

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

15th SEPTEMBER 2020, 10.00-15.48

1 JUDGE BARAITSER: Thank you. Good morning. Yes, just before we start then I
2 understand the technological problems that we were experiencing yesterday have been
3 resolved and we can continue with the evidence of Mr Lewis. Just before we do I have been
4 asked to remind those who attend this hearing via the remote cloud video platform that if you
5 are in a court room, CVP room, and have technical difficulties please raise your hand. If you
6 are in the observer room and have technical difficulties please use chat function to advise the
7 host of the issues. I think that deals with all the housekeeping. Anything else before you
8 continue the evidence, Mr Lewis?

9 MR LEWIS: Not from me, madam.

10 JUDGE BARAITSER: Lovely. Thank you very much indeed. Good morning, Mr Lewis, I
11 understand that you can both see and hear the court this time, is that correct?

12 WITNESS: It is and I want to take responsibility for my own technological glitch I had. A
13 news article that Mr Fitzgerald asked me about was on a browser that had been taken off my
14 screen and it seemed to have embedded video of Sarah Sanders who ended up – and that
15 seemed to pop up with no action on our part and I apologise very much. I know that Sarah
16 Sanders is not to give testimony in this case.

17 JUDGE BARAITSER: Thank you very much for bringing that to the court's attention and
18 for your apology. Thank you very much. I think we will continue then as before.

19 MR ERIC LEWIS, on former affirmation

20 Cross-examined by MR LEWIS (cont.)

21 Q. Good morning, Mr Lewis. I am just going to pick up where we left off before the
22 break and the technological problems, and if you remember we had been looking at the case
23 of *Ahmed* in the European Court. If you turn to your fourth statement, Mr Lewis, and
24 paragraph 27 in your fourth statement. You say this, "First, although the European Court" –
25 and you are talking about the *Ahmad* decision, you see that from paragraph 26 – "First,
26 although the European Court found that solitary confinement is permissible, it rendered its
27 decision in 2012 and I have not had the benefit of recent studies to inform its opinion on
28 whether solitary confinement is truly a safe form of punishment or prison population
29 management."

30 And then you go on to mention a report on the Danish prison system. But first, can
31 we just examine this, if we just pop back to the case of *Ahmad*, it is in the supplemental
32 prosecution bundle, and I just want you to turn up in the decision of *Ahmad* bundle page 102,
33 that is paragraph 98 of the decision. And I just want to show you one or two passages before
34 asking you to comment. So, the first passage ---

1 A. I am sorry. Can you tell me – just a moment please.

2 Q. Certainly.

3 A. Can you tell me the page?

4 Q. Yes. It is ---

5 A. I do not have, I do not have a paper bundle. I only received , I received it before you
6 had been – after it had been sent to me in hard copy so I apologise for any delay. Please just
7 tell me what page and I will try and find it.

8 Q. So, it is in the bundle which is specifically marked for you and it is page 102 in the
9 bottom right hand corner and it is paragraph 98 of the European Court’s judgment in *Ahmad*.
10 It begins “The applicant ---

11 A. Right. As I – yes – hang on. As I – I think I received it either over the weekend or
12 yesterday so I am going to have to take a moment so that I can find it and scroll through the
13 document. OK. I am now at paragraph 98.

14 Q. Yes. What I want to do is just take you through a number of passages and then I will
15 ask you for your comment when I have shown you those passages. So, paragraph 98, ---

16 A. Certainly.

17 Q. “The applicant submitted general evidence as to the effect of solitary confinement on
18 prisoners.”. And then in paragraph 99 ---

19 A. Yes.

20 Q. --- last sentence, “There was also evidence of solitary confinement leading to a range
21 of physical illnesses. Dr Kuper’s conclusions were supported by a number of journal articles
22 by psychologists and criminologists, which the applicants provided.”. And we see those in
23 footnote 1, set out a number of matters relating to solitary confinement.

24 If we then go further in the judgment and we go to page 107 and paragraph 107
25 coincidentally in the report, you will see where the court comments, “Lower federal courts” –
26 that is in the United States – “have found that where an extended term of solitary confinement
27 violates the eighth amendment will depend on the particular facts of each situation.”.

28 And then “Although they have recognised that prolonged conditions of solitary
29 confinement may cause significant psychological damage.”. And if we then go over the page
30 to page 109, there is a section, a complete section headed “E. Relevant international materials
31 on solitary confinement”, and what the European Court does is it goes through a number of
32 those, and if we go to page 111 we see at paragraph 116 ---

33 A. You are going to have to –

34 Q. Shall I go more slowly? Sorry.

- 1 A. Mr Lewis, you are going to have to, you are going to have to slow down, I am
2 scrolling through the document.
- 3 Q. Sorry.
- 4 A. I am scrolling through the document so I need to – again – now, page 109 please?
- 5 Q. So, we have gone to page 109, go to page 111. I will take it more slowly.
- 6 A. Yes.
- 7 Q. Paragraph 116.
- 8 A. Thank you.
- 9 Q. And it is the General Report ---
- 10 A. Yes.
- 11 Q. --- of the European Committee for the Prevention of Torture which addressed solitary
12 confinement and then that is set out. And if you scroll down further, page 112, for instance
13 the European Court deals with the Inter-American system and then also ---
- 14 A. Yes.
- 15 Q. at 118 it deals with the United Nations, all dealing with solitary confinement. Now,
16 going back to your report now, you say in your paragraph 27 of your fourth report that the
17 European Court would not have had the benefit of recent studies and you quote the Danish
18 report.
- 19 A. Yes, there are, there are other studies as well including studies done by United States
20 Government agencies that deal with this issue.
- 21 Q. Well, I just want to deal with the Danish report first of all. Do you say that the
22 Danish report would have reversed the European Court of Human Rights Judgment?
- 23 A. I do not think that is a question that is possible to answer. I would suggest – I think it
24 would be accurate to say that if the European Court had before it the large body of evidence
25 for them to inspect the psychological effects of solitary confinement today, I would hope and
26 expect that the European Court would have approached this issue differently.
- 27 Q. I just want to look at that report. The report itself – and madam, we printed it out, it is
28 just on your desk just at the front I think. It is coloured. It is a short report, it looks like that.
- 29 JUDGE BARAITSER: I have it. Thank you.
- 30 MR LEWIS: My learned friends have it. It is the one you quote, this is the Danish report,
31 Mr Lewis. Solitary confinement placement and post-release mortality risk. And what it says
32 is that the findings on the first page, the overall mortality five years after release, 4.5 per cent,
33 is higher than those who did not spend time in solitary confinement, 2.8 per cent. However, -
34 --

1 A. Just remember, I did not - I am sorry, I did not quote anything, what I did was I
2 referred to an article which referred to the Danish report.

3 Q. So, had you looked at the Danish report itself?

4 A. I just cannot recall whether I thumbed through it but I know I looked at the articles
5 that were cited so this is – I do not – I totally did not consider the article by Dr Wildeman and
6 Dr Andersen that are cited – that referred to the Danish report.

7 Q. Well, I am reading the article, we have got the article by Christopher Wildeman and
8 Lars Andersen, and it says that there are five core limitations to its report. Do you know what
9 those five core limitations are?

10 A. You know, I am sitting 4,000 miles from my office so I do not have it in front of me.

11 Q. But this says you relied upon it.

12 A. But if you point – well, yes, when I read the report.

13 Q. Well, let us just read you some of those limitations. First of all, why did you not
14 mention any limitations that are in the report in your own expert's report?

15 A. I would say, Mr Lewis, that they were vague. That body of social science research
16 regarding the psychological effect of solitary confinement, I could have gone on for hundreds
17 of pages. I did not – I think it was a suggestion that solitary confinement, this solitary I
18 would strongly disagree with.

19 Q. Right. Well, I want to read you the core limitations – madam, it is page, you will
20 know, page 112 in that short article, the second column on the right hand side, first full
21 paragraph – Mr Lewis, it says, “Important as these results are for informing our
22 understanding how conditions of confinement in correctional facilities moderate the
23 association between incarceration and health, our analysis has five core limitations.” And I
24 just want to point out the second one which is halfway down the page, “Secondly, the
25 analyses presented here were merely associational and a possible causal effect of solitary
26 confinement placement on mortality could not be estimated because of the retrospective and
27 observational nature of the study. The stringent interpretation of our main results was thus
28 that the proportion of individuals placed in solitary confinement and mortality from non-
29 natural causes was increased in incarcerated people with specific demographic
30 characteristics, ie”, I presume this is the people who get put in solitary, “younger individuals,
31 individuals who serve longer sentences. And, “Third, some omitted variable (or set of
32 variables, such as rapidly declining mental health, exposure to severe trauma through other
33 sources within the facility, or within-facility drug or alcohol abuse), rather than solitary

1 confinement, might have driven the association we found.” So what they are saying is that
2 the report, their findings in the report are extremely limited. Is that not right, Mr Lewis?

3 A. I think what they are saying is that they are qualified.

4 Q. But why did you not mention those limitations in your report?

5 A. Well, what I did was I linked to the two articles so that if anyone wished to look at
6 them, they could look at them and see all of the intricacies of this special science data,
7 methodologies and limitations. There are only a few paragraphs with respect to solitary
8 confinement and what I attempted to do was to summarise the practice at all times other than
9 attempt to (inaudible) the study at a length that would have been impracticable.

10 Q. The reality, is it not, Mr Lewis, that you were just fishing about for something to try
11 and distinguish in *Ahmad* which is against your opinion?

12 A. Again, as I said, and as is elsewhere, there is extensive information, including most
13 importantly a GAO report and a Bureau of Prisons report dealing with repeated issues. There
14 is also a (inaudible) study. So if I were fishing there are some large fish in there that
15 convinces me that there is greater and greater doubt and greater and greater appreciation of
16 the effects of solitary confinement. So I have picked on one aspect of one study of my view
17 that *Ahmad* would be considered differently today is not based on what you have just put to
18 me.

19 Q. Mr Lewis ---

20 A. That is just one piece of data.

21 Q. Please, Mr Lewis, please.

22 A. There are 80,000 ---

23 Q. Please, Mr Lewis. I am going to ask you because – please, just answer the questions
24 or else we will not finish in time. We do not have unlimited time, so please keep your
25 answers concise to my questions. So my next question is going to be that the correct position
26 is far from matters getting worse, they have improved in the Bureau of Prisons since 2012
27 because of the *Cunningham* litigation. Do you know what the *Cunningham* litigation was?

28 A. I do.

29 Q. Why did you not mention the *Cunningham* litigation in your report?

30 A. The *Cunningham* litigation dealt principally with ADX and it is, the *Cunningham*
31 litigation was a settlement, and I am happy to deal with the *Cunningham* litigation now. It
32 attempted to make changes in certain rules and regulation. In my view, nearly all, or at least

1 (inaudible), and again (inaudible) either has not been properly implemented or do not apply
2 to Mr Assange. I am happy to explain.

3 Q. The question I asked was why did you not mention the *Cunningham* litigation in your
4 report?

5 A. As I said, I do not think the *Cunningham* litigation affects anything that I have
6 espoused in practice and I am here to talk about (inaudible) practice.

7 Q. Do you accept that the defence, one of the defence assertions is that he might go to the
8 ADX - Mr Assange might go to the ADX?

9 A. Yes.

10 Q. Because the Government's position is no one knows yet, and that is all speculative,
11 but I am just going to deal with that position. Can we go to *Cunningham*?

12 A. I know that is the Government ---

13 Q. Madam, the actual litigation is, it is described by Gordon Kromberg, but the actual
14 settlement agreement is in tab 13 of the prosecution core bundle as exhibit B to a fifth
15 affidavit of Gordon Kromberg. I am sorry it is ---

16 JUDGE BARAITSER: Now the Government's core bundle.

17 MR LEWIS: The declaration of Mr Kromberg is in the paginated bundle.

18 JUDGE BARAITSER: Yes, what page is that?

19 MR LEWIS: But not the exhibit.

20 JUDGE BARAITSER: Ah.

21 MR LEWIS: So the exhibit, to get that, madam, we have to go to the prosecution core
22 bundle, tab 13, exhibit B.

23 JUDGE BARAITSER: Now, I am not sure. Do I have a prosecution core bundle is the
24 question?

25 MR LEWIS: I think you should have, madam. I think I have written in very ---

26 JUDGE BARAITSER: Yes, I think I do.

27 MR LEWIS: On the front it has an index.

28 JUDGE BARAITSER: Yes, I think I do. Tab 13.

29 MR LEWIS: And tab 13. It is not internally paginated, madam, but if you go to tab 13, we
30 have got Kromberg 5.

31 JUDGE BARAITSER: Yes.

32 MR LEWIS: And it is exhibit B, and it is after page 33.

33 JUDGE BARAITSER: I have it.

34 MR LEWIS: No, that does not help.

1 JUDGE BARAITSER: I have exhibit B.

2 MR LEWIS: You have exhibit B. So let me just read this to you, Mr Lewis.

3 A. I am sorry, Mr Lewis. I do not have the document, but if you could tell me which
4 Kromberg ---

5 MR LEWIS: Mr Kromberg deals with it and you definitely have his evidence on it because
6 his evidence you will find on this, I think, at page 330 ---

7 A. Mr Lewis, if you could just tell me the name of the document I can find it. I have the
8 whole of his ---

9 MR LEWIS: It is the last Kromberg. It is Kromberg 5 and ---

10 A. If you can just tell me the name of the declaration. He has named each one.

11 Q. I am sorry. What are you asking, Mr Lewis? It is the fourth supplemental
12 declaration.

13 A. OK, lovely. That is helpful. Let me try and find it.

14 JUDGE BARAITSER: Page 298 of the other prosecution bundle.

15 MR LEWIS: I am obliged, madam, yes, 298, and the actual paragraph which deals with it is
16 paragraph 22 on page 306. But, madam, I first of all before I went to Mr Kromberg I just
17 wanted to go to the actual exhibit itself because it reads through it.

18 JUDGE BARAITSER: All right, Mr Lewis? I do not think you have the exhibit to hand, but
19 Mr James Lewis will summarise the relevant parts for you.

20 MR LEWIS: Thank you, madam. So I am just going to explain, Mr Lewis ---

21 A. Thank you, madam.

22 Q. --- what the settlement says and what it is about. "Introduction. On June 15, 2015",
23 and this was filed in November 2016, "plaintiffs Harold Cunningham and others, it was a
24 class action", going over the page, "complaint alleging the treatment of inmates with mental
25 illness by the Federal Bureau of Prisons in the United States Penitentiary Administrative
26 Maximum located in Florence ADX has failed to make the minimum level of care necessary
27 to satisfy the Eighth Amendment to the US Constitution", and this was all about people
28 diagnosed with mental illness being held in the ADX. We see that in paragraph 2, and if we
29 go to paragraph 4, and I will read you this recital. Madam, this is page 3 of the actual exhibit.
30 "This addendum is also the result of nearly four years collaboration, arm's length settlement
31 negotiations by energetic and experienced counsel for the parties and their respective
32 consultants and experts aided by an experienced United States magistrate judge to resolve the
33 claims raised by this action. The parties, without conceding any affirmatory in their claims or
34 defence, is engaged in extensive arm's length settlement negotiations to implement changes

1 relevant to the constitutional violations alleged in the second amended complaint.” And then
2 it says, “The parties benefited from the informed advice of two psychiatrists with correctional
3 experience who have significant experience as expert witnesses and monitors in correction
4 mental health litigation.” And then we see page after page of the settlement and the things
5 which have to be dealt with. And then before I ask you the question, Mr Lewis, if we then
6 just go back to Mr Kromberg’s fifth declaration. You had it at page 306. It is his paragraph
7 22.

8 A. I do not have - page 306?

9 Q. Page 306.

10 A. I do not think that is the case.

11 Q. It starts at 22.

12 A. I am sorry, I do not – that is not – I have here a bundle. Is it your bundle or a bundle
13 to me?

14 JUDGE BARAITSER: Can you find the fourth supplemental declaration?

15 A. Yes, I think I can, but I think I have it at the - I am looking for it. I think it is in a
16 different bundle. I will need a moment. I apologise for this.

17 MR LEWIS: Well, Mr Lewis, can I just ask you this question? It may shortcut matters.

18 A. Yes.

19 Q. Given what Mr Kromberg says in paragraphs 22 to 27, do you agree that the
20 *Cunningham* litigation has improved matters in relation to the secure housing of inmates with
21 mental health conditions?

22 A. My view is that it has improved it in certain ways and in certain ways things have
23 gotten worse.

24 Q. All right. Well, I am going to leave it there and I am going to move to something
25 else. At paragraph 38 of your witness statement, your fourth witness statement.

26 A. Yes.

27 Q. You talk about US federal prisons are failing to protect inmates from Covid-19.

28 A. Yes.

29 Q. Now, you have that? That is your fourth statement, paragraph 38.

30 A. I do have it, yes.

31 Q. Now, have you read what Mr Kromberg says about this?

32 A. Are you talking about something he said recently or what he said some months ago?

33 Q. I mean your opinion ---

34 A. I have the statistics so I can tell you today what the statistics are ---

- 1 Q. Just let me ask you ---
- 2 A. --- and what Mr Kromberg said.
- 3 Q. Well, let me ask the question, please.
- 4 A. It is not ---
- 5 Q. Mr Lewis. Mr Lewis, just let me ask the question.
- 6 A. OK.
- 7 Q. Right.
- 8 A. Yes.
- 9 Q. We were looking at Mr Kromberg's fifth declaration, bundle page 301, starts at page
10 301. It starts at page 30. Going over to paragraph 9, the ADC (the Alexandria Detention
11 Center), have you visited there since the Covid-19 pandemic, Mr Lewis?
- 12 A. I have not been able to, no. No is the answer. No, I have not.
- 13 Q. "Amongst other things", the protocols are set out: "issued with a cloth mask they must
14 wear at any time out of their cells. Temperatures of all inmates are taken on a daily basis.
15 The protocols are updated on a regular basis to reflect current practices. According to the
16 USMS, only one inmate at the ADC has tested positive for Covid-19. That inmate was a new
17 arrestee. Staff placed the arrestee in quarantine, and the arrestee subsequently tested negative
18 and was released." So there are no cases of Covid-19 at the ADC; do you see that?
- 19 A. As at what date, sir?
- 20 Q. As at 3 September, a week or two ago.
- 21 A. That is what Mr Kromberg says, yes,
- 22 Q. Do you dispute it?
- 23 A. I cannot dispute that at that facility that Mr Kromberg is stating that and I have
24 absolutely no reason to doubt it.
- 25 Q. That is the facility that Mr Assange, you have said, and we have agreed, will be sent
26 to.
- 27 A. That is the facility that he will most likely be sent to, yes, indeed.
- 28 Q. I do not think it is most likely, you have said it is certain – and we have agreed – he
29 will be sent there.
- 30 A. I think what I said was that I would like to refer to my statement where I state it is
31 overwhelmingly likely if there is room there then that is where he will go.
- 32 Q. All your statistics about other prisons are really irrelevant, are they not?
- 33 A. I would say they are relevant if he is sent to another facility, that would - nearly 12
34 per cent of the prison population have Covid, so I would say that if he is convicted and is sent

1 elsewhere and there is still Covid, then I would say it is not irrelevant, but that remains to be
2 seen.

