure if that was Gizmodo or another news organisation,
27 but essentially, telling potential whistleblowers to leak to them.

28 Q. Your exhibit 11 and just looking finally on this chapter at exhibit 10, is it something
29 you have done yourself?

30 A. We created a group of concepts for how news organisations can potentially do this in
31 a safe manner. The reason we were at (inaudible) about this is because often, advertising can
32 leak sensitive information about sources, so we wanted to make sure that if news
33 organisations did this, which they were already doing, they did it in a safe way, so we tried to
34 explain how that could potentially work.

1 Q. And just looking at exhibit 10 on the third page is a copy of a tweet from Freedom of
2 the Press, “If you work for the Trump administration and your conscience compels you to
3 blow the whistle, you can use the SecureDrop to contact the press.” Who sent that?

4 A. I believe it was from our Freedom of Press Foundation organisational account.

5 Q. And just pausing there, if I had come to you in 2009 and said, “I am planning to do
6 something like this. Am I at risk of criminal prosecution?” What would you have told me?

7 MR LEWIS: That is not in his statement.

8 JUDGE BARAITSER: I am going to allow the question.

9 WITNESS: I would have said, you know, pardon?

10 JUDGE BARAITSER: Yes, just answer the question please.

11 WITNESS: I would have said that you know, that is protected speech under the First
12 Amendment.

13 MR SUMMERS: Right. Can I therefore just move, your paragraphs 11 to 13, and the most
14 wanted list on the WikiLeaks page? Before I do, I think you have a point to make about the
15 most wanted list at paragraphs 24 through to 31 and what, in a sentence, is that point?

16 A. Well, you know, it was not mentioned in the indictment, but this most wanted news
17 page was actually, not solely created by WikiLeaks. It was actually in essence a document
18 that anybody in the public can potentially edit and the Electronic Frontier Foundation, a civil
19 liberties organisation, my former employer wrote extensively about this that this was not just
20 WikiLeaks saying that these documents should be published. It was members of the public
21 potentially acting as human rights defenders, stallers, journalists and it was a collaborative
22 document, not just one, that was created by WikiLeaks.

23 Q. And that is, I think, exhibit 17 analyses that in detail. Is it an analysis with which you
24 concur or not?

25 A. I concur, yes.

26 Q. Madam, you will recall that the list itself is your volume L2 and it begins, “You may
27 securely and anonymously add information to this page. For each entry click edit next to
28 each country.” We looked at that before. Now, the most wanted list and positively asking
29 people for classified information, is that something that is criminal?

30 A. No. As I stated in my written opinion this is firmly entrenched in the free speech
31 rights of anybody in the US.

32 Q. That is your paragraphs 11 through to 13. Can I test it then finally in this way? Your
33 paragraphs 18 to 23. The senate committee reported on CIA torture in I think 2014, is that
34 right?

- 1 A. Correct.
- 2 Q. Yes. The committee report was classified or unclassified?
- 3 A. The executive summary was eventually unclassified with major redactions. The full
4 report remains classified.
- 5 Q. Just remind us in essence what was the CIA found to have been up to?
- 6 A. The CIA in the mid – early to mid-2000’s was engaged in a systematic torture regime
7 which violated in my opinion both international and domestic law yet no one was ever
8 brought to justice for engaging in this blatantly – these blatantly illegal acts. The Senate
9 ended up investigating the CIA and produced a report, it was hundreds and hundreds of pages
10 long yet it was – even though it contained much evidence of criminality the classification
11 system was being used to hide those acts and it was my opinion that if the government did not
12 release it in full then a whistleblower within the government should give it to the press
13 because it is information that the public deserve to know.
- 14 Q. Just pause there. It was classified information. Secret.
- 15 A. Likely top secret.
- 16 Q. And ---
- 17 A. A higher classification level than anything in this case.
- 18 Q. And any whistleblower within the government who did that would have been
19 committing a criminal act?
- 20 A. Most likely, yes.
- 21 Q. Can you look at your exhibit 14 please?
- 22 A. OK.
- 23 Q. Did you send that Tweet that we can see at the top of the page.
- 24 A. I did, yes.
- 25 Q. If you had the CIA torture report and are in a transparent mood, here is a list of the
26 news organisations running SecureDrop. Yes?
- 27 A. Yes, I did send that.
- 28 Q. Did you also more widely advertise your solicitation or invitation? So, tab 12, was
29 this an article that you published inviting somebody to whistleblow or leak the report?
- 30 A. I did. It was particularly about members of congress who had access to the report
31 who clearly saw this as illegal behaviour. The government was using the classification to
32 hide this illegal behaviour and I believed it was their duty to potentially tell the public even if
33 the government claimed that they could not.
- 34 Q. Exhibit 13, did you write in the Guardian about your efforts?

1 A. I did, yes. And to be clear, I was not the only journalist asking for government
2 employees to potentially give this document to journalists. There was probably you know,
3 dozens of journalists saying the same thing but again, that is often what journalists do.

4 Q. Was it ever suggested to you then or since that that is criminal activity on your part?

5 A. No, absolutely not. I mean, this is First Amendment protected speech and again, this
6 is not just my opinion it is the consensus opinion of virtually every person and lawyer or
7 media lawyer in the country.

8 Q. Under the criminal theory contained in Mr Assange's indictment, what would your
9 position be?

10 A. My position would be that this indictment is clearly unconstitutional. WikiLeaks, just
11 like anybody else, has First Amendment rights. That is to say that we would like to receive
12 documents that potentially show corruption or abuse or illegality, just like every newspaper in
13 the United States does. And if this were to go forward it would potentially criminalise all of
14 those other news organisations.

15 Q. Thank you very much. If you would like to wait there, there may be some more
16 questions for you.

17 Cross-examined by MR LEWIS

18 MR LEWIS: Madam, can we just enquire if it is possible to increase the view?

19 JUDGE BARAITSER: Simon.

20 COURT USHER: Sure.

21 MR LEWIS: Ah. Much better.

22 Q. Mr Timm, I am going to ask you some questions on behalf of the government.

23 A. Correct.

24 Q. And you can hear me OK?

25 A. I can hear you, yes.

26 Q. Good. And your statement is fairly recent, it is July the 17th, is that right?

27 A. That is correct.

28 Q. And you describe yourself as an expert witness and believe your opinion is an
29 expert's opinion compliant with the English Criminal Procedural Rules?

30 A. Yes.

31 Q. Could you just help us with what those rules say?

32 A. Um, I do not have the rules in front of me so then I am not an expert ---

33 Q. No, no ---

34 A. --- in the law in the UK.

- 1 Q. Sure, but just give us the gist.
- 2 A. But I am ---
- 3 Q. Give us the gist of what your obligations to the court are.
- 4 A. Well, my obligations to the court are to explain my credentials, how I have been
5 working on these issues as an expert for many years and to be truthful to the court.
- 6 Q. What about being objective and unbiased and with no conflict of interest?
- 7 A. Sure. Absolutely.
- 8 Q. So, your opinion you say is objective, unbiased, with no conflict of interest, is that
9 right?
- 10 A. Yes.
- 11 Q. OK.
- 12 A. I believe that to be the case.
- 13 Q. Now, forgive me if I have got this wrong, but do you work for the FFP or have you
14 founded the FPF?
- 15 A. Yes. Free the Press Foundation, yes.
- 16 Q. And you contributed to Mr Assange's costs in this case.
- 17 A. Yes. As I disclosed in my witness statement our organisation believes that this case is
18 a dire threat to the person then and the press freedoms in the United States and so an
19 organisation we decided to make the contribution to the legal costs given the paramount
20 issues at stake.
- 21 Q. Thank you. How much did you contribute?
- 22 A. Around \$100,000 US dollars.
- 23 Q. And is there any agreement in any form to be reimbursed those funds in any
24 circumstances?
- 25 A. I am not sure I understand the question.
- 26 Q. I will try it again. Is there any agreement to be reimbursed the \$100,000 or any part
27 of the \$100,000 in any circumstances?
- 28 A. Oh no. Not that I am aware of.
- 29 Q. Do you yourself feel threatened if this prosecution went ahead?
- 30 A. Um, myself personally? I work on behalf of journalists in the United States. I feel
31 that they – their rights are under threat. I myself am not a full-time national security reporter.
32 I am not talking with sources who potentially may give me information on a daily basis. It is
33 – my fear is on behalf of them.

1 Q. But we were just shown a report where you were asking for the CIA report. Is that
2 right?

3 A. Yes. As I said, we believe that that is protecting to each other the constitution and
4 certainly if this case were to go forward, not just anybody who says something like that
5 potentially would find themselves under criminal liability, but anybody who has reported on
6 WikiLeaks cables in the past entirely which could include hundreds or thousands of
7 journalists in the United States. The Espionage Act is written so wrongly that even people
8 who are reading the newspaper that contains this information potentially would be violating
9 it. So, in that sense I think yes, everybody is and should be fearful of this case.

10 Q. So, have I understood it correctly, Mr Timm, if this case went to prosecution you
11 would not feel comfortable writing or inviting people as you did do to provide you with the
12 CIA report, is that right?

13 A. In my Tweets and the exhibits I was advocating for sources to go to other news
14 outlets. In all of the cases I was not saying send it to me but there were many other reporters
15 who were saying send this information to me in person foremost, that potentially would lead
16 to them being criminally liable if this case went forward. And there is a urgent need in the
17 media community to prevent that from happening.

18 Q. Because, Mr Timm, the rules may be different in America but in England experts
19 must have no conflict of interest in the case. And it does appear to me, correct me if I am
20 wrong, but you do appear to have an interest in the outcome of this prosecution.

21 A. Well, my interest is as a press freedom advocate, yes, absolutely. I think every single
22 expert witness has some sort of fear that a prosecution of Mr Assange will lead to the
23 prosecution of many other reporters. My full-time job is to protect reporters' rights and that
24 is why I am testifying in this case.

25 Q. OK. Because my impression from overall reading of your statement is you are
26 effectively saying that this prosecution would be the thin edge of the wedge to prosecute
27 journalists, is that fair?

28 A. That is correct.

29 Q. What I am having difficulty understanding is the prosecution position in this case is
30 that Julian Assange is not a journalist, you understand that?

31 A. I understand that and in my opinion and in the opinion of many other legal scholars, it
32 does not matter whether the government considers Julian Assange a journalist. In the United
33 States there is a long history and nobody needs, you know, the New York Times to issue
34 them a press pass to act as a journalist or to receive First Amendment rights. This goes all the

1 way back to the country's founding with famous pamphleteers who were writing
2 anonymously. Whether or not anyone considers Julian Assange a journalist is beside the
3 point. He was engaging in journalistic behaviour, he was acting as a publisher, and that is the
4 right of everybody.

5 Q. This is where the tension might arise. I wonder if you could look at Mr Kromberg's
6 first declaration. It is in the prosecution witness bundle which should have been emailed to
7 you and it is page 105. Do you have that?

8 A. I have the bundle. It will only take a minute to find it.

9 Q. Sure.

10 A. You said I am at page? Page 105?

11 Q. Bundle page. So, the number in the bottom right-hand corner is 105. It may or may
12 not ---

13 A. Great. Just give me a second here.

14 Q. Sure.

15 A. OK.

16 Q. Now, presumably you have already read in some detail Mr Kromberg's declaration?

17 A. Well, I was given the 350 page document less than 24 hours ago. I have read
18 extensively on the case. I cannot say that I have read every word in this document. I wish it
19 was given to me with time to actually read it.

20 Q. Sure. Well, I would have hoped the defence would have given it to you before you
21 made your statement. Did they not give it to you?

22 A. Well, from what I understand - from what I understand the prosecution only gave it to
23 them on Monday evening and I am in the US and so I have had less than 24 hours with it.

24 Q. Well, not your fault at all, Mr Timm, I understand that, but this declaration was made
25 on 17 January of this year and it was served on the defence on 17 January and, presumably,
26 before giving your expert opinion the defence would have sent it to you so that you could
27 give an unbiased and objective opinion. Were you not sent it?

28 A. No, it is likely I - I was sent it. Like every witness I think that has come up
29 previously, the official sending of it by the prosecution was less than 48 hours until some
30 witnesses had to testify, I thought was rather short notice.

31 Q. Have you been watching ---

32 A. I ---

33 Q. Mr Timm, I did not understand, have you been watching the previous cross-
34 examinations?

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A. No, unfortunately witnesses were not given a ---

Q. Well, I am sorry, I thought you said ---

A. A video link.

Q. I just wondered why you said ---

A. No, there was a report - well, reports, reports in the media, there are many people live tweeting the proceedings who have access to the video because they are members of the media and so I have been trying to follow ---

Q. OK.

A. --- the hearing as best I can.

Q. So there is no mystery about that, the bundle you were sent on Monday is not new at all. It simply consists, for ease of reference, of all the previous supporting documents which were previously served; so the extradition request, the indictment and the five previous Gordon Kromberg declarations, do you follow? Are you telling us ---

A. Understood, yes.

Q. And I will just give you the dates. The first Gordon Kromberg declaration on 17 January; Gordon Kromberg 2 was 19 February; Gordon Kromberg 3 was 12 March; Gordon Kromberg 4 was 24 March; with only the last one, which is Gordon Kromberg 5, which is the 2 September; but all of those, the first four all predate the making of your statement?

A. Yes, I was - I was referring to specifically the 350 page packet.

Q. Yes.

A. I have been following this case closely since the original filing was made, so I am generally familiar with ---

Q. No, I understand.

A. --- the things you are saying.

Q. The 355 pages is simply a consolidation of all those documents, do you follow?

A. Yes, I understand that. I just think that the prosecution should have given this to the witnesses far in advance so we could have a better sense of following the documents at issue in the case, that is all.

Q. So are you saying the defence never sent you Gordon Kromberg 1, Gordon Kromberg 2 ---

A. No.

Q. --- Gordon Kromberg 3, Gordon Kromberg 4?

1 A. No, they sent it - like I said, they sent it to all witnesses shortly after they received it
2 from the application. What I am saying is that I felt there should have been more lee-time.

3 Q. OK?

4 A. The prosecution should have given witnesses this document far earlier in the process.

5 Q. But you have already had the material ---

6 A. Yes, I am happy that ---

7 Q. --- for many, many months, sir?

8 A. Yes, I am happy - I am happy to answer questions about what is in these documents.

9 Q. Because none of the material which is produced by the Government features
10 whatsoever in your expert report and I want to know why you excluded it all?

11 A. I - I - there was no intentional exclusion. My point in my expert witness testimony
12 was to talk about the general practices within the United States of journalists and how they
13 relate to how WikiLeaks practice journalism. I think there are many other witnesses who are
14 talking about the substance of what WikiLeaks publish, but I am happy to respond to any
15 questions.

16 Q. Well, I am going back to my point now - I am sorry, we got a little bit off track -
17 which is the position that the Government takes that Mr Assange is not a journalist. I am
18 going to ask you to look at page 105, paragraph 22. I think you just had it up on your screen,
19 do you see that?

20 A. I do, I do, I see it, yes.

21 Q. "As publicly stated by another Department of Justice official in announcing the
22 superseding assignment". It says, "The Department takes seriously the role of journalists in
23 our democracy and it is not and has never been the Department's policy to target them for
24 their reporting. Julian Assange is no journalist. This is made plain by the totality of his
25 conduct as alleged in the indictment. It is conspiring with and assisting a security clearance
26 holder to acquire classified information and publishing the names of human sources. Indeed,
27 no responsible actor, journalist or otherwise, would purposely publish the names of
28 individuals he or she knew to be a confidential human source in war zones exposing them to
29 the gravest risk of dangers". So that is the public announcement by the Department of Justice
30 about this, you see that. Now ---

31 A. Yes, I see that.

32 Q. So what I want to just understand is why you take the view that this prosecution is the
33 thin edge of the wedge to prosecute journalists, because ---

34 A. Sure ---

1 Q. I will just finish and then let you comment, because ---

2 A. Sure, apologies.

3 MR LEWIS: Take this into account, so the Government is publicly not only saying it is not
4 targeting journalists but it is publicly and expressly going out of its way to do so. And,
5 secondly, it states it is not prosecuting Mr Assange for merely publication but for specifically
6 publishing names of informants which exposed them to danger, which no responsible
7 journalist would do. So is it not rather odd if your speculation that this is really the thin end
8 of the wedge to publish other journalists, the Government went specifically out of its way to
9 say this is nothing to do with publishing journalists and nothing to do with ordinary
10 publication of classified material, do you find that odd?

11 JUDGE BARAITSER: Is the question for comment?

12 A. No, no, I did not base my ---

13 JUDGE BARAITSER: Just wait one moment, Mr Timm, the question is “please comment on
14 this” or “why did you not refer to it”, what is the exact question?

15 MR LEWIS: Madam, the exact question, right, is, I will try and - it is probably my inelegant
16 way of expressing the question. Mr Timm, I will try again. The position is your statement
17 says this is the thin end of the wedge to prosecute journalists and you have agreed with that. I
18 am saying ---

19 A. Yes.

20 Q. --- if that were really the case, it is a pretty strange way of going about it, making
21 these public announcements that it is nothing to do with publishing - prosecuting journalists
22 and nothing to do with prosecuting for mere publication, would you agree with that?