3 Q. Are you seriously trying to help the court, Mr Lewis, or are you just trying to find
4 every fact you can in favour of your opinion?

5 A. I am trying to help the court by providing information that I have that is complete.

6 Q. I am going to turn to a different subject now, sentence, a new topic. You deal with it
7 as your question 4 in your first witness statement.

8 A. Yes, let me just turn to that, please.

9 Q. Paragraph 36 and following. Mr Lewis, back in May 2019 you said that Mr Assange
10 faced 340 years in prison; do you accept you said that in the press?

11 A. I accept that it was in the article. There used to be a 20-year sentence that was
12 (inaudible) to him. What I have not been able to determine is whether that was an editing
13 issue or whether it was just a mistake, but the answer is 175 years.

14 Q. The point is, Mr Lewis, what you said you based your quotation on the Espionage Act
15 18 USC 2388A, which says: “When the United States is at war”, and that carries a 20-year
16 sentence, not what he is indicted for, which only carries a 10-year sentence per count. That is
17 right, is it not? That is why you said 340 years.

18 A. I do not think so, but I ---

19 Q. Let me take you exactly to it, because it is a quotation you made. It is in the bundle -
20 -

21 A. I am happy to say that it was an error.

22 Q. It is an error. I want to explain - -

23 A. It was an error in this article, yes.

24 Q. The 175 years you are saying is simply a soundbite on behalf of the defence, is it not?
25 You do not really expect him to be sentenced to that.

26 A. (Inaudible)

27 Q. Do you expect him to be sentenced to 175 years in prison?

28 A. I think that there is a reasonable likelihood and I can explain why if you would like
29 me to.

30 Q. No, we are going to come to that because we are going to go through some sentencing
31 cases.

32 MR FITZGERALD: Madam, I do think if my learned friend is going to say that it is merely
33 a soundbite, and Mr Lewis says, “I am happy to explain how I arrived at it”, he ought to let
34 him deal with that.

1 JUDGE BARAITSER: Mr Lewis, the point is that you asked two questions. First you said it
2 was a soundbite and then you said you do not really expect him to be sentenced in that way,
3 so it was a compound question, entitled to answer each of the two parts.

4 MR LEWIS: "Soundbite" was probably a comment, madam. I will ask him again - -

5 MR FITZGERALD: I think he should be allowed to explain why he thinks that that is a real
6 possibility, rather than my learned friend constantly saying "you have to answer my question"
7 as if he is a headmaster.

8 MR LEWIS: I am happy for him to explain. Madam, I would ask that he does not go on for
9 more than five minutes on the answer.

10 JUDGE BARAITSER: There is no time limit. Your question is: "you do not really expect to
11 be sentenced to that, do you?" If you are asking that kind of open question, then he will
12 explain why he does. If that is the answer you are looking for, then no doubt he will give it.
13 Is that the question you want to formulate?

14 MR LEWIS: I could put a "nod": he will not be sentenced to 175 years, will he?

15 JUDGE BARAITSER: He will still tell you why he thinks he will be and that is a legitimate
16 answer.

17 MR LEWIS: Madam, it does not matter whether I ask a closed question or open question, he
18 is going to answer in that way in any event. It is really irrelevant whether it is an open
19 question. I am happy for him to explain why he is going to get 175 years.

20 JUDGE BARAITSER: Yes. Mr Lewis, you said there was a reasonable likelihood, and you
21 are being asked why you have reached that view. I am not going to time-limit you, but be
22 aware that you have already expressed your view in your statement and therefore some of
23 what you are saying will be repetitive, so bear that in mind when you answer this question,
24 please.

25 THE WITNESS: Thank you, madam. I will try not to be repetitive. The US Government has
26 said that this is one of the largest disclosures of classified information in history. Espionage
27 Act cases often result in life sentences and that is under 794 - is under 793. Senator Pompeo
28 is the Head of the United States Intelligence Agency and that hostile governments, including
29 Russia, Iran, China, Syria, the Taliban, Osama bin Laden, all rely on what Mr Assange has
30 said. The second superseding indictment greatly broadens the factual matrix with respect to
31 Mr Assange. Chelsea Manning, the Government asked for 60 years. Mr Assange's
32 maximum is 175 years. I have gone through the sentencing guideline and, indeed, the
33 sentencing guidelines, as madam will be well aware, are now advisory but they are

1 encouraged to be followed. What I tried to do was to work out what I thought would be the
2 likely factors for (inaudible).

3 JUDGE BARAITSER: Thank you.

4 THE WITNESS: The base offence under the guidelines is 30 ---

5 MR LEWIS: I am sorry, I am going to stop you there. The base offence is 24.

6 JUDGE BARAITSER: You can come back and ask him that. Mr Lewis, everything you
7 have said thus far I do already have and really does just replicate what you have said in your
8 statement, so I understand your answer. I am going to hand back over to Mr Lewis.

9 MR LEWIS: The first thing one obviously looks at is the sentencing guidelines. We have
10 them here; we have them in America. I want to look at some cases under the same
11 provisions. One of the things you would look at is similar Espionage Act sentences. If we go
12 to bundle page 170, paragraph 185 in the original bundle which was served, we have the case
13 of *Sterling*, in Mr Kromberg's first declaration. What Mr Kromberg says at page 168, page
14 182, which I will read before you comment: "Eric Lewis alleges in his affidavit that Assange
15 is highly likely to be sentenced to imprisonment which will constitute the rest of his natural
16 lifespan. Mr Lewis's affidavit suffers from critical flaws. He relies heavily on the statutory
17 maximum of 175 years without acknowledging that only a tiny fraction of all federal
18 defendants receive statutory maximum sentences." I am going to pause there. Do you accept
19 that only a tiny fraction of federal defendants receive statutory maximum sentences, Mr
20 Lewis?

21 A. Yes.

22 Q. 183: "The law that controls sentencing of federal courts of the United States sentences
23 18.3553. Pursuant to that statute, the court should impose a sufficient sentence not greater
24 than necessary to comply with the need for the sentence imposed to reflect the seriousness of
25 the offence, promote the respect for law, provide just punishment for the offence, afford
26 adequate deterrents, protect the public from further harm of crimes and provide the defendant
27 with needed educational, vocational training. In determining a particular sentence to be
28 imposed, the District Court should consider the following factors: the nature of the
29 circumstances of the offence and the history, the need for sentence", those factors we have set
30 out. 185: "A key factor, as noted above, to be considered by a sentencing court of the United
31 States is the need to avoid unwarranted sentence disparities among defendants with similar
32 records who have been found guilty of similar conduct. Mr Lewis relies heavily on the
33 sentence initially imposed on Manning but fails to account for the key fact, while parole is

1 unavailable in the federal criminal justice system...”. Pause there; do you agree with that:
2 “while parole is unavailable in the federal criminal justice system”, Mr Lewis?

3 A. There is 15 per cent good time but that is the closest to (inaudible).

4 Q. “Defendants with sentences of more than a year incarceration in the military system
5 generally are considered for parole while serving a third of their sentence”. Do you agree
6 with that?

7 A. That is when they are first available to be considered for parole.

8 Q. “As a result, the sentence imposed by a military court of a term of years of
9 imprisonment tends, in practical terms, to be the equivalent of a much lower term of years of
10 imprisonment imposed in a federal civilian court. Moreover, Manning’s sentence was in any
11 event commuted accordingly. The sentence imposed on Manning by the military judge will
12 be of limited use as a factor of consideration for a judge considering the appropriate sentence
13 for Assange. Instead, in seeking to avoid an unwarranted sentence disparity for Assange, the
14 sentencing judge, his sentencing judge will likely consider sentences recently imposed in US
15 civilian courts for unauthorised disclosure of classified information to the media.” *Sterling*.
16 Are you familiar with the facts of *Sterling*?

17 A. I am.

18 Q. Now, *Sterling*, do you know what centre – he was a CIA agent and, during his time,
19 he was assigned to a classified programme aimed at, to disrupt Iran’s nuclear capability
20 where he was a programme case manager for two years and he served as the primary contact
21 for a Russian scientist and the CIA would pass on realistic, but ultimately flawed nuclear
22 plans to the scientist who in turn would give them to officials in the Iranian Government and
23 he was charged with, on an indictment, of handing over those letters and plan. Do you know
24 what maximum sentence he faced, Mr Lewis?

25 A. I know that the Government asked for 290 to 365 months. I believe that that would be
26 – I know it is awfully difficult for non-US criminal lawyers to (inaudible) which I think
27 would be about 23, 24 years to a figure well over 30 years.

28 Q. Mr Lewis, I am going to stop you there because you are not answering the question.
29 Mr Lewis, I am going to stop you.

30 A. Yes.

31 Q. The question I asked is quite simple. What was the maximum sentence he faced?
32 That is the exact parallel with what you have done with Mr Assange’s 175 years. What was
33 the maximum sentence he faced?

34 A. Well, he had a conviction. I think it was a level 38 without enhancement.

- 1 Q. No, I am not talking about the sentencing guidelines. I am talking about the ten
2 counts he faced. I can read them out to you, all under 793(d), 793(e), all the same counts
3 other than there is a mail fraud and obstruction of justice which Mr Assange is not faced with,
4 but I want you to tell this court what the maximum sentence is he faced.
- 5 A. He faced, he faced ten 10-year counts and they had a maximum sentence of 100 years.
- 6 Q. Well, in fact, he faced a sentence of 130 years. Do you accept that?
- 7 A. Okay. I have no reason to doubt that.
- 8 Q. He fought the case so there is no discount for a guilty plea. He fought the case and
9 after being convicted at trial, what was his sentence? His sentence was 42 months, was it
10 not?
- 11 A. That was the sentence imposed by the court but not what the Government requested.
- 12 Q. I understand that entirely, but what we are dealing with is what sentence Mr Assange
13 will get. So he faced 130 years and got 42 months. Why did you not give a realistic estimate
14 of what Mr Assange faced rather than the soundbite of 175 years?
- 15 A. I did give a realistic – I gave what I thought the statutory maximum was and then I
16 looked at the sentencing guidelines as to what I thought would be the sentencing guidelines
17 sentence, most common sentence within the guidelines. I did not think I was permitted to say
18 how those guidelines would work, but I am happy to go through and show what the
19 guidelines say. He was given a sentence that was way below the guidelines by this particular
20 judge. There were certain reasons given, I think, by the court as to why he should be below
21 the guideline (inaudible).
- 22 Q. Right. Mr Lewis, what about, what about the next, what about the next case?
- 23 MR FITZGERALD: Madam, I just wonder whether he should permit Mr Lewis to explain
24 how he has arrived at the figure he has arrived at. He has not dealt in any detail with the
25 guidelines in his statement. He has referred to it twice. Every time my learned friend cuts
26 him off. I really think it would be fair to Mr Lewis, to Mr Eric Lewis, if my learned friend
27 would just let him explain how he arrived at the figures he has arrived at.
- 28 JUDGE BARAITSER: Mr Fitzgerald, this is classic re-examination territory I would have
29 thought. I do not think there is any need for me to insist upon it, but no doubt, you can ask
30 the same question.
- 31 MR LEWIS: We are going to turn to the case of *Allbury*, which is still in paragraph 185.
32 Can you see that? Mr Kromberg quotes *Allbury*. Are you familiar with that case?

1 A. I am familiar. I believe that was the case in which an African-American FBI agent
2 from Minnesota who alleged racism, passed an internal FBI document, a table document and
3 that was – he pleaded guilty.

4 Q. How many years was the maximum that Mr Allbury faced?

5 A. That I did not calculate. I think it was one count but I do not recall, and I was not able
6 to access all of the documents.

7 Q. Will you take it from me it is more than one count? He in fact faced two counts with
8 a maximum sentence of 20 years. Do you accept?

9 A. Yes, I do. I have no reason to doubt your integrity.

10 Q. I am going to take you to the sentencing memorandum. It is in the extra material
11 bundle, madam, bundle page 250, a fairly recent case, the United States District Court,
12 District of Minnesota, October the 18th 2018, sentencing hearing.

13 Now, you have this at page 250 and I just want to take you through some of the
14 provisions, Mr Lewis, because he ---

15 A. Page 250 of what, sir.

16 Q. Sorry?

17 JUDGE BARAITSER: Of which bundle he is asking?

18 MR LEWIS: This is the ---

19 A. Page 250 of which?

20 Q. Additional material sent to you yesterday morning.

21 A. Right, I have to confess I have not read it yet.

22 Q. Well, we will read it together. Go to page 254. So, he is charged with exactly the
23 same statutory provision as Mr Assange. We see that by looking at page 255 and we see line
24 22, “Central to a finding of guilt under 18 US C793E. Now, if we get into the sentencing
25 memorandum.

26 A. Sorry, which page are we on?

27 Q. Sorry?

28 A. I am sorry, what page are you on? What page are we on?

29 Q. Bundle page 255.

30 A. Okay.

31 Q. And if we go to 258, what the judge is then, this is what the judge is saying, picking
32 up at line 14, “The guidelines reflect that as well 2M31 of the Espionage statute lays out the
33 most severe guideline penalties because of the intent level and those guidelines are driven by
34 the classification of the information and not any position. They do not take in anything with

1 respect to volume of material. They do not take in anything about the level of crime. They
2 only discuss the classification level,” so the judge is saying when you sentence for 793C, you
3 only look at the classification level. If we then go to bundle page 262.

4 A. I am sorry, is there a question or ---

5 Q. I am just going to show - I am going to ask a question in a moment. Go to page 262,
6 line 4, “The parties agree the information was not top secret which distinguishes Mr
7 Allbury’s offence level 24 from the higher base level offence under this guideline which
8 would be 29 for disclosure of top secret information.” Now, pausing there, a moment ago,
9 you said Mr Assange’s base level was 30. Why do you say 30 and not 24?

10 A. I do not think those are the – because I do not think that the 2018 guidelines had been
11 promulgated and were in effect at that time. I looked at the 2018 guidelines. Those were
12 (inaudible). If I am in error, then I apologise, but I did spend quite a bit of time with the 2018
13 guidelines.

14 Q. So ---

15 A. And I believe that those are the guidelines that are in effect the top level of
16 conviction.

17 Q. Are there any documents in Mr Assange’s which are top secret rather than secret?

18 A. Not to my knowledge. I obviously have not seen the document.,

19 Q. So, that would be the lower base level.

20 A. 30.

21 Q. I am not going to argue with you.

22 A. 30 would be ---

23 Q. Let us go to page 264. The judge said ---

24 A. As an answer to the question, I think, employment.

25 Q. The judge said at 264 he found the total offence level is 23 because of discounts. The
26 criminal history category is 1. The imprisonment range is 46 to 57 months. The supervisory
27 release ranges from one to three years, a fine range of £200,000 and then, if we go to the
28 actual sentence which we have, which he explains at page 285, the court, line 10, “I want to
29 now explain the reasons for the sentence I have imposed which was 48 months. Having
30 considered all of section 335(a) factors, I find the sentence that I have imposed is sufficient.
31 It is not greater than necessary to reflect the seriousness of Mr Allbury’s offence and provide
32 just punishment for the crime. To deter Mr Allbury from committing crimes in the future, to
33 deter others from committing this crime or similar crimes, to protect the public, to provide Mr
34 Allbury, if needed, treatment and counselling and to avoid unwarranted disparities between

1 Mr Allbury's sentences and the sentences of defendants who have similar records who have
2 been found guilty of similar conduct. I have sentenced Mr Allbury to 49 months'
3 imprisonment," and it sets over – he then gives the reason why and at page 286, "Lest it be
4 mistaken, this is a very serious offence." So, would you accept, Mr Lewis, that the judge
5 went through a meticulous sentencing exercise in relation to Mr Allbury?

6 A. Well, I have not read it because I just received it yesterday, but I would accept that the
7 judge has gone through what you have shown me and given (inaudible).

8 Q. Answer me this, Mr Lewis. What is the longest sentence, and this is a simple
9 question that does not require a speech, what is the longest sentence served by a federal
10 defendant for unauthorised disclosure to the media? What is the longest sentence ever
11 imposed? Do you know?

12 A. I do not have – I mean, I have looked at numerous sentences but I do not – maybe
13 why do you not share that with me and I will let you know. I know most of the espionage
14 cases (inaudible) ---

15 Q. I am going to ask you to agree that it is 63 months' imprisonment.

16 A. Well, I believe there have been eight cases that have been tried under the Espionage
17 Act until this one. There were so many Espionage Act cases. There have been other
18 espionage cases with material given to a foreign power, which is what is suggested in the
19 guidance. Those cases – there are numerous cases that have resulted in life imprisonment,
20 but with respect to 793 only, to my knowledge there have been eight cases and there has
21 never been a case like this, but, if that is right, then I accept that those days, 63 months, is the
22 longest.

23 Q. Do you agree that Mr Assange does not face a mandatory minimum sentence in this
24 case?

25 A. I do agree with that.

26 Q. Do you agree that the federal judge assigned to this case will himself decide on the
27 appropriate sentence?

28 A. The federal judge has a discretion upon the sentence.

29 Q. Do you agree that the Government ---

30 A. And the guideline – sorry.

31 Q. Do you agree that the ---

32 A. (Inaudible) ---

- 1 Q. These are not difficult questions, Mr Lewis. Please just concentrate on the question
2 and give a simple answer. The Government can make a recommendation for sentence, can it
3 not?
- 4 A. Yes.
- 5 Q. The defence can make a recommendation as to sentence, can it not?
- 6 A. Yes.
- 7 Q. But ultimately, it is the federal district judge that decides the appropriate sentence, is
8 it not?
- 9 A. That is correct.
- 10 Q. Federal district judges are nominated by the President of the United States.
- 11 A. That is correct.
- 12 Q. They have to be confirmed by the US Senate.
- 13 A. Yes.
- 14 Q. Once confirmed, they enjoy life tenure. There is no retirement age and they cannot be
15 removed from office. Is that right?
- 16 A. Except by impeachments, so they can be removed yes ---
- 17 Q. Yes, I think the same in England, you have ---
- 18 A. --- by impeachment.
- 19 Q. --- a High Court judge has to be impeached by both Houses of Parliament. I think it
20 happened in 1601. But effectively, ---
- 21 A. Yes, but ---
- 22 Q. --- the district judge has life tenure in America. Now, the purpose of life tenure is to
23 ensure the federal judge's independence, is it not?
- 24 JUDGE BARAITSER: I think there is some delay in hearing the question.
- 25 Q. Now, Mr Lewis ---
- 26 A. I am sorry, I was not sure whether you – you talked about impeachment, it is only the
27 Senate that impeaches. There have been probably eight or 10 or 12 impeachments in recent
28 years and mainly for corruption. So, effectively, with good behaviour a federal judge has life
29 tenure, that is correct.
- 30 Q. And the purpose of life tenure is to ensure the federal judge's independence, is it not?
- 31 A. Yes.
- 32 Q. And are you familiar with the federal judge assigned to Mr Assange's case, Judge
33 Claude Hilton?