23 A. No, so I base my opinions on this case not by reading a Justice Department press
24 release about what is actually contained in the indictment and there are several charges in this
25 indictment that deal with just the mere fact that WikiLeaks had these documents in their
26 possession. These charges, the three charges you are referring to about publication, deal with
27 specific cables involving alleged informants. The other charges relate all to documents. You
28 are essentially - or the US Government is essentially saying that by merely possessing these
29 documents that Julian Assange was committing a crime and if Julian Assange is committing a
30 crime by possessing those documents so is any other journalist who possesses the same
31 documents or similar. Just as you are saying, or the US Government is saying that by
32 communicating with a source and potentially asking them for more information, Julian
33 Assange is also committing a crime. Again, in my written testimony I talked about how that
34 is common practice among journalists. So the aspect of criminalising publications is a very

1 warped issue and it worries me and any First Amendment scholars greatly, which would
2 actually be a rewriting of First Amendment law. But that is beside the point. There are many
3 other charges in this document that are as worrying or more worrying and can criminalise
4 common journalistic practice, whether you believe Julian Assange is a journalist or not.

5 Q. Well, I am going to examine that because you have missed out a very important factor
6 that this involves a hacking allegation. You accept that a hacking allegation is central to
7 count 1 and central to the other counts?

8 A. It is certainly central to count 1. I do not know how it relates to the other counts.

9 Q. Let us just examine the alleged criminality because we say that Mr Summers when he
10 put it to you has misstated the prosecution case consistently. Now the prosecution case,
11 before I move to that, can I just go to one of your exhibits to understand that we are talking
12 about the same thing. If we go to your exhibit at tab 3. It is the “New York Law School
13 handcuffing the press” argument.

14 A. Yes.

15 Q. Now tell me if I have understood this correctly. First of all, I would like you to go to
16 page 124. It is a subheading, “Unlawfully acquired information”.

17 A. Just a second.

18 Q. Sure.

19 A. Yes.

20 Q. In all of its ---

21 A. Got that.

22 Q. I am just going to read it out so we all know where we are, “In all of its cases
23 addressing the First Amendment’s protection of truthful information about newsworthy
24 matters, the court has recognised that such protections necessarily apply when the
25 information has been lawfully obtained by its publisher. In *Bartnoki*, the court specifically
26 considered whether the punished publisher of information had obtained the information in
27 question in a manner lawful in itself but from a source who had obtained it unlawfully. May
28 the Government punish the ensuing publication of that information based on a defect in a
29 chain and the court answered the question in the negative”. So the first point is, if you obtain
30 the information in a manner which is lawful in itself, you will not be prosecuted because of
31 the First Amendment, have I understood that correctly?

32 A. That is correct, yes.

33 MR LEWIS: Now if we go to page 1030, “Criminal liability of the press”.

34 MR SUMMERS: Madam, it is not my style or practice to interrupt, but one cannot lead

1 section D of this article without following it through to its conclusion because it deals at
2 pages 1025 to 1026 with specifically the issue of whether interacting with a source who
3 unlawfully acquires information is protected by the First Amendment and those two pages
4 that have just been skipped over completely ---

5 JUDGE BARAITSER: Well, it depends what the question is. If we are talking about the
6 nature of the interaction, it may be that that is where there is a dispute between the two of you
7 and Mr Lewis in due course will put the prosecution's nature of the interaction. It rather
8 depends what he says next.

9 MR SUMMERS: Yes, certainly.

10 MR LEWIS: That is exactly right, madam. My learned friend can always deal with matters
11 in re-examination, which is the proper way to deal with it.

12 JUDGE BARAITSER: Except if you put it and it is unfair because ---

13 MR LEWIS: Of course.

14 JUDGE BARAITSER: --- you have only put some of it, then I understand Mr Summers's
15 interruption.

16 MR LEWIS: But, of course, I am not saying - I make it abundantly clear - that it is wrong,
17 this is saying it is wrong to passively solicit. It is not making that point.

18 JUDGE BARAITSER: But, even if it goes beyond that, which I think Mr Summers point is,
19 it may not go as far as you are, the place you are arriving at.

20 MR LEWIS: Well, if we wait to see where I get to, because where I am going to get to is
21 1030 which says, "Criminal liability and the press". And I am picking it up before the
22 footnotes, four lines from the bottom, Mr Timm, and it begins, "Rather, journalists" ---

23 A. I am just ---

24 Q. I am sorry? It begins, "Rather, journalists" ---

25 A. Sorry, I am just looking for the spot. I have found it.

26 Q. Do you have it now?

27 A. Yes.

28 Q. "Rather, journalists have only been prosecuted in the rare circumstances where they
29 have directly committed an unlawful physical act such as removing a piece of debris from the
30 wreckage of a sabotaged aircraft, stealing documents or engaging in private wiretapping".

31 Now what I was going to say is that journalists have been prosecuted when they commit a
32 crime such as this in order to obtain the information, because what I was going on to say was
33 that would you agree that agreeing with someone, a government employee, to break a
34 password and to hack into a government computer would fall within this passage, 1030, or

1 would you say it would fall within the passage at 1024, there being apparently a spectrum of
2 conduct? It is a rather long question.

3 A. Are you asking – just to clarify, are you asking me hypothetically or are you talking
4 about the specific fact in ---

5 Q. I am going to ask you hypothetically. Hypothetically, if a journalist engaged with a
6 government employee to crack a password to allow the employee to enter into the computer
7 and take out government secrets, which side of the line would that fall?

8 A. You know, it is hard to answer hypotheticals. I think in a particular case even the
9 government is not alleging that Manning and Assange were conspiring to break a password to
10 steal more documents, as far as I understand it. The only alleged motive was to potentially
11 keep Miss Manning more anonymous, and in general journalists are often attempting to keep
12 our sources anonymous. That is why they use encrypted messaging applications and that is
13 why they often made promises to sources to keep them confidential so that they can do their
14 job.

15 Q. OK. Perhaps we can agree on this, Mr Timm, it is a matter of fact, you would agree
16 in each case, where on the spectrum it falls, whether it falls on the side which we were
17 looking at at page 1024, or the side of the line which we were at at 1030. Would that be
18 right?

19 A. Sure, in the sense that there is always a line somewhere in every case.

20 Q. Yes.

21 A. Some of the cases it can be hard to determine those lines, but ---

22 Q. Of course. I am not saying ---

23 A. But actually there is.

24 Q. I am saying, of course, there is a line and someone has to draw it. Now, have you
25 seen the actual evidence which supports the charges in this case?

26 A. From what I understand, if you are talking about the specific of one charge out of 17
27 or 18 that deals with conspiracy to violate the CFAA, I believe it is snippets of chats
28 purporting to be between Miss Manning and Mr Assange.

29 Q. But you will not have seen all the evidence because the grand jury proceedings were
30 secret and the evidence has yet to be released in full. Is that not right?

31 A. I mean certainly it is possible that there is secret evidence. Yes. I have not seen it.

32 Q. Do you accept that a grand jury found there was probable cause to prosecute
33 Mr Assange?

34 A. Sorry. Can you repeat the question?

1 Q. Sure.

2 A. Do I accept that as a fact that they ---

3 Q. Do you accept that a grand jury found that there was probable cause to indict
4 Mr Assange on all the counts on the second superseding indictment?

5 A. I understand that is the case, yes.

6 Q. So let us look at the redactions, for instance, and if you forgive me I am going to ask
7 you another hypothetical question on the redaction charges. Would a responsible journalist,
8 or in fact any journalist, publish the name of a third party where it is unnecessary as part of
9 the publication to publish that name while knowing to publish the unredacted story would put
10 that person's life and lives of her family in danger?

11 A. You know, with respect, to me the idea of a responsible journalist, or who is or who is
12 not a responsible journalist, is entirely different than what is legal and what is illegal conduct,
13 and in this case, you know, no court has ever said that the publication of names in this matter
14 would be potentially illegal. And, in fact, Congress debated this very issue after WikiLeaks
15 published information in 2010 there was a proposed bill called the SHIELD Act introduced
16 by Senator Joe Lieberman at the time, which was aimed at specifically making it a crime to
17 publish so-called human intelligence. That bill failed to pass and so that tells me two things.
18 Number one, this was not illegal to begin with in the eyes of Congress, and that Congress
19 decided that it was not worth making it illegal then as well, and so the idea whether I agree or
20 disagree, or whether I would have published particular names I think is beside the point. The
21 point is whether this is illegal or not and in my mind, and in the mind of many First
22 Amendment scholars, this conduct is protected by the First Amendment.

23 Q. Right. Well, let me help you with what the press have said. I am sure you have read
24 the articles. Could you turn to page 349 in the bundle? It is a publication by the Guardian on
25 2 September ---

26 A. Could you give me a moment?

27 Q. --- 2011.

28 A. Did you say 349?

29 Q. I did.

30 A. OK.

31 Q. Let us read it. The Guardian. "WikiLeaks has published its fuller archive of 251,000
32 secret US diplomatic cables without redactions potentially exposing thousands of individuals
33 named in the documents to detention, harm or putting their lives in danger. The move has
34 been strongly condemned by the five previous media partners – the Guardian, the New York

1 Times, El Pais, El Spiegel and Le Monde, who have worked with WikiLeaks publishing
2 carefully selected and redacted documents.” Quote: “We deplore the decision of WikiLeaks
3 to publish the unredacted state department cables, which may put sources at risk, the
4 organisation said in a joint statement. Our previous dealings with WikiLeaks were on the
5 clear basis we would only publish cables which had been subject to a thorough joint editing
6 and clearance process. We will continue to defend our previous collaborative publishing
7 endeavour. We cannot defend the needless publication of the complete data – indeed, we are
8 united in condemning it.”

9 Does that make you change your last answer?

10 A. No, absolutely not. I am not saying that WikiLeaks had perfect editorial judgment,
11 just like I have never said that the Guardian or the New York Times has had perfect editorial
12 judgment. Sometimes newspapers make mistakes, but that does not mean that differences of
13 opinion of editorial judgment means that something should be illegal, and I certainly do not
14 think that the US government is the entity that should be determining whether the editorial
15 judgments of a publisher or a newspaper were sound or not. The question before us is not,
16 you know, do we agree with Julian Assange’s decision to publish these names? The decision
17 is whether or not this is illegal, and it is my opinion, as it is the opinion of many, many other
18 First Amendment scholars and media lawyers, that this publication was not illegal, and that
19 the indictment to try to make it illegal would potentially criminalise a lot of other
20 publications that news media members do every day. And I should mention that all of the
21 newspapers that you just mentioned that issued this joint statement, they have also issued
22 statements vociferously condemning this prosecution. They have all stated that this
23 prosecution, even if it includes charges involving these people’s names, or these sources’
24 names, is a direct threat to press freedom and they themselves are worried about the liability
25 they have because of it.

26 Q. You just said the US government should not be the determiner of editorial judgment,
27 whether editorial judgment is sound or not, but is it not a fact that whether the publication of
28 these names is illegal or not will be determined by a jury?

29 A. You know, ultimately it will probably be decided by – you know, it may be decided
30 by a jury at some point, but then it will go to a judge, appeals judges and potentially the
31 Supreme Court because when we are talking about larger constitutional issues, it is not just a
32 jury that gets to decide it; often it will be ultimately in the hands of the judge as to whether
33 this is unconstitutional or not.

1 Q. Well, the first thing the jury has to decide is whether the publication of these
2 unredacted names caused harm, is it not?

3 A. In some sense that may be an element of a crime as far as the Espionage Act goes, but
4 it is also possible that a judge would rule that these charges are unconstitutional before it even
5 gets to a jury.

6 Q. But why should your opinion be preferred over the opinion of the courts in the United
7 States on this?

8 A. My opinion is in line with previous court cases. This case is actually wholly
9 unprecedented. There has never been a publisher that has been charged with a crime for
10 publishing this type of information. As my written testimony and other experts' written
11 testimony has talked about extensively, the Supreme Court precedent is almost wholly on the
12 side of Mr Assange in this case.

13 Q. So I want to be quite clear. You think it is perfectly all right, perfectly legal – I will
14 not say “all right” – perfectly legal to publish the names of the informant knowing it is likely
15 to result in their death?

16 A. First of all, I do not think anybody knows it is likely to result in their death. As far as
17 I understand it in the Chelsea Manning trial that the US government can point to no specific
18 deaths in this case, but regardless, the First Amendment has never been in the United States a
19 balancing act between harm and benefit. The First Amendment sometimes allows for odious
20 speech, for speech that is unpopular and, you know, frankly it is possible that in some cases,
21 in some types of speech, some harm might result, but in the United States, you know, our
22 people have made the determination that having (inaudible) information, allowing wide
23 latitude for journalists to cover matters of public opinion, or a public import, makes it vital
24 that they are protected from prosecution, even when it comes close to a line or to a particular
25 subject matter which some of us might find uncomfortable. And this is not me saying that,
26 you know, I would have made the same decision; I am saying that, you know, editorial
27 judgment should not be decided by the US government.

28 Q. Do you know Professor Feldstein? He is the Professor of Journa ---

29 A. I do not.

30 Q. And he was called as an expert witness in this case yesterday.

31 MR SUMMERS: Yes.

32 JUDGE BARAITSER: It was yesterday. It was Monday and Tuesday.

33 A. Sorry, I did not mean to interrupt.

34 Q. He was called. He is a Professor of Journalism at the Maryland University.

1 A. Yes, I am aware that he was called as a witness. I just do not know him personally.

2 Q. We will find the passage but would it surprise you he completely disagrees with you
3 and says it was completely wrong to publish, for any journalist to publish names of people
4 which would put them in mortal danger.

5 A. And so I think you are twisting my words here with respect. I did not say that I
6 thought it was right to publish these names, or that I agreed with the decision, I said merely
7 that it would be unconstitutional for Mr Assange to be prosecuted under the Espionage Act
8 for this act.

9 Q. Now, are you a lawyer? A practising lawyer in the United States?

10 A. I am not currently practising, no.

11 Q. So, what expertise do you have to give a legal opinion on American law to this court
12 if you are not a practising lawyer?

13 A. Well, I graduated law school in 2011 and was admitted to the New York Bar at that
14 time, but instead of practising law I have chosen a different path where I write about the law
15 to the general public and attempt to explain these complicated legal issues to a non-legal
16 audience. And I currently as I have for the past eight years run a non-profit organisation and
17 while I do not myself represent us on legal issues we are constantly involved in legal issues
18 that involve government transparency and often sign on to for example, Amethyst briefs in
19 various cases around the country that touch on press of freedom issues.

20 Q. You say that this is a war on journalism, those are your words from your statement.
21 Do you stand by that? You said this prosecution is a war on journalism?

22 MR SUMMERS: Which paragraph are you referring to?

23 A. I ---

24 MR LEWIS: It is paragraph 39.

25 Q. Three lines, four lines up from the bottom, "The decision to indict Julian Assange is a
26 massive unprecedented escalation in tranche war on journalism".

27 A. Did you say paragraph 39?

28 Q. Yes. I have it. I only have the unsigned copy of your statement. I do not know if the
29 paragraphs have changed.

30 MR SUMMERS: I think the numbering has.

31 JUDGE BARAITSER: Yes.

32 MR SUMMERS: It is paragraph 40, madam, in yours.

33 MR LEWIS: It is paragraph what?

34 MR SUMMERS: 40.

1 MR LEWIS: 40.

2 A. I see. OK. Paragraph 40, yes. Yes, actually I am very glad you brought that up
3 because you know, President Trump – another project with the Freedom of the Press
4 Foundation is to keep track of how many disparaging and insulting remarks or threatening
5 remarks that President Trump has made towards the press on Twitter. So far since he ran his
6 campaign in 2016, President Trump has tweeted over 2,200 times insulting the press and
7 sometimes calling them enemies of the people threatening legal action against them. We
8 know President Trump has sued reporters half a dozen times in his life for the crime of
9 reporting on him and his businesses, practices, and he has even talked about how in at least
10 one of the cases he only sued because he wanted to try and punish the reporter. He was not
11 even sure what the reporter had written. We know for a fact, it has come out from several
12 former government officials that Trump has private views about jail and journalists. Whether
13 he is talking to former FBI director Jim Comey or others. We know that Trump has had
14 probably the most hostile relationship with the press since Richard Nixon and to me it is very
15 telling that his Justice Department is the first since Richard Nixon to attempt to indict a
16 publisher. And we know from his own statement that President Trump would like to punish
17 reporters, let us say, the New York Times or the Washington Post, and this case ultimately
18 will be a perfect avenue for him to do so.

19 Q. Now, I want to take you to Mr Kromberg's declaration which you have read at page
20 97 of the bundle, paragraph 6.

21 A. OK. Just a second. Almost there, sorry. All right.

22 Q. Now, you have read this before your statement but none of it makes an appearance in
23 your expert report does it?

24 MR SUMMERS: Sorry, again I ---

25 A. What is that specifically?

26 Q. None of Mr Kromberg's opposing position makes an appearance in your expert report
27 ---

28 JUDGE BARAITSER: Mr Lewis ---

29 Q. --- so that you could evaluate it before ---

30 JUDGE BARAITSER: --- there is an objection to the question.

31 MR SUMMERS: Before the witness answers, again, it is not my practice to interrupt and I
32 am on my feet reluctantly.

33 MR LEWIS: You are making it a practice.

1 MR SUMMERS: This is the second time this has happened. What bit of Mr Kromberg's
2 affidavit is, it is said, that the witness should have referenced?

3 JUDGE BARAITSER: I presume that is exactly what he is about to tell him ---

4 MR LEWIS: I am going to get to that. I know exactly ---

5 JUDGE BARAITSER: --- I imagine.

6 MR SUMMERS: The question is why have you not referenced the report?

7 JUDGE BARAITSER: No, he was talking about page 97 so I presume it is section 6.

8 MR LEWIS: Well, I am going to deal specifically where he talks about the war on
9 journalism at paragraph 18 but I am introducing it at 6 and at 18 he says, "It is not about the
10 war on terrorism" and I am going to ask Mr Timm why he did not put that in.