1 A. I am – I am familiar with his decisions. I am not sure I have appeared before him. I
2 could not really comment.

3 Q. Well, let me help you a little bit. He was appointed a federal judge in 1985 and has
4 been sitting on the bench for 35 years. Would you agree that he is a highly experienced
5 district judge?

6 A. Yes.

7 Q. Do you have any reason to think he would not make a fair sentencing decision in this
8 case?

9 A. His reputation is as a strict sentence, but I do not know whether that would say that he
10 is unfair. Lawyers talk a lot about the tendencies of judges and who you would want to
11 sentence your client. He is not one of them.

12 Q. But you agree ---

13 A. But he is fair, I do not ---

14 Q. You ---

15 A. --- I do not question his integrity in any way.

16 Q. And you agree with me, I think we have already said, there are various laws about
17 how judges make sentencing decisions.

18 A. There are the sentencing guidelines which no longer have the effect of law but there
19 are statutory provisions that have maximum sentences. The judge has a discretion whether to
20 impose a consecutive or cumulative sentence and that would be in his or her discretion.

21 Q. Well, what I am getting at, Mr Lewis, is section 3553(a) of Title 18 instructs the court
22 to impose a sentence sufficient but not greater than necessary to establish the goals set out in
23 that section, does it not?

24 A. That is certainly what it says, yes.

25 Q. And have you any reason to think that Judge Hilton would fail to apply this law?

26 A. Well, the law is very general. We have the (inaudible) in the world by far, so there is
27 a wide range of discretion within the very general principle. Yes, I think he will apply a
28 sentence that remains within the scope of (inaudible). There is a broad range even within that
29 scope. I do not think I have ever seen a sentence outside that statutory maximum or
30 minimum..

31 Q. Now, we may disagree about the base sentencing level but you said the base level is
32 30. Tell us what the range for sentence for base level 30 is.

33 A. Yes. The core adjustments according to the 2018 sentencing guidelines, which as I
34 understand are the guidelines currently in effect, the base at 30 is 97, 121 months.

1 Q. Thank you. Right, the ---

2 A. Per count.

3 Q. --- I am just going to move to another area, madam. I do not know, it is quite hard
4 work here.

5 JUDGE BARAITSER: Yes. I was going to offer ---

6 MR LEWIS: I do not know if it is worth 10 minutes?

7 JUDGE BARAITSER: Yes, I was going to offer a break shortly anyway. Mr Lewis, I think
8 everyone just wants a short break. It is five past 11. Perhaps if we can reconvene at quarter
9 past 11? Are you content to do that?

10 A. Yes, certainly, madam.

11 JUDGE BARAITSER: Thank you. We will leave the link open. Back at quarter past please.
12 Thank you.

13 (Short adjournment)

14 MR LEWIS: Mr Lewis, we are back.

15 A. Fine. Thank you.

16 Q. Now, Mr Lewis, I am going to turn to a different topic on the First Amendment. You
17 have suggested in your evidence that US legal precedent precludes the prosecution of
18 Mr Assange. Is that correct?

19 A. Yes, that is correct. There has never been a prosecution of a publisher - a successful
20 prosecution of a publisher, of information relating to the national security.

21 Q. Right, well, I am going to take you to the case of *Rosen*. It is in the extra material
22 bundle, madam.

23 JUDGE BARAITSER: Thank you.

24 MR LEWIS: It is page 299. Actually, before we just move that, I could not find, put my
25 finger on it before, but if we turn to page 296, Mr Lewis, you will see an article you
26 published in The Independent. Do you see that, page 296, entitled, "As an American lawyer I
27 don't want to see Julian Assange extradited to my country."

28 A. Yes, I think we talked about that article yesterday.

29 Q. We did. But in fact the reason I am just drawing your attention to it is this is where
30 you say he faces 340 years in prison. That is just the first paragraph and you, in fact, quote
31 the wrong section and give the wrong number, do you not?

32 A. I think we discussed that was an error. The Espionage Act of 1917 has been amended
33 on numerous occasions.

34 Q. Right.

1 A. Well, I do not think it is actually quoted or conveyed both reports. I am taking a look
2 at the date. I think this was just, just after the last superseding indictment, so that is an
3 inaccuracy for which I apologise to my reader, but certainly when I was providing a vague
4 number it was correct.

5 Q. I want to go through the decision of the *US v Rosen*, which is decided in fact as long
6 ago as 2006, and you will tell us if there is any precedent which has changed it. It begins at
7 page 299 and in this case DJ Ellis, I am just going to read a couple of paragraphs to just set
8 the scene. This is about a prosecution under 793(g), which is what Mr Assange is also
9 charged with. “In this Espionage Act prosecution, defendants Steve Rosen and Keith
10 Weissman have been charged in count 1 in a superseding indictment with conspiring to
11 transmit information relating to the national defence to those not entitled to receive it.” And
12 the arguments are “Unconstitutionally vague”, which I think is an argument in this case, or
13 was certainly an argument put forward back at Woolwich. Secondly, abridges the First
14 Amendment right of free speech and they assert the First Amendment rights of others by
15 attacking the statute as facially overbroad.” So that is what happens. And if we go to page
16 302 the judge sets out the provisions which we are concerned with in this court, 793(d), (e)
17 and (g), and I am going to ask you some questions on this case. First of all, Mr Lewis, have
18 you read this case before?

19 A. I have read the case, but not in a long while because the case was ultimately not
20 proceeded with.

21 Q. Let us just see what the judge says and ask you whether you agree with various
22 passages. At 304, again just setting the scene, at the bottom of page 304, the judge says
23 “Over the years numerous commentators have criticised these provisions”, which we just
24 looked at, “as excessively complex, confusing, indeed impenetrable, yet despite repeated
25 calls for a reform of these provisions in the more than half a century since their last
26 amendment in 1950, the statute has remained unchanged.” This is in the context of arguing
27 that it is vague or uncertain, and he deals with it, page 305, by the first perforation, he deals
28 with section 793’s litigation’s history is sparse but nonetheless both pertinent and
29 instructive.” And we drop down, second line, “While the Supreme Court has never
30 considered a 793(d) or (e) case, it has considered and rejected a vagueness challenge to the
31 phrase ‘information relating to the national defence’ as used in a related espionage case. See
32 *Gorin*.” Do you agree that the Supreme Court did that?

33 A. Did what?

34 Q. That the Supreme Court rejected a vagueness challenge in *Gorin*.

- 1 A. In which case? Yes, I do.
- 2 Q. And the Fourth Circuit denied vagueness, a vagueness First Amendment challenge, in
3 the case of *Morrison*. That is right, is it not?
- 4 A. It did. *Morrison* was a discloser and not a publisher.
- 5 Q. Because we are going to deal with publishers in a moment. And would you agree
6 with what the judge says at page 307 against the first perforation. “While not without
7 superficial appeal, the argument”, this is on vagueness, “fails to persuade. A closer look at
8 793’s history reveals that the absurdity identified by the defendants is as a result of
9 inadvertence and careless drafting, and not an indication that the drafters intended to restrict
10 the prohibition of the first clause to tangible items.” Do you agree with that?
- 11 A. I would agree with that, that is what Judge Ellis says, but I do not agree with it.
- 12 Q. And at 309 he says, between the two perforations, “Finally, and especially pertinent to
13 the present challenge, there exists a generally recognised proposition that an otherwise
14 unconstitutionally vague statute can survive a challenge if it contains the specific intent
15 required.” Do you agree with that?
- 16 A. Well, there is vagueness as applied and vagueness in terms of the statute (inaudible).
17 So I think we probably need to talk about (inaudible). I think that when you are looking at
18 the Espionage Act which has never been enforced in 100 years and there has never been a
19 successful prosecution and you are looking at it as applying, yes there is a knowledge
20 acquired but the knowledge in there is intent to harm national defence, which takes in other
21 areas and ambiguities.
- 22 Q. I am going to leave that ---
- 23 A. (Inaudible)
- 24 Q. --- and go to the First Amendment now, and I want to take you to bundle page 320. It
25 is actually paragraph 43.
- 26 A. I beg your pardon?
- 27 Q. It is bundle page 320.
- 28 A. Same bundle?
- 29 Q. Same bundle. It is just a few pages further on. Paragraph 43.
- 30 A. Yes.
- 31 Q. What the judge says, page 320. You can hardly see the paragraph numbers, but they
32 are there. 43. Madam, do you have that?
- 33 JUDGE BARAITSER: Yes, I do.

1 MR LEWIS: We are going to talk about the First Amendment challenges. “When
2 considering First Amendment challenges to prosecutions under this statute the Supreme
3 Court did not adopt a categorical rule that prosecutions under the Espionage Act did not
4 implicate the First Amendment, but carefully weighed the government’s interest in
5 prosecuting the war against the defendant’s First Amendment interest.” It sets out what
6 Justice Holmes said, and if we go over the page and we are talking about *Schenck*, two lines
7 down. “Justice Holmes frequently dissented or joined Justice Brandeis’s dissent on the
8 ground that the harm to the nation’s interest was insufficient to overcome the First
9 Amendment’s right to free speech in a particular case. Thus these cases refute - do not
10 support the government’s claim for a categorical rule that espionage prosecutions are immune
11 from First Amendment scrutiny.” Then going on, bottom of that paragraph, “Indeed,
12 subsequent Supreme Court decisions have confirmed that while the First Amendment must
13 yield at times to the Government’s interest in national security, at other times the First
14 Amendment interest must prevail.” Would you agree with that?

15 A. What I would say is that there is a balancing of the national security and First
16 Amendment that was set forth definitively in the Pentagon Papers case, which is “Publication
17 will surely result in direct, immediate and irreparable damage to our nation or its people or
18 gravely prejudice the defence interests in the United States, gravely be a danger to the
19 security of the United States.” It is a balancing act and that balance is set extremely high and
20 ---

21 Q. Well, I am going to take you to the Pentagon. The judge deals with at length the
22 Pentagon Papers case. If we go to page 322 and pick it up at paragraph 46. The Pentagon
23 Papers case is known as *The New York Times against the United States*, is it not?

24 A. That is correct.

25 Q. And what they deal with, because that was, in fact, a case about an injunction; it was
26 nothing to do with prosecution. Well, the ratio was not to do with prosecution.

27 A. No. It had to do with (inaudible) for pre-publication through injunction which
28 (inaudible) one would think that (inaudible).

29 Q. What the judge says, if we drop down to the end of paragraph 46: “Importantly here,
30 the defendants are not accused merely of disclosing government secrets, they are accused of
31 disclosing National Defence information, ie, government secrets, the disclosure of which
32 could threaten the security of the nation. However vital the informed public might be, it is
33 well established the disclosure of certain information may be restricted in the service of a
34 nation’s security. It is obvious and unarguable that no governmental interest is more

1 compelling than the security of a nation.” Drop down after footnote 45: “Thus, the right to
2 free speech and the value of an informed citizenry is not absolute...the government’s
3 legitimate efforts to ensure the environment of physical security which a functioning
4 democracy requires.” Would you agree with that sentiment?

5 A. As I have said it is a good testament that you cannot disclose the sailing times of
6 troopships in wartime, you cannot expose – that is *New York v Minnesota* whether the troops
7 are in grave and immediate danger and faced with (inaudible). In this case, Ormsberg was
8 accused of disclosing the name of active (inaudible), that is our (inaudible). There is a
9 balance and that balance is taken at an extremely high level, which must explain why there
10 has never been a successful prosecution under the Espionage Act of a publisher.

11 Q. I want to deal with what is much more specific to this case, if we go to page 323, and
12 pick it up just between the two perforations: “As the defendants correctly argue, the analysis
13 of the First Amended implicated by section 793(d) and (e) depends on the relationship to the
14 government of the person whose First Amendment’s rights are implicated. In this respect,
15 there are two classes of people, roughly correlating to those subjects to prosecution under
16 793(d) and those subject to prosecution under 793(e). The first class consists of persons who
17 have access to the information by virtue of this official position. These people are most often
18 government employees or military personnel with access to classified information, or defence
19 contractors with access to classified information.” Would you agree that the first class here
20 are people - - Chelsea Manning would fall into the first class; that is right, is it not?

21 A. Chelsea Manning had (inaudible) by virtue of her position.

22 Q. She would fall into what the judge there describes as the “first class”?

23 A. That (inaudible) that would be first class.

24 Q. Yes. He then goes on to say: “because, as such, they are in a position of trust with
25 the government. The second class of persons are those who have no employment or contract
26 relationship with the government and therefore have not exploited a relationship of trust to
27 obtain the national offence information they are charged with disclosing, but instead
28 generally obtaining the information from one who has violated such a trust.” That is like
29 journalists, would you agree?

30 A. I would agree that is like journalists.

31 Q. He then goes on to analyse this. At the top of 325 what the judge says: “The analysis
32 must go beyond this”, having looked at various things, “because the defendants are charged
33 with conspiring to violate 793(e) for their own disclosures of national defence information to
34 those not entitled to receive it. In this regard they belong to the second class of those subject

1 to prosecution under 793, namely those who have not violated a position of trust with the
2 government to obtain the disclosed information.” If we drop down to what he says about
3 that, would your position be that Mr Assange falls within that second class?

4 A. What do you want me to do?

5 Q. Just describing the second class people who are not government employees or have
6 access themselves to the secrets. Is it your position that Mr Assange would fall within the
7 second class?

8 A. He was not an employee and he did not have access to those secrets, other than as a
9 person who intended to publish information.

10 Q. What the judge says, we pick this up in the last paragraph in bundle page 325, about
11 four lines down: “Seizing upon this possible implication, defendants here contend that the
12 First Amendment bars Congress from punishing those persons, like the defendants, without a
13 special relationship to the government for disclose of MDI.” That would be journalists. “In
14 essence, their position is that once a government secret has been leaked to the general public
15 and the first line of defence thereby breached, the government has no course to sit back and
16 watch as the threat to national security caused by the first disclosure multiplies with every
17 subsequent disclosure. This position cannot be sustained. Although the question whether the
18 government’s interests can preserve international defence secrets is sufficient to trump the
19 First Amendment rights, those not in a position of trust with the government is a more
20 difficult position and, although the authority addressing this issue is sparse, both common
21 sense and relevant precedent point, points persuasively to the conclusion that the government
22 can punish those outside of government for the unauthorised receipt and deliberate
23 transmission of information relating to national defence.” What he is saying is that
24 journalists can be prosecuted under 793; do you agree that is what he is saying?

25 A. That is what he is saying and I am quite confident they are the (inaudible) the criminal
26 Supreme Court precedent would be drawn.

27 Q. I am going to ask you about that in a moment because over the page ---

28 A. If (inaudible) proposition ---

29 JUDGE BARAITSER: Mr Lewis, can I ask you to lean a little forward so we can hear
30 absolutely everything that you are saying; we are not getting a very clear sound. Thank you.

31 MR LEWIS: Page 326, about ten lines down, when he is talking about the *Pentagon Papers*
32 and a case you have repeatedly relied upon, *The New York Times v The United States*.

33 A. Can you just give me a moment to ---

1 Q. I am reading from four, five lines down. “The most relevant precedent that dealt with
2 freedom of the press is the Supreme Court’s decision in , *The New York Times v The United*
3 *States.*” Do you agree that that is the most relevant precedent, that is the *Pentagon Papers*
4 case?

5 A. I think “precedent” is ---

6 Q. We will come to that in a moment. You disagree with the judge saying that is the
7 most relevant precedent?

8 A. I am saying that it is a highly relevant precedent, but there are other precedents that I
9 would say are ---

10 Q. We will come to other ones.

11 JUDGE BARAITSER: Let him finish, Mr Lewis. I appreciate there is a time lag, but he
12 needs to get to the end of his sentence.

13 MR LEWIS: The judge goes on to say there: “The Supreme Court” -- the *Pentagon Papers* -
14 - in a brief...decision denied the United States’ request for an injunction preventing the New
15 York Times and Washington Post from publishing the contents of a classical and historical
16 study of the United States towards Vietnam...on the ground the government failed to
17 overcome the heavy presumption against the constitutionality of a prior restraint on
18 speech...was accompanied by six concurring opinions and three dissents and although...not
19 directly before the court, a close reading of these opinions indicates that may have been
20 different had the government sought to prosecute the newspapers under 793(e) subsequent to
21 the publication of the *Pentagon Papers*. Of the six justices concurring...three justices,
22 Stewart, White and Marshall, explicitly acknowledged the possibility of the prosecution of
23 the newspapers under section 793(e).” Do you agree that that is a correct reading of the *New*
24 *York Times v United States Supreme Court* case?

25 A. I agree they acknowledged the possibility but they did not state that it would be
26 (inaudible).

27 Q. Far from your original position which you said, “legal precedent precludes
28 prosecuting Assange”, I put it to you, Mr Lewis, there is absolutely no legal precedent that
29 precludes prosecuting Mr Assange. That is the first question.

30 A. OK. Putting it as a question, I would invoke what I understand in First Amendment
31 jurisprudence like the *University of Minnesota v* (inaudible) case and others that have never
32 been faced specifically with criminal prosecution under the Espionage Act by a publisher.
33 The Supreme Court would have voted on 244 years without ever having to aver the criminal
34 prosecution or share of information and in my view (inaudible) in jurisprudence (inaudible)

1 with the principles. There may not be a case, but the principle playing them out for balancing
 2 national security interests against the First Amendment made clear that other than in the
 3 extreme cases, taking away those troopships, the publishing of plans for a plutonium bomb,
 4 you cannot be prosecuted. That is my analysis of the principle of the various First
 5 Amendment cases. Judge Ellis (inaudible) take a different view but that is my view.

6 Q. Paragraph 13 of your fourth statement, you say in terms: “Mr Assange has by contrast
 7 provided ample US legal precedent against prosecuting publishers.” I challenge you, Mr
 8 Lewis, to provide to this court one single precedent that says that publishers cannot be
 9 prosecuted.

10 A. Let me start by saying that the (inaudible) have taken a view of the law, a tunnel view
 11 of the law. I still take the view that *The New York Times v The United States* is a precedent.
 12 The University of *Minnesota* is a precedent, *Brandenburg v Hayes* is an important precedent
 13 about when speech or expression can be published. I think there is probably ample Circuit
 14 Court precedents as well including the Second Circuit opinion of *The New York Times v The*
 15 *Pentagon Papers*. I would refer you to the (inaudible). I also refer you to (inaudible) in the
 16 DC District Court.

17 Q. I am talking ---

18 A. I think there is precedent in an unbroken line of practice of non-prosecution. There
 19 are national security leaks into the newspapers every day and they are not prosecuted. This
 20 case which you are pointing me to (inaudible).

21 Q. I am going to ask you this one question which – and I want you to listen to it very
 22 carefully because I have constructed the question for an exact answer. I do not even mind if
 23 you write it down, Mr Lewis. The United States Supreme Court has never held that the First
 24 Amendment precludes the Government from prosecuting third parties including journalists
 25 for publishing national defence information. Is that correct or incorrect?

26 A. The United States Supreme Court were never presented with that direct case, but they
 27 have been presented with related cases (inaudible) to this context would probably indicate
 28 (inaudible) to accept that publishers generally are not prosecuted for publishing. Now, that is
 29 assuming, of course, that Mr Assange had First Amendment rights which Mr Kromberg has
 30 said he does not.

31 Q. So, what is the answer to my question?

32 JUDGE BARAITSER: Well, I think he has answered the question. There are related cases.
 33 Is that not the answer, Mr Lewis? You can put it again if you wish?

34 MR LEWIS: Well, I will put it again.

- 1 A. Yes.
- 2 Q. Is it correct ---
- 3 A. Thank you, thank you, madam.
- 4 Q. It is correct – and I would ask for a binary answer – is it correct the US Supreme
5 Court has never held that the first amendment precludes the government from prosecuting
6 third parties including journalists for publishing national defence information?
- 7 A. I think (inaudible).
- 8 Q. Well, let me try it in this way. Do you accept that the government can prosecute
9 insiders, government insiders, for leaking classified information and has done so?
- 10 A. Yes.
- 11 Q. And third parties are not allowed to help government employees break the law in
12 obtaining classified information to leak. Is that correct?
- 13 A. No. I believe that if any – if a journalist is working with a source, how is that source
14 to provide information for the relevance of publication and also to protect that source, that’s
15 core journalist activity and in that sense every national security reporter from Bob Woodward
16 could be held to (inaudible).
- 17 Q. Do you agree that journalists have no right in order to obtain information to, for
18 example, gain unauthorised entry into the White House?
- 19 A. Do you mean to sort of jump the fence or – I believe that journalists do not have the
20 right to go onto the White House if they are unauthorised. Yes, I do.
- 21 Q. The case is *Zeminon. Brandenburg v Hayes*.
- 22 A. Yes.
- 23 Q. That a reporter has no right – a reporter has no right, a reporter or his news sources
24 has no right to violate valid criminal laws. That is right, is it not?
- 25 A. Well, I think that is an overstatement, a whole different (inaudible) which dealt with
26 whether there was independent privilege not to disclose sources. Before *Brandenburg v*
27 *Hayes*, which largely remains a controversial case, the court said, I think it was about
28 (inaudible) required to disclose – can be disclosed in context, but that is not prosecuting
29 journalists for disclosing national security information.
- 30 Q. All right. I am just going to turn to a different topic now.
- 31 JUDGE BARAITSER: Well, by my reckoning, you have had about two hours 45 minutes.
- 32 MR LEWIS: All right. I will finish within the detail I think now, madam.
- 33 Q. Political opinions, Mr Lewis.
- 34 A. Yes.

- 1 Q. What political science qualifications do you possess?
- 2 A. I have a degree in Public and International Affairs from the Woodrow Wilson School
3 of International Affairs at Princetown University. That has been my only qualification other
4 than having practised law (inaudible) and politics for the last 35 years.
- 5 Q. What academic peer reviewed publications on political opinions have you written?
- 6 A. None.
- 7 Q. Now, you – give me one moment, madam – you have opined in other extradition
8 cases in this jurisdiction that the extradition request has been politically motivated, have you
9 not?
- 10 A. I think you are referring to the *Dempsey* case. I had – I was asked by to opine on
11 (inaudible).
- 12 Q. Well, let us ---
- 13 A. I was asked to explain why I thought (inaudible), if I could finish.
- 14 Q. Mr Lewis, we are going to take it in stages. The first answer was have you opined?
15 And I think the answer to that is yes. So, we will go to the *Dempsey* case, ---
- 16 A. Well, ---
- 17 Q. --- it is page ---
- 18 JUDGE BARAITSER: Let him answer. What is the answer, Mr Lewis, have you opined or
19 not?
- 20 A. I have given the *Dempsey* case with respect to what might be the cause of a change in
21 circumstance and I just thought that the characterisation of Mr Lewis was a bit overstated.
- 22 Q. Well, let us just have a look at what the Divisional Court, Lord Justice Gross and Mr
23 Justice William David said about your evidence.
- 24 MR LEWIS: Madam, it is page 334 of the extra material bundle. It is reported the
25 *Government of the United States v Dempsey*, [2018] 4 WLR 110. You have that there at page
26 338. Could you go to page 338, Mr Lewis?
- 27 A. I do.
- 28 Q. There is a heading that says “Extraneous considerations”, that is the political one.
29 And this is what the court said, “Before considering the appeal for which leave was given, we
30 shall consider the application for permission by the Respondent to appeal against the District
31 Judge’s decision in relation to the political motivation for the request and abuse of process.
32 Both proposed grounds rely on the evidence of Eric Lewis to which I already have made
33 reference.”. Now, is that you?
- 34 A. It is.

1 Q. “As well as dealing with the issue of combatant immunity, Mr Lewis discussed the
2 change in US government policy between 2013 and 2016 and opined that this explained the
3 delay between the interviews with the Respondent in 2013 and 2014 allegedly giving rise to
4 the offence and the return of the indictment in 2016. On that basis he suggested that the
5 prosecution was politically motivated. We are satisfied the opinion offered by Mr Lewis is
6 pure conjecture. More to the point it does not begin to demonstrate that the prosecution of
7 the Respondent is motivated by his political opinions.” So, your own evidence was not
8 accepted by the High Court as being anything other than pure conjecture was it, Mr Lewis?

9 A. That certainly would be (inaudible) evidence because I gave testimony in the District
10 Court, but based upon whatever they had, that is their view.

11 Q. Now, I want to show you some evidence of ---

12 A. I would also – I ---

13 Q. I want to show you some other evidence ---

14 A. Can I ---

15 JUDGE BARAITSER: Well, sorry, Mr Lewis, was there something else you wanted to say
16 about that? You gave your evidence to the District Court? Something else?

17 A. Well, I was asked to – if I had an understanding or a theory as to why the gentleman –
18 it is a very strange case. Mr Dempsey was talked to by FBI agents in Rome Airport and
19 asked why he was going to Syria. And he said, he basically said for humanitarian work, and
20 he was going to support a group that was battling Assad, which is a regime. He then spoke in
21 2014 and charged in 2016 at a time when (inaudible). It was the policy of the United States
22 and to reflect to the group that Mr Dempsey was fined for it which he had not (inaudible) the
23 FBI agents. That was the policy that had changed. So, it is certainly what the High Court did
24 but I think it is not, it is not precisely accurate. It was not Mr Dempsey’s political opinions, it
25 was a change in policy. And that is what I stated and obviously in the District Court, the
26 court took certain parts of my testimony and accepted it and did not order extradition,
27 rejected others, and that (inaudible).

28 Q. I want to show you some evidence from Professor Feldman which he gave last week.
29 I wonder if we could turn to page 193 in this extra bundle which is the transcript of Professor
30 Feldman.

31 JUDGE BARAITSER: Feldstein?

32 MR LEWIS: Feldstein. I am sorry. I am thinking of Marty Feldman.

33 A. I am sorry, it is in the extra bundle?

34 JUDGE BARAITSER: Yes, that is right.

- 1 A. Yes, I am on page 493, Mr Lewis.
- 2 Q. Picking up at the bottom of the page, paragraph 32, this is – I am so sorry, it is the
3 transcript page ---
- 4 A. Line 32?
- 5 Q. If the transcript page, the transcript page is internally numbered 36 ---
- 6 MR FITZGERALD: Then it is 193, is it?
- 7 MR LEWIS: And 193 on the bundle. And line 23.
- 8 Q. What Professor Feldstein said, “I am not actually saying there was a decision of not to
9 prosecute. We do not have evidence of that. But at two levels, firstly there is law in
10 Washington,” - that is precisely what I would have expected him to say unless there had been
11 a clear decision not to prosecute. “It certainly remained open.” And if we drop down to line
12 nine, question, “You have just said on oath to this court you are not saying there was a
13 decision not to prosecute.” Answer, line 11, “I am saying we do not know.”. And then he
14 gives this longer answer at lines 15 to 21, “Well, perhaps I should re-phrase that slightly by
15 saying during his term in office Obama did not take the decision to prosecute. I should put it
16 as a positive, not a negative, but as far as we knew no decision was taken to prosecute and
17 yes, it is true that a decision to not prosecute was not formally taken, so yes, I will correct
18 myself on that by saying that at that time, the Obama administration did not take the decision
19 to prosecute. They did not withdraw the possibility of prosecuting but they did not take the
20 decision to prosecute whereas the Obama,” he means Trump, “where the Trump
21 administration did, that was the change.” And we go over the page just so you have the full
22 context, the top of page 195, Professor Feldstein said, “I am not saying for a minute that the
23 decision was taken not to prosecute and I admit that I put that badly when you asked me
24 recently.” Line 12, “Thank you, Professor and just so it is lucidly clear, you are now saying
25 that it was not a decision. You are not saying there was a decision in the Obama
26 administration not to prosecute, but you are saying there was no decision to prosecute during
27 the Obama administration.” Answer, “From what we know in the public domain, it is the
28 latter. There was no decision to prosecute,” so that is what Professor Feldstein said in cross-
29 examination. Do you agree with that?
- 30 A. No.
- 31 Q. And in re-examination, in re-examination, I just want to show you, see if you agree
32 with this then?
- 33 A. Can I explain why I do not agree?

1 JUDGE BARAITSER: Well, Mr Lewis, you certainly will. I have no doubt this will be re-
2 examined. You have answered the question asked. I think we will leave it at that but you
3 will get an opportunity when Mr Fitzgerald asks you the same question in a moment, I have
4 no doubt.

5 MR LEWIS: Page 200, line 21 in, I think this is in re-examination by Mr Fitzgerald so in
6 answer to his counsel, he said at line ---

7 MR FITZGERALD: Which page are we on?

8 MR LEWIS: --- 21. It is page 43 of the internal bundle. I am picking it up at 21, "I would
9 have to say that the whole tenure of the Obama administration was to move on and I have no
10 doubt that that was something which related to the idea they would not prosecute Mr Assange
11 at that stage. That did not mean the decision was never taken to prosecute him and I will
12 standard corrected in what I said." Do you agree with that evidence?

13 A. Can I just look at the language again? This is on page?

14 Q. 200.

15 A. 200. Sorry, I have just gone forward to the next ... I believe (inaudible)

16 misunderstanding of the way the prosecution process works and so, I cannot really agree or
17 disagree. I know how the Justices Department operates and there seems to be an assumption
18 about the way the process works that is not consistent with my own experience in dealing
19 with the Justice Department.

20 Q. Well, let us just deal with some of your experience with the Justice Department.
21 Have you any first-hand knowledge of the deliberations under the Obama administration or
22 Trump administration about whether to prosecute Mr Assange?

23 A. No.

24 Q. So, is it right that all your knowledge about those deliberations is derived from
25 newspaper articles you have read?

26 A. I have also watched, I believe I have seen a television interview. I have seen a
27 television interview and I believe other material, government material (inaudible).

28 Q. Now, one of the people who gave an interview which is relied on by the defence, a
29 former Department of Justice prosecutor, Matthew Miller, is it right that he left the
30 Department of Justice, he left there in 2011, two years before ---

31 A. That is correct.

32 Q. --- he was a spokesman, sorry. He left two years before he gave that interview to the
33 Washington Post I think it was.

1 A. It was to the Washington Post. It is correct, but I believe that he would have
2 contemporaneous information based upon what I know of the Department of Justice
3 (inaudible) relationship between Mr Holden (inaudible) and I have gone off on something
4 that had not been ordered by Mr Holden. That would be my judgment.

5 Q. Your judgment.

6 A. But I cannot prove my judgment, yes.

7 Q. Have you ever served in the United States Department of Justice?

8 A. I have not. I have served in the judicial branch but not the executive branch.

9 Q. And your opinion is not based on discussions you have had with participants who
10 would be involved in the deliberations on whether to prosecute Mr Assange or not. That is
11 rather clumsy.

12 A. That is correct.

13 Q. But it is correct. And would you agree federal prosecutors are guided by the
14 principles of federal prosecution in bringing charges?

15 A. No, not at this point in time. I believe that they are guided by the Attorney General
16 and the Attorney General has a very different set of principles. I believe it is a (inaudible)
17 bureaucracy. I can explain about that if you would like.

18 Q. Let me ask you this, then, Mr Lewis. It is right, is it not, that the principles of federal
19 prosecution bar prosecutors from bringing charges based on the defendant's political
20 associations, activities or beliefs?

21 A. That may be what is written down, but I think if you lived in the United States and
22 you saw what 2,600 prosecutors wrote with respect to the decision in the former case and
23 more than 1,000 prosecutors wrote in the Stone and with respect towards Judge Gleeson, a
24 respected retired judge and a respected former prosecutor wrote about how prosecution
25 decisions are being made now. (Inaudible) which is written down in prosecution guidelines
26 is not being followed.

27 Q. So, is your position that Mr Kromberg, Mr Dwyer who filed affidavits and
28 declarations in this matter are acting in bad faith?

29 A. I do not know what is in Mr Kromberg's heart or Mr – I do know that there has been
30 extensive disclosure with respect (inaudible) prosecution and as well as in this prosecution,
31 Mr Sessions pressured the eastern district of Virginia to bring an indictment, so that is, that is
32 what I am aware of. I am not accusing anyone of bad faith. I am accusing, I am only saying
33 that the Justice Department has been (inaudible) and I think very few Americans would
34 question that presumption.

- 1 Q. If we go to your third statement, Mr Lewis, and we look at ---
- 2 A. What page?
- 3 JUDGE BARAITSER: It is tab 38 if it helps.
- 4 MR LEWIS: Your third statement. It is the one about political motivation. I want you to
- 5 take – I want you to try and help us with the explanation of this. Paragraph 33 of your third
- 6 statement.
- 7 A. Yes. I see it.
- 8 Q. Do you have that?
- 9 A. Yes I do.
- 10 Q. “WikiLeaks and Mr Assange pose a threat to the legitimacy of Trump’s,” do you
- 11 mean his election? You do not use the word ‘election’ but I take it you mean election
- 12 campaign?
- 13 A. Well, I may not have put the precedent. I have indicated, I think what I have tried to
- 14 express there ---
- 15 Q. No, Mr Lewis, I am just asking if there is a missing word, I am not asking for an
- 16 explanation. When you say campaign, you mean election campaign presumably.
- 17 A. I mean the 2016 campaign and that the accusations with respect to which (inaudible),
- 18 that was (inaudible) Trump felt that his ingenuity was being impacted through the WikiLeaks.
- 19 That is what I mean to say.
- 20 Q. Mr Lewis, I am not asking you to be defensive on this. I just want to clarify, should
- 21 we insert the word ‘election’ there or do you mean something else?
- 22 A. A what?
- 23 Q. It says, “WikiLeaks and Mr Assange pose a threat to the legitimacy of Trump’s
- 24 campaign.” Do you mean election campaign or not? It is not difficult, Mr Lewis.
- 25 A. I did not – well, if I said campaign, there is a 2016 and a 2020 so I just wanted to
- 26 make clear that what I was talking about in that paragraph is the 2016 election campaign.
- 27 Q. Thank you. So, we can just put in 2016 election campaign, can we?
- 28 A. I apologise if that was unclear.
- 29 Q. So, “WikiLeaks and Mr Assange poses a threat to the legitimacy of Trump’s 2016
- 30 election campaign that he is desperate to squash by diverting attention and imprisoning Mr
- 31 Assange. WikiLeaks is a vulnerability for Trump because the evidential links between his
- 32 campaign and WikiLeaks. In October 2016, WikiLeaks published DNC emails to the
- 33 undoubted benefit of Trump.”

1 And then, if we go over to paragraph 35, “Trump regularly applauded WikiLeaks
2 during his campaign, remarking, ‘I love WikiLeaks.’ 2019, he claimed to know nothing
3 about WikiLeaks.”

4 Dropping down to paragraph 36, “The prosecution of Julian Assange is part of
5 Trump’s efforts to distract attention from the hell that WikiLeaks gave and to focus attention
6 on the earlier leaks which are much more political potent for him. He wants to put Mr
7 Assange in jail and keep him quiet.”

8 So, are you saying that this is a politically motivated prosecution of someone who
9 helped Mr Trump get elected in 2016?

10 A. I am saying that is a politically motivated prosecution that at certain points, he was
11 helped, President Trump. At certain points he has had not and President Trump has
12 expressed a view from 2010, he called for the death penalty, changed his view during the
13 campaign when there were 140 (inaudible) mentions from WikiLeaks and then when he got
14 into office, became extremely negative towards WikiLeaks and Julian Assange.

15 Q. What I am having trouble with, Mr Lewis, is this concept that President Trump wants
16 to put Mr Assange in jail and keep him quiet. Surely, a public trial and these proceedings
17 have the completely opposite effect.

18 A. I would suggest that a public trial, depending on the classified information that is
19 held, because the public is not (inaudible) classified information, so assuming that we talk
20 about public information, that might do it, although Mr Assange has continued to operate
21 WikiLeaks and put information he believes is of national security significance (inaudible) and
22 so that is something that the administration (inaudible) information to the public again. The
23 case did not charge anything relating to the 2016 leaks, they only charge 2010 and ‘11 and I
24 think a couple of conferences that Mr Assange may have spoken at after that.

25 Q. Well, I am putting it to you, that is just pure conjecture.

26 A. Well, again, I am trying to take statements that have been made (inaudible) with
27 legitimacy sent through Lindsey Graham of South Carolina, who is one of President Trump’s
28 closest confidantes and frequent golfing buddy and he said: “I think he’s worried and inquiry
29 into what Russia did in the election is going to undermine his credibility and legitimacy.”
30 Now, there’s an extensive body of literature about this president’s concern about his
31 legitimacy because of what happened in the 2015 election. Ted Cruz is communications
32 director; Rita Sangrine, the New York Times; Jane Mayor of New Yorker. So, it is an - I - I
33 don’t know, but it is an informed assumption, pulling together the facts and the comments
34 from numerous sources with effect to the concern about the 2016 leaks and the change from

1 death penalty to - to 17 life counts. Those are how - that is how (inaudible) investment could
2 link those facts together. So it's not pure conjecture, it is based upon my consideration of the
3 issue based upon extensive review of - of documentation and my thoughts. I'm sure you may
4 have a different view, but that's my opinion.

5 Q. And then going to something slightly different now. In your first statement, question
6 number 3, paragraph 24.

7 A. Just a moment.

8 Q. About classified information.

9 A. Just a moment, I thought that we - I don't know, I thought we had finished with that.
10 All righty. What first? I have it here, I just need a moment, please. Yes, I have it now, Mr
11 Lewis.

12 Q. Classified information. You answer a question on it. Now, ---

13 A. What page, sir?

14 Q. It is page 6, paragraph 24 of your first statement.

15 A. Yes.

16 Q. Is it not right that the Classified Information Procedures Act, CIPA, governs the use
17 of classified information in criminal trials?