11 JUDGE BARAITSER: All right.

12 MR LEWIS: It is a perfectly proper position.

13 JUDGE BARAITSER: Go ahead.

14 Q. You probably heard that, Mr Timm, why we are – so, I am introducing the point to
15 you because this is all in his section on section 1 which is challenges to the superseding
16 indictment without merit. Now, you will see that based on the evidence of applicable law a
17 grand jury found probable cause to charge Julian Assange for violating United States law.
18 An independent grand jury issued these charges based on evidence of the following actions
19 that Assange knowingly took. And it sets those out at the end of paragraph 6. He then deals
20 with the fact in paragraph 7 that journalists do not have a First Amendment right to steal or
21 otherwise unlawfully obtain information and he deals with at paragraph 10 the fact that Mr
22 Assange has alleged a politically motivated and he says they are not because in 12 and 13 that
23 he is a federal prosecutor and applies the rules.

24 And where we are going to get to is 18, "Assange has also alleged the superseding
25 indictment is part of some escalating public war against journalists. He further asserts that
26 criminalisation of journalists' activities such as the public interest in or the publication of
27 collateral murder video and conditions in Guantanamo Bay strike to the very essence of
28 article 10 of ECHR.

29 The grand jury however did not charge Assange for passively obtaining what seemed
30 to be classified information. Neither did it charge him for publishing in bulk the hundreds of
31 thousands of stolen classified documents. Rather, the charges against Assange focus on the
32 complicity of Manning's theft and unlawful disclosures."

33 We go over the page to 104, "The only instances in which the superseding indictment
34 challenges Assange with the distribution of national security information to the public are

1 explicitly limited to his distribution of documents classified up to the secret level containing
2 the names of individuals in Afghanistan, Iraq, and elsewhere around the world who risk their
3 safety and freedom by providing information to the United States.”.

4 And it just sums it up at paragraph 21 at bundle page 105, “In short, Assange is
5 charged with publishing specified classified documents that contain the unredacted names of
6 innocent people.”. Now, what I will ask you is in relation to your allegation on this is
7 President Trump’s war on journalists, why did you not mention the points that Mr Kromberg
8 makes against your opinion in your expert’s report?

9 A. Why – so, I was testifying to a specific subject but I am happy to talk about those
10 right now. First of all, ---

11 Q. No, no, no, just ---

12 A. --- the fact that ---

13 JUDGE BARAITSER: Mr Timms, you are welcome to talk about it ---

14 A. Go ahead, sorry.

15 JUDGE BARAITSER: --- in a moment but I think the question has been asked and I think
16 Mr Lewis is looking for the answer.

17 MR LEWIS: Yes.

18 JUDGE BARAITSER: Did you understand the question?

19 A. Yes, I mean – can you repeat the question? I think I misunderstood.

20 Q. I will phrase it slightly differently. Why as an unbiased who objected expert would
21 you not put in material which you had read which was to the opposing position of your
22 asserted position in paragraph 39 of your report? In short, why did you not include ---

23 A. Well, you know, I ---

24 Q. --- it?

25 A. I did actually talk about all these issues. I did not specifically reference this
26 document, like I did not specifically reference the other affidavits, but for example, you
27 know, I talk about in my indictment, sorry, in my affidavit about how journalists engage and
28 the exact type of behaviour that is I think misleadingly described in this particular document
29 all the time.

30 I would also like to point out that actually I think this document that you pointed to is
31 also inaccurate. It says the grand jury did not charge Assange with passively obtaining or
32 receiving copies of that information but you will get for example count 7 is under title 18,
33 USC, section 7 93 (c). If you feel to read section 7 93 (c) it talks about whoever receives or
34 obtains or agrees or attempts to receive or obtain this type of information.

1 And so, you know, not only does this criminalise the path of receipt of information in
2 my view, it also criminalises discussions that may happen between sources and reporters. So,
3 for example, I brought this up earlier, but I am very glad that Bob Woodward and Carl
4 Bernstein were not thrown in jail for potential of conspiracy to violate the Privacy Act by
5 asking Deep Throat for more information during the Watergate scandal just as I am very glad
6 the reporters who were potentially reporting on the CIA torture programme during the
7 George Bush administration were also not charged for asking sources to show them proof that
8 torture was happening. And so, in fact I believe I did discuss these issues in very general
9 terms in my witness statement but again, that written statement was about a particular sub-set
10 of issues, not every single issue in this case.

11 Q. Well, let us just examine that, Mr Timm. You told this court a moment ago on oath
12 that you did talk about these all issues in my report. Let us just go through them one by one
13 shall we? Can you help us where they are in your report? So, let us go to the first one ---

14 A. I mean, I ---

15 Q. --- about a grand jury. Where is that in your report?

16 A. Sorry, if I said all I meant that I talked in general about the issues, a sub-set of issues
17 of these cases. When I was – if I misquoted I apologise, in particular reporting to the quote
18 on the war on journalism that you referenced. You are right, I did not talk about grand juries
19 in my expert testimony. I cannot claim to be an expert on grand juries, but I do know, for
20 example, that in 2010 a study was done in which it found that 99.9 per cent of grand jury -
21 federal grand juries came back with charges to the point where if a federal prosecutor went to
22 a grand jury it was almost guaranteed that they would come back with charges. There was
23 over 162,000 of these cases and exactly 11 of them did not return an indictment. So the fact
24 that the grand jury returned an indictment, at least to my mind, you know, is immaterial to
25 whether these charges are dangerous to the First Amendment or not.

26 Q. Where in your report did you mention the professional obligations of the prosecution
27 only to bring charges when there is sufficient evidence and not to take into account a person’s
28 political association, activities or beliefs, where did you mention that in your report?

29 A. Sorry, can you repeat the question.

30 Q. I am referring to paragraph 12 which we looked at very briefly and paragraph 13,
31 which effectively says, “A federal prosecutor cannot take into account any political opinions
32 or activities and he can only prosecute on the merits of a case”. Why did you not put that into
33 your report?

34 A. My expert testimony revolved around general journalistic practices. I was not asked

1 to write a written testimony on the federal rules of criminal procedure.

2 Q. Yes, but you said the decision to indict Julian Assange was part of the war on
3 journalism. I am just trying to examine why you are saying the decision to indict was part of
4 the war on journalism. Why did you not take into account ---

5 A. As I ---

6 Q. --- the obligations federal prosecutors have, which would be contrary to that?

7 A. Yes, absolutely, this is exactly why I maintain that I did not think that this prosecution
8 should go forward. As I mentioned previously, there is mountains of evidence that,
9 particularly President Trump and the Trump administration take an incredibly hostile view
10 towards journalists of all stripes and that Donald Trump and his campaign have looked for
11 ways to abuse the legal system to go after journalists. This is just one prong in many in that -
12 in those - that larger strategy to try to delegitimize and potentially criminalise what reporters
13 do on a daily basis.

14 Q. Are you saying, Mr Timm, that Mr Kromberg and the other prosecutors which
15 brought this case and seek to prosecute it are, therefore, acting contrary to their obligations
16 and in bad faith?

17 A. No, I am not going to - I do not think it is appropriate for me to comment on internal
18 Justice Department rules of which I am not an expert on. I will say that there was a report in
19 the Washington Post that many, or that multiple lawyers within the Justice Department
20 vehemently opposed these charges. They actually dropped off the case because there was an
21 extreme disagreement within the Justice Department about the First Amendment implications
22 here.

23 Q. But if you are right and this was an in - which we obviously do not accept, a decision
24 to indict Julian Assange as an escalation in Mr Trump's war on journalism, that would be
25 contrary to the obligations that the federal prosecutors who brought the charges have, would
26 it not? It would, in effect, be them acting in bad faith, that is the consequence of your
27 argument?

28 A. I think that is a reasonable argument for one to make and, if they did breach those
29 violations, you know, I hope there would be accountability.