18 A. I think that's what I described at 20 - paragraph 25 (inaudible).

19 Q. And do you agree that the CIPA is a procedural statute?

20 A. Yes.

21 Q. And do you agree that the CIPA does not change the government's discovery
22 obligations, nor does it alter the rules of evidence?

23 A. I - I would agree that it does not per se, but then it - it changes very much the way you
24 go about handling information that's produced in discovery within a specific (inaudible).

25 Q. And with respect to discovery, do you agree that the government may only withhold
26 classified material on the - if the trial judge agrees it is not relevant and not helpful to the
27 defence?

28 A. I'm sorry, could you put that question again?

29 Q. With respect to discovery, do you agree the government may only withhold classified
30 material if the trial judge agrees that it is not relevant, or helpful to the defence?

31 A. Yes, there's a first stage where the government has to take the position (inaudible)
32 that are helpful when some government who knows what you consider relevant and helpful
33 and then the judge hears that (inaudible) disclosed to the government who think it's helpful
34 and relevant.

1 Q. I do not know if you are familiar ---

2 A. (Inaudible)

3 Q. It is the same position in England under what are called PII, public interest immunity
4 applications, if you are familiar with that. Are you familiar with those?

5 A. I am not.

6 Q. All right, I will leave that. So, it is absolutely clear that the United States cannot
7 unilaterally withhold classified information?

8 A. They can - they can unilaterally withhold classified information, even if it's relevant
9 and helpful, if the Government decides that they will proceed without the information, or they
10 will give summaries of the information, or that the defence cannot have the information but it
11 does not materially affect the fair trial of the day. I think that is a complete answer.

12 Q. Right. I think we probably agree with you on that. And defence attorneys routinely
13 receive security clearances?

14 A. Some do and some don't.

15 Q. And if a ---

16 A. I know, for example, on the - on Abu Qatada case, I had a - one of my critical young
17 partners did not receive one because he was married to an Egyptian woman and I - I had to -
18 to deal with the classified work, he could not. But usually, assuming normal practice, one
19 would - one would hope so. I hope, Mr Lewis, after this, I can still get a security clearance.

20 Q. So do I. So, do you agree that ---

21 A. Thank you.

22 Q. --- the goal of the CIPA is not to prevent the defendant having a fair trial, the purpose
23 of the CIPA is to protect sensitive sources and classified information while protecting a
24 defendant's right to a fair trial?

25 A. I would agree that that is the goal to be counting on. It makes it much more difficult
26 to try the case. The defendant often does not have access to the classified information in
27 preparing for the trial and so that makes it more difficult to try a case which affects the
28 fairness. I would also say that the Government - and this is not (inaudible) - the Government
29 over classifies mightily and you spend a lot of time (inaudible) about documents and it delays
30 the trial longer in my experience.

31 Q. Just give me one moment, madam. Madam, that is all I ask.

32 JUDGE BARAITSER: Thank you very much and within time, Mr Lewis.

33 Now, Mr Fitzgerald, are you happy to carry on? I would like to if you are happy to
34 re-examine.

1 MR FITZGERALD: I may need a break at lunch, but if I can make a start.

2 JUDGE BARAITSER: Yes, I will give you that. Yes, can you take your mask off, just for
3 the purposes of ---

4 MR FITZGERALD: I am so sorry, yes.

5 JUDGE BARAITSER: --- speaking to the court.

6 Re-examined by MR FITZGERALD

7 MR FITZGERALD: Mr Lewis, I just want to go back to the second to last area that my
8 learned friend dealt with you on, and that was the question of whether there was a decision
9 under President Obama's department of justice and whether there was then a decision to
10 reverse that under President Trump's department of justice. You have referred to your
11 knowledge as derived from firstly the newspaper cuttings that we have referred to, the
12 sources quoted in numerous articles by the Washington Post and New York Times, is that
13 right?

14 A. Yes.

15 Q. And then you referred to the ---

16 A. And the (inaudible).

17 Q. Yes. Then you have referred to the TV interview, is that right?

18 A. Yes.

19 Q. And that is the - I think that is the - the Sarah Sanders interview that unfortunately
20 nearly impinged, but that is the one which you referred to where Sarah Sanders said: "Obama
21 did nothing about Assange. We", that is to say, the Trump administration, "have done
22 something." Is that what you are referring to?

23 A. Assange referred to Eric Holder's interview with Eric Holder on MSNBC.

24 Q. I see.

25 A. And Sarah Sanders' interview also ---

26 Q. Yes.

27 A. --- relates to that.

28 Q. Right.

29 A. So, thank you.

30 Q. And - and so the Eric Holder interview, the relevance of that is in confirming that
31 there was a decision under Obama is what?

32 A. That the state would not prosecute publishing of information who are not engaged,
33 who are not being directed by a foreign power.

1 Q. Right. And so therefore drawing a distinction between Mr Assange and someone who
2 is being directed by a foreign power. Is that - is that the point? That is what Mr Holder was
3 saying?

4 A. That is correct.

5 Q. Right. And you have referred to the fact of Matthew Miller's statement, which we
6 have at K5, in the Washington Post article of the 25 November 2013, the quotation: "The
7 problem the department has always had in investigating Julian Assange is there is no way to
8 prosecute him for publishing information without the same theory being applied to
9 journalists," said former department spokesman Matthew Miller. That is what you were
10 referring to, is that right?

11 A. Right and - and the next sentence as well.

12 Q. Right.

13 A. I think that is also germane.

14 Q. Yes and if you are not going to prosecute journalists for publishing classified
15 information, which the department is not, then there is no way to prosecute Assange. And if
16 one looks at ---

17 A. That's correct.

18 Q. If one looks at that as a whole, it then goes on to refer to quotes from justice officials
19 who are obviously current justice officials, would that be right? "Justice officials said they
20 looked hard at Assange but realised ---

21 A. Yes.

22 Q. --- that they have what they described as the New York Times problem." So one has
23 the Matthew Miller quote.

24 A. That's correct.

25 Q. And then you have the quotes from justice officials and then if we go over the page,
26 do you see there about the third full paragraph down: "There have been persistent rumours
27 that the grand jury investigation of Assange and WikiLeaks had secretly led to charges". And
28 then again it says: "Officials told the Post last week that there was no sealed indictment and
29 other officials have since come forward to say, as one senior US official put it, that the
30 department has all but concluded that it will not bring a case against Assange." Looking at
31 that, those quotes from ---

32 A. Yeah.

33 Q. --- the officials, are those officials in the DOJ speaking reliably to the Washington
34 Post?

1 A. I ---

2 MR LEWIS: Madam, I do not think he can answer that without speaking reliably.

3 JUDGE BARAITSER: Yes, I do agree, Mr Fitzgerald.

4 MR FITZGERALD: Well, do - do you - what - what reliance can one place on that?

5 A. Well, there's a quotation from a senior US official and so then the question is can you
6 trust a four time Pulitzer Prize winner covering the Justice Department when she quotes a
7 senior official to be quoting that person accurately? Did anyone come forward and say that
8 that is not true and deny it? I trust Sari Horwitz. No one has ever denied it. That is the basis
9 for – that is just my reading of it. I cannot say any more than that.

10 Q. Yes. You have then also referred in answer to my learned friend's questions in the
11 fact that the pressure being put on the prosecutors in the Eastern District of Virginia, do you
12 have bundle K with you, or can you access it?

13 A. I do.

14 Q. I just want to make sure that I understand what you are referring to there. Do you
15 have tab 39, the April 20 of 2017 article in The New York Times ?

16 A. My bundle only has 38, but I do have that article separately.

17 Q. Right, OK.

18 A. If you are talking about the Adam Goldman article?

19 Q. Exactly. Adam Goldman, New York Times, I think you have it at tab 39.

20 JUDGE BARAITSER: I do have it, yes.

21 MR FITZGERALD: Thank you, madam. And do you see there, is this what you are
22 referring to, the official speaking on the condition and the anonymity because the details of
23 the discussion are in secret, said, "Senior Justice Department officials have been pressuring
24 prosecutors in the Eastern District of Virginia to outline an array of possible charges." Do
25 you see that?

26 A. I do see that, yes.

27 Q. And that is what you were referring to as the evidence that there was pressure put on
28 the Eastern District of Virginia prosecutors to bring an array of charges. Is that right?

29 A. Yes, and I think that was corroborated a few days later by Attorney General Sessions,
30 I think, stating that it is a priority for the Justice Department to arrest Mr Assange.

31 Q. Now, then we know that in December of 2017 there was the provisional warrant and
32 the indictment in March of 2018. My learned friend has put to you that the Department of
33 Justice is entirely independent and that they would act without any political influence or

1 pressure. Can I just invite you to clarify this. You talked about one thousand prosecutors
2 writing in protest at the interference with the DOJ process in the *Stone* case. Is that right?

3 A. Yes. I think it was more than that, but it was around that number.

4 Q. Yes.

5 A. That is my recollection, including the number two of the Justice Department under
6 President, first President Bush, who (inaudible) Attorney General Barr in that position.

7 Q. Yes. And so as to whether my learned friend is right to say that the DOJ in reaching
8 these decisions in March 2018 and subsequently in May 2019 would be free of any political
9 influence, what is your comment?

10 A. President Trump said, “I can do whatever I want with the Justice Department.”
11 Attorney General Barr has written a 19 page memo, which I think is worth reading, in which
12 he has said that all prosecutorial discretion rests effectively in the President and it is the
13 President who makes those prosecutorial decisions and if the attorney general and the lawyers
14 in the Justice Department are – I say this in inverted commas – “his hand” to implement
15 whatever instructions that he chooses to give. This is called the Unitary Executive Theory, it
16 is not an accepted theory, it is an (inaudible) theory, but this Attorney General has articulated
17 it and it is his job to implement the President’s direction. That is totally out of keeping with
18 the entire history and tradition of the Justice Department and so, yes, that is what the
19 handbook says, but that is not the way Mr Barr views his role or the role of the Justice
20 Department. So it got viewed as the hand of the Attorney General and I would refer the court
21 to pages 10, 11 and 12 of Mr Barr’s memo. I do not know whether that is a matter of record.

22 Q. We can certainly locate it.

23 A. The Constitution granting law enforcement power to the President is clearly
24 constitutionally it is wrong to consider that the President as simply the highest officer within
25 the executive branch hierarchy. While the President has subordinates, as such he is the sole
26 repository of all (inaudible) powers conferred by the constitution. While the President has
27 subordinates, the Attorney General, the DOJ lawyers who exercise prosecutorial discretion on
28 his behalf, they are merely his hand. The discretionary he exercises as the President is his
29 discretion and the decisions are legitimate precisely because they remain under his
30 supervision. His discretion is absolute and they are unreviewable.

31 Q. OK.

32 A. And it is remarkable statement but it is hard to overemphasise how out of keeping that
33 is with the Justice Department’s history, so that is what I think we have to say without

1 questioning anyone’s integrity, things have changed in a way that they can bring prosecution
2 because the President tells the Attorney General how (inaudible).

3 Q. And you deal in your fourth statement, if you can go there, at paragraph 63 onwards,
4 with this point, and you refer to Mr Barr’s history just before that about orders to drop
5 charges and at paragraphs 58 President Trump called Flynn a warrior and then John Gleeson
6 was arguing before the court whether there was a basis to dismiss the case post-conviction.
7 And then you refer to the fact that the campaign, at paragraphs 60 to end, ordinary
8 administration of justice continues unabated with Mr Barr announcing that the US attorney
9 for the Southern District of New York, Geoffrey Berman, would be stepping down and this
10 was a lie and unconstitutional. Mr Berman had been appointed by a panel of judges and
11 could not be fired. And one sees that he was effectively made to stand down is what you are
12 saying, and then one has further that the history of President Trump interfering with the
13 justice process to commute Roger Stone’s 40 month sentence. Roger Stone was associated
14 with Trump. Is that right?

15 A. For 40 years.

16 Q. And then you then say that the reasons for bringing these events to the court’s
17 attention is to stress and confirm that if Mr Assange is extradited he will be prosecuted by an
18 agency that is led by an Attorney General who has repeatedly ordered prosecutors to follow
19 Trump’s personal and political preferences in cases that are politically charged. And then is
20 that ---

21 A. Yes, (inaudible) on the assumption that that administration is in office at such time as
22 it may be ordered for Mr Assange to go to the United States.

23 Q. You have also dealt in both your third and your fourth statement with the fact that the
24 superseding indictment was brought, that is to say in May 2019, was brought shortly after
25 Attorney General Barr took office. Is that right?

26 A. Yes. Well, a full month after he took office.

27 Q. And you deal with the fact at paragraph 65 of that same fourth statement. “Many
28 career prosecutors have resigned over the politicisation of cases by the attorney general. Mr
29 Kromberg, as is his right, did not”, and then you refer to the various further instances of Mr
30 Barr interfering with the course of justice. Just drawing back from that. Looking at the super
31 ---

32 A. Yes, I ---

1 Q. I am so sorry. Looking at the superseding indictment against the background of that
2 history, do you see that as a normal exercise of the criminal justice arm, or as due to some
3 political and extraneous influences? What is the answer to that?

4 A. My view is that it shows allegedly extraneous influence and I say that because there
5 was no decision taken under the Obama administration and, in fact, the Justice Department as
6 a matter of course very rarely says, “The investigation is over, we have closed it, not to
7 worry, everything is fine.” Lawyers ask for it all the time. I have asked it in the past couple
8 of weeks, “Can you just say you are not going to charge him?” They do not do that; they let
9 the limitation period - they give you signals but there is no reason to close it unless they think
10 somebody – unless there is some other reason. There is always a possibility that someone
11 may walk in the door in the limitation period and tell the Justice Department something
12 completely remarkable that they did not know about.

13 That is not what happened here. President Obama leaves office. All the facts that are
14 going to the superseding indictment are out and of record by 2010/2011, maybe some were in
15 2012, but the factual matrix is fixed. They have a team looking at this. Nothing really
16 changes and no one has pointed to anything that has changed from 2011 to 2017. There are
17 reports that the case is dormant when the Trump administration began. There are statements
18 from Eastern District of Virginia prosecutors, they appear to have been pressured and then
19 James Trump - no relation - who was the prosecutor in the United States versus Sterling case
20 that Mr Lewis and I discussed before, was put on the team, and Mr Grooms, Theodore
21 Grooms, who is the Colonel in Chief was put on the team. Mr Sessions said, (inaudible) and
22 it has been recorded, and again the Justice Department is not that leaky, but these leaks come
23 out. Trump and Grooms both state that they disagree with Espionage Acts being brought
24 because of the constitutional issue.

25 You also have the sense that prosecutors have looked at the same evidence for years
26 and determined such charges were a bad idea. That is what the professional (inaudible)
27 prosecutors thought. That is what the experienced Eastern District of Virginia prosecutor
28 thought, and (inaudible) said they did not have significant evidence of facts beyond the
29 number officials had when they reviewed it. So the evidence has not changed, the witnesses
30 have not changed, the First Amendment has not changed, the Espionage Act that had never
31 been used against a publisher had not changed. The only thing that has changed, and the first
32 indictment tries to get away from The New York Times problem and talks about conspiracy
33 to hack. I am not commenting on that, but what I am commenting on is from the first and the
34 second, The New York Times problem appears and is parsed into 17 separate different

1 counts, and that is (inaudible). The explanation in our view, the only explanation that accords
2 with the fact is that there has been the change of Barr in the highly publicised case that Mr
3 Trump certainly has a significant interest in.

4 JUDGE BARAITSER: I appreciate, Mr Fitzgerald, ---

5 MR FITZGERALD: Thank you.

6 JUDGE BARAITSER: --- you are only asking questions which have been raised, but nothing
7 that has just been said has not already been said in a statement made by Mr Lewis.

8 MR FITZGERALD: I am grateful for that. It did arise from what Mr Lewis was putting.

9 JUDGE BARAITSER: It did, and I appreciate that. It does not add to it.

10 MR FITZGERALD: One final matter, you have referred to the disagreement of the
11 prosecutors. You are referring to the K38, the article on May 24th, which refers to the
12 disagreement by James Trump and Mr Grooves with the prosecution of espionage being
13 brought; that is the source of that important point?

14 A. Yes.

15 Q. I want you to go back to the start. First of all my learned friend questioned you on the
16 basis of whether you were qualified to talk about prison conditions in America. I want to ask
17 you this: Mr Kromberg has expressed views throughout the statements about prison
18 conditions, about SAMs, about all the matters my learned friend says you should not be
19 talking about, for example from paragraph 82 following in his first declaration. Is he any
20 more qualified than you to talk about prison conditions? He is a lawyer.

21 A. Mr Kromberg is a prosecutor. He obviously does criminal work. I would be
22 somewhat surprised if he had spent more time in prisons that I have. Certainly when clients
23 are unhappy about their treatment via Mr Kromberg, it would come to me. I spent weeks and
24 weeks at Guantanamo and I have been to quite a few other prisons in the United States and in
25 the UK, as well as other places, so I think I have seen enough and read enough to try and give
26 my best.

27 Q. You have raised questions about whether the account given by Mr Kromberg of
28 prison conditions correspond to the reality, is that right?

29 A. I have, and I have seen respective statistics in how some of these reforms have been
30 implemented. While they may look good on paper, it seems like a lot of them have not been
31 fully implemented. It is a resource problem among others.

32 Q. You have referred in answer to my learned friend's questions your experience with
33 representing Mr Khattala and he was detained at the Alexandria Detention Center, is that
34 right?

- 1 A. That is correct.
- 2 Q. I think you said he was held in remand there for over three years, so three years
3 awaiting trial; is that right?
- 4 A. That is correct.
- 5 Q. That time and length of period could well happen, could it, to Mr Assange as well?
- 6 A. It could be if there is an extensive requirement of classified information. I think a lot
7 turns on whether WikiLeaks documents themselves are viewed by the Government as
8 classified information, which has been their policy to date. If every piece of paper that is at
9 issue in this case is classified, it will take a very, very long time.
- 10 Q. You were asked about the question of solitary confinement and it was put to you that
11 there is no solitary confinement in Alexandria. As I understand it, you said that if there was
12 someone who was in administrative segregation and subject to SAMs, that would be
13 tantamount to solitary confinement; is that right?
- 14 A. Yes.
- 15 Q. You referred in answer to my learned friend's questions to the fact that you would
16 spend 22 hours per day in your cell with no contact with the rest of the prison population,
17 even when out of your cell; is that right?
- 18 A. Yes.
- 19 Q. I want to put this to you: are you aware of the UN Mandela Rules, Standard
20 Amendment Rules for the Treatment of Prisoners?
- 21 A. Yes.
- 22 Q. Rule 44 says that: "For the purposes of these Rules, solitary confinement shall refer
23 to the confinement of prisoners for more than 22 hours a day without meaningful human
24 contact." If that is a valid definition, is there a real risk that someone in ad seg on SAMs
25 would meet that definition of 22 hours or more without meaningful human contact?
- 26 A. Yes. Yes, as was the case for Mr Khattala.
- 27 Q. You were asked questions about the review procedure by my learned friend who
28 cited the fact that there was a review procedure for SAMs, and you said there is a procedure
29 but no basis of challenge; is that right?
- 30 A. There is a review procedure, SAMs, ordered by the attorney general. As Mr
31 Assange's case is under 501(2), Code of Federal Regulations, the Attorney General would
32 have to decide that they were not needed because of the national security threat being abated.
33 It is possible to challenge that ultimately in court. I am not familiar with any such challenge

1 which was successful, and the whole idea of challenging conditions of confinement is very
2 restrictive, particularly with Trump.