30 Q. Well, what evidence do you have that they breached those obligations?

31 A. I did not say that they had breached those obligations. I said that I am not an expert
32 on those obligations. I am an expert on the First Amendment and how journalists operate. I
33 only said if they have violated those agreements that they should be held to account, just like
34 I think anybody should be held to account who has violated ---

1 JUDGE BARAITSER: Just pause for a moment, Mr Lewis. Is there an objection?
2 MR SUMMERS: No, his hour is up.
3 JUDGE BARAITSER: Ah, that was what you were ---
4 MR LEWIS: I did not know I had an hour.
5 JUDGE BARAITSER: You did. It is on the ---
6 MR SUMMERS: It is on the sheet.
7 JUDGE BARAITSER: It is on the sheet. I will just check my times.
8 MR LEWIS: Oh, madam, well, I do not think we have been sticking to that because then the
9 defence told us earlier that their examination in-chief estimate included their re-examination,
10 which they have certainly not stuck to.
11 JUDGE BARAITSER: I was not aware that it included their re-examination. I gave them 30
12 minutes to settle and orientate their witness.
13 MR SUMMERS: Yes.
14 MR LEWIS: And you have never said to the prosecution we are only limited to the estimate.
15 If, madam, you are saying that, well, we will take a different view of things.
16 JUDGE BARAITSER: Well, that was my ---
17 MR LEWIS: Because I will revise the estimates.
18 JUDGE BARAITSER: Well, that was my assumption on being given this provisional order.
19 MR LEWIS: Well, madam ---
20 JUDGE BARAITSER: What I asked for originally - excuse me just for a moment while we
21 have this conversation. It does not really impact on your evidence at all. I asked for an
22 agreed proposed time estimate.
23 MR LEWIS: Estimate.
24 JUDGE BARAITSER: I received it on the basis that it was agreed. It was approved.
25 MR LEWIS: Well, madam, I do not accept that I should be limited to one hour if I am in the
26 middle of my cross-examination and it is wholly off-putting and wrong of Mr Summers to
27 deliberately just get up and interrupt as he has done and it unsettles your approach. If you are
28 saying, madam, that I only have whatever is set down on that paper, then we will have a
29 dispute about whether or not there will be any re-examination at all given that they
30 specifically said, we will find it in the transcript, Mr Fitzgerald said those estimates include
31 our re-examination.
32 JUDGE BARAITSER: Just pause a moment. What I am going to do is, in relation to this
33 particular witness, let you finish in your own time. We will have this conversation after the
34 conclusion of this witness' evidence. All right.

1 MR LEWIS: Well, in fact, I have finished.

2 JUDGE BARAITSER: Ah.

3 MR LEWIS: We will have a proper discussion about this in the absence of the witness.

4 JUDGE BARAITSER: Yes, we will. Yes, yes.

5 MR LEWIS: And I do not like being interrupted in the context of my cross-examination.

6 JUDGE BARAITSER: Well, fortunately, you got to the end of your questions. Mr

7 Summers, do you have any re-examination?

8 Re-examined by MR SUMMERS

9 Q. Mr Timm, are you a qualified lawyer?

10 JUDGE BARAITSER: Well, we know the answer to that, Mr Summers.

11 MR SUMMERS: Yes.

12 A. I believe - sorry, can you repeat the question?

13 Q. Are you a qualified lawyer?

14 A. I believe my law licence is inactive because I do not actively practice law but, as I
15 stated, I graduated law school in 2011, passed the bar shortly after that and I have been
16 writing about legal issues in the public space ever since.

17 Q. And your role as a legal commentator over the past decade has focused on what?

18 A. It has focused on (inaudible) issues, First Amendment, privacy and, generally,
19 constitutional rights in the United States.

20 Q. Thank you. And, when you were approached to be a witness in this case, were you
21 familiar or not with the indictments?

22 A. Yes, I was very familiar. We had covered this case closely.

23 Q. You were taken to page 105 of the file of materials that you have been sent. You will
24 remember it, it is where Mr Kromberg says, "Mr Assange is no journalist". Just firstly this,
25 because the Government asserts that its guns are not aimed at journalists, does that help you
26 in any way?

27 A. No, not at all. As I said, instead of - instead of reading the Justice Department's press
28 release, I focused on the actual wording of the document which would criminalise a lot of
29 activities that journalists engage in on a daily basis.

30 Q. Thank you. And let us just look at the two reasons he gives for asserting that Mr
31 Assange is no journalist. First, he says he is conspiring with and assisting a security
32 clearance holder to require classified information. Is assisting or soliciting or encouraging a
33 whistleblower to disclose classified information criminal or not?

34 A. Certainly not encouraging or asking for more information is. I do not even think that

1 the Government is alleging that Julian Assange assisted Manning in getting him any of this
2 information that he received. Again, as I had mentioned in my written statement, speaking
3 with sources, asking them for clarification, even asking them for more documents, is
4 behaviour that journalists engage in on a daily basis and it would be incredibly unprecedented
5 and dangerous for this practice to be criminalised.

6 Q. And you were taken to your exhibit 3, the New York Law School review of the law
7 surrounding this and, at pages 1025 and 1026, does that review consider this very issue?

8 A. Yes, absolutely. This is actually the crux of the entire law review article about how it
9 is a journalist's job to not just publish information but to gather the news or engage in news
10 gathering which courts for decades have talked about in the United States. This law review
11 article goes into a great many examples that we talked about previously all to prize-winning
12 reporters who would essentially have their activities criminalised if we were to say that
13 journalists were never allowed to speak to sources or ask them questions.

14 Q. And, at page 1026, it is said that, "These decisions" - those are the decisions that are
15 considered on those two pages - "reflect the reality that the press routinely seeks out
16 information from a variety of sources, many of whom may be have held to have violated a
17 statute, contract or some other legal or ethical duty in obtaining the information or by
18 disclosing it to the press. The courts have nevertheless concluded that when the press induces
19 sources to disclose, it is protected by the First Amendment". Is that your understanding?

20 A. That is correct and I would go a step further, which the article also talks about. Even
21 if the journalist knows that the particular information was obtained unlawfully by the source,
22 it is still protected First Amendment speech for then the journalist to lawfully publish it.

23 Q. And you were then taken to page 1030, where the report considers the situation where
24 a journalist engages in different separate criminal activity like removing debris from the
25 wreckage of a sabotaged aircraft or stealing documents or private wiretapping.

26 A. Correct.

27 Q. And that, it was said, was on the other side of the line, do you agree?

28 A. Yes, I would agree with that and I would also say that Mr Assange has not been
29 accused of any of that in any of the counts in this case and it does not - any of the actions
30 alleged in the indictment do not reach this level in my opinion.

31 Q. Well, let just explore that slightly. Mr Lewis said, well, the Government says that
32 what he calls the hacking allegation does, do you remember that, that is the conversation
33 about cracking a pass code hash, and he asked you where on the spectrum you would place
34 that allegation and I think you replied, "It depends on the purpose". Is that right, does it

1 depend on the purpose for which that allegation is said to have been done?

2 A. Oh, well, I get - you know, it is hard for me to comment on the specifics of the
3 Computer Fraud and Abuse Act, but I will say, you know, two things. To me, you know, the
4 Government itself is not even alleging that Mr Assange stole any of these documents himself.
5 They are not alleging that any actions that he took furthered the ability of Ms Manning to take
6 any of these documents and it seems clear that this was a passing conversation, maybe 30
7 seconds or a minute, involving weeks and weeks of conversations where a journalist and
8 source were talking about how to stay anonymous. Journalists often promise anonymity to
9 sources in all sorts of situations so that they can do their job and I think, you know, it is
10 important to look at this very, very tiny part of the case in the larger context of the fact that it
11 was involving trying to stay anonymous, but also that the government is attempting use this,
12 essentially, a big leap to bring a giant mountain of cases that could affect journalists
13 everywhere.

14 Q. Can I ask just two follow-up questions in relation to that? Firstly, the purpose that is
15 alleged to lie behind that chapter of conduct, what is your understanding?

16 A. From what I understand, there was a pass or hash that was allegedly passed to Mr
17 Assange, you know, he is purported to say something like, "We'll look into it." Nothing ever
18 came of it, but with the government alleging – they were not actually in any sort of attempts
19 to get more documents. Manning herself was worried that she needs to stay anonymous
20 when she accessed these documents. There is a whole conversation revolved around sought
21 anonymity, not gaining access to more documents.

22 MR LEWIS: Madam, I hesitate to interrupt, but I do not want this witness to be misled as to
23 the government's position. I would ask Mr Summers to draw the witness's attention to
24 paragraph 11 at page 199 of Mr Kromberg's fourth document which it specifically says it is
25 not limited to that, that the hacking allegation to crack the password, if you pick it up at the
26 bottom of page 199, where contrary to the defence assertion, because they constantly say this,
27 he puts it right and says at the bottom of the page, having quoted superseding indictment,
28 count 18, "As this language plainly reflects, the United States allege the purpose of a hash
29 cracking agreement was to facility the acquisition and transmission of classified national
30 defence information generally." So, it is not as Mr Summers puts it or as the witness has
31 described so far as the government is concerned.

32 JUDGE BARAITSER: So, to be clear, if you ask questions on a premise which is not
33 accepted by the government, then the answers are going to add little value to my decision
34 making process, so it is a matter for you. You are very welcome to put it on the basis that

1 you do, knowing that the government disputes. I understand in due course there will be some
2 argument about this, but the point is if you ask the questions on the basis that you wish to, the
3 answer will have less weight if I come to accept the government's position.

4 MR SUMMERS: Thank you. The point that I think was being made or the distinction that
5 was being made was between on the one hand, decrypting a password hash in order to gain
6 access to materials and on the other hand, doing so to make it more difficult for investors to
7 identify Manning as the source of the disclosures. Now, we have got paragraph 11 in front of
8 us. The first is not alleged. The second is. On the basis that it is alleged that a purpose of
9 that chapter of conduct was to, "Make it more difficult for investigators to identify Manning
10 as the source of the disclosure of classified information." How would you, please, Mr Timm,
11 categorise that in terms of First Amendment protection?

12 A. Well, I would just say that that is how I interpreted it as well. You know, the words,
13 "Such a measure may have made it more difficult for investigators to identify Manning,"
14 suggests to me that Manning's concern was about remaining anonymous and not accessing
15 more documents. Then, as I said before, you know, journalists will often promise anonymity
16 to sources in a variety of situations to protect them potentially from losing their livelihoods,
17 despite the fact that they may be revealing illegal and corrupt behaviour. Whistle-blowers in
18 the United States are often retaliated against and providing them anonymity is often the only
19 way to protect them.

20 Q. And protecting your sources, is that protected or not protected speech under the First
21 Amendment?

22 A. Well, you know, there is a long and complicated history about the First Amendment
23 right involving reporters and protecting their sources and in each jurisdiction, there are
24 slightly different rules. We could probably spend an hour talking about all those rules. I will
25 say in general, journalists have always argued that they have a strong right to protect their
26 sources and not reveal to prosecutors who their sources are in court proceedings.

27 Q. Okay. A quick other question in relation to that aspect of the case. You have offered
28 some opinions about what you think the evidence shows and I think Mr Lewis says no one
29 has seen the evidence so what are you talking about? Have you ever seen the criminal
30 complaint in this case?

31 A. I have read the indictment. Are you referring to a different document?

32 Q. I am in fact referring to the JABA chat that underlies that aspect of the case that was
33 released when the criminal complaint was filed on the 21st of December.

34 JUDGE BARAITSER: Found where, please.

1 MR SUMMERS: Sorry, the government had never served it. It came as part of the
2 provisional arrest request.

3 JUDGE BARAITSER: Do I have it?

4 MR SUMMERS: It is not in your papers, no. I just want to know if the witness has actually
5 seen it. That is the underlying evidence. I just want to know whether the witness has seen it.

6 A. I have seen quotes and excerpts that the government has put in its affidavits and its
7 indictments and if there is a way of pointing to the document, I can tell you.

8 Q. No, it is not an important point.

9 A. (Inaudible).

10 Q. No, it is not an important point. I am not sure it is worth taking up any more time.
11 Can I take you back, please, to Mr Kromberg and page 105?

12 A. Just one sec. All set.

13 Q. Now, we were looking at Mr Kromberg's assertion that Mr Assange is no journalist.
14 We have looked at his first justification for that. His second is that he was publishing the
15 names of human sources. Can I just examine that in a little detail?

16 A. Sure.

17 Q. Firstly, I think you told us that under the First Amendment, the approach of the US
18 courts is not to weigh harm such as that or morality in the article, the First Amendment
19 analysis, is that right or did I mishear?

20 A. No, that is correct and actually, the law review article has been cited repeatedly over
21 the past two hours. It goes into this extensively and so I would encourage the court to take a
22 look at that for more detail.

23 Q. And do you have in mind page 1020 and the discussion there? "The Supreme Court
24 has expressly disavowed any test of whether particular speech falls within protections of the
25 First Amendment that was premised on an ad hoc determination of its value in comparison
26 with the harm it is alleged to have perpetrated and instead, it has carved out specific
27 categories of expression that are not protected." Is that what you are talking about?

28 A. Yes.

29 Q. Is this the article you thought that we should read?

30 A. That is exactly what I am talking about and, you know, as this characterises, you
31 know, that it would be a radical free right of the First Amendment if the government was
32 allowed to go (inaudible) these charges.

33 Q. Alright. You also told us, I think in response to questions about whether Mr Assange
34 is charged with publishing the whole batch of cables, but that was not your understanding of

1 the limits on this indictment, so, just to remind you, on the issue of names, it was suggested to
 2 you that the publishing charges in this indictment are constrained by only those cables, for
 3 example, the named individuals, yes? I do not want to engage with you in the rights or
 4 wrongs of that. That suggestion, I just want to explore your response. Your response, as I
 5 understood it, was well, that may or may not be right, but there are charges, other charges in
 6 relation to the cables that travel more widely. Is that right?

7 A. Correct on both counts. I mean, so contrary to what the government said, I think it is
 8 an open question as to whether the last three counts only deal with the publication of names.
 9 You know, the Espionage Act ---

10 Q. I do not want to engage in this discussion. It is one that we, as lawyers, are going to
 11 have to deal with, but let us assume that Mr Lewis is completely right and there is no charge
 12 for publishing the cables other than those, that subset of cables that contains names, what
 13 about obtaining the cables or receiving the cables? Is that limited in the same way?

14 A. Exactly, it is a very good question. This the vast majority of the counts on the
 15 indictment and the vast majority of the counts on the indictment, even if you were to take the
 16 governments assertions as true, as far as the last three counts, these counts relate to the
 17 entirety of all of the information that Manning is alleged to have given Assange, so all of the
 18 cables that ended up becoming thousands and thousands of stories in the biggest papers in the
 19 world, Assange is charged with just having them in his possession and also, the second set of
 20 charges is his conversations with Manning where he is alleged to have potentially implicitly
 21 asking for more or encouraging Manning to give him these documents.

22 All of these counts, again, sorry to sound like a broken record, activities that
 23 journalists are engaged in all the time, without question.

24 Q. Alright. Now, you mentioned count 7 in particular. Can I just draw it up, page 285. I
 25 am almost at the end of my questions, page 285 charges the knowing and unlawful receiving
 26 and obtaining of documents, namely the cables. Any of the cables ---

27 A. That is why I mentioned ---

28 Q. Go ahead, I interrupted, I apologise.

29 A. Yes, correct. Yes, correct. So, this is referring, at least in my understanding, to all of
 30 the cables, but not only that, this is actually why I pointed out that I thought that the
 31 government's remarks in one of the affidavits that Julian Assange was not charged with
 32 receiving information or passively receiving information is incorrect, because this charge
 33 specifically is only about receiving and it is not about encouraging, those are other counts.

1 So I believe, you know, this count read as is, is about passively receiving and the statements
2 that the US government has made are not true.

3 Q. And from a First Amendment perspective, from a journalistic free speech perspective,
4 what do you have to say about an indictment that contains that kind of allegation?

5 A. I do not think it is an exaggeration to say that this would criminalise national security
6 journalism in the US. Every single major paper has a team of national security reporters that
7 report on conduct of the government to classify, whether we are talking about foreign policy,
8 treaty negotiations, budgets involving the Pentagon or other members of the military, all sorts
9 of “secret” programmes that the public has the right to know about and, again, I would
10 encourage the court to read the affidavit from Max Frankel and the Pentagon Papers, who laid
11 this out in quite vivid detail and it is just as true today as it was 45 years ago.

12 Q. Thank you very much. That is all I ask unless, Madam, you have any questions.

13 JUDGE BARAITSER: No, I have no questions. Thank you very much indeed for giving
14 your evidence. Your involvement in the case has now finished. We will sever this link,
15 thank you very much for your time.

16 WITNESS: Thank you very much.

17 (Witness withdrew)

18 JUDGE BARAITSER: I will ask Simon to sever the link. Shall we have a discussion about
19 the timings?

20 MR SUMMERS: Yes, can we. Can I just say two things. Firstly, my understanding was that
21 the prosecution are constrained to the times that they have committed themselves to. I do not
22 press it, madam, because, of course, I do not maintain that we should be constrained by
23 timings, but there we are. But, secondly, and just in relation to the point that Mr Lewis
24 makes, the reference to a combined estimate for chief and re-examination was obviously a
25 reference to the original estimates that we gave on that schedule, madam.

26 So let us take Professor Feldstein, for example, 1.75 hours. That was our combined
27 estimate, as we said, for chief and re-examination and we came in well underneath that, even
28 with the constraints. I do not want there to be any misunderstanding about what we have
29 said. It was never part of my notes that, in addition to being held to 30 minutes in-chief, I
30 should get no additional limits for re-examination as well and I have never said it and I do not
31 think you ever heard that from our side.

32 JUDGE BARAITSER: Can we go back to your first point, so you are not objecting to
33 revised cross-examination timings?

34 MR SUMMERS: That is a matter for you, madam. You have imposed limits on us; it is a bit

1 odd if you then do not hold Mr Lewis to his timings.

2 JUDGE BARAITSER: Well, I have imposed in terms of cross-examination the limits which
3 were agreed between the parties ---

4 MR SUMMERS: Yes.

5 JUDGE BARAITSER: --- in relation to cross-examination. Now if there are submissions
6 that that should change, I am seeking, first, your view on that.

7 MR SUMMERS: It is entirely a matter for you, madam. How you regulate this proceeding is
8 entirely up to you.

9 JUDGE BARAITSER: All right, so be it. Mr Lewis.

10 MR LEWIS: Well, madam, sorry if I was a bit cross earlier. I was just being constantly
11 interrupted by Mr Summers when I was in flow.