3 Q. My learned friend took you to the *Ahmad* decision, the admissibility decision in
4 *Ahmad*. You referred to the fact that it was on pre-trial detention, those claims which had
5 been lodged in 2008 and 2009 were declared inadmissible. That was obviously on the basis
6 of evidence prepared in 2008 and 2009; is that right?

7 A. Maybe earlier. I think he was arrested in 2007, but it could be 2008.

8 Q. In any event, a very long time ago. My learned friend fairly said that the European
9 Court actually declared admissible the enquiry into conditions in ADX Florence, Colorado;
10 that is in the admissibility decision.

11 A. Yes, it is in the decision.

12 Q. Is this right, in relation to one of the applicants, Mr Harun Aswat, the European Court
13 later found in his favour, he suffered from a mental disorder.

14 A. Yes.

15 Q. You said, in answer to my learned friend's questions, that the decision in *Ahmed*
16 might well be decided differently today; is that correct?

17 A. Yes.

18 Q. When you were asked what factors - - can you help us as to what factors might
19 influence a decision that might be different today on these issues? I think you were
20 beginning to deal with some of them when you were cut short: the Inspector General's
21 report, the Yale Law School and the BOP. Could you help us as to what materials now today
22 are relevant if this question were looked at again?

23 A. Yes. There has been extensive research in respect to the effects are human beings of
24 extended solitary confinement. The solitary confinement regime at ADX, although there are
25 certain procedures, we now have a lot of information about whether those, a decision of the
26 10th Circuit in its challenge of certain classification, a decision. I would also call your
27 attention - I am very conscious that the court does not want to hear anything repeated -
28 mental health is a particular issue. There was a GAO report on serious mental illness ---

29 Q. Sorry, GAO.

30 A. Government Accountability Office, a government body which used to be called the
31 General Accounting Office. It does research on behalf of government agencies. It talks
32 about ADX and it says: "The BoP cannot accurately determine the number of its inmates
33 who have a mental illness. (inaudible) We have 17 institutions' stats but not all document
34 inmates' mental disorders." Then it goes on specifically to ADX: "Psychologists stated that

1 blindness to mental health issues...mental health staff is alarming.” I would also call further
 2 attention to the Inspector General’s report of the Bureau of Prisons which looked at some of
 3 the issues arising from the *Cunningham* case and how things are going. It is correct that more
 4 staff have were added since the *Cunningham* settlement but there is a 30 per cent decline in
 5 mental health treatment through the prison system since the guidelines that Mr Lewis kindly
 6 took me to yesterday were implemented. Also two-thirds of the suicides and cell suicide and
 7 self-harm in the US Bureau of Prisons system take place in (inaudible) housing. There was
 8 also a review of how people with serious mental illness are classified with care levels, the
 9 Care Review Mr Lewis and I discussed yesterday. A lot of the people diagnosed with a
 10 serious mental illness under the Bureau of Prisons standard. 44 per cent of those people are
 11 in Care Level I, that is in no need of any regular mental health treatment. 36 per cent are in
 12 Level II, that is probably a monthly mental health visit. Only 9 per cent are Level III which
 13 is serious mental illness but no need hospitalisation. Then under 10 per cent for the rest. I
 14 know that does not add up to 100 but I could get you those precise numbers. The point I am
 15 making is that 80 per cent of people diagnosed with a serious mental illness in the prison
 16 system either have no care or a visit on a monthly basis. That is a problem. It may not be
 17 what the handbook said, but that is what is going on and when the Inspector General comes in
 18 and looks at it, and other officials come in and look at it, and academics come in and look at
 19 it, clearly it is a very serious problem. The Bureau of Prisons are (inaudible) that is just a
 20 basic fact.

21 Q. You have also seen the report of Maureen Baird that has been referred to on a number
 22 of occasions.

23 A. I have seen that.

24 Q. She is a former warden in the Bureau of Prisons. One of the points that was put to
 25 you by my learned friend was that if Mr Assange’s diagnosis of Asperger’s Syndrome is
 26 confirmed, he said that there were programmes available for treatment of Asperger’s
 27 Syndrome in the Bureau of Prisons and you should have mentioned that. Have you seen what
 28 Maureen Baird has said about the availability of that for someone who is subject to SAMs?

29 A. Yes, she says that that is not available to someone subject to SAMs.

30 JUDGE BARAITSER: Mr Fitzgerald, this is a witness giving the evidence of a different
 31 witness who has not yet been heard.

32 MR FITZGERALD: My learned friend challenged him that he should have referred to
 33 something. If you read Warden Baird you will see the answer to it. He was then cut off. I
 34 am just trying to make sure that he can give the answer about what Warden Baird did say.

1 JUDGE BARAITSER: Warden Baird I am sure can speak for herself in due course. I do not
2 think it is appropriate for this witness to give her account in his evidence.

3 MR FITZGERALD: Madam, I wonder whether this would be an appropriate moment to
4 break?

5 JUDGE BARAITSER: Can I ask how many topics you have to cover in relation to your re-
6 examination?

7 MR FITZGERALD: Madam, I have dealt with the prison conditions mainly. There was a
8 question that my learned friend asked about the Cunningham litigation; there was a question
9 about Covid; then there is the question of sentence which you will recall, madam, you wisely
10 told me that I should explore it in re-examination, which I would wish to do. That was about
11 what the base-level was, what the increments were and how he had reached the figure.

12 JUDGE BARAITSER: Can you give me an estimate about how long those topics will take?

13 MR FITZGERALD: I would hope 20 minutes, madam.

14 JUDGE BARAITSER: We will resume at 2 o'clock. Your next witness is Mr Durkin and he
15 is lined up and ready to give his evidence; is that right?

16 MR FITZGERALD: Yes, I think he is.

17 JUDGE BARAITSER: Thank you very much.

18 (Luncheon adjournment)

19 JUDGE BARAITSER: Mr Lewis, are you comfortable? Can you hear the court again as
20 before?

21 A. I am.

22 JUDGE BARAITSER: Thank you. We will hand you directly back over then to Mr
23 Fitzgerald.

24 A. Thank you.

25 Q. Yes, Mr Lewis, we hear you better when you are a little bit forward. So, I wanted you
26 to move on to the issue of sentence and my learned friend asked ---

27 A. Yes.

28 Q. --- asked you about the maximum sentence and you said that the maximum sentence
29 was 175 years. And then he asked you about how you arrived at that through the guidelines
30 and you were dealing with first of all what the base level was for offences under 793 and then
31 what the possible enhancements were. Can you just explain to us how you arrive at a figure
32 that would result in Julian Assange spending the rest of his life in prison given his age at
33 present? Just tell us how you arrive at that.

- 1 A. Certainly. I use the sentencing table which – I think there should be a copy of it in the
2 court room –the sentencing guidelines are effective November 2018 ---
- 3 Q. Just take us very slowly through it – Mr Lewis, if you could just take us slowly
4 through it. You said that the base level for offences of this kind you said were 30, is that
5 right?
- 6 A. Yes. That is the base level for both the Espionage Act 793 violations as well as for
7 the conspiracy for computer intrusion.
- 8 Q. OK.
- 9 A. I think they barely – the conspiracy, you deduct three for conspiracy, but I will talk
10 about the espionage bracket, the Espionage Act offences.
- 11 Q. OK. So, if the base level is 30 ---
- 12 A. (Inaudible).
- 13 Q. You go.
- 14 A. Yes, so that is if the information is not top secret.
- 15 Q. So, if the base level is 30, what does that mean in terms of the range of months that
16 the judge is guided to impose?
- 17 A. Well, it would assume that there are no adjustments.
- 18 Q. Yes. And in that case, we will go on about the adjustments afterwards, but for the
19 moment ---
- 20 A. And I have looked at the adjustments (inaudible). Assuming that Mr Assange has no
21 relevant criminal history, the base level at base level 30 is 97 to 121 months.
- 22 Q. OK. And just in terms of years ---
- 23 A. But it has got to be linked. Eight years and one month to 10 years and one month.
- 24 Q. OK. Now then, just explain about what happens if you have adjustments upwards and
25 whether it is likely that he would have adjustments upwards.
- 26 A. I have gone through all of the adjustments, it is very common for there to be
27 adjustments. The government act for adjustments in many cases and obviously it is for the
28 court to determine whether the adjustments are appropriate but there are no adjustments that
29 mean to be ---
- 30 Q. Go ahead.
- 31 A. --- sorry about that, I do not know if that came from me, but can I continue?
- 32 JUDGE BARAITSER: Yes, please.
- 33 Q. Yes, please.

1 A. Thank you. And I do believe that some of the adjustments come in quite clearly
2 under the second superseding indictment that may not have been there under the first
3 superseding indictment and remained ---

4 JUDGE BARAITSER: I am just going to ask you to pause for one moment, Mr Lewis, just
5 one moment.

6 (Judge Baraitser conferred with the Court Usher)

7 A. Certainly, madam.

8 Q. All right. So, you were talking about the second superseding indictment justifying
9 certain adjustments. What would those adjustments be and what would the result of those
10 adjustments be?

11 A. Well, a very common adjustment is if the defendant was an organiser or leader of a
12 criminal activity that involved five or more participants or was otherwise extensive. And
13 obviously you now have the first superseding indictment I think focussed on Chelsea
14 Manning and Mr Assange. We now have many other people who are included, Teenager and
15 other various people are named. So, that adds more level to the analysis ---

16 Q. So, we are up to ---

17 A. --- that will take you from a 30 to a 34.

18 Q. OK. Other adjustments?

19 A. And I – yes, but I think the government would be likely to ask for that unless they
20 undertook not to but I can – would you like to know the sentence for the 34?

21 Q. Yes. Shall we just go through it methodically? Yes.

22 A. Sure. The sentence for 34 is 151 to 188 months.

23 Q. Which in terms of ---

24 A. So, that would be 12 years and seven months for a low-end and I will just get out my
25 sharp pencil to approximately – between 14 and 15 for a 34.

26 Q. Right. And then are there other adjustments?

27 A. The next ---

28 Q. Yes.

29 A. Yes. The next adjustment which is likely and which seems to have been added
30 specifically is with respect to Teenager whose age seems to be relevant in that you add two
31 levels if a minor under the age of 18 is involved in the offence.

32 Q. So, what does that reach ---

33 A. So, that ---

34 Q. That is 36.

- 1 A. --- that takes you to 36 which is 188 to 235 months, 188 as we said before, I think it
2 was just under 15 – is it 15 years 7 months? Sorry about that.
- 3 Q. Yes. 15 years ---
- 4 A. 188 months. Yes, 15 years and eight months on a low-end to 235 months which is 19
5 years and seven months.
- 6 Q. All right. Now, are there ---
- 7 A. Now ---
- 8 Q. --- any other enhancements.
- 9 A. --- there is also – yes. There is – does the crime involve a special skill? And that is
10 also an adjustment that can be added for people who seem to have special, special abilities
11 that help them commit the crime. I would think that Mr Assange’s technological efficiency
12 would lead to the special skill adjustment which would add two to the offence level table and
13 take it up to (inaudible).
- 14 Q. And what is the effect of 38?
- 15 A. 235 to 293 months.
- 16 Q. So, what is the ---
- 17 A. 235 is 19 years and five months and 293 is 24 years and four months.
- 18 Q. OK.
- 19 A. No, I am sorry, 24 years and five months.
- 20 Q. Right.
- 21 A. Under 38.
- 22 Q. OK. So, that is if it gets up to 38. Could it go higher with other enhancements?
- 23 A. Yes, it could. There are a few other enhancements that could arguably apply. One is
24 obstruction. An obstruction includes steps that are taken to inhibit the investigation of a
25 crime. I would think that as the indictment is charged there is a suggestion that there were
26 attempts that were made to prevent the identification of Chelsea Manning as a person
27 removing documents. That might be seen as a qualifying for obstruction which would add
28 two (inaudible), two or four..
- 29 Q. So, that is 40. And any other enhancements that are raised by this ---
- 30 A. 40. At 40, the sentence is 292 to 365 months. 292 months is 24 years and three
31 months. 365 is 13 years and five months. The only other enhancement that I could - could
32 see the Government may take based on the superseding indictment, is there is a - there are
33 charges in the second superseding document. With respect to the disclosures from state
34 department opinions, it discloses the identity not only of sources on the ground in

1 Afghanistan, Iraq, China and other places, Iraq, but also of United States officials, which
2 would include people in the embassy who would be working with whatever agency they are
3 attached to, and they would be identified as well. And there is an enhancement (inaudible) if
4 the victim of disclosure of information is a government employee, that adds three levels.

5 Q. And so if - if - that would reach a level of 43, is that right?

6 A. That's correct.

7 Q. And what is the maximum sentence on 43?

8 A. Well, the maximum sentence on 43 is life, but that is above the statutory maximum of
9 175 years and so, if the court accepted a score of 43, and wished to sentence under the
10 guidelines, it would be life reduced to 175 years.

11 Q. And that would be ---

12 A. That assumes that there is cumulation, cumulation of counts which the court has the
13 power to do.

14 Q. So the court would have the power to cumulate the counts, is that right?

15 A. It - it - it could but it could not go above 175 years. I'm sorry, so 175 is the maximum
16 and there are - one way to get there is to cumulate individual counts, but you could simply
17 take just a few counts and then start with the base level and getting it - and if you add those
18 enhancements, you - if you get to a 43 then that is life. You could not - in - in order to do that
19 though, you would need to have enough convictions to support the statutory (inaudible), if
20 you see what I mean.

21 Q. Yes. So, I just want to - OK, so that background. Other factors: the guidelines are
22 only guidelines; can you exceed the guidelines in fact?

23 A. A court can exceed the guidelines. It would need to provide written reasons because
24 it would - if it went below guidelines.

25 Q. Yes. And in addition, we have - you referred to the fact that Chelsea Manning
26 received a sentence of 35 years. Would that be a relevant factor that could be taken into
27 account?

28 A. I would think that both - there are three data points with respect to Chelsea Manning.
29 One is that she received 35 years, another is that the Government asked for 60 and the third is
30 that she could have had (inaudible). She was tried on a count that could have required - that
31 could have provided for life imprisonment, but she was - or even death, the government decided
32 not to seek death and she was acquitted of that count.

33 Q. Now, against that background, looking at all the factors, the maximum sentence
34 allowed for by the 18 counts, the way in which one could reach 43 under the guidelines, is

1 there a real risk that he will receive a sentence which, as you refer to in your first report,
2 could mean that he spends the rest of his life in - in prison?

3 A. Yes.

4 Q. Yes, I think that those are the only matters I wish to deal with on the sentence. Just
5 one final point, in answer to my learned friend's questions in relation to the First
6 Amendment, you referred to an unbroken line of practice not to prosecute for the publication
7 of national security information, is that right? An unbroken line.

8 A. Yes, I think the Fourth Circuit (inaudible) already had been broken and then thought
9 better of it and decided not to. The Eastern District was broken and then he thought better of
10 it and decided not to, but there has never been a criminal conviction or a prosecution to the
11 end and then a criminal with respect to any publisher of national security information.

12 Q. And in the ---

13 A. And ---

14 Q. And in the Rosen case ---

15 A. (Inaudible)

16 Q. I am so sorry.

17 A. Yes.

18 Q. And in the Rosen case ---

19 A. (Inaudible)

20 Q. --- the prosecution did not go ahead.

21 A. It did not.

22 Q. Those are the only points I wish to raise.

23 JUDGE BARAITSER: Right.

24 MR FITZGERALD: Thank you very much, Mr Lewis.

25 JUDGE BARAITSER: Mr Lewis, I do not have any questions for you, which means that
26 your involvement in this case is now completed. You are very welcome to sever the link.
27 Thank you very much for your - giving up your time to give evidence in this case, thank you.

28 MR FITZGERALD: Thank you very much.

29 A. Thank you, both.

30 (Witness withdrew)

31 MR FITZGERALD: Madam, the next witness is Mr Durkin. Could we just have a few
32 minutes to make sure that everything is in place?

33 JUDGE BARAITSER: Right, 20 past, five minutes then, 25 past; will that be enough time?

34 MR FITZGERALD: Could we have 10 minutes?

1 JUDGE BARAITSER: You can. Let me just look at my schedule.

2 MR FITZGERALD: I think I understand my - my - my learned friend does not intend to, is
3 that right?

4 JUDGE BARAITSER: You do not have any questions, Mr Lewis, is that ---

5 MR LEWIS: Well, I do, I do, your Honour.

6 MR FITZGERALD: Oh, I see, but...

7 MR LEWIS: I am not sure I need ---

8 MR FITZGERALD: No, no.

9 MR LEWIS: I am not sure I need an hour though.

10 JUDGE BARAITSER: So, Mr Durkin, estimate an hour, all right.

11 MR LEWIS: But I am not withdrawing from the hour.

12 MR FITZGERALD: No.

13 JUDGE BARAITSER: I am just wondering whether or not we can fit a second witness or
14 third witness in this afternoon. Let us see how it goes.

15 MR FITZGERALD: I - I think it is un ---

16 JUDGE BARAITSER: You think it is unlikely.

17 MR FITZGERALD: Unlikely, madam.

18 JUDGE BARAITSER: All right, 2.30 then, please.

19 MR FITZGERALD: Thank you very much.

20 (Short adjournment)

21 JUDGE BARAITSER: Yes. Thank you very much. Yes. Good afternoon, Mr Durkin, well,
22 afternoon certainly in this jurisdiction. Can you see the court and hear the court?

23 MR DURKIN: I can hear, your Honour, and good morning to you here, but it is the
24 afternoon there.

25 JUDGE BARAITSER: Thank you very much. In that case, the first thing we are going to do
26 is ask you to affirm your evidence. Just listen carefully please whilst we conduct that
27 process.

28 THOMAS DURKIN, Affirmed

29 Examined-in-chief by MR FITZGERALD

30 Q. You are Thomas Durkin, is that right?

31 A. Yes, sir.

32 Q. And is it right that you have prepared two statements for the court, one dated 17
33 December 2019 and the other dated 11 February 2020?