12 JUDGE BARAITSER: Just pause. There seems to be some ... Are you willing to talk over
13 that noise?

14 MR LEWIS: I am happy to, madam.

15 JUDGE BARAITSER: Yes.

16 MR LEWIS: Madam, if it is my fault it is my fault. At no time had I understood it was
17 anything other than an estimate because the basis of your ruling was either they examine in-
18 chief or - this was the way we put it forward - they can adopt their statements. You accepted,
19 we thought, a generous compromise, a fair compromise, and allowed them time as well as
20 adopting their statements. In addition, no limit was put on re-examination. Mr Summers
21 spent nearly half an hour in re-examination on that. I timed it. The witness statements get
22 adopted in full. They then have half an hour to warm up their witness and then they have as
23 much time as they like in re-examination. It does not seem fair.

24 Now, madam, luckily, I seem to have stuck to my estimates but, if you were going to
25 make a ruling that they are firm times, I would seek to revisit them because I just do not
26 know. The best I can do, madam, and we are all experienced counsel in the case and I have
27 done many cases, these are our best estimates. Sometimes, you get shorter. Sometimes, you
28 get longer.

29 It is up to you, madam. You are perfectly within your case management powers to
30 impose a guillotine, if you wish but, if you do, we would respectfully say it needs to be clear
31 that it has been imposed. And, also, we would seek an opportunity to reconsider the
32 estimates because some of the witnesses have become rather prolix and, in those
33 circumstances, it is very difficult to estimate how long it will take to get through the material
34 we intend to put to them.

1 JUDGE BARAITSER: Yes.

2 MR LEWIS: I would respectfully say that pretty much it can be left to the good sense of
3 counsel in so far as cross-examination and re-examination is concerned. But if you wish to
4 impose limits, so be it, but we would, in those circumstances, seek the opportunity to at least
5 reconsider what we put because we put round figures. I just put 2 and 1.

6 JUDGE BARAITSER: Yes.

7 MR LEWIS: I did not give it precise thought.

8 JUDGE BARAITSER: All right. Well, in relation to examination in-chief, as I had
9 previously said, there is no benefit at all to this court in the evidence being repeated and the
10 witness statements being gone through in any detail again. However, I accepted that, in order
11 to sensibly answer questions in cross-examination, the witness should have the opportunity to
12 orientate themselves by being reminded of key aspects of the statements that they have been
13 given and I, therefore, set, as you quite rightly said, a generous period of time for that to take
14 place but a fixed period and, to date, the defence to their credit have fully complied with that
15 and I maintain that. So that is the purpose of setting time limits for examination in-chief.

16 In relation to cross-examination, I was under the impression that, as this had been
17 agreed between the parties, that it was the estimated time that you believed it would take to
18 ask the questions and I do think I should exercise my case management powers to limit the
19 time periods, albeit with your agreement, as to how long you think they will take. So I am
20 very happy for you to look at this again and to speak to the defence in case they object to the
21 proposed changes, but I will impose those thereafter. I might not be as strict as I have been
22 with the defence for the reasons I have given, but they are limits in order that this is not an
23 open-ended exercise for the prosecution.

24 In terms of re-examination, it is a much more difficult estimate for the defence to
25 give. Generally, they are much shorter and have been than any examination in-chief
26 proposed but, because they are based on the issues raised by the prosecution, it is very
27 difficult for them to predict how long their examination in-chief will take, it is going to
28 depend on the questions which have been asked of their witness. I, therefore, propose to
29 continue exactly as I have until now and not impose a time limit in relation to the re-
30 examination.

31 MR LEWIS: Well, madam, I respectfully say that is wrong and unfair because if there is
32 going to be case management powers that are imposed purely on the prosecution and the
33 cross-examination, I am not in a real position to give you cast iron times. It does not happen
34 in real trials that one imposes arbitrary guillotines to this. You can give an estimate and

1 counsel will keep to it probably as much as it possibly can.

2 JUDGE BARAITSER: Well, that will do, Mr Lewis.

3 MR LEWIS: But if you are going to say ---

4 JUDGE BARAITSER: Keeping to the estimate is what I am asking you to do.

5 MR LEWIS: --- I have to sit down - may I finish. If you are going to say I have to sit down
6 at one hour exactly, then I will revise all my estimates upwards.

7 JUDGE BARAITSER: Well, I am certainly going to give you the opportunity to revise your
8 estimates but, as part of my case management of this case when there are a significant
9 number of witnesses to give evidence, in order to maintain control of the proceedings I must
10 impose limits and I will.

11 MR LEWIS: Well, madam, another point is I do wish to say they were never agreed time
12 limits. They were estimated. We were simply asked to put what our estimate was. So,
13 madam, it was wrong to say, and if you were led into that error by Mr Summers by saying
14 they were agreed they were never agreed.

15 JUDGE BARAITSER: All right. So, going forward, what will happen is in the morning you
16 can try and agree overnight.

17 MR LEWIS: I ---

18 JUDGE BARAITSER: It is always preferable to the court for there to be agreement on those
19 revised estimates. If there is no agreement, well, then I will make my decisions in the
20 morning. If you come into court with those revised estimates, I can deal with them first thing
21 tomorrow morning.

22 MR LEWIS: I do not really understand, madam. I have never in my experience agreed a
23 time limit with the defence because there is nothing to agree when I am cross-examining. I
24 can either give an estimate and the court can then say whether it thinks it is reasonable or not
25 depending on the issues and we may spend some considerable time debating whether all the
26 matters I am going to go through and how much time I need to do them, and I am willing to
27 do that, but I will not ---

28 JUDGE BARAITSER: Yes, well it may be ---

29 MR LEWIS: --- think it is sensible, and I have never come across it, my learned friends will
30 tell me if I am wrong, to seek agreement from the other side on how much time you can have
31 to cross-examine.

32 JUDGE BARAITSER: Well, by agreement I mean you can make your proposal and if there
33 is objection by the defence, then they can raise it in the morning. If they agree to it, then it is
34 not a matter - well, it is a matter I will consider, of course, in the usual way but if there is

1 agreement between the two of you it makes the task easier as far as I am concerned.

2 MR LEWIS: So be it.

3 JUDGE BARAITSER: Anything else?

4 MR SUMMERS: Yes, please, madam. Tomorrow's witness, and he is scheduled for all day,
5 is Mr Lewis.

6 JUDGE BARAITSER: Yes.

7 MR SUMMERS: You will no doubt have noted that he has provided a number of lengthy
8 reports.

9 JUDGE BARAITSER: Yes.

10 MR SUMMERS: I think I counted five and none of them are short. May we, exceptionally
11 in his case, request of you 45 minutes to orient him in relation to all of the various issues that
12 he deals with?

13 JUDGE BARAITSER: I am going to say no. As has been said already, a generous 30
14 minutes has been given. The only purpose of that time is not for your witnesses to give their
15 evidence. It is for you to assist them and remind them of the main points of the evidence that
16 they are going to give and 30 minutes, quite frankly, should be enough time in relation to that
17 witness. So that is the decision in relation to that.

18 MR LEWIS: Madam, I am going to be the rest of the day with Mr Lewis.

19 JUDGE BARAITSER: Well, I think the way we will do it is, if you come in the morning
20 with your proposed revisions, then we can look at the witnesses perhaps day by day, perhaps
21 all in one go. It depends really how much argument there is about it. Let us see if we can
22 manage to ---

23 MR LEWIS: Well, I do not understand there to be any other witness tomorrow.

24 JUDGE BARAITSER: Yes.

25 MR LEWIS: So we will just have a short day then.

26 JUDGE BARAITSER: Well, it depends on how long you are going to be. You say you are
27 going to be the rest of the day. I will hear what you have to say in the morning. It is
28 probably better to deal with it first thing in the morning than now. We will deal with it in the
29 morning. I will hear what you have to say about the length of time you are going to take with
30 that witness and perhaps the other witnesses and I will set the time limits in the morning. All
31 right. Now, one other question, I know that you need to see your client in the morning.

32 MR SUMMERS: Yes.

33 JUDGE BARAITSER: And it means a late start. Is there any way the cells can
34 accommodate you seeing your client earlier than you are currently so that we can start on

1 time?

2 MR SUMMERS: I am sure we can ask, but we were told they do not open until 9.30. I think
3 that is just the way this court operates. We will certainly convey, madam, your request that
4 we be allowed in earlier.

5 JUDGE BARAITSER: Thank you.

6 MR SUMMERS: If it is at all possible.

7 JUDGE BARAITSER: I would like to start at 10 o'clock if possible.

8 MR SUMMERS: Certainly.

9 JUDGE BARAITSER: Can you pass the message if that is possible and just let everybody
10 know if it is possible we will start at 10 o'clock tomorrow morning. Thank you. Yes, Mr
11 Assange, overnight, as before, you remain in custody for the same reasons, to be produced
12 again in the morning. Thank you.

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ADJOURNED AT 16.27 UNTIL THURSDAY, 10th SEPTEMBER 2020

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