34 A. That is correct.

- 1 Q. Madam, you have them at tab 16 and tab 43.
- 2 JUDGE BARAITSER: Thank you very much.
- 3 MR FITZGERALD: And just to deal with your qualifications. I am so sorry. Do you stand
4 by the contents of those two statements?
- 5 A. Yes, I do.
- 6 Q. And just to turn to your qualifications, you deal with them in your third paragraph of
7 your first statement. Can I just summarise the position with you? You are an attorney
8 licensed to practise law in a number of states, including Illinois. Is that right?
- 9 A. Yes, sir.
- 10 Q. And you are admitted to practise in the Federal District Court, the Circuit Court of
11 Appeal and in the US Supreme Court?
- 12 A. That is correct.
- 13 Q. And you have been practising federal criminal law for many years. Is that right?
- 14 A. More than I care to admit.
- 15 Q. And you have been practising federal law, federal criminal law both initially a period
16 as an assistant US attorney for the Northern District of Illinois between 1978 and 1984. Is
17 that correct?
- 18 A. That is correct.
- 19 Q. And then ---
- 20 A. And then ---
- 21 Q. And then from 1984 – I am so sorry. Carry on.
- 22 A. From 1973 to 74 I was a law clerk to a Federal District Court judge in Chicago.
- 23 Q. And then having been an assistant US attorney between 1978 and 1984, from 1984
24 onwards have you been in private practice largely working in the field of federal criminal
25 defence cases in your Chicago law firm?
- 26 A. Yes.
- 27 Q. And is it right that you ---
- 28 A. That is correct.
- 29 Q. You also teach law at Loyola University in Chicago?
- 30 A. Yes, I do.
- 31 Q. And you have received a number of awards for your legal work, those include for
32 representing Guantanamo detainees and most recently you received the Illinois association of
33 criminal defence lawyer’s lifetime achievement award. Is that correct?
- 34 A. Yes, that is correct.

1 Q. Now, in your report you deal with the special problems of cases involving classified
2 information from paragraphs 9 onwards of your first report under the heading, “(A) The US
3 law relating to classified evidence and its application to Mr Assange’s particular
4 circumstances.” Could you just summarise the problems very briefly that face someone who
5 is charged with offences which involve classified materials?

6 A. Well, the biggest problem is that you cannot discuss anything you learn in the
7 classified setting with the defendant. Unless the government declassified the discovery
8 materials, classified evidence can only be reviewed in what is called a SCIF, or a superior
9 compartmentalised information facility and you would have to have security clearance and
10 what the government has described as a need to know the information, and you can only
11 review that evidence during SCIF. You can only discuss it with your cleared co-counsel in
12 the SCIF. You cannot discuss it with the defendant at all. And the other problem that I
13 mention in my paper is that it is very difficult to prepare pleadings if you want to prepare
14 pleadings for the court in a classified SCIF with classified arrangement you have to use the
15 computer that they provide you with the SCIF that I find very difficult to use.

16 Q. Right. Just ---

17 A. And anything you cannot take anything out of the SCIF either, so you can only work
18 on it while you are there.

19 Q. Just pausing there for one moment, Mr Durkin. At paragraph 13 you deal with the
20 problems succinctly about halfway down saying that Mr Assange will not know what his
21 lawyers have learned from the classified evidence, nor will his lawyers be able to ask
22 Mr Assange what he might know about the materials to which they have been granted access.
23 Is that right?

24 A. Yes, sir.

25 Q. And would that be a serious handicap in the preparation of the defence in a case of
26 this nature?

27 A. It is an incredible difficulty to deal with.

28 Q. Now, I want you next, if I can move you on to deal with the question of sentencing
29 and then with the question of plea bargaining. You deal with the question of sentencing at
30 part (D) of your first statement at paragraphs 19 onwards. Can I just ask you first of all about
31 your paragraph 23 and your conclusions there as to the scale of sentence that Mr Assange
32 might face.

33 A. Yes.

1 Q. So we are talking about whether there is a real risk that he will suffer a sentence
2 which will, as you say, constitute the rest of his likely natural lifespan. Is there such a risk in
3 this case that he will receive a sentence of imprisonment that will constitute the rest of his
4 likely natural lifespan?

5 A. I think that is a very likely possibility.

6 Q. Right. And can you just help us as to how you arrive at that conclusion, bearing in
7 mind the statutory maximum?

8 A. Well, there is what I referred to and just, if I understand, there are federal sentencing
9 guidelines in the federal court and the calculations that I have done in projecting those
10 guidelines I believe it would be realistic to say that Mr Assange would be looking after a
11 conviction by a jury on all counts at a level of 38, or 40 or 43 and those levels would
12 effectively be 235 to 293 months, 40 would be 293 to 365 and 43 is the equivalent of a life
13 sentence. Now, the guidelines are not mandatory, so it is impossible to predict what the
14 sentencing range would be. If Mr Assange were my client, we would have prepared a
15 guidelines memorandum laying out the operation of the guidelines and this is our potential
16 calculation that, you know, you cannot be certain of what those calculations turn out to be
17 until after the trial and it will ultimately be made by the court with the assistance of probation
18 department. But, in my opinion, based on my experience with the guidelines and these things
19 with national security cases, I am comfortable with saying that the range could be anywhere
20 from 38 to 40 to 43, and at least in my understanding if there are (inaudible) I think that likely
21 could result in a sentence that would be the equivalent of a life sentence. I would not predict
22 it. I am certainly not suggesting he would get a life sentence, but I think he does face a real
23 risk of a sentence in the range of anywhere from 30 years to 40 years. And the other reason I
24 say that is a real risk is that the sentence that Manning received – I realise there are
25 differences there, but that is still a number that it could be taken into account. The
26 government appears to take a position that Mr Assange is far more liable than Manning, so I
27 think it is realistic to say that the sentence that he could very well receive if he goes to trial
28 and is convicted.

29 Q. Right. And just pausing there. So on the guidelines, somewhere between 30 and 40
30 years, resulting in effectively the rest of his natural life.

31 MR LEWIS: No, I think he said level 38.

32 MR FITZGERALD: No. He said 30 to 40 years on the basis ---

33 JUDGE BARAITSER: He said a life sentence, 30 to 40 years.

34 MR LEWIS: Thank you.

1 MR FITZGERALD: 30 to 40 years with either level between 38, 40 and 43. Yes. So,
2 Mr Durkin, given that potential likely risk, can you just deal with one other factor which you
3 have dealt with in your report. Can the court take into account relevant conduct of which he
4 is not actually convicted, but which is the subject of allegations made against him by the
5 prosecution at the sentencing stage?

6 A. Yes, that is correct.

7 Q. And I think you have set that out at paragraph 20, "No limitation shall be placed on
8 the information concerning the background character and conduct which can be taken into
9 account." So in this case other factors, things he is not convicted of, which are alleged
10 against him by the prosecution could be taken into account to enhance the sentence further.
11 Is that right?

12 A. That is correct.

13 Q. And I think you have said further on that it could be conduct unrelated to the charges,
14 or even conduct that he has actually been acquitted of that could be taken into account when
15 it comes to sentencing.

16 A. Yes, that is correct. And that is true, I would call it, it would be used in an
17 aggravation. It would not be in an enhancement under the guidelines, but it could certainly
18 be used in an aggravation, but, as I said in paragraph 20, the court has almost unfettered
19 discretion in determining what information it will hear and rely upon in sentencing, and that
20 works both way.

21 Q. Against that background, I want to ask you about the question of plea bargaining that
22 you deal with at paragraph 17 to 18 of your report. What is the effect of the fact that he will
23 be facing such a great sentence likely to be on his freedom of choice as whether to defend the
24 matter or not?

25 A. The first point is that someone who pleads guilty in a timely fashion gets three points
26 off of those guidelines, and three points when you are up in that high range, anywhere from
27 38 to 43, for example 35 if you are down in 168 or 210 in terms of months. If you go down
28 to 33, you are 135 or 168. There is an incentive to plead guilty under the guidelines, that is
29 the suggestion in the report that I referred to by the National Association of Criminal Defence
30 Lawyers, who are what trial lawyers call a trial tax; in other words, you get penalised for
31 going to trial. The other issue generally becomes, in my experience, is that the government
32 has the ability to limit a defendant's exposure for the plea agreement to a certain number of
33 counts. For example, if they wanted to make in ten-year maximum penalties, his exposure
34 would only be 240 months, by operating on 240 at 360 to life, for example. It is often my

1 experience, particularly in the last five to ten years, that most clients who are honest and blunt
2 with them about the consequences simply cannot risk that type of exposure and will take a
3 plea that is put in front of them because they cannot run the risk of going to trial.

4 Q. At paragraph 17 you have quoted from the report of the Trial Penalty, a 65-page
5 report by a task force of 11 nationally prominent US defence practitioners, and you have
6 cited: “There is ample evidence that federal criminal defendants are coerced to plead guilty
7 because the penalty for exercising their constitutional rights is simply too high to risk”; does
8 that accord with your own experience?

9 A. It does very much so. I would venture to guess that my trial practice has been reduced
10 dramatically over the last ten years.

11 Q. If we look at the situation - - go ahead, Mr Durkin, I am sorry.

12 (Short adjournment)

13 JUDGE BARAITSER: Mr Fitzgerald.

14 MR FITZGERALD: Mr Durkin, you were dealing with the question of the trial penalty, the
15 penalty for, as it were, fighting or contesting a case. If a defendant is induced to accept a plea
16 by the fear of a very great sentence in the alternative, would a requirement of that plea be full
17 co-operation with the authorities?

18 A. Generally speaking, yes. Usually any type of plea agreement would be relatively
19 meaningful from a defence standpoint which required co-operation. It could be done be
20 without co-operation, but it most likely would have.

21 Q. If we are talking about co-operation, could co-operation include the revelation of
22 sources of information, in this case of WikiLeaks?

23 A. Absolutely. Co-operation always has to be whatever the government claims, and
24 requires, to be complete, full and truthful.

25 Q. They can require you to provide any information that they want as part of saying “you
26 are co-operating”; is that right?

27 A. Yes.

28 Q. Including the nomination of sources of information?

29 A. I would assume to the government.

30 Q. Finally, Mr Durkin, you have dealt in your Second Affidavit in February with the
31 history of the case and the changing approach to this case, first under the Obama
32 administration and then under the Trump administration; is that right?

33 A. Yes, sir.

1 Q. Have you reached a conclusion as to whether there is something other than just
2 legitimate criminal justice concerns driving the prosecution under the Trump administration?

3 A. Yes. What I said in my Affidavit is that I thought it was more likely than not that
4 there were political considerations that influence a decision to challenge him at the time he
5 was first charged by the Trump administration.

6 Q. If we go on to the superseding indictment that has brought him in May 2019 with the
7 18 counts, including 17 counts of espionage; do you see the same factors at work driving that
8 quantum leap in the charges?

9 A. Yes.

10 Q. Of course, you have now factored in the second superseding indictment which adds
11 further allegations, the most recent one; is that right?

12 A. Yes, sir.

13 Q. Mr Kromberg, in his statement says: "There is a potent protection against any abuse
14 in the form of the grand jury, the grand jury having to give its go-ahead before these
15 indictments are preferred." I want to ask you this: is the grand jury really an effective
16 protection against a prosecution which is either over-zealous or politically influenced?

17 A. There are quite a few practitioners in... (audio connection lost)... of National
18 Association of Criminal Defence Lawyers in the system, it is ...(audio connection lost).

19 Q. We are losing you, Mr Durkin. I do not know whether you can try again.

20 A. I am sorry. Can you hear me now?

21 Q. Yes, we can just hear you but it is breaking up.

22 A. Can you hear me now?

23 Q. Yes, I can hear you now. Do you want to have another go at the answer about
24 whether the grand jury provides an adequate protection against an over-zealous or politically
25 influenced prosecution?

26 A. (Audio connection lost).

27 JUDGE BARAITSER: Simon, is the technician being summonsed? I think I will take
28 another five minutes.

29 (Short adjournment)

30 JUDGE BARAITSER: Thank you. Mr Fitzgerald, just so you know, I am reliably informed
31 that it is his connection that is causing the difficulty.

32 MR FITZGERALD: Yes, I am grateful. Yes. Mr Durkin, I think he is now – Mr Durkin, I
33 think you can now hear us can you?

34 A. Yes, sir.

- 1 Q. Yes. So, the question was ---
- 2 A. Yes.
- 3 Q. --- does the grand jury system provide a protection against a politically motivated
4 prosecution?
- 5 A. No. The decision, the decision to charge and in all cases invited by the Department of
6 Justice or the local US attorney or in a case of this magnitude and in a case of (inaudible)
7 decisions made by the national security position of the Department of Justice.
- 8 Q. And will the grand jury, once it is presented to them by the federal prosecutor be
9 likely to say no, or are they likely to go along with it?
- 10 A. The (inaudible) say no is virtually unheard of. It happens maybe once every four or
11 five years.
- 12 Q. And is this right, the defence have no right to appeal before the grand jury or make
13 representations, is that right?
- 14 A. That is correct. We used to, we used to hear or my opinion is merely based on the
15 changes in the administration that accept the decision to move forward and is backed up.
- 16 Q. Yes. Can you still hear me, Mr Durkin?
- 17 A. Yes.
- 18 Q. OK. Thank you very much.
- 19 A. Can you hear me?
- 20 Q. Yes, I can hear you. Yes, that is fine. Yes, thank you very much. If you just wait
21 there my learned friend for the prosecution may wish to ask you some questions.
- 22 JUDGE BARAITSER: Just before you do so, I am just going to plug in my computer.
- 23 A. All right.
- 24 (Judge Baraitser conferred with the Court Usher)
- 25 JUDGE BARAITSER: Right. Thank you very much.
- 26 Cross-examined by MR LEWIS
- 27 Q. Mr Durkin, I am going to ask you a few questions on behalf of the government. Can
28 you hear me OK?
- 29 A. Yes.
- 30 Q. Thank you. Can I just confirm that for your first statement your opinion was sought
31 by the defence relating to fair trial issues in the United States?
- 32 A. Yes.
- 33 Q. And ---
- 34 A. Yes.

1 Q. Thank you. Are you saying Mr Assange will not get a fair trial in the United States?
2 Or are you saying it is just going to be difficult?

3 A. I do not believe he will be able to get what I would consider to be a fair trial in the
4 United States.

5 Q. Well, let us just examine one or two things. Your evidence that you can only see
6 classified material at a designated location and on a designated computer comes to this, does
7 it not, it is inconvenient or very inconvenient but does not prevent the defence seeing and
8 acting on that classified information?

9 A. Well, no, more than that because you cannot, you cannot discuss it unless its
10 determinative. That is true only insofar as it goes, but the other huge problem is the inability
11 to discuss what you learn in a classified setting with the defendant, which is the most
12 important point in that process.

13 Q. Now, you say that, that he will not be able to discuss it with his attorneys, I wonder if
14 you can turn to the paginated prosecution bundle at page 138? That is the first declaration of
15 Gordon Kromberg.

16 A. I apologise for that. I apologise, I had that open on my computer. I was using my
17 iPad and I have the screen over here so I cannot do that without fear of losing you.

18 Q. All right, well, let us try it this way, Mr Durkin, I will just read it out to you.

19 A. I know I have a hard copy of it.

20 Q. I will simply read the passage out to you.

21 MR LEWIS: Madam, it is page 138 ---

22 A. That is fine.

23 MR LEWIS: --- paragraph 110.

24 Q. "As a practical matter, Mr Assange will be able to review certain classified
25 information that has been disclosed by the prosecution in accordance with its discovery
26 obligations. The Federal Court House in Alexandria, Virginia, has cell secured classified
27 information facilities, CIF's ..." Do you accept that that is correct?

28 A. I do not accept the fact that the defendant would be able to review classified evidence.
29 I accept the fact that the Government has the ability to declassify certain classified evidence,
30 and only if they declassify it he will be able to see it. I do not accept Mr Kromberg's
31 statement that the defendant would be permitted access to the CIF to review classified
32 evidence.

33 Q. So ---

1 A. That is not my experience and as I said it is not my experience whatsoever and I do
2 not know how Mr Assange would be granted a security clearance in order to go into the CIF
3 and review the material.

4 Q. Because when we are talking about the material ---

5 A. I cannot see that happening.

6 Q. Mr Durkin, you talk in your paragraph 14 of your witness statement of an
7 unprecedented amount of discovery. Where does your understanding that there is an
8 unprecedented amount of discovery come from?

9 A. From the (inaudible) another affidavit. I want to say maybe Mr Rouen.

10 Q. Well, that is a defence witness. Do you have it from anywhere in the prosecution
11 position?

12 A. I do not. No, I do not. I do not believe I have seen any of the Government's
13 (inaudible) but I read that somewhere. There is a statement in my papers, it was between the
14 classified evidence and the discovery materials that the classified evidence would only be a
15 portion of the overall discovery material.

16 Q. But do you know what the defence issues Mr Assange is going to raise at his trial?

17 A. No. I am not privy to Mr Assange's defence because I am not his lawyer.

18 Q. So, without knowing what the issues are, how can you make the assertion that there is
19 going to be a problem with an unprecedented volume of discovery materials?

20 A. Well, ---

21 Q. He might be going to plead guilty, for instance.

22 A. Large volumes of discovery is always (inaudible). One is a huge cost consideration
23 and it requires, particularly in these days of electronic discovery, a large staff of non-lawyers
24 to organise it, and the other problem that I pointed out with respect to large amounts of
25 discovery, regardless of what the defence is, is that you have to review it with the client and
26 that is - that becomes very difficult, as I think I explained, when a defendant is detained pre-
27 trial.

28 Q. Now, Mr Durkin, let us just examine that a little bit, because surely this
29 unprecedented volume of discovery must contain the 500,000 documents or so of unredacted
30 documents that WikiLeaks put on the internet, must it not?

31 A. I - I - I don't know, I would assume so, but I - I don't know. I am assuming so.

32 Q. And Mr Assange's lawyers have had unrestricted access to all those 500,000 pages of
33 material or so for the last 10 years, have they not?

1 A. I - I do not know what they have had access to but it - I mean, I assume so, but I don't
2 - I can't speak for them.

3 Q. But I am just trying to get to the bottom of why you say it is impossible for him to
4 review the discovery material when, in reality, it is only going to be the - the bulk of the
5 documents he has already put on the internet and knows all about and his lawyers know all
6 about.

7 A. I - I did not - I would not presume that, but I - I mean, do not know since I do not
8 know what the discovery is, but regardless of what it is, you still have to (inaudible).

9 Q. But, what I am trying to get to the bottom of, Mr Durkin, perhaps rather inelegantly, is
10 your statement in paragraph 14, your understanding that the US prosecutors have described
11 Mr Assange's case as involving an unprecedented volume of discovery materials and that is -
12 exacerbates the problems. If you have got no idea what the discovery materials are, and no
13 idea whether they have already been seen by the defence, you cannot properly make that
14 statement, can you?

15 A. Well, I acknowledge that has to be true. I (inaudible) and I have got that from the
16 opening note on behalf of the Government of the United States on July 30th of 2019, so that is
17 the US Government's statement about their own discovery, so, you know. Since I do know
18 what the discovery is, I cannot comment on what you are asking me, but ---

19 Q. Yes, I think you misread it, Ms Dobbin says, because we - we wrote that note and it
20 says: "Unprecedented nature of the disclosure." It has got nothing to do with unprecedented
21 volume of disclosure materials. Unless we are wrong. Could you point it out to us? We
22 have got the opening here.

23 A. I wouldn't know. I - I will take your word for it. I - I do not have the statement in
24 front of me, but I thought I had (inaudible).

25 Q. Well, one of my colleagues will find that while we are just looking. Now, on the
26 plea-bargaining point, you talk about the trial tax. Now, that is simply a discount for a guilty
27 plea is it not? I think you said: "We get three levels off..."

28 A. That's right.

29 Q. OK. I'll just go back. Ms Dobbin with her customary efficiency has found what it
30 said in the prosecution opening note and it said: "At the time, the volume of classified
31 materials which were compromised by their provision to Mr Assange was unprecedented". It
32 has got nothing to do with disclosure. Madam, it is paragraph 2. Page 2 of the - of the
33 opening note.

34 A. You asked the question and I do not know exactly where it is said.

- 1 Q. OK. Well, let us just go back to the trial tax. You get three levels off if you plead
2 guilty, is that right?
- 3 A. That is right.
- 4 Q. In fact ---
- 5 A. Yes.
- 6 Q. --- in England we also have what you would describe as a trial tax, you get a third off
7 if you plead guilty. Are you saying there is anything wrong in that?
- 8 A. Well, I am not suggesting that the only trial path is the three points off. What I am
9 suggesting is that is that one that builds inherently into the guidelines, but I am also saying
10 because of how draconian, for want of a better term, the guidelines are, when the Government
11 puts something on the table that is far below the guidelines in terms of the maximum penalty,
12 it is very difficult then to go to trial.
- 13 Q. OK. You were asked extensively by my learned friend, although it was not in your
14 statement, about the different levels of sentencing. What base level did you begin with under
15 the United States sentencing guidelines? What base level?
- 16 A. 30.
- 17 Q. And it would be right, if he pleaded guilty, or was given discount, and the judge did
18 not accept any enhancements, that the level would go down to 27, would it not?
- 19 A. Well, yes, if he does not get the two enhancements he cannot - just by pleading guilty
20 you do not get to avoid the penalty.
- 21 Q. No, but supposing the judge - it is up to ---
- 22 A. If the Government were ---
- 23 Q. It is up to the judge to accept whether there should be any enhancements or not, is it
24 not?
- 25 A. I am not sure what you mean by accept. The judge would not have to rule on the
26 applicability of each enhancement.
- 27 Q. Yes.
- 28 A. But he does not have the ability to ignore the enhancement. He cannot just decide:
29 "Oh, I think this is 30 when" ---
- 30 Q. And just to help us, if it goes down to 27, so we just understand the bracket, the
31 bracket at level 27 is 70 to 87 months, is it not?
- 32 A. Yes.
- 33 Q. Thank you.
- 34 A. Yes.

1 Q. Now, I just want to ask you about you were examined about being sentenced for other
2 conduct and the rule of specialty.

3 MR FITZGERALD: No, I did not ask that question.

4 MR LEWIS: Well, it is in your statement.

5 MR FITZGERALD: He does not say anything about specialty.

6 MR LEWIS: Well, at paragraph 19 under D, the heading is 'the rule of specialty'.

7 MR FITZGERALD: But he does not say anything about specialty.

8 JUDGE BARAITSER: Well, nevertheless, questions can be asked.

9 MR LEWIS: So, is it right that you say, you are talking about the rule of specialty in
10 paragraph D of your first statement. It is page 8.

11 A. Yes, that is what it says.

12 Q. Thank you.

13 A. That is correct.

14 Q. And have you had the advantage of reading the case, or were you provided with the
15 case of *Welch* from the United Kingdom Divisional Court?

16 A. No.

17 Q. Can we just ---

18 A. No.

19 Q. I just want to read one or two passages from that. Madam, we have not got it
20 anywhere else, but, madam, you have it as my learned friends have it, from abuse authorities,
21 volume 1, which was at Woolwich.

22 JUDGE BARAITSER: Well, I have it in my room.

23 MR LEWIS: I am not going to ---

24 MR FITZGERALD: Madam, I should just point out, he does not deal with the question of
25 specialty at all.

26 JUDGE BARAITSER: Well, it may be that he cannot ask the question in that case.

27 MR LEWIS: He may not. And it is tab 20, madam, simply for your note.

28 JUDGE BARAITSER: Thank you.

29 MR LEWIS: Well, in that case, and I am going to paraphrase, Mr Durkin, effectively the
30 court said that the defendant was not being punished for another offence. The consideration
31 of other conduct was relevant to the punishment as part of the sentencing process, i.e. a form
32 of aggravating feature. Is that what you are talking about in your paragraph under your
33 section D?

34 A. Yes.

1 Q. Thank you.

2 A. Yes.

3 Q. And I just want to turn to your second statement, which is about - you were asked to
4 opine on whether it was politically motivated and part of your decision, your - your opinion,
5 as I understood it, or the main factor which influenced you, was the decision to move
6 forward, I think you - were your words.

7 A. That is correct.

8 Q. You rely on others who say there had been a decision by the Obama administration
9 not to prosecute, but I would like to show you what Professor Feldstein said about that when
10 he was in this court last week. I am not sure you are going to have this actually, Mr Durkin.
11 I am just going to read - read a passage to you, because you do not have it. I am sorry. It is a
12 transcript from his evidence. What Professor Feldstein said was - I am going to page 193,
13 madam, in that bundle which we used for Mr Lewis.

14 JUDGE BARAITSER: Yes.

15 MR LEWIS: What Professor Feldstein said, was that he accepted that there was not a
16 decision not to prosecute, but that there was simply no decision to prosecute during the
17 Obama administration. Would you accept that as correct?

18 A. Could you read it back again?

19 Q. Of course. There is lots of - there is a double negative in it and I am sorry but that is
20 just the way it was dealt with, so I am going to read it to you again, I will read you what he
21 says. He says: "I should have put it as a positive, not a negative, but as far as we knew, no
22 decision was taken to prosecute and, yes, it is true, a decision to not prosecution was not
23 formally taken, so I will correct myself on saying that at the time the Obama administration
24 did not take the decision to prosecution. They did not withdraw the possibility of
25 prosecuting, but they did not take the decision to prosecute, whereas the Trump
26 administration did, that was the change." Would you agree with that?

27 A. Well, not necessarily. Obviously, I mean, what - what appeared to me to have
28 happened is the Obama administration, under Attorney General Holder, made a decision not
29 to charge Mr Assange. Obviously they can always go back if the statute of limitations still
30 applied, but that does not mean that it was not a political decision. It seems very clear to me
31 that the Obama administration made a decision not to prosecute. What Mr Kromberg seemed
32 to say is that there is this ongoing Grand Jury, which I do not add a lot of credence to; that is
33 something that mattered vis a vis the issue of whether it was more likely than not that it was a
34 political decision. It seems to me that, one, there was some reason for the Obama attorney

1 general not to prosecute. What no one has said is that nobody ever declined the case. My
2 guess is that case probably was declined. That does not mean that they cannot reopen it, but I
3 think that is what happened. They decided not to go ahead. They declined the case. For
4 Donald Trump's political purposes they decided to reinstate the charges. The grand jury was
5 not the one that first charged Mr Assange, it was the US Attorney's Office in a complaint.

6 Q. Mr Durkin, I want to understand the basis for your belief. It is right, is it not, that you
7 do not have any first-hand personal knowledge of the deliberations under the Obama
8 administration or Trump administration about whether or not to prosecute Mr Assange?

9 A. That is because the government has not waived the deliberate privilege. They are the
10 only ones who can do that. I do not know what their files say.

11 Q. All your knowledge about those deliberations are derived from newspaper articles; is
12 that right?

13 A. Of course.

14 Q. Your opinion is not based on discussions you have had with any other participants
15 who have even given those newspaper reports?

16 A. I am sorry, can you rephrase that question?

17 Q. Let me give you an example. Mr Miller, who gave an interview to the Washington
18 Post in 2013 had already left two years earlier the Department of Justice, had he not?

19 A. I do not know.

20 Q. You have not spoken to any of those people directly. Your opinion is based upon
21 what is written in the newspaper reports?

22 A. Of course.

23 Q. Thank you. One final point, and I am only asking you this in response to your final
24 statement, not your first statement which is on the law, in relation to the political opinion.
25 Are you being paid a fee for producing it, Mr Durkin?

26 A. I am being paid by the hour for my time, yes.

27 Q. May I ask how much you are being paid by the hour?

28 A. I am sorry?

29 Q. May I ask how much you are being paid by the hour?

30 A. Only if the judge will redact it so my other clients cannot see what I accepted.

31 Q. I am not going to press that. Thank you very much. I do not think I have anything
32 else. Thank you very much, Mr Durkin.

33 JUDGE BARAITSER: Mr Fitzgerald.

34 Re-examined by MR FITZGERALD

1 Q. Mr Durkin, you have been asked about the source of your information and you have
2 agreed with my learned friend that you have relied on press reports, quoting sources; do you
3 have bundle K available to you which has a number of press reports?

4 A. I am sorry.

5 Q. Let me do it as my learned friend did it. Have you seen the report that my learned
6 friend referred to of 15 November 2013 in the Washington Post which was headed “Julian
7 Assange unlikely to face US charges”?

8 A. Yes.

9 Q. In that report, as my learned friend put to you, there is a quote from the former Justice
10 Department official, Matthew Miller, which says: “The problem the department has always
11 had in investigating Julian Assange is there is no way to prosecute him for publishing
12 information without the same theory being applied to journalists.” It goes on: “If you are not
13 going to prosecute journalists for publishing classified information, which the Department is
14 not, then there is no way to prosecute Assange.” That is the quote from Matthew Miller, the
15 former DoJ spokesman. It goes on to say: “Justice officials [not former Justice officials] said
16 they looked hard at Assange but realised that they have what they describe as a New York
17 Times problem.” It goes on: “If the Justice Department indicted Assange, it would also have
18 to prosecute the New York Times and other news organisations and writers.” You have seen
19 that report before, have you?

20 A. Yes.

21 Q. Where it quotes sources there, that is to say, “Justice officials said that they looked
22 hard”, do you regard that as likely to be a reliable source, or not?

23 A. Yes. I also plead that it is not a requirement for the Justice Department to want to get
24 their position out into the press that they might otherwise not ask to disclose.

25 Q. Although there is no formal announcement, we go on in that same article that my
26 learned friend put to you: “There have been persistent rumours that the grand jury
27 investigation of Assange has secretly led to charges” and then it goes on “officials” – and this
28 is in November 2013 – told the Post last week that there was no sealed indictment and other
29 officials have since come forward to say, as one senior US official put it, that the department
30 has all but concluded that it will not bring a case against Assange.” Can you help us as to
31 whether that is something you regarded as reasonable to rely on or not?

32 A. Not only that, but I did not see any report contradicting it around that time. It is my
33 experience that when things get leaked and the government does not approve of what is being
34 reported, it will see that that gets corrected.

1 Q. You worked in the Department of Justice yourself for six years, I think?

2 A. Yes, I did.

3 Q. You are familiar with Justice Department procedures and the way that they act. Is
4 that right, Mr Durkin; are you familiar?

5 A. Yes, but my opinion is not with that. I am one of a number of people and I have seen
6 that stuff that has happened. It is not uncommon for leaks to occur and, if the government
7 does not like the way the reports are coming out, they will deal with that and correct that. I
8 guarantee you that if the Obama administration had intended to prosecute Assange, it would
9 be my opinion that they would have corrected those stories in some way.

10 Q. That article quotes from something that Mr Holder said on record in the same article,
11 is that not right?

12 A. That is right.

13 Q. One other matter. I think you have seen the article dated May 24, 2019 after the
14 superseding indictment was brought in under Attorney General Barr; you have seen that, have
15 you?

16 A. Yes.

17 Q. There is a reference in that, obviously you cannot turn it up, but I will do as my
18 learned friend did: to the fact that: “two senior prosecutors, James Trump and Daniel
19 Grooms, strongly disagreed with charging Mr Assange with espionage.” Is that right?

20 MR LEWIS: He does not even have bundle K.

21 MR FITZGERALD: He does have it. He cannot access it at the minute but he has confirmed
22 that he has seen it.

23 JUDGE BARAITSER: Does he refer to it in his statement?

24 MR FITZGERALD: Yes.

25 MR LEWIS: I do not know why we are re-examining him on this.

26 THE WITNESS: I have reviewed bundle K.

27 MR FITZGERALD: My learned friend is saying these are pure press reports. I am entitled
28 to put to this witness whether he regards those press reports as reliable statements of what
29 was happening in the Department of Justice. If he says they are not, they are not. My learned
30 friend was saying: “all you have to go on is press reports”.

31 JUDGE BARAITSER: Yes.

32 MR LEWIS: Yes, fine.

33 MR FITZGERALD: Thank you, madam. Thank you. In that it says: “Part of the concern
34 from Justice Department veterans was that prosecutors had looked at the same evidence for

1 years during the Obama administration and determined such charges were a bad idea, in large
 2 part because Assange’s conduct was too similar to that of reporters. People familiar with the
 3 Assange case said that the Justice Department did not have significant evidence or facts
 4 beyond what the Obama era officials had when they reviewed the case.” Then it quotes
 5 Department officials. Tell us, those quotes as to concerns of Justice Department officials,
 6 and as to what had been decided years ago during the Obama administration, do you regard
 7 those as reliable or not?

8 A. I view them as reliable because I view that position as a legally sound principle that
 9 makes sense as to why they would not pursue the case.

10 Q. My learned friend asked you a number of questions about the classified information,
 11 and then he asked you about the nature of the sentence that would be faced. He said: “there
 12 may be a trial tax, in the sense of a discount for a plea, three points”. I think you said there
 13 was more than that, the was the prosecutorial discretion as to what to charge you with?

14 A. Yes, that is right.

15 Q. Explain how that works. Forgetting you get three points off if you plea, how does it
 16 work when you have an 18-count indictment like this? How does the prosecutor offer you a
 17 plea that you cannot refuse?

18 A. By permitting you plead only to certain counts that would provide a protection that
 19 could not go above the maximum penalty side of the statute. In other words, I think I used
 20 the example in my testimony that if they were to permit a (inaudible) account, that would cap
 21 his exposure at 240 and then as a matter of law the 240 months would be the guideline, not
 22 the tighter guideline, and that would then give the judge more comfort so to speak to be able
 23 to go lower if he chose to because then the guidelines are only 240. The judge, the
 24 sentencing judge always has to take into account reasons why he is going to go below the
 25 guidelines or above the guidelines. More often than not Mr Kromberg says they go below,
 26 but it has to be justified so that if you are only starting from 240 you are in much better shape
 27 than you are if you are starting at 360. It is as simple as that.

28 Q. So, my learned friend was saying well, what is the problem with it? What is the
 29 problem with this wide power to decide what you are charged with and what you are not
 30 charged with in the context of ---

31 A. The problem is that all the power is left in the hands of the Government prosecutor. If
 32 the prosecutor does not put something on the table that you can live with then you do not get
 33 it. In my experience, whenever the government might have a problem at trial, they will put

1 something on the table that you cannot refuse because of the counterplan. It is not any more
2 complicated than that.

3 Q. Yes.

4 A. Most clients understand risk. And the final analysis, they have to accept the risk of
5 those guidelines with in a lot of cases, especially the case of national security, are very
6 draconian.

7 Q. And what is the consequence of the prosecution having an 18 count espionage
8 indictment at their disposal?

9 A. Well, because - they have I do not how many, how the numbers add up but somebody
10 mentioned 175 years. I think they could in terms of (inaudible).

11 Q. Yes.

12 A. The judge can sentence him consecutively on counts.

13 Q. Thank you very much, Mr Durkin, I have got no further questions. Thank you.

14 JUDGE BARAITSER: Thank you very much.

15 MR FITZGERALD: Thank you for your assistance.

16 JUDGE BARAITSER: Mr Durkin, no questions from me which means that concludes your
17 involvement in this case and you are very welcome to sever the link. Thank you very much
18 for your time.

19 A. Thank you, Judge. Likewise.

20 (Witness withdrew)

21 JUDGE BARAITSER: Now, it is quarter to four so we cannot fit in another witness this
22 afternoon ---

23 MR FITZGERALD: No.

24 JUDGE BARAITSER: --- but can you tell me which witnesses we will be hearing from
25 tomorrow?

26 MR FITZGERALD: Mr Goetz will be the first witness and then Mr Ellsberg who is from
27 California.

28 JUDGE BARAITSER: That is 2 pm?

29 MR FITZGERALD: Well, sorry, madam, because I think there is eight hours difference.

30 Madam, my learned friend points out that because of the problems of accommodating
31 Californian time it might be wise, if it is acceptable to you, that we start the whole hearing a
32 bit later and then we could hear him at a later stage but it is up to you.

33 JUDGE BARAITSER: I would rather start at 10 o'clock and not lose any time. Is there
34 anything that can fit in?

1 MR FITZGERALD: So, ---
2 JUDGE BARAITSER: Can we hear from one witness and interpose another witness? I
3 would rather not lose time if at all possible.
4 MR FITZGERALD: Well, madam ---
5 JUDGE BARAITSER: Even if it means interposing witnesses.
6 MR FITZGERALD: Could we ---
7 JUDGE BARAITSER: Think about it.
8 MR FITZGERALD: Could well be. We will obviously take on ---
9 JUDGE BARAITSER: Yes.
10 MR FITZGERALD: --- board your desire if at all possible to use the full time tomorrow.
11 JUDGE BARAITSER: Yes, I would like to do that.
12 MR FITZGERALD: Yes.
13 JUDGE BARAITSER: Thank you.
14 MR FITZGERALD: Madam, so can we just check whether there is another short witness
15 who we could fit in ---
16 JUDGE BARAITSER: Yes.
17 MR FITZGERALD: --- in the intervening space? So, it is Mr Goetz in the morning then Mr
18 Ellsberg in the late afternoon by the looks as things ---
19 JUDGE BARAITSER: Yes.
20 MR FITZGERALD: --- and we will see what we can do.
21 JUDGE BARAITSER: As long as Mr Lewis knows that he knows what to prepare overnight.
22 And can you just send me a note in the morning as to which bundles I need to bring into court
23 that would be helpful.
24 MR FITZGERALD: Oh right, for Mr Goetz? I think we can probably help you. Yes. He's
25 in the index.
26 JUDGE BARAITSER: Because I have got the core bundles.
27 MR FITZGERALD: I am sure we can assist you, madam. Mr Goetz is tabs 31 and 58 of the
28 core volumes.
29 JUDGE BARAITSER: And nothing else needed?
30 MR FITZGERALD: I do not believe so, no.
31 JUDGE BARAITSER: Thank you. Lovely. Anything else I can deal with this afternoon?
32 All right. Thank you, Mr Assange. That completes the hearing for today. You will remain
33 in custody overnight as before to be produced in the morning. Thank you very much
34 everybody.

ADJOURNED AT 15.48 UNTIL WEDNESDAY, 16th SEPTEMBER 2020

